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Date Delivered:	10 Mar 2022
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Court:	Environment and Land Court at Kericho
Case Action:	Judgment
Judge:	Mary Clausina Oundo
Citation:	Solomon Kipkoech Kemei & another v Mohamud Mohamed Mohamud & another [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kericho
Docket Number:	-
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Case Outcome:	-
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT KERICHO**

**ELC NO. 60 OF 2014**

**SOLOMON KIPKOECH KEMEI.....1<sup>st</sup> PLAINTIFF**

**JOSEPH KIPLANGAT RONO.....2<sup>nd</sup> PLAINTIFF**

**VERSUS**

**MOHAMUD MOHAMED MOHAMUD.....1<sup>st</sup> DEFENDANT**

**NATIONAL OIL CORPORATION OF KENYA LTD..... 2<sup>nd</sup> DEFENDANT**

**JUDGEMENT**

1. By a Plaint dated the 25<sup>th</sup> November 2014, and amended on 23<sup>rd</sup> March 2016, the Plaintiff herein seeks for the following orders;

i. A declaration order that the 1<sup>st</sup> Defendant has breached the material conditions and warranties of the lease agreement dated 11<sup>th</sup> September 2001 and 24<sup>th</sup> January 2002 respecting the lease properties LR No. Kericho/Kapsoit/1832 and Kericho/Kapsoit/2071 respectively and for that reason, the leases be declared forfeited and the Plaintiffs are entitled to evict the Defendant and his agents, assignees and servants.

ii. An order of cancellation of the entry No. 2 and 3 of the encumbrance section of both the registers for the land parcels LR No. Kericho/Kapsoit/2071 and Kericho/Kapsoit/1832.

iii. Judgment against the Defendant (sic) for the rent arrears of Ksh 870,000/= to the 1<sup>st</sup> Plaintiff for the lease of the land parcel LR No. Kericho/Kapsoit/1832.

iv. General damages to be assessed by the court for each of the Plaintiffs for the Defendant's breach of the express as well as the implied terms of the lease agreements dated 11<sup>th</sup> September 2001 and 24<sup>th</sup> January 2002.

v. Costs and interests of this suit and interest on (b) at commercial rates and (c) at court rates.

2. Pursuant to the service of the pleadings upon the 1<sup>st</sup> Defendant herein, he entered appearance on the 27<sup>th</sup> August 2015 and filed his Defence dated 8<sup>th</sup> September 2015 on the equal date wherein he denied the contents of the Plaint stating that he was a stranger to the allegations therein and seeking that since the Plaintiff was not entitled to the reliefs claimed, that the suit herein be dismissed with costs. There was no amended defence filed.

3. The 2<sup>nd</sup> Defendant filed their Memorandum of Appearance dated the 19<sup>th</sup> May 2016 on the 25<sup>th</sup> May 2016 and their statement of defence, to the amended Plaint, dated the 5<sup>th</sup> June 2016 on the 10<sup>th</sup> June 2016 to the effect that they were not privy to the terms of the lease agreement between the 1<sup>st</sup> Defendant and the Plaintiffs but conceded that they had sub-leased the suit lands herein from the 1<sup>st</sup> Defendant at a renewable 10 year term which was consented to in writing by both the Plaintiffs in their capacities as head-lessors, and which consent was not fraudulent.

4. By a consent, filed on 31<sup>st</sup> October 2017, an order of 24<sup>th</sup> October 2017 had decreed that the 1<sup>st</sup> Defendant had paid to the 1<sup>st</sup> Plaintiff the rent arrears from January 2007 to 2017 totaling to Ksh 795,000/= and that the payment of arrears owed to the 2<sup>nd</sup> Plaintiff shall be amicably worked out and made immediately thereafter. The matter was then slated for hearing but the same did not

take off immediately due to the numerous adjournments caused by the defence.

5. On the 13<sup>th</sup> March 2019 the court was informed that since the 2<sup>nd</sup> Defendant had been a sub tenant to the 1<sup>st</sup> Defendant, that parties were considering an out of court settlement wherein on the 13<sup>th</sup> May 2019 the court was informed that the 2<sup>nd</sup> Defendant was no longer a party to the suit and the matter proceeded for hearing without their participation.

