



**New Chota Raha Ltd v Kenya Methodist University (Environment & Land
Case E402 of 2021) [2023] KEELC 16707 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16707 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E402 OF 2021**

**JO MBOYA, J
MARCH 29, 2023**

BETWEEN

NEW CHOTA RAHA LTD PLAINTIFF

AND

KENYA METHODIST UNIVERSITY DEFENDANT

JUDGMENT

1. The instant suit has been filed by and on behalf of the Plaintiff herein, who contends to have been a lawful and legitimate tenant of the Defendant, prior to and before same was (sic) illegally evicted from L.R No. 209/0566, otherwise referred as Kemu Towers, situate within the City of Nairobi.
2. For coherence, the suit herein is premised on the Complaint dated the 8th November 2021, and in respect of which the Plaintiff herein has approached the Honourable court seeking for the following reliefs;
 - i. Special damages (to be particularized).
 - ii. General damages for illegal Eviction.
 - iii. Interests on (a) above.
 - iv. Cost of the suit.
3. Upon being served with the Complaint and summons to enter appearance, the Defendant herein duly entered appearance and thereafter filed a Statement of Defense. For completeness, the Defense is dated the 15th March 2022.
4. It is also imperative to state and underscore that other than the Statement of Defense, the Defendant herein also filed a List and Bundle of Documents, as well as the witness statement, which same sought to rely on during the trial.



5. Additionally, it is worthy to state and observe that after the Plaintiff was served with the statement of defense (details in terms of the preceding paragraph), the Plaintiff filed a Reply to Defense, dated the 25th April 2022.
6. Thereafter, the pleadings in respect of the instant matter closed and the matter, proceeded to and underwent the requisite Pre-trial and Case Conference.
7. Subsequently, the subject matter was confirmed ready and ripe for hearing and hence the Honourable court proceeded to and indeed, set down the matter for hearing.

Evidence By The Parties

a. Plaintiff's Case:

8. The Plaintiff's case revolves and gravitates around the evidence of one witness, namely, Johnson Njoroge, who testified as PW1.
9. It was the testimony of DW1 that same is the Director of the Plaintiff company and that by virtue of being a Director of the Plaintiff company, same was duly authorized and mandated to testify on behalf of the Plaintiff company.
10. In addition, the witness added that the Plaintiff company had entered into and executed a lease agreement with the previous owner and/or proprietor of L.R No. 209/5060 (now not (sic) L.R 209/0566), which is alluded to in the Plaint. In this regard, the witness further averred that the Plaintiff thereafter remained in occupation of the designated portion thereof up to and including when the lease expired.
11. Nevertheless, it was the further testimony of the witness that shortly before the expiry of the lease entered into between the Plaintiff and the previous owner, the suit property was sold, disposed of and ultimately, transferred to the Defendant herein.
12. As a result of the sale and disposition of the suit property to and in favor of the Defendant, the Defendant herein technically became the landlord of the Plaintiff.
13. Furthermore, the witness testified that on or about the 3rd of September 2012, the Defendant herein generated and thereafter served the Plaintiff with a Notice to terminate tenancy and in respect of which the Defendant indicated that the notice would take effect on the 10th October 2012.
14. It was the further testimony of the witness that upon receipt of the impugned Notice to terminate tenancy, same engaged and instructed the Plaintiffs advocate to file the requisite Reference, with a view to challenging the Notice to terminate tenancy.
15. On the other hand, the witness further testified that thereafter the Plaintiff and the Defendant herein were engaged in a plethora of cases/suits before the Business Premises Rent Tribunal, inter-alia, Tribunal Case No. 157 of 2012, 298 of 2012 and 678 of 2017, respectively.
16. Other than the foregoing, the witness also testified that on or about the 11th December 2012, the Defendant herein proceeded to and filed a suit before the Environment and Land Court. In this regard, the witness alluded to ELC No. 1041 of 2012, wherein it was contended that the Defendant sought for, inter-alia, orders of Eviction.
17. Be that as it may, the witness added that the named suit, to wit, ELC No. 1041 of 2012, was subsequently, withdrawn by and at the instance of the Defendant.



