



**Mueke v Mwangovya (Civil Suit 104 of 2014)
[2023] KEHC 22161 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 22161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 104 OF 2014**

**F WANGARI, J
MAY 25, 2023**

BETWEEN

PHILIP SAMMY MUEKE PLAINTIFF

AND

LILIAN MWANGOVYA DEFENDANT

JUDGMENT

1. Through a plaint dated 19th August, 2014 and filed in court on 21st August, 2014, the Plaintiff sought for judgement against the Defendant for: -
 - a. Payment for the value of the Plaintiff trade stock worth Kshs 10,651,590/= as stated in paragraph 10 of the said plaint;
 - b. General damages;
 - c. That this Honourable Court be pleased to make any further or other orders as it may deem just and fit to grant;
 - d. Interest on (a) and (b) above at court rates;
 - e. Costs of the suit.

Pleadings

2. The plaint was accompanied by other pleadings such as the verifying affidavit, list of witnesses, witness statements, list of documents and the copies of documents. Upon service of pleadings upon the Defendant, she entered appearance on 4th September, 2014 and filed her statement of defence, list of witnesses, witness statements, list and copies of documents on 17th September, 2014. Reply to defence was filed on 29th September, 2014. Both parties thereafter filed pre-trial questionnaires on 19th



November, 2014 and 1st December, 2014 respectively. Pleadings were closed and the matter fixed down for hearing.

Summary of the Plaintiff's Case

3. After both sides made their opening remarks on 12th October, 2016, the Plaintiff took to the stand and testified as PW1. He adopted his witness statement and produced all the documents in his list in the order listed save for the photographs which were objected to. He stated that he knew the Defendant as the person who let him space at Kongowea Market Stall No 4E. The agreement to let was in the year 2012. The initial agreed rent was Kshs 6,000/= but it increased to Kshs 7,000/= and later to Kshs 8,000/=. The mode of payment was M-Pesa. The agreement ran from 2012 to 2014. In 2014, the step children came to him and demanded that he shares the rent between the Defendant and her co-wife. When he complied, the Defendant threatened to end the relationship. On the date his stall was broken into, he was at Coast General Hospital where a colleague had died. He was only informed by one Joseph Makau that the stall had been broken into.
4. He went to the site and found the stall broken and wares strewn outside and he reported the matter to the market security as well as Nyali Police Station. He was accompanied by the Officer Commanding Nyali Police Station (OCS) and the District Officer (DO) to the site and he was advised that it was a civil case and that is why he filed the present suit. There were people who witnessed the breaking. He marked the photographs for identification. He stated that at the time of breaking, the goods he had were worth Kshs 10,651,590/=. He therefore sought for judgement against the Defendant as prayed in the plaint.
5. On cross examination, he confirmed that though he was the Defendant's tenant pursuant to an agreement, there was none in writing. He had a written agreement with Joyce's (co-wife) children. On rent, he was paying monthly to the Defendant either through M-Pesa or cash. On what caused the differences, he stated that it emanated from him sending the money to one David Mwangovya. He referred to a letter dated 14th May, 2016 where he was granted an extension until 13th June, 2014. On the said date, he did not vacate the stall. He stated that the stall was broken into on 20th June, 2014 way after his last day to vacate had passed. He was operating the stall personally as he had not employed anyone. Referred to the photographs, he stated that he could see a young man whom he could not identify. The photographs had no dates. He confirmed that he was not present when the photos were being taken. He also did not see anyone carrying out his wares. He was not paying for single business permits. Inside the stall, he had other stalls he was letting out including an M-Pesa. He stated that on 20th June, 2014, the M-Pesa shop was not open as the Defendant had locked the main door. The person operating the M-Pesa shop was one Museu also known as Kamwana. He stated that he kept records of his business but the documents were lost. He added that he used to bank at K-Rep, Ecobank and Faulu. On his profits, he stated that it depended on the market but the average was between Kshs 150,000/= to Kshs 300,000/=. However, he did not have any document to show his average profit. He stated that he was not storing any goods for anybody.
6. On re-examination, he stated that according to his agreement with the family of Mwangovya, there was a term that he would enjoy the use of the premises without interference by the widows. He stated that he paid rent of Kshs 20,000/= on 3rd April, 2014 to the County Government of Mombasa but he did not know for what duration it related. However, it was the duty of the of the Defendant to pay but she did not pay. According to the documents he filed, he was to leave on 11th May, 2014 but by that time, the stall was not operating as it had been closed. The receipts disclose the goods were in the shop as at 20th June, 2014. The Plaintiff stated that not all the items in the receipt were for sale. Others were tools of trade. This was in answer to a question posed to him by the court.