**Plaintiffs' case.**

6. The 1<sup>st</sup> Plaintiff, upon adopting his statement recorded on 23<sup>rd</sup> March 2016 testified as PWI to the effect that the 1<sup>st</sup> Defendant was his tenant on land parcel No. Kericho/Kapsoit/1832 to which he was the registered proprietor as per the certified copy of the register herein produced as Pf exh 1.

7. That he had entered into a lease agreement with the 1<sup>st</sup> Defendant on 11<sup>th</sup> September 2001 as per the lease agreement produced as Pf exh 2, which lease had been registered on the 24<sup>th</sup> October 2007 as per the certified copy of the register dated produced as Pf exh 3. That the 1<sup>st</sup> Defendant had paid rent from the year 2001 to 2005 when he stopped paying the rent and vacated the premises without handing the same over to him.

8. That on 22<sup>nd</sup> September, they had recorded a consent whereby the 1<sup>st</sup> Defendant had agreed to pay the rent arrears totaling to Kshs. 795,000/= which he indeed paid in September, 2017 but started defaulting once again. That what the Plaintiff now lay claim to was the rent arrears from October 2017 to when the matter came up for hearing totaling to Kshs. 200,000/=. His evidence was that the 1<sup>st</sup> Defendant was in breach of clause 5 (a) of the lease agreement which had stipulated that he was to pay 2 years rent in advance at a monthly rent of Kshs. 10,000/= per month.

9. The 1<sup>st</sup> Plaintiff proceeded to testify that the 1<sup>st</sup> Defendant had subsequently unlawfully and without his consent charged his title as security for a loan with the National Oil Corporation, the 2<sup>nd</sup> Defendant herein where he had taken a loan of Kshs. 7.2 million on the 1<sup>st</sup> April 2008 as per entry No. 2 of the encumbrances section (Pf exh 1) which showed that he had sub-leased the suit property to National Oil Corporation of Kenya for 10 years for a sum of Kshs. 120,000/=

10. The Plaintiff thus prayed that the court orders the 1<sup>st</sup> Defendant to pay the rent arrears in the sum of Kshs. 200,000/=: orders for the termination of the lease agreement which had been for 40 years from the year 2001 and for the eviction orders thereafter as per the reliefs sought in the amended Plaintiff.

11. He produced the certificate of official search dated 10<sup>th</sup> March 2013 as his Pf exh 5(a) and the Certificate of Official Search dated 10<sup>th</sup> March 2014 showing when the title deed was issued as Plaintiff's exhibit 5(b).

12. Upon being cross-examined the Plaintiff responded that as per the terms of the lease agreement there had been no notice period for termination of the lease. That both parties had signed the lease agreement and further that the signature on the lease between the National Oil Corporation of Kenya Ltd and the 1<sup>st</sup> Defendant dated 10<sup>th</sup> March 2008 was his although he did not recognize the other signature on the document. He also confirmed that the signature on the charge document dated 10<sup>th</sup> March 2008 was his and went on to testify that according to the 1<sup>st</sup> lease agreement, he had allowed the lessor to assign or sublet the lease, but that he had not consented to the charge. That the suit property had been transferred to him in 1998 wherein he had transferred the lease to the 1<sup>st</sup> Defendant on the 24<sup>th</sup> April 2001 for a period of 40 years.

13. In re-examination the Plaintiffs reiterated that he did not remember signing the sub-lease agreement which had been signed before Gilbert Nyamweya Omoke Advocate as he never went to Nairobi to sign the same.

14. The 2<sup>nd</sup> Plaintiff, Joseph Kiplangat also adopted his witness statements too and proceeded to testify that the 1<sup>st</sup> Defendant was his tenant on land parcel No. Kericho/Kapsoit/271 as per the lease agreement entered between them on the 24<sup>th</sup> January 2002 which lease agreement had been prepared by Chelule Advocate. He produced the same as Pf exh 6 and a certified copy of the register in respect of Kericho/Kapsoit/2071 as Pf exh 7. He further testified that the lease was for a period of 40 years and produced the certified copy of the register for leasehold interest as Pf exh 8.

15. His evidence was that he had sued 1<sup>st</sup> Defendant because he had failed to pay rent and had also charged his title as security for a loan which had been taken on the 1<sup>st</sup> April 2008 without his authorization. He further testified that he did not consent to his title

being given/or sub-leased by National Oil Corporation Ltd. He produced the charge document as Pf exh 9.