18. First forward, the witness testified that on or about the 9th September 2017, and 20th July 2018, respectively, the Defendant herein proceeded to and levied an illegal eviction against the Plaintiff, culminating into the wrongful evacuation and removal of the Plaintiff from the demised premises.
19. Furthermore, the witness added that in the course of levying the illegal eviction, the Defendant herein confiscated and took possession of various properties, including tools of trade belonging to the Plaintiff. In this regard, the witness averred that the Plaintiff has therefore suffered loss and damages.
20. In view of the foregoing, the witness testified that the Plaintiff herein is now entitled to compensation arising from the impugned illegal Eviction, as well as, for the values of the chattels, that were confiscated and carted away. Consequently, the witness implored the court to grant the reliefs sought at the foot of the Plaint.
21. Additionally, the witness referred to the witness statement dated the 8th November 2021 and same sought to adopt and rely on the contents thereof. In this regard, the witness statement dated the 8th November 2021, was duly admitted and constituted as further evidence of the witness.
22. Other than the foregoing, the witness also referred to the List and Bundle of Documents dated the 8th November 2022 and containing 7 documents. For clarity, the witness sought to adopt and produce the documents named and alluded to at the foot of the said list.
23. Suffice it to point out that the documents contained and alluded to at the foot of the list of documents dated the 8th November 2021, were thereafter produced and admitted in evidence as Plaintiff's Exhibit 1 to 7, respectively.
24. On cross examination, the witness stated that the Plaintiff had a lease over and in respect of a designated portion of the suit property. However, the witness added that the lease in question lapsed and thereafter same proceeded to and filed a case before the Business Premises Rent Tribunal.
25. In addition, the witness stated that same was aware and knowledgeable of the facts that the suit property had been sold to and in favor of the Defendant herein.
26. Nevertheless, the witness contended that same was not aware that the Defendant had intended to use the suit property for Educational purposes.
27. On the other hand, the witness further stated that same was aware of the existence of BPRT Cause No. 678 of 2017. However, the witness added that he did not know that the said case had been dismissed.
28. Besides, the witness further testified that same did not know that the tribunal had ordered that same (read, the Plaintiff), does pay costs which were assessed in the sum of Kes.100, 000/= only.
29. Furthermore, the witness also testified that same did not know whether there was an order directing the removal and or eviction of the Plaintiff from the suit property.
30. However, upon being shown an order from the tribunal, the witness confirmed that there was indeed an order directing the removal of the Plaintiff from the suit property.
31. Whilst still under cross examination, the witness testified that the Plaintiff was not in any rent arrears. For clarity, the witness denied the claim that the Plaintiff herein owed the Defendant the sum of Kes.4, 839, 000/= only, on account of rent arrears.
32. With the foregoing testimony, the Plaintiff's case was closed.

b. Defendant's Case



33. Similarly, the Defendant's case is predicated and anchored on the evidence of one witness, namely, Ms. Njeri Mbugua, who testified as DW1.
34. It was the testimony of the witness herein, that the Defendant is the registered owner and proprietor of the suit property, which same bought and acquired from the previous registered owner, namely, Teleposta Pension Scheme.
35. Furthermore, the witness added that upon the acquisition of the suit property, the Defendant found the Plaintiff in occupation of a portion of the suit property, insofar as same (read Plaintiff) was a tenant of the previous owner.
36. Additionally, the witness testified that when the Defendant bought and purchased the suit property, same was being used for commercial purposes. However, the witness averred that upon the acquisition of the suit property, the Defendant sought for and/or obtained the requisite approval for change of user.
37. It was the further testimony of the witness that on or about the 7th of February 2012, the Defendant herein issued and served the Plaintiff with a Notice to terminate tenancy. However, the witness averred that upon receipt of the Notice to terminate tenancy, the Plaintiff herein proceeded to and filed a suit before the Business Premises Rent Tribunal.
38. Additionally, the witness testified that other than BPRT Cause No. 157 of 2012, which was filed by the Plaintiff to challenge the Notice to terminate tenancy, the Plaintiff also filed yet another suit before the BPRT, namely, Tribunal Cause no. 298 of 2012.
39. Furthermore, the witness testified that following the filing of Tribunal Cause No. 298 of 2012, the tribunal proceeded to and issued orders, inter-alia, an order of temporary injunction to restrain and/or prohibit the Defendant herein from evicting the Plaintiff from the suit property.
40. In any event, the witness added that upon being served with the pleadings and the resultant orders arising from the suit before the tribunal, the Defendant herein instructed her advocates on record to oppose the said suit and in particular, to challenge the impugned orders.
41. In this regard, the witness testified that the Defendant's advocate proceeded to and took up the instructions and thereafter filed various pleadings, inter-alia, a Notice of preliminary objection challenging the propriety and validity of the impugned orders.
42. On the other hand, it was the further testimony of the witness that thereafter the tribunal proceeded to and disposed of the said suit, culminating into the issuance of orders barring the Defendant from evicting the Plaintiff.
43. It was the further testimony of the witness that on or about the 3rd August 2021, the Defendant herein was constrained to and filed a Notice to terminate tenancy, whereby the Defendant sought to terminate the Plaintiff's tenancy with effect from the 10th October 2012.
44. In addition, it was the testimony of the witness that despite the fact that the impugned notice to terminate tenancy was duly served upon the Plaintiff herein, same failed and neglected to respond thereto. For clarity, the witness pointed out that no Reference was ever filed by the Plaintiff.
45. Furthermore, the witness added that the Defendant herein thereafter wrote to the Tribunal to authenticate and/or ascertain whether the Plaintiff had filed any Reference challenging the notice to terminate tenancy.



