Case Number:	civ app 242 of 99
Date Delivered:	17 Dec 1999
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Riaga Samuel Cornelius Omolo, Philip Kiptoo Tunoi, Effie Owuor
Citation:	WILDLIFE LODGES LIMITED vs JACARANDA HOTEL LIMITED[1999] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	839 OF 1999
Case Outcome:	Cross-appeal Allowed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, TUNOI & OWUOR, JJ.A.)

CIVIL APPEAL NO. 242 OF 1999

BETWEEN

WILDLIFE LODGES LIMITED .....APPELLANT
AND
JACARANDA HOTEL LIMITED .....RESPONDENT

(Appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (Justice S.O. Oguk) dated 28th October, 1999 in H.C.C.C. NO. 839 OF 1999)
****
JUDGMENT OF THE COURT

Jacaranda Hotel Limited, the plaintiff in the suit and now the respondent, is a limited liability company incorporated in Kenya. It is the registered proprietor of two adjacent pieces of land known as **Land Reference Numbers 209/8369 and 209/8370** situate at Westlands, Nairobi, upon which is erected a prestigious hotel, restaurants, bars and other assorted buildings and improvements to which we shall collectively hereinafter refer as "the suit premises". Wildlife Lodges Limited, the defendant in the suit and now the appellant, is also a limited liability company incorporated in Kenya.

By a Lease Agreement made on 26th March, 1997, the respondent demised the suit premises together with the fixtures, fittings, equipment, plant machinery and other chattels to the appellant for a term of ten years from 1st August, 1996 at the rents, terms, conditions and covenants contained in the said Lease Agreement.

The appellant covenanted, inter alia:

(a)"not to make any alterations or additions whatsoever structural or otherwise in or to the said premises or any part thereof ..... or remove any of the walls beams columns or other structural parts thereof without the consent in writing of the landlord first had and obtained";

(b)"not to do or permit or suffer anything to be done whereby the City Council of Nairobi's or any other competent authority's consent to use and occupation of the said premises may be forfeited or jeopardised";

and

(c)"not to bring any explosive or inflammatory substances on the said premises".

It is averred in the amended plaint dated 27th May, 1999, that the appellant as the tenant was in breach of these aforesaid covenants in that in or about the month of July, 1998, it made extensive alterations and modifications to the suit premises thereby changing the structural character and design of the popular restaurant commonly known as **PIZZA GARDEN** without first obtaining the consent of the respondent, the landlord.

It is further contended by the respondent that the appellant had defied Notices issued to it by the City Council of Nairobi on 18th February, 1999, 10th and 12th March, 1999, requiring it to:

(i)stop using highly inflammable (fire-risk) structures as kitchens

(ii)produce approved building plans

(iii)produce the occupation certificate and

(iv)ensure that all rooms used for preparation for food, its storage or warm habitation must be approved by the MOH of Nairobi City Council.

Consequent upon the alleged breaches, the respondent on 12th February, 1999, served notice upon the appellant to remedy the breaches within 60 days which elapsed without any positive move by the respondent. In the premises, it is averred by the respondent that forfeiture of the Lease has arisen and that it is entitled to recovery and possession of the suit premises.

In its written statement of defence the appellant claimed that during the negotiations prior to the execution of the Lease it was the common understanding between the parties that **PIZZA GARDEN** which was in total state of disrepair and had a leaking roof would be refurbished and renovated to render it usable. The appellant denied that the refurbishment effected had in any way interfered with the structure of the suit premises and moreover, the appellant contended, the works undertaken had enhanced the value of the suit premises and the respondent had not suffered any prejudice at all. However, the appellant was willing at the expiry of the Lease to return the suit premises in their original state by removing all the refurbishments and the repairs done on them.

By an amended motion on notice dated 4th June, 1999, and which was expressed to be brought under **Order XXXV rule 1 and Order XII rule 6 of the Civil Procedure Rules**, the respondent moved the superior court seeking summary judgment against the appellant for vacant possession of the suit premises. In the alternative, it sought judgment upon admission as contained in the appellant's letter to the respondent dated 19th February, 1999. Part of this letter reads as follows:-

".....The improvements made have not in any way fundamentally altered the exterior look or structure of the Pizza Garden or its attached Conference Centre. Our investment has only served to improve the value and condition of the Landlord's property. It seems ironic, therefore, that we receive a letter ..... asking us to reinstate the premises to their original state!.

Are you seriously suggesting that we pull up the carpet, pull out the window frames and restore the holes and leaks to the roof"!."

Mr. Kigano, counsel for the respondent and who also prosecuted the application in the superior court, referred to the Clauses in the Lease Agreement which he claimed the appellant had breached and relied in the main on the architectural report and findings made by Messrs Karago and Associates who were the Architects of the suit premises before the execution of the Lease Agreement. Mr. Kigano also placed much reliance on the correspondence exchanged between the parties of which he submitted constituted admission of breach of many clauses in the Lease Agreement. He also grounded his application on the failure by the appellant to abate an alleged nuisance which consisted mainly on the user of inflammable substances on the suit premises as well as unauthorised additions of the toilets.