16. He proceeded to testify that although the demand letter, herein produced as Pf exh 10, had been issued to the 1<sup>st</sup> Defendant by his Advocate on the 26<sup>th</sup> August 2014, the 1<sup>st</sup> Defendant did not respond wherein a reminder had been sent to him on the 18 September 2014 without any response. He marked the reminder as Pf exh 11 and sought that the court terminates the lease agreement between him and the 1<sup>st</sup> Defendant as the 1<sup>st</sup> Defendant had not paid rent at the rate of Kshs. 2,500/= per month, for the period starting June, 2018 to date of hearing the case.

17. In cross examination the 2<sup>nd</sup> Plaintiff confirmed that the lease agreement had been prepared Mr. Chelule Advocate and that there had been no provision in the lease agreement for termination of the agreement. He also confirmed that the signature on the sub-lease agreement is was his mine and that the sub-lease agreement had been signed on the 2<sup>nd</sup> June 2007 and that the Identity Card (ID) No. 0850554 was his. That the sub-lease agreement had been signed before Gilbert Nyamweya Omoke.

18. He however confirmed that the charge dated 10<sup>th</sup> March 2008 had been signed by him at Kapsoit where the 1<sup>st</sup> Defendant had taken it to him to sign. That the sublease dated 26<sup>th</sup> in the year 2007 was also signed by him which signified his consent to sub-lease the suit premises to the National Oil Co-operation. He however denied having signed the document before an advocate and consenting to the title being charged, but confirmed that the 1<sup>st</sup> Defendant had promised to revise the rent upwards when National Oil moved into the premises.

19. In re-examination, the 2<sup>nd</sup> Plaintiff reiterated that although he had signed the sub-lease agreement to National Oil Corporation Ltd yet it had not been before any advocate and that he never went to Nairobi. That the charge had been signed at Kapsoit and that he had expected the 1<sup>st</sup> Defendant to pay more rent when the National Oil Corporation leased the suit premises.

20. At the close of the Plaintiffs case the matter was adjourned for the hearing of the defense case but only the Plaintiff attended court on the day slated for defence hearing. The defence case was closed on the 9<sup>th</sup> November 2021 without there being any evidence tendered by the 1<sup>st</sup> Defendant.

21. Parties were directed to file their submissions, but again, only the Plaintiff complied and filed their submissions dated 17<sup>th</sup> January 2022 to which they submitted that the 2<sup>nd</sup> Defendant, by consent had exited the proceedings as the term of the sub lease granted to it by the 1<sup>st</sup> Defendant had lapsed and its interest in the suit terminated.

22. That the Plaintiff's main contention was that the 1<sup>st</sup> Defendant had breached their terms of the lease agreement when he sub-leased and charged the suit properties without consent of the Plaintiffs as the lessors.

23. That secondly, the 1<sup>st</sup> Defendant had breached the terms of lease by failing to adhere to their agreed terms of payment of rent payable in advance for a period of two years thus falling into areas of Ksh 870,000/= as at the time of filing the amended Plaintiff. That pursuant to the courts intervention for compliance a consent dated 22<sup>nd</sup> September 2017 had been recorded.

24. That in his statement of defence, the 1<sup>st</sup> Defendant had confirmed to being in arrears but had failed to defend his suit and therefore the Plaintiffs' claim remained unchallenged and their testimony uncontroverted.

25. The Plaintiffs framed their issues for determination as follows;

i. Whether or not the Plaintiffs are entitled to the prayers as sought in the Plaintiff.

ii. Which party shall bear the costs of this application (sic)

26. On the first issue for determination the Plaintiff submitted that they were entitled to the prayers sought in their amended Plaintiff as the case was uncontroverted. That indeed the 1<sup>st</sup> Defendant had breached the terms of the agreements dated 11<sup>th</sup> September 2001 and 24<sup>th</sup> January 2002 as per the evidence submitted in court. That the 1<sup>st</sup> Defendant did not defend his case and therefore the Plaintiffs had proved their case on a balance of probability as required by law.

27. The Plaintiffs then sought that the court declares that the lease agreements having been breached by the 1<sup>st</sup> Defendant and there

be an order for termination and/or forfeiture and eviction against him as provided in the provisions of Section 56 of the Registered Land Act (now repealed.) and Section 73 of the Land Act.

**Determination.**

28. I have considered the undefended evidence herein and the submissions by learned counsel. It is worth noting that the claim against the 2<sup>nd</sup> Defendant was settled out of court and the 2<sup>nd</sup> Defendant is no longer a party to the suit.