46. Be that as it may, the witness added that the tribunal thereafter wrote back and clarified that the Plaintiff had neither challenged nor objected to the Notice to terminate tenancy.
47. Based on the foregoing, the witness contended that the Plaintiff's tenancy over and in respect of the suit property, therefore stood terminated and/or extinguished.
48. Additionally, it was the testimony of the witness that insofar as the tenancy between the Plaintiff and the Defendant had terminated, the Plaintiff herein henceforth became a trespasser and not otherwise.
49. Other than the foregoing, the witness added that the tribunal also proceeded to and determined BPRT Case No. 678 of 2017, which had also been filed by the Plaintiff herein, challenging the Defendant's right to recover vacant possession. In this regard, the witness averred that the said suit was struck out.
50. It was the further testimony of the witness that after the said suit was struck out, the tribunal proceeded to and awarded costs to and in favor of the Defendant. In this regard, the witness added that the costs were assessed and certified in the sum of Kes.100, 000/= only.
51. Subsequently, it was the further testimony of the witness that pursuant to and arising from the award of costs in favor of the Defendant, the Defendant herein commenced and levied Distress with a view to recovering the named costs.
52. In addition, the witness averred that after the distress which was levied by the Defendant, with a view to recovering of the costs, the Plaintiff herein vacated and handed over the suit property. In this regard, the witness averred that the Plaintiff was never evicted by the Defendant in the manner alleged.
53. Other than the foregoing, the witness alluded to the witness statement dated the 26th July 2022, and same sought to adopt and rely on the contents of the witness statement. In this regard, the named witness statement was duly admitted and constituted as further evidence of the witness.
54. Furthermore, the witness also alluded to and identified that List and Bundle of documents dated the 22nd July 2022, containing a total of 15 Documents.
55. In the absence of objection by counsel for the Plaintiff, the documents contained at the foot of the List dated the 22nd July 2022, were duly admitted and constituted as Defense Exhibit 1 to 15, respectively.
56. On cross examination, the witness herein admitted and acknowledged that same had hitherto filed Civil proceedings in ELC No. 1041 of 2012. However, the witness added that same was not privy to the reliefs that were sought at the foot of the said suit.
57. In addition, the witness stated that the Environment and Land Court has neither issued nor granted any Eviction order in respect of the subject property.
58. Upon being referred to the orders issued by the tribunal on the 13th July 2018, the witness stated that the named order was in respect of recovery of the costs and not for Eviction.
59. Furthermore, upon being referred to the contents of paragraph 25 of the witness statement, the witness admitted and acknowledged that the contents thereof were correct.
60. At any rate, the witness added that in the course of levying of the impugned distress, the Defendant herein neither instructed nor retained any licensed auctioneers.
61. Whilst still under cross examination, the witness added and averred that the levying of distress was undertaken by blocking the Plaintiff from accessing the suit property.



62. On re-examination, the witness averred that the break- in was for purposes of recovery of the costs that were awarded by the Honourable Tribunal.
63. With the foregoing testimony, the Defendant's case was closed.

Submissions By The Parties:

a. Plaintiff's Submissions:

64. The Plaintiff filed two sets of submissions, inter-alia, the submissions dated the 20th February 2023; and the Supplementary submissions dated the 9th March 2023.
65. Vide the named sets of submissions, the Plaintiff has raised, highlighted and amplified three (3) issues for determination by the Honourable court.
66. Firstly, learned counsel for the Plaintiff has submitted that the cause of action in respect of the subject matter arises out of a controlled tenancy/contract, which was obtaining between the Plaintiff and the Defendant herein.
67. Owing to and arising from the fact that the impugned eviction arose from a controlled tenancy, the counsel for the Plaintiff has submitted that the impugned cause of action is therefore contractual in nature and not a claim based on tort.
68. To the extent that the cause of action of illegal eviction is a cause in contract, learned counsel for the Plaintiff has further contended that the timeline for the filing of the instant suit was therefore 6 years, reckoned from the date when the acts complained of arose and/or accrue.
69. As pertains to the instant matter, learned counsel for the Plaintiff therefore contended that insofar as the impugned activities took place on the 9th September 2017 and 20th July 2018, respectively, the Plaintiff was at liberty to file and or mount the instance suit after and including September 2023.
70. Essentially, learned counsel for the Plaintiff has submitted that the Plaintiff's suit has been timeously filed and lodged before the Honourable court. In this regard, the Learned Counsel for the Plaintiff has reiterated that the suit is not time barred.
71. In this regard, the counsel for the Plaintiff has cited and quoted the holding in the case of South C Fruit Shop Ltd versus Housing finance company of Kenya Ltd (2013)eKLR and Antony Talaka Nlegembo versus C R D B Bank PLC & Another (Land Case No 1 of 2017) (2020) TZHC 384, respectively.
72. Secondly, learned counsel has submitted that the impugned Eviction, which was carried out and or undertaken by the Defendant herein, was carried out albeit without a lawful court order.
73. Furthermore, learned counsel has contended that the only suit wherein the Defendant would have procured and obtained an eviction order was ELC No 1041 of 2012, but which suit was withdrawn by and at the instance of the Defendant herein.
74. Other than the foregoing, learned counsel added that the tribunal had also not granted or issued any eviction orders as against the Plaintiff herein. In any event, learned counsel clarified that the only orders which the Tribunal gave was an order for payment of costs and not eviction.
75. Nevertheless, learned counsel added that even though the Defendant herein had neither been granted nor issued with an order of eviction, same proceeded to and evicted the Plaintiff from the suit premises.