In a reserved judgment the learned Judge, Oguk, J. found, basing his decision on the architectural plans, drawings and correspondence that the works effected on the suit premises were quite substantial and that they were undertaken without the written consent of the landlord nor of the Nairobi City Council first having been sought and obtained. The consent, he held, was a prerequisite under the Agreement and that it mattered not and was irrelevant that these works went to enhance the value of the suit premises. The learned Judge held that he would not permit the respondent re-entry and possession of the main hotel which is on **L.R. No. 209/8369** which he found was totally unaffected by the breaches on the part of the appellant. These part premises, the learned Judge said, were intact and were in the original state as when the Lease Agreement was executed. The interference and alteration were limited only on **PIZZA GARDEN** situate on **L.R. No. 209/8370**. Accordingly, the learned Judge decreed that the appellant must forfeit the lease in respect of **PIZZA GARDEN** of which he ordered its immediate vacant possession. It is this judgment which has elicited the appeal before us and the subsequent cross-appeal. The appellant says that this judgment is wrong and ought to be reversed and all orders adverse to the appellant made consequent upon the judgment be set aside on the following main grounds, namely:-

> (a)That the learned Judge erred in not finding that the appellant's defence raised serious triable issues not capable of being disposed of at an interlocutory stage;
>
> (b)That the learned Judge erred in holding that the appellant was in breach of the covenants contained on the Lease Agreement and that the right of forfeiture had arisen and become exercisable; and
>
> (c)That the learned Judge erred in severing the lease and decreeing vacant possession over part of the demised premises when forfeiture had not arisen at all."

The motion was supported by an affidavit of Hon. Njenga Karume, the Chairman and director of the respondent company to which there were annexed several documents including a copy of the Lease Agreement and an Inspection Report carried out on **PIZZA GARDEN** by Messrs. Karago and Associates Architects on 4th May, 1999. This Report concludes that the works have fundamentally altered the aesthetic and therefore the historic value of **PIZZA GARDEN.** However, it is worthy of note that the maker of the report has not made an affidavit to swear positively to its contents. This would have been of significance since the Financial Director of the appellant Mr. Kimiti had deponed that the appellant did not effect the alleged modifications and alterations of the suit premises and had actually challenged the authenticity of the report terming it purely a gross exaggeration. We would think that in the circumstances the learned Judge ought not to have ignored the affidavit of the appellant which disclosed issues fit for trial. Further, upon the totality of the circumstances related by the Lease Agreement, the architectural report and the correspondence exchanged between the parties, the learned Judge should have found that the appellant had shown enough to entitle it to interrogate the respondent. If such a

situation had arisen obviously summary judgment should not have been decreed.

That sagacious Judge Madan JA had this to say in **CONTINENTAL BUTCHERY LTD V. SAMSON MUSILA NTHIWA** Nai. C.A. No. 35 of 1997 (unreported):-

> "On an application for summary judgment the plaint, the defence, the counterclaim and the reply to defence, if any, and affidavits in support of and in reply as also all relevant issues and circumstances are all proper material for consideration. Nothing is immaterial which helps justice to be done. Nothing is extraneous which helps to prevent injustice being done.".

With respect, we would adopt the above dictum.

It is manifestly clear that the dispute between the parties depended upon the construction of many clauses in the Lease Agreement which the appellant vehemently denied having breached. On our part having perused the pleadings together with the affidavits and the annexures thereto we are satisfied that the appellant has a good defence and should be allowed to defend and that the application for summary judgment should have been refused.

Though the Lease Agreement contained in clear and unmistaken language an express clause which reserves to the respondent the right of re-entry and forfeiture if one or more of the covenants are broken, the position in the actual context of this case does not attract disposition of the suit by way of summary procedure. A case fit for trial had been made out and for this reasons we would allow the appeal.

The mutual complaint in both the appeal and the crossappeal is that the Lease Agreement could not be severed or dismembered. This contention has, in our view, considerable merit. Forfeiture means the loss of all interest in the property spoken of and a clause effecting it must be construed strictly: see **Stroud's Judicial Dictionary ..... 5th Edn Vol 2**. This ground of appeal and a cross-appeal must therefore succeed.

In the result we allow the appeal, set aside the ruling and decree dated 28th October, 1999 and the Notice of Motion (amended) on 3rd June, 1999 is ordered dismissed. We, however, refrain from making any order as to costs in the superior court.

The cross-appeal is allowed with no order as to costs. Also, there will be no order as to costs of the appeal. The suit shall be disposed of by trial in the superior court in the normal manner.

Dated and delivered at Nairobi this 17th day of December,

1999.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

E.OWUOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR