



**Kingorani EPZ Limited v Twaweza Kenya Apparel (EPZ) Limited (Environment & Land Case 149 of 2022) [2024] KEELC 13750 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13750 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 149 OF 2022  
NA MATHEKA, J  
DECEMBER 10, 2024**

**BETWEEN**

**KINGORANI EPZ LIMITED ..... PLAINTIFF**

**AND**

**TWAVEZA KENYA APPAREL (EPZ) LIMITED ..... DEFENDANT**

**JUDGMENT**

1. It is the plaintiff's case that it is the registered owner of Land Parcel No. CR 17699 Land Reference No 567/W/MN where it runs its licensed Export Processing Zone known as Kingorani EPZ Complex and leases out the go-downs to other entities. It was averred that on 3<sup>rd</sup> November 2020, the plaintiff entered into a tenancy relationship with the defendant for go-down A, B, C, D and E within the suit premises. The defendant proceeded to occupy the go-downs without a formal lease, and on 25<sup>th</sup> November 2020 counsel for the plaintiff wrote to the defendant requiring execution of the lease to comply with the letter of offer. The plaintiff followed the said request with several emails and letters to the defendant demanding the execution of the lease but the defendant failed to comply. Instead, the defendant wrote to the plaintiff on 1<sup>st</sup> July 2022 stating they would vacate the go downs before 31<sup>st</sup> December 2022, and when the plaintiff invited the defendant to inspect the premises for damage assessment, the defendant refused to avail himself. Instead of vacating as promised, the defendant on 30<sup>th</sup> November 2022 demanded a lease to be executed, however, they failed to execute it on their part. The plaintiff has since suffered a loss and is on the verge of cancellation of its licence on the grounds of allowing occupation without a duly executed lease. The plaintiff prays for judgment against the defendant for:

1. An order evicting the defendant whether by themselves or their agents, employees, servants or otherwise from the premises being Go Down Number A, B, C, D and E within Kingorani EPZ Complex Changanwe.



2. A permanent injunction restraining the defendant, whether by themselves, their servants or agents or otherwise howsoever from entering, remaining on or continuing to remain in the premises being Go Down Number A, B, C, D and E within Kingorani EPZ Complex Changamwe and for the unconditional handover and return of the premises to the plaintiff.
  3. A permanent injunction prohibiting, preventing or restraining the defendant, whether by itself, its agents, employees and servants from trespassing on, wasting, alienating or otherwise interfering or dealing with the premises being Go Down Number A, B, C, D and E within Kingorani EPZ Complex Changamwe.
  4. An order granting the plaintiff access, entry and the right to continue to use and remain in quiet occupation of the premises being Go Down Number A, B, C, D and E within Kingorani EPZ Complex Changamwe until the hearing and determination of this matter.
  5. A declaration that the defendant's termination of the tenancy agreement and adamant refusal to execute a lease outlining the terms and condition of the lease was unlawful.
  6. A declaration that the defendant's occupation of the premises after 31<sup>st</sup> December 2022 is unlawful, forceful and tantamount to trespass.
  7. Special damages amounting to USD 697, 823.28
  8. Costs of this suit.
  9. Interest on (7) and (8) above for such period as the court deems fit at court rate.
  10. Any such and further relief as this honourable court may deem fit to grant.
2. The defendant responded to the plaintiff's claim with a statement of defence and counterclaim. The defendant admitted to entering into a tenancy agreement on 3<sup>rd</sup> November 2020 with the plaintiff for Godown No, A, B, C, D & E within Kingorani EPZ Complex Changamwe. The defendant denied that the enjoyment of the premises was conditional to executing the lease and claimed that it had fulfilled all its obligations as set out in the agreement dated 3<sup>rd</sup> November 2020, which include among other things paying rent and service charges up to 31<sup>st</sup> December 2023 and keeping the building in a reasonable state. The defendant contended that after the plaintiff forwarded the lease on 20<sup>th</sup> May 2021, they simply objected to some of the terms and hence refused to execute the lease as it was introducing new terms that were not on the lease agreement of 3<sup>rd</sup> November 2020. The defendant argued that the plaintiff breached the lease agreement of 3<sup>rd</sup> November 2022 by introducing terms fundamentally different from the terms agreed upon in the letter of offer dated 3<sup>rd</sup> November 2022 and by denying the defendant peaceful and quiet enjoyment of the demise premises. The defendant denied that the plaintiff will suffer any loss since they had paid the annual rent until 2023 and is willing and ready to pay for the years 2024 to 2026 upon the terms of the lease dated 3<sup>rd</sup> November 2020.
3. The defendant raised a counterclaim against the plaintiff, whose actions were said to disrupt the defendant's supply chain and the defendant will be unable to recover its market share if the manufacturing processes are broken by the disruptive acts of the plaintiff. The defendant prayed for judgment against the plaintiff for:
- a. A declaration that the parties herein are bound by the lease agreement entered into on 3<sup>rd</sup> November 2020 and any other terms implied by the law into the said agreement.
  - b. A declaration that the formal lease drawn by either party should not add, contradict, vary or subtract from the terms of the said agreement of 3<sup>rd</sup> November 2020 without a memorandum