76. Premised on the foregoing, learned counsel for the Plaintiff has therefore contended and submitted that the impugned eviction was carried out and undertaken illegally and unlawfully without an order of court.
77. In support of the submissions, that the procurement and recovery of vacant possession without a lawful court order amounts to illegal eviction, counsel for the Plaintiff cited and quoted the case of Francis Githuku Kabue versus Kimani Chege & Another (2009)eKLR and Gusii Mwalimu Investments Company Ltd & 2 Others versus Mwalimu Hotel Kisii Ltd (1996)eKLR, respectively.
78. Thirdly, learned counsel submitted that the Plaintiff herein is entitled to recovery of both Special and General damages, which have been alluded to at the foot of the Plaint.
79. Furthermore, learned counsel has submitted that even though the Plaintiff has not particularly, pleaded the special damages, the Honourable court is still enjoined to grant and award such damages, in the Interests of Justice.
80. In addition, learned counsel for the Plaintiff has cited and invoked the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, to impress upon the Honourable court that the court is seized of the Inherent Jurisdiction to grant special damages, even where same have not been particularly pleaded.
81. Moreover, learned counsel has submitted that the failure to particularize special damages was a genuine mistake on the part of the counsel on record. However, counsel has added that such a mistake ought not to non-suit the Plaintiff herein.
- b. Defendant's Submissions
82. The Defendant filed written submissions dated the 3rd March 2023 and in respect of which the Defendant similarly raised and highlighted three issues for consideration and ultimate determination by the Honourable court.
83. First and foremost, learned counsel for the Defendant has submitted that the claim at the foot of the Plaint herein relates to illegal Eviction of (sic) the Plaintiff from the suit property. In this regard, learned counsel has therefore submitted that illegal eviction comprises of and constitutes a cause of action in tort.
84. In addition, learned counsel has submitted that insofar as illegal eviction is a claim in tort, it was therefore incumbent upon the Plaintiff to commence and lodge the claim within a duration of three (3) years from the date of occurrence of the said action.
85. Based on the foregoing, learned counsel for the Defendant has therefore submitted that instant suit, which arises out of (sic) illegal eviction, was therefore filed out of time, albeit, without the requisite leave, if at all.
86. In the premises, learned counsel has invited the Honourable court to find and hold that the Plaintiff's claim is statutorily time barred and hence ought to be struck out in Limine.
87. In support of the submissions that the Plaintiff's suit is statutorily time barred, learned counsel for the Defendant has cited and quoted the case of Jeliioth Wambui Theuri versus Stanly Omondi & Another (2019)eKLR.
88. Secondly, learned counsel for the Defendant has submitted that the claim by the Plaintiff, which alludes to (sic) contract is illegal and thus void. In this regard, counsel has contended that upon the approval by



the City County Government of Nairobi, the user of the suit property, was converted from commercial to education.

89. Furthermore, learned counsel has submitted that immediately upon the conversion of the user from commercial to educational, the Plaintiff herein cannot purport to have been holding any lawful and legitimate contract in respect of the suit premises.
90. In any event, learned counsel for the Defendant has cited and quoted the provisions of Section 67 of the *Physical and Land Use Planning Act*, 2019.
91. Other than the foregoing, the counsel for the Defendant has also cited and relied upon the case of Mapis Investment Kenya Ltd versus Kenya Railway Corporation, Court of Appeal Civil Appeal No. 14 of 2005 and Njogu & Company Advocates versus National Bank of Kenya Ltd (2016)eKLR.
92. Thirdly, learned counsel for the Defendant has submitted that the Plaintiff herein was never evicted from the suit property. To the contrary, learned counsel has submitted that what transpired and/or happened is that the Defendant sought to levy distress as against the Plaintiff and for recovery of the costs which were awarded by the tribunal.
93. Be that as it may, learned counsel added that upon the levying of distress, the Plaintiff herein voluntarily vacated and evacuated the suit property. In the premises, learned counsel has therefore contended that the Plaintiff was never illegally evicted from the suit property, either as alleged or at all.
94. Lastly, learned counsel for the Defendant has submitted that the claims alluded to and contained at the foot of the Plaint are special in nature and hence it was incumbent upon the Plaintiff to particularly plead the claims and thereafter specifically prove same.
95. However, learned counsel has submitted that despite the trite and established legal position pertaining to pleading and proof of special damages, the Plaintiff has neither complied with nor adhered to the legal position. In this regard, counsel has therefore submitted that the claim for damages alluded to at the foot of the Plaint are neither payable nor due to the Plaintiff.
96. In support of the submissions that the Plaintiff has neither pleaded nor proved the claims for Special damages as required by law, learned counsel for the Defendant has cited inter-alia, the case of Siree Ltd versus Lake Trukana El Molo Lodges (2002)EA 521, Maritime & Another versus Anjere (1990 to 1994) EA 312, Grate Lakes Transport company Ltd versus Kenya Revenue Authority (2009)eKLR and Daniel Otieno Migore versus South Nyanza Sugar Company Ltd (2018)eKLR, respectively.
97. In view of the foregoing submissions, learned counsel has implored the Honourable court to find and hold that the Plaintiff's case is not only misconceived, but bad in law and legally untenable.
98. Consequently and the circumstances, Learned counsel has invited the Honourable court to dismiss same.

Issues For Determination

99. Having reviewed and evaluated the Plaint dated the 8th November 2021, together with the attachment thereto and upon taking into account the Statement of Defense filed and upon reviewing the oral testimony tendered by and on behalf of the Parties and finally upon consideration of the written submissions filed by the respective Parties, the following issues do arise and are thus germane for determination;
 - i. Whether this Honourable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the issues in Dispute at the foot of the instant claim.



- ii. Whether the claim at the foot of the instant suit, namely, illegal Eviction, was statute barred by dint of Section 4(1) of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya?
- iii. Whether the Plaintiff was illegally Evicted from the suit Property.
- iv. Whether the Plaintiff is entitled to the Damages sought at the foot of the Plaintiff or otherwise.