29. The basis of the Plaintiffs' claim is that they were proprietors of parcels of land LR No. Kericho/Kapsoit/1832 and Kericho/Kapsoit/2071 respectively. That on the 11<sup>th</sup> September 2001 and 24<sup>th</sup> January 2002 respectively, the Plaintiffs had entered into a lease agreement with the 1<sup>st</sup> Defendant wherein they had leased to him their respective properties for a term of 40 years.

30. In regards to the 1<sup>st</sup> Plaintiff, the 1<sup>st</sup> Defendant leased his property No. Kericho/Kapsoit/1832 vide a lease agreement of 11<sup>th</sup> September 2001 at a monthly rent of Kshs. 10,000/= wherein he was to pay 2 years rent in advance. That the 1<sup>st</sup> Defendant had paid rent from the year 2001 to 2005 when he stopped paying the rent and vacated the premises without handing the same over to him. However on the 22<sup>nd</sup> September 2017, parties recorded a consent wherein the 1<sup>st</sup> Defendant paid the rent arrears totaling to Kshs. 795,000/=. However he started defaulting once again and by the time the matter came up for hearing, he was in arrears from October 2017 totaling to Kshs. 200,000/=.

31. The 2<sup>nd</sup> Plaintiff's case on the other hand was that after the 1<sup>st</sup> Defendant had leased his property No. Kericho/Kapsoit/2071 vide a lease agreement of 24<sup>th</sup> January 2002, at a monthly rent of Kshs. 2,500/=:, he had fallen into arrears from the June, 2018 to the time the matter went to trial.

32. What comes out clearly in this matter is that since the 1<sup>st</sup> Defendant had breached the terms of the lease agreement by defaulting in payment of rent which continues to accrue, the Plaintiffs now seek for the court to declare their lease agreement with the 1<sup>st</sup> Defendant terminated, and thereafter, to order for forfeiture and eviction against the 1<sup>st</sup> Defendant.

33. From the pleadings on record and the evidence herein submitted, the relationship between the Plaintiffs and the 1<sup>st</sup> Defendant is that of landlord and tenant. It relates to non-payment of rent for the premises that 1<sup>st</sup> Defendant leased from the Plaintiffs. That although the Plaintiffs have demanded in writing to the 1<sup>st</sup> Defendant to make good the outstanding payments due, none has been forthcoming. The dispute herein being between the landlord and tenant clearly relates to use and occupation of land to wit Article 162 (2)(b) of the Constitution and Section 13 of the Environment and Land Court Act have donated jurisdiction to this court to determine.

34. The 1<sup>st</sup> Defendant herein, entered appearance on the 27<sup>th</sup> August 2015 and filed his defence dated 8<sup>th</sup> September 2015 on the equal date wherein he denied the contents of the Plaintiffs' claim stating that he was a stranger to the allegations therein and seeking that since the Plaintiffs were not entitled to the reliefs claimed, that the suit herein be dismissed with costs. There was no amended defence filed. The 1<sup>st</sup> Defendant did not offer any evidence to challenge the Plaintiffs' claim which remains uncontested.

35. In the case of **Mugunga General Store –v- Pepco Distributors Ltd (1986) LLR 5111 (CAK)** the Court of Appeal stated thus:

*“First of all, a mere denial is not sufficient defence in this type of case. There must be some reason why the Defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason.”*

36. Similarly in the case of **Continental Butchery Ltd –v- Nthiwa (1989)KLR 573**, Madan, JA stated:

*“with a view to eliminate delays in the administration of justice which would help litigants out of their just dues or enjoyment of their property, the Court is empowered in an appropriate suit to enter judgment for the claim of the Plaintiff under the summary procedure provided under Order 35 subject to there being no bona fide triable issues which would entitle a Defendant leave to defend. If a bona fide triable issue is raised, the Defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.”*

37. Given the above facts herein I find the issue arising herein for determination before the Court as being:-

- i. Whether there was a breach of contract by the 1<sup>st</sup> Defendant of the lease agreements of 11<sup>th</sup> September 2001 and 24<sup>th</sup> January 2002
- ii. Whether the Plaintiffs have proved their case on a balance of probabilities to warrant granting the reliefs sought.