in writing signed by the other and attested as required by Section 3 (3) of the [Law of Contract Act](#) Cap 23.

- c. A prohibitory injunction restraining the plaintiff from denying entry, evicting, interrupting electricity, water, internet or any other service enjoyed by the defendant under the lease agreement dated 3<sup>rd</sup> November 2020 on the suit property or otherwise interfering with the peaceable and quiet enjoyment of the demised premises.
  - d. A mandatory injunction compelling the plaintiff to execute the execute the draft formal lease prepared by the plaintiff and sent to the plaintiff on 30<sup>th</sup> November 2022.
  - e. Costs of the suit.
  - f. Any other remedy that the court may deem fit.
4. The plaintiff replied to the defendant's statement of defence and mounted a defence to the counterclaim on 16<sup>th</sup> February 2023. The plaintiff insisted that what was to be confirmed by the defendant was not the terms of the lease but the terms of the letter of offer and that the defendant was estopped from denying the terms, and conditions of the lease after confirming the terms of the letter of offer. The plaintiff contended that the letter of offer dated 3<sup>rd</sup> November 2020 does not meet the lease threshold and that the plaintiff is entitled to lease out its premises on its own terms and conditions. The plaintiff insisted that the letter of offer was not conclusive on the contractual obligations and the defendant was fully aware that they were required to execute the lease. In response to the claim that the lease had oppressive clauses, the plaintiff maintained that all the issues were answered by the counsel of the plaintiff and where they were not agreeable are free to vacate the suit premises.
5. In defence to the counterclaim, the plaintiff contended that the defendant had failed to adhere to the terms and conditions of the letter of offer that required the execution of a lease. That the defendant's continued occupation of the suit property without executing a lease violated Section 54 of the [Land Registration Act](#) that require registration of leases that are not of a short term, as well as evasion of stamp duty tax as provided by Section 56 of the [Stamp Duty Act](#). The defendant was said to lack the locus to issue a completion notice and is estopped from issuing any completion notice since they are in breach of the letter of offer by failing to execute the lease, since the notice was not based on any agreement as they are obligated to pay liquidated damages and restore the premises to good and tenable state. The court was urged to strike out the defendant's defence and counterclaim with costs and for judgement to be entered in favour of the plaintiff as prayed in the plaint.
6. This court has considered the evidence and he submissions therein. It is not in dispute that on 3<sup>rd</sup> November 2020 plaintiff issued the defendant with a letter of offer for the lease of five go downs at Kingorani Complex Changamwe. It was stated in the said letter of offer that a lease between the parties shall be executed and that other terms and conditions (besides the one indicated on the letter of offer) would be indicated in the lease agreement upon confirmation. Maureen Katuta on behalf of the defendant accepted the terms and conditions on 4<sup>th</sup> November 2020, and it was noted that the plaintiff may prepare the lease and forward the same to the plaintiff for signing. The plaintiff through their counsel, Anne Wamithi counsel forwarded a draft lease to the defendant on 8<sup>th</sup> June 2021 for perusal and confirmation for execution of the same. On 30<sup>th</sup> August 2021, the defendant through their counsel, Simon Karina returned the draft lease with comments and concerns, which include but are not limited to; the term limit of the lease, amount of default interest, terms of rent payable and maintenance of the premises. On 1<sup>st</sup> March 2022, the plaintiff issued the defendant a Completion Notice demanding the execution of the lease failure to which they sue for the specific performance. The defendant wrote to the plaintiff on 11<sup>th</sup> March 2022 stating that they still have issues with the oppressing clause in the lease



as they seem to take away the lessee's rights. On 7<sup>th</sup> April 2022 they further informed the plaintiff that the defendant would not execute the unconscionable lease and that their EPZ licence is based on the letter of offer. The plaintiff issued the defendant with a demand letter dated 13<sup>th</sup> October 2022 stating that they no longer wish to negotiate the terms of the lease with the defendant and demanded for vacant possession of the premises as well as liquidated damages. It is clear to this court that the plaintiff and defendant were unable to agree on the terms of the formal lease, and as a result the anticipated lease agreement never crystallized and was never executed.