Analysis And Determination

Issue Number 1

Whether this Honourable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the issues in dispute at the foot of the instant claim.

- 100. The claim by and on behalf of the Plaintiff herein relates to compensation arising from (sic) the illegal eviction, whereupon the Defendant herein is stated to have broken into the Plaintiff's restaurant, which was being operated within the suit property and thereafter seized and confiscated assorted movable properties of the Plaintiff.
- 101. Furthermore, the Plaintiff has also contended that arising from the break-in, the Defendant also carted away the Plaintiff's tools of trade and thereafter looked the suit/demised premises with some of the Plaintiff's perishable goods in the suit premises.
- 102. Thereafter, the Plaintiff has proceeded to and supplied particulars of (sic) the goods which were illegally confiscated, nay, carted away by the Plaintiff. For clarity, it is evident that the named items/chattels, which are alluded to and contended to have been taken away are indeed movable properties/chattels.
- 103. In addition, after supplying the details of the named items, the Plaintiff has thereafter endeavored to costs the various items and posted (sic) the value thereof against each item.
- 104. Having costed/ priced and thereafter posted the values of (sic) each chattel/item in the body of the Plaintiff, the Plaintiff has therefore proceeded and laid a claim to compensation.
- 105. My understanding of the Plaintiff's claim is to the effect that the Plaintiff herein is seeking to recover (sic) the value of the named movable items/ chattels from the Defendant.
- 106. Consequently and in the premises, the question that does arise and which has to be dealt with by this court is whether this Honourable court has Jurisdiction to interrogate the values of movable chattels/ items, ascertain same and make an order for compensation in favor of the beneficiary of the named items.
- 107. First and foremost, it is not lost on the Honourable court that the Jurisdiction of this court is circumscribed and well delineated by dint of Article 162 (2) (b) of *the Constitution* 2010.
- 108. Consequently and at all times, the Honourable court must endeavor to and comply with the cold/ black letter law that speaks to and underlines the extent of her Jurisdiction.
- 109. To this end, it is imperative to reproduce the provisions of Article 162 (2) (b) of *the Constitution*, 2010.
- 110. For coherence, same is reproduced as hereunder;
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and



- (b) the environment and the use and occupation of, and title to, land.
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
111. From the foregoing provision, it is crystal clear that the Jurisdiction of this Honourable court relates to issues pertaining to ownership of and title to land and not otherwise. Consequently, before this Honourable court takes up and adjudicate upon a dispute, same is called upon to interrogate whether there is any iota or scintilla of claim touching on or concerning to ownership of land.
 112. However, in respect of the instant matter, the Plaintiff herein is not laying any claim to ownership of or title to the suit property, in manner whatsoever and howsoever.
 113. To the contrary, the compensation, which the Plaintiff is pushing to be granted arises from and attaches to (sic) the value of movable chattels that were allegedly confiscated, nay, carted away, by the Defendant herein.
 114. Quite clearly, what the Plaintiff has placed before the Honourable court has nothing to do with the Jurisdiction of this court. In any event, had the Plaintiff or her counsel given the subject matter due consideration, same would no doubt, have come to the conclusion that the claim did not fit within the four corners of the statutory prescription that confers Jurisdiction on the Environment and Land Court.
 115. Furthermore, even assuming, for the sake of arguments only, that the claim arises out of breach of contract pertaining to the suit property, such kind of a claim would still be outside the Jurisdiction of Environment and Land court.
 116. In this respect, it is appropriate to restate and reiterate the holding of the Court of Appeal in the case of Cooperative Bank of Kenya Ltd versus Patrick Kang'ethe & Another (2017)eKLR, where the Court stated and held as hereunder;
 40. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.
 41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.

In Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,



“The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the [Employment and Labour Relations Court Act](#), the court could entertain the dispute in all its aspects and award damages appropriately.”

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.

117. Guided by the ratio decidendi in the decision (supra), I come to the conclusion that this Honourable court is neither vested nor conferred with the requisite Jurisdiction to entertain and/or adjudicate upon a suit pertaining to compensation of the value of movable properties/chattels, which are quite distinct from ownership of /title to land.
118. Having come to the conclusion that this Honourable court is devoid of the requisite Jurisdiction to adjudicate upon the instant suit, the incidental question that flows from such determination is whether the Honourable court can decree any award/compensation, either as sought or otherwise.
119. Without belaboring the issue, it is appropriate to recall and reiterate that Jurisdiction is everything and where a court is bereft and divested of Jurisdiction then the named court must down her tools at the earliest moment/opportunity.
120. In this respect, it is appropriate to cite and invoke the holding in the case of Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd 1989 KLR 1, where the court observed as hereunder;

“Jurisdiction is everything. Without it, a court has no power to take one more step. In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of [the Constitution](#), Constitutional Application No. 2 of 2011; the Supreme Court noted that The Lillian ‘S’ case [1989] KLR 1] establishes that “jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein.

Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity...”

121. Furthermore, the significance of the Jurisdiction of the Court to entertain and adjudicate upon a dispute beforehand, was also calibrated upon and underscored in the case of Phoenix of E.A. Assurance Company Limited versus Simeon Muruchi Thiga t/a Newspaper Service [2019] eKLR, is succinct and apt.
122. For ease of refence, the Court of Appeal held as hereunder;
 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
 2. In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly



shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

123. Premised on the foregoing, it is therefore evident and apparent that the claim that colors the foot of the Plaint dated the 8th November 2021, certainly do not lie within the statutory Jurisdiction of the Environment and Land court.
124. For clarity, if the Plaintiff was aggrieved by the impugned actions and was desirous to obtain recompense for the offensive confiscation of the movable chattels, same ought to have approached the appropriate forum, including the Chief Magistrate's Court subject to the requisite pecuniary jurisdiction.
125. Finally, it is imperative to underscore that each and every cadre of court, the Environment and Land court must adhere to and comply with the Jurisdiction as provided for under the statute. For coherence, the court must not be seen to expand her Jurisdiction, either by craft or innovation.
126. To this end, the holding of the Supreme Court of Kenya in the case of Samuel K Macharia versus Kenya Commercial Bank Ltd & Others (2012)eKLR, is apt and succinct.
127. For coherence, the Supreme Court stated and held as hereunder;

(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

128. It is my humble, albeit considered view, this Honourable court is not seized of the requisite Jurisdiction to entertain and adjudicate upon the dispute beforehand. On this account alone, I would have been disposed to terminate the Judgment.
129. Nevertheless and for purposes of completeness, I shall still be minded to proceed and address the outstanding issues, which were itemized at the foot of the issues for determination.

Issue Number 2:

Whether the claim at the foot of the instant suit, namely, illegal Eviction, was statute barred by dint of Section 4(1) of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya?



130. The second issue that merits deliberations and ultimate determination by this Honourable court relates to whether illegal eviction, which has been alluded to at the foot of the Plaint is a cause of action in tort or a contract.
131. Incidental to the determination of whether illegal eviction is a cause of action in tort or otherwise, is whether the suit herein was filed within the statutory limitation prescribed by dint of Section 4(1) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
132. On behalf of the Plaintiff herein, learned counsel has submitted and contended that the impugned illegal eviction, arose out of an existing tenant/landlord relationship and hence same constitutes an infringement on or breach of the named contractual relationship.
133. As a result of the foregoing, learned counsel for the Plaintiff has therefore implored the Honourable court to find and hold that the illegal eviction, which arose from infringement of the contractual relationship, was therefore a cause of action in contract and not otherwise.
134. To anchor her submissions, learned counsel for the Plaintiff has cited and quoted the Court of Appeal decision in the case of South C Fruit Shop Ltd versus Housing Finance of Kenya Ltd (2013)eKLR, where the Honourable Court of Appeal stated and held as hereunder;

The next issue for consideration is what the cause of action was based upon, and whether it was limited in time. The action herein arose out of an illegal eviction. The claim is for damages and loss that occurred as a result of that illegal eviction.

We have stated that the appellant in this case was entitled to the benefits conferred upon him as a protected tenant. It was entitled to notice, but as a result of lack of notice, it is claimed that the appellant suffered loss and damage. It is our finding that the cause of action arose out of a breach of a tenancy agreement and hence a breach of contract. We therefore find and hold that the trial judge erred when she found that the claim was based on tort and dismissed the plaint.

135. On the other hand, learned counsel for the Defendant has submitted that by the time the Plaintiff was evacuated from the suit property, which constitutes (sic) the claim for illegal eviction, the tenancy relationship, if any, between the Plaintiff and the Defendant had long terminated. For clarity, learned counsel for the Defendant contended that the Plaintiff ceased to be a tenant of the Defendant immediately the Notice to terminate tenancy dated the 3rd August 2012 took effect.
136. In addition, learned counsel for the Defendant has submitted that the impugned Notice to terminate tenancy took effect after the Plaintiff herein failed to file any reference and which position was confirmed by the business rent tribunal vide letter dated the 5th December 2012.
137. In the premises, it is the Defendant's submissions that by the time the impugned cause of action accrued, the Plaintiff herein was a trespasser in the suit property and hence there was no contract, capable of being breached to warrant an invocation of a contractual claim.
138. In the circumstances, it is the Defendant's further submissions that the cause of action of illegal eviction therefore related to the occupation of the suit property by a trespasser and hence the illegal eviction was a stand alone claim, devoid of contractual inclination and/or anchorage.
139. From the foregoing, learned counsel for the Defendant has therefore submitted that the cause of action for illegal eviction was therefore one arising out of tort and not otherwise.