38. I have considered the contents of the lease agreement herein entered between the Plaintiffs and the 1<sup>st</sup> Defendant dated the 11<sup>th</sup> September 2001 and 24<sup>th</sup> January 2002 herein produced as Pf exh 2 and Pf exh 6 respectively. I have also considered the terms of clause 8 of the said agreements to wit that if there were to be any notice of request or demand by parties, that the same would be in writing, which I confirm was complied with when the Plaintiffs served the 1<sup>st</sup> Defendant with demand and forfeiture notices before the matter was escalated to court.

39. The Court of Appeal in **National Bank Kenya Limited –vs- Pipeplastic Samsolit (K) Limited & Another [2002] 2.EA 503** held that a Court of law cannot rewrite a contract between the parties and that the parties are bound by the terms of their contract unless they can prove that coercion, fraud or undue influence was used to procure the contract.

40. The power to lease land is expressly provided for under Section 56 of the Land Act and by operation of the said section, the parties herein stated such terms and conditions that were binding to them and since there is no express provision on termination of lease in the lease agreement, but by operation of Section 65 of the Land Act all leases are subject to the conditions and covenants thereunder, hence need for compliance.

**41. The lease documents which are similar in substance, save for the respective title numbers, were produced as Pf exh 2 and 6 respectively. The rent for Pf exh 2 was agreed at Kshs 10,000/= (revisable) per month but where the same moves to pay an equivalent of two years rent in advance after every two years for a term of 40 years commencing from 1<sup>st</sup> June 2002. In regard to Pf exh 6, the rent had been ksh 2,500/= (revisable) per month but where the same moves to pay an equivalent of two years rent in advance after every two years for a term of 40 years commencing from 1<sup>st</sup> June 2002.**

42. **It was also a term of the lease that** if at any time the rent or any part thereof (whether lawfully demanded or not) shall remain for a period of one calendar month after becoming payable or any of the lessee covenants shall not be performed or observed in any of these events, the lessor at prejudice to the right of action of the lessor in respect of any breach of the lessee's covenant herein contained.

43. The Plaintiffs accuse the 1<sup>st</sup> Defendant for breaching the lease on two accounts. The first is on account of non-payment of rent as and when they fell due. The second account is because the 1<sup>st</sup> Defendants sub leased the properties to the 2<sup>nd</sup> Defendant without the consent of the head lessors, the second account was however settled out of court.

44. A notice to terminate the lease and for forfeiture was served upon the 1<sup>st</sup> Defendant by the Plaintiff via Pf exh 4, Pf exh 10 and Pf exh 11 and the reason for the termination was given. The said notice in my view complied with the provisions of Section 75 of the Land Act. The 1<sup>st</sup> Defendant neither challenged that notice nor remedied their position by settling the due rents save for the payment made to the 1<sup>st</sup> Plaintiff in September 2017 totaling to Ksh 795,000/= wherein after, he started defaulting once again and was in arrears from October 2017 to date. The 2<sup>nd</sup> Plaintiff has not received any payments from the period starting June 2018.

**45. The 1<sup>st</sup> Defendant has not challenged the Plaintiffs claim. The evidence by the Plaintiffs remains uncontested and therefore the material facts as stated by the Plaintiff are uncontroverted. I am therefore satisfied that the Plaintiffs have proved their case to the required standard and order as follows;**

- i. It is declared that the lease agreements dated 11<sup>th</sup> September 2001 and 24<sup>th</sup> January 2002 respecting the lease properties LR No. Kericho/Kapsoit/1832 and Kericho/Kapsoit/2071 respectively are herein declared terminated and/or forfeited the 1<sup>st</sup> Defendant having breached the material conditions and warranties thereof.

- ii. The 1<sup>st</sup> Defendant, his agents, assignees and servants shall vacate both the suit premises within 30 days from today. In default, the Plaintiffs shall be at liberty to evict them. The Officer Commanding Kapsoit Police station shall ensure law and order is maintained during the eviction.

- iii. In relation to prayer (ii) of the Plaint, since no evidence was led on the same, and further, keeping in mind that the prayers sought involve a third party who was not party to the proceedings herein, the same is denied.

iv. In terms of **prayer (iv)** I find that the Plaintiffs are entitled to general damages **of the unpaid rent due for the period there has been default together with interest at commercial rates from date of filing of this suit till payment in full.**

v. The Plaintiffs shall have costs and interests of this suit at court rates **which costs shall be at a lower scale since the suit was undefended.**

**It is so ordered.**

**Dated and delivered via Teams Microsoft at Kericho this 10<sup>th</sup> day of March 2022.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**



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