7. A letter of offer is accepted subject to the crystallization of a formal contract, this means that the transaction remains in negotiation stage until the formal lease is settled upon by the parties who proceed to execute is as provided for by Section 3 (3) of the Contract Act and Section 38 of the [Land Act](#).

8. Section 3(3) of the [Law of Contract Act](#) which provides as follows:-

No suit shall be brought upon a contract for the disposition of an interest in land unless—

- a. the contract upon which the suit is founded—
  - i. is in writing;
  - ii. is signed by all the parties thereto; and
- b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

While Section 38 (1) of the [Land Act](#) states,

Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—

- (a) the contract upon which the suit is founded—
  - (i) is in writing;
  - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

9. I have perused the said letter of offer and it states, "A lease between Twaweza Apparel EPZ limited and ourselves shall be executed among other things on the following terms and conditions... other terms and conditions to be indicated in the lease agreement upon confirmation." The letter of offer further stated that the plaintiff would then prepare the lease and forward to the defendant for confirmation, execution and registration. The correspondences exchanged between the parties did not amount to a meeting of the minds since the parties never agreed on the terms and conditions of the lease agreement. The defendant was not satisfied with the contents of the intended lease agreement, they never reached a consensus with the plaintiff and there was no lease to execute hence no lease came into effect that can be enforced by the court.

10. The bone of contention in this suit revolves around the legal status of the letter of offer which was formally expressed subject to an anticipated formal lease that never was. This question was considered



by the Court of Appeal in *East African Fine Spinners Limited (in receivership) & 3 others vs Bedi Investments Limited* (1994) eKLR, where Gicheru JA adopted the following words:

As long ago as 1865 Lord Westbury, LC in *Chinnock v The Marchioness of Ely* 4 DE G J&S 638 at 646, observed that:

“As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract.

But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.”

11. This observation prompted Jessel, MR in *Winn v Bull* [1877] 7 Ch D 29 at pages 31 and 32, to conclude that:

“where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail.”

12. In *Chillingworth v Esche* [1924] 1 Ch 97 at page 114, Sargant LJ had this to say in regard to the words “subject to contract” or “subject to formal contract”:

“..... To my mind the words “subject to contract” or subject to formal contract” have by this time acquired a definite ascertained legal meaning - not quite so definite a meaning perhaps as such expressions as FOB or CIF in mercantile transactions, but approaching that degree of definiteness. The phrase is a perfectly familiar one in the mouths of estate agents and other persons accustomed to deal with land; and I can quite understand a solicitor saying to a client about to negotiate the sale of his land: “Be sure that to protect yourself you introduce into any preliminary contract you may think of making the words ‘subject to contract.’” “I do not say that the phrase makes the contract containing it necessarily and whatever the context a conditional contract. But they are words appropriate for introducing a condition, and it would require a very strong and exceptional case for this clear prima facie meaning to be displaced.”

13. Evershed, J (as he then was) in *Brilliant v Michaels* [1945] 1 All ER 121 at page 123 letters D & E, observed that:

“The phrase that the law does not recognise a contract to enter into a contract must now be taken as subject to certain qualification. ... The principle is the same and may be expressed in the form of a question. Did the parties intend to make a final and exhaustive bargain, the terms of which should in due course, for convenience or otherwise, be recorded in a formal document; or did they merely reach the point of together saying that either immediately or on the happening of some event an agreement would be entered into between them incorporating not only matters on which they had already reached accord but other matters proper or essential to the relationship proposed between them but not so far discussed?”



And in *Bennett, Walden & Co v Wood* [1950] 2 All ER 134 at page 137 letters B & C, Sir Raymond Evershed, MR said this:

“Parties contracting in particular words must be assumed to intend the ordinary meaning of those words.

Applying the proper test of construction, viz, what is the ordinary, straightforward, meaning of the language, it seems to me reasonably clear that the answer here is that by “offer” is meant a firm offer. In the ordinary sense of the term in business matters an offer is something which by acceptance creates a bargain. An offer subject to contract lacks that essential characteristic, for its acceptance does not create a contract”.

14. From the above analysis of the legal effect of a letter of offer, it is clear to the court that the letter of offer dated 3<sup>rd</sup> November 2020 issued by the plaintiff and executed by the defendant on 4<sup>th</sup> November 2020 was subject to a formal contract by way of a lease agreement. The anticipated lease agreement never crystallized for the reason that parties were unable to mutually agree on the terms and conditions of the draft lease as drafted by the plaintiff. In the absence of an executed lease, there is no binding contract as the letter of offer remains in the negotiations state pending settlement of terms and conditions and execution of the formal lease.
15. The plaintiff has prayed for the eviction of the defendant from the suit premises as well as special damages amounting to USD 697,823.28 being the remainder of the term from 1<sup>st</sup> January 2023 to 31<sup>st</sup> December 2026. It is trite law that a claim for special damages have to be pleaded and proved as was stated by the Court of Appeal in *Yusuf Mohammed Jiwa t/a Jiwa Properties & another vs Mwangi & 2 others (Civil Appeal E014 of 2021)* [2024] KECA 38 (KLR) (26 January 2024) (Judgment) where it was held that;

“In this regard, it is trite law that a claim for special damages should be specifically pleaded and proved. This Court in the case of *Ikumbu vs. Wanjiru* [Civil Appeal 157 of 2017] [2022] KECA 81 [KLR] while dealing with similar circumstances held that:

“Having laid the basis for the claim, we now proceed to address the prerequisites for sustaining a claim of this nature, being a special damage claim. We take it from the decision of this court in *Hahn vs. Singh* [1985] KLR 716 for the holding, inter alia, that special damages must not only be claimed specifically but must also be proved strictly, with a caveat that the degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves. In this appeal, as we have already alluded to above, the respondent tendered evidence through PW2 a registered valuer. She admitted on oath that she did not have receipts to show the costs of the improvements. There was no further pressure for her to avail them. Neither did the appellant seek the court’s authority to have these renovations valued by a valuer of his own choice. The trial Judge cannot therefore be faulted for allowing the same.”

16. It is my view since no lease has been executed, the defendant remained a licensee of the plaintiff and the said licence could be terminated at any time. There was no binding lease between the parties, the letter of offer only offered a contractual licence that could be terminated by the plaintiff at will. The Court



in *Mt. Kenya Safari Club Ltd vs Mukawa (Hotels) Holdings Ltd (1989)* eKLR was of the view that a licence confers no special rights and in common law can be terminated at will. It was held,

“The substance of the above passage is echoed in the judgments of other Law Lords in the case. Halsbury’s Laws of England, 4th Edition Vol 9 paragraph 530 on p 365 strengthens the above statement of the rule of law of contractual licences “which at common law be effectively revoked at any time whether or not it contained provisions regarding the duration ...” It goes on to prescribe the remedies available to the licensee but none to the licensor. In this case the plaintiff is not entitled to any remedy because there was no breach on the part of the defendant, even if those remedies were available to it under the law.”

17. It is therefore clear even though the parties chose to continue with the tenancy in the absence of a formal lease, and even though the defendant has demonstrated that they paid the annual rent, service charge and deposit as stipulated in the letter of offer i.e. 16<sup>th</sup> December 2022 they paid the plaintiff USD 182,763/= and 23<sup>rd</sup> December 2022 paid USD 182,763 as rent payment for the year 2023; plaintiff was entitled to evict the defendant from the suit premises at will subject to a one month notice to evict was done on 20<sup>th</sup> December 2022. Because the letter of offer was nothing more than an offer to lease, no matter how long it stretched the defendant could not consider himself a tenant once the lease was executed until then he was a mere licensee. As the case may be, the plaintiff was entitled to get into the suit premises and make it ready for the business it intended to undertake, which included making it ready for a potential lessee.
18. Consequently, the court finds that the plaintiff has partially proved their case on a balance of probabilities and the defendant has failed to prove their case and as such the counterclaim dated 18<sup>th</sup> January 2023 is dismissed with costs to the plaintiff. I proceed to make the following orders:
  1. The defendant whether by themselves or their agents, employees, servants or otherwise is to vacate the premises being Go Down Number A, B, C, D and E within Kingorani EPZ Complex Changamwe within the next 6 (six) months from the date of this judgement and in default eviction order to issue.
  2. A permanent injunction prohibiting, preventing or restraining the defendant, whether by itself, its agents, employees and servants from trespassing on, wasting, alienating or otherwise interfering or dealing with the premises being Go Down Number A, B, C, D and E within Kingorani EPZ Complex Changamwe.
  3. Costs of this suit and the counterclaim dated 18<sup>th</sup> January 2023 are awarded to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10<sup>TH</sup> DAY OF DECEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