140. To this end, the learned counsel for the Defendant has cited and quoted the decision in the case of Jelioth Wambui Theuri versus Stanley Omondi & Another (2019)eKLR, where the court stated and held as hereunder;
12. Upon my perusal of the plaint annexed to the Motion, I have established that the cause of action is founded on trespass and unlawful forceful eviction arising out of a tenancy relationship and the orders being sought in the plaint are of an injunctive and declaratory nature.
13. Both trespass and forceful/wrongful eviction are known to constitute torts which means that this court is clothed with jurisdiction to entertain both the application and the intended appeal.
141. Having duly evaluated and analyzed the totality of the evidence tendered and placed before the Honourable court, I find and hold that the tenancy relationship between the Plaintiff and the Defendant was effectively terminated when the Plaintiff failed to file a Reference to challenge the Notice to terminate tenancy dated the 3rd August 2012, which was issued and served by the Defendant.
142. Furthermore, the fact that the impugned Notice to terminate tenancy was neither challenged nor objected to was underscored by the Tribunal, vide the letter dated the 5th December 2012.
143. In the premises, effective the 5th December 2012, when the tribunal confirmed that the Notice to terminate tenancy had not been challenged by the Plaintiff, the Plaintiff became a trespasser and not otherwise.
144. Consequently and in the premises, by the time when the Plaintiff was being evacuated and/or removed from the suit property, on the 20th July 2018, (which action underlines the claim for illegal eviction), the tenancy/contractual relationship between the Plaintiff and the Defendant had long ceased to exist.
145. In my humble view, the impugned illegal eviction therefore did not arise from and/or relate to any existing tenancy/contractual relationship. In this regard, the infringement in question (read illegal eviction) did not emanate from and/or attached to any contract/breach of tenancy whatsoever.
146. In short, I do not agree with the submissions by Learned counsel for the Plaintiff that the illegal eviction, which informs the current suit, constitutes a cause of action in contract.
147. Conversely, I do agree with the submissions by learned counsel for the Defendant that the impugned actions, which constitutes the claim for illegal eviction, arose when the Plaintiff was a trespasser in the suit premises.
148. Consequently, the cause of action of illegal eviction was one arising out of tort and not otherwise. In this regard, I do share the sentiments and the holding at the foot of the case of Jelioth Wambui Theuri versus Stanly Omondi & Another (2019)eKLR, where the court held as hereunder;
13. Both trespass and forceful/wrongful eviction are known to constitute torts which means that this court is clothed with jurisdiction to entertain both the application and the intended appeal.
149. Furthermore, my persuasion in terms of the preceding paragraph, is also vindicated by the decision of the High Court of Tanzania in the case of Antony Talaka Nlegembo versus CRBD Bank PLC &



Another (land case number 1 of 2017) Parenthesis 2020 TZHC 3084 (19th march 2020), where the Honourable Court held as hereunder;

“the cause of action arose on 1st October 2005 when the 1st Defendant illegally evicted him and his spouse from the disputed house without adhering to land mortgage rules. The facts pleaded in this paragraph clearly reveal that the cause of action is eviction which emanates from a mortgage transaction between the Plaintiff and the 1st Defendant. The same having arose from a mortgage transaction, it cannot fall under tort as argued by Mr. Mbise, but rather from landlord where the time limitation is twelve (12) years as provided under the limitation of action act. The claim would have fallen under tort if the Plaintiff would have based on eviction as a standalone cause of action”.

150. From the foregoing, I come to the conclusion that insofar as the tenancy/contractual relationship between the Plaintiff and the Defendant had terminated, the Plaintiff cannot be heard to contend that the impugned cause of action arose out of breach and/or infringement of contract.
151. To my mind and for good measure, there was no contract that was in existence and thus capable of constituting a cause of action in contract.
152. In view of the foregoing, I come to the conclusion that by the time the instant suit was filed, the three-year limitation, stipulated and envisaged for mounting a claim based on tort, had long lapsed and extinguished.
153. In the premises, the Plaintiff's suit/claim was rendered redundant, sterile and thus incapable of enforcement by a court of law, whatsoever.
154. In this regard, it is appropriate to recall and reiterate the holding in the case of Gathoni versus Kenya Corporative Creameries Ltd (1982)eKLR, where the Court stated and held as hereunder;

The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.

Issue Number 3

Whether the Plaintiff was illegally Evicted from the suit Property.

155. The Defendant herein stated and contended that the Plaintiff filed and/or lodged various cases before the tribunal, inter-alia, case number 678 of 2017, wherein the Plaintiff sought to procure and obtain orders to bar and prohibit the Defendant from retaking possession of the suit property.
156. Furthermore, the Defendant aver that upon the filing of the named suits, the Plaintiff indeed procured and obtained assorted orders, which were issued/granted on the 11th September 2017.
157. Be that as it may, evidence was adduced by and on behalf of the Defendant that upon being served with the pleadings and the orders arising from the said suits, same instructed and retained her advocates on record to challenge the proceedings and the orders which had been issued by the tribunal.



158. Additionally, learned counsel for the Defendant submitted that upon receipt of instructions, same filed various court processes, inter-alia, a Notice of preliminary objection, which was ultimately heard and disposed of vide ruling rendered on the 6th July 2018.
159. Furthermore, learned counsel for the Defendant submitted that vide the ruling rendered on the 6th July 2018, the tribunal struck out the reference and the various proceedings that had been commenced by the Plaintiff herein and awarded costs in the sum of Kes.100, 000/= Only, to the Defendant.
160. First forward, learned counsel for the Defendant submitted that after being awarded the sum of Kes.100, 000/= only, on account of costs, the Defendant herein sought to recover the named costs by way of distress. In this regard, counsel added that the Defendant therefore proceeded to and locked the Plaintiff's premises.
161. In addition, learned counsel for the Defendant has also submitted that after the Plaintiff's premises were locked, (sic) in the name of levying distress, the Plaintiff vacated the suit premises.
162. Consequently and according to the Defendant, the Plaintiff was not/ never evicted from the suit property. To the contrary, it is posited that the Plaintiff vacated the suit premises, on his own accord.
163. On the other hand, learned counsel for the Plaintiff contended that the Defendant herein proceeded to and locked the demised premises and thereafter confiscated and carted away various items which were in the demised premises.
164. Additionally, learned counsel for the Plaintiff has submitted that at the time when the Defendant locked the suit premises and carted away the various items that were on the suit property, the Defendant did not have any lawful court order to warrant the impugned actions.
165. In short, learned counsel for the Plaintiff has posited and submitted that the Plaintiff was illegally evicted from the demised premises, albeit without a lawful court order.
166. Before addressing the issue as to whether the Plaintiff was unlawfully evicted from the demised premises or otherwise, it is imperative to reproduce a segment of the evidence of DW1 whilst under cross examination by learned counsel for the Plaintiff.
167. For coherence, DW1 stated as hereunder;
- “ the Environment and Land court has never granted an order of Eviction against the Plaintiff herein.
- ..there is no Eviction order. The order in question was in respect of recovery of the costs.
- .We did not instruct any auctioneer. The right of distress was by way of blocking the Plaintiff from accessing the premises.
168. On re-examination, DW1 stated as hereunder;
- “ the break- in was for recovery of the costs that were awarded by the tribunal”.
169. From the foregoing, it is evident and apparent that the Defendant herein neither procured nor obtained any eviction order before breaking into the demised premises and effectively removing the Plaintiff from the suit property.



170. In the absence of a lawful court order, the Defendant could not exercise the right to retake possession or otherwise evict the Plaintiff from the suit property. In this regard, the impugned actions by and on behalf of the Defendant amounted to illegal eviction.
171. To underscore, the foregoing observation, it is appropriate to reiterate the holding of the Court of Appeal in the case of *Gusii Mwalimu Investment Company Ltd & 2 Others versus Mwalimu Hotel Kisii Ltd (1996)eKLR*, where the court held as hereunder;

“I have no hesitation whatsoever in holding that the landlord did all it could to obtain the possession unlawfully and the learned judge was entirely right in making the orders he made. If what the landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession.”

172. To surmise, I find and hold that the impugned actions and/or activities by and at the instance of the Defendant, inter-alia, the admitted breaking into the demised premises, constituted and amounted to illegal eviction of the Plaintiff.

Issue Number 4

Whether the Plaintiff is entitled to the Damages sought at the foot of the Plaint or otherwise.

173. The claims by and on behalf of the Plaintiff herein are no doubt, in the nature of special damages. Consequently and in this regard, there is no gainsaying that the Plaintiff was called upon to comply with the rules of pleadings pertaining to and concerning special damages.
174. For coherence, it is common knowledge that any claimant, the Plaintiff not excepted, who seeks to procure a favorable order on account of special damages must particularly plead and thereafter specifically prove the special damages.
175. In this respect, case law abound. Nevertheless, it suffices to cite and quote the holding in the case of *John Richard Okuku Oloo versus South Nyanza Sugar Co Ltd [2013] eKLR*, where the court of appeal stated and held as hereunder;

We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

In the *Jivanji* case (*supra*), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes *Coast Bus Service Limited v Murunga & others Nairobi CA No. 192 of 1992 (ur)* appears in the *Jivanji* case:

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of *Kampala City Council v Nakaye [1972] EA 446*, *Ouma v Nairobi City Council [1976] KLR 297* and the latest decision of this Court on this point which appears to be *Eldama Ravine Distributors Limited and another v Chebon civil appeal number 22 of 1991*



(UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgement:

“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In *Ouma v Nairobi City Council* [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ’s judgment at 532-533 in *Ratcliffe v Evans* [1892] QB 524, an English leading case of pleading and proof of damage.

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

176. Furthermore, the legal position pertaining to special damages was also succinctly addressed in the case of *Union Bank of Nigeria PLC versus Alhaji Adams Ayabule & another* (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), Mahmud Mohammed, JSC. delivering the judgment of the supreme court of Nigeria stated:

I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.

177. From the foregoing, there is no gainsaying that it was incumbent upon the Plaintiff to particularly plead the claim pertaining to special damages and thereafter specifically prove same.
178. In the absence of particulars of special damages and in the absence of proof thereof, in accordance with the law, no award can issue and or be made in favor of the Plaintiff.
179. As to the contention that the failure to particularly plead special damages was occasioned by a genuine mistake on the part of counsel, this Honourable court wishes to state and underscore that the requirements of the law apply to all and sundry, in equal measure.
180. If anything, learned counsel for the Plaintiff had due latitude and opportunity to apply for and obtain leave to amend the Plaint in question and thereafter supply the requisite particulars. However, same failed to exercise due diligence.
181. Consequently and in my humble view, the plea that the failure to particularize the prayer on special damages was occasioned by a genuine and honest mistake on the part of counsel, (sic) amounts to a cry in the wilderness.

Final Disposition

182. Having duly calibrated upon, evaluated and analyzed the thematic issues, which were itemized in the body of the Judgment, it is now appropriate to make the final pronouncement and render the verdict in the matter.



183. In the circumstances and taking into account the various observations, contained in the preceding paragraphs, I come to the conclusion that the Plaintiff's suit, was not only misconceived, but bad in law and legally untenable.
184. Consequently and in this regard, the Plaintiff's suit, which was mounted before a court without the requisite Jurisdiction is hereby and is hereby Ordered struck out.
185. Finally, Costs of the suit be and hereby awarded to the Defendant and same to be agreed upon and/or taxed by the deputy registrar of the Honourable court.
186. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Ms Kariuki h/b for Mr Achach for the Plaintiff.

Mr. Ndungu for the Defendant.