7. Joseph Sevu Makau testified as PW2. He adopted his witness statement as his evidence in chief. He stated that while at his stall on 20th June, 2014, a lady came and started to break the door of stall No 4E which faces his which is stall No 3R. The lady had come in the company with many youths. The witness stated that the lady was saying that the stall was hers. She used a hammer to break the padlock. As the chairman of the traders, he went to the AP Camp and spoke to the In-charge by the name Zubedi. After explaining what had transpired, the In-charge told him that was not his work. He equally went to market superintendent who equally dismissed him. He thereafter called the Plaintiff who had gone for a funeral of their secretary and the Plaintiff came and reported the matter to the police. When shown some photographs, he identified the lady who was breaking the stall in the company of youths. He produced the photographs. He stated that he saw the lady and the youths throwing out the Plaintiff's property including sacks of potatoes and other merchandise. He said that chaos broke and even other stall owners could not help as riotous youth took away all the goods. He said that he had been at the market ever since it was opened. He had before known the Defendant as the owner of the stall. The stall owner was a man and an employee of the Municipal Council who always let it out. He later came to know the name of the lady as that of the Defendant herein.
8. On cross examination, he stated that he had worked at Kongowea since 1988 when the market opened. All through, his stall has been No 3R which is opposite the Plaintiff's facing each other. Before the Plaintiff rented the stall, it was let to one Tinga. He did not know if the Plaintiff was given on rent or not. On his duty as chairman, he stated that he was solving problems for market traders. He stated that the gang of youths was about 20 people. He did not witness the photographs being taken and he did not know the person who took them. He however, believed they were taken at the time of the incident. Referred to the photographs, he confirmed that there was no gang other than the man and the lady. He stated that the commotion lasted between 2pm and 4pm. During that time, he was at his stall looking at what was happening. He confirmed that he went to Zubedi and Market Superintendent and the two places took like 30 minutes. He came back at around 2:45 p.m. He confirmed that there was an M-Pesa kiosk inside the stall but it was not open. He did not know if the Plaintiff had any employee. He denied knowing any person called Kamwana. He confirmed that he was present when the goods were being thrown out. He did not know what business the Plaintiff was undertaking in the said stall. He confirmed that one Biasha Hamisi Mwanjama was his vice chairman. He stated that he called the Plaintiff after he came back from the two offices which was at around 2:45 pm. When he called the Plaintiff, the goods had already been thrown out. Referred to the photographs, he confirmed that none showed goods strewn all over. He denied seeing either Mr. Biasha or Ali Alfani Mtsumi whom he recognized as a former chairman. He stated that prior to the date of the incident, he did not know the Defendant. Shown the photographs, he confirmed that they had no dates.
9. On re-examination, he stated that when he went to report to the AP, the Defendant had broken the stall open and was removing things. He stated that he witnessed the breaking and removing. That marked the close of the Plaintiff's case.

Summary of the Defence Case

10. The Defendant, Lilian Mwangovya testified as DW1. She adopted her witness statement as her evidence in chief. When referred to a photograph marked F, she confirmed that she was captured in it. She equally confirmed that she had removed things and she wanted to lock the store after breaking the padlock. She listed the items in the store as empty drums, empty sacks and six (6) bags of onions. While she was removing the things from the store, there was a young man who was left by the Plaintiff. He was running an M-Pesa till. He did not break the shop as it was open. She stated that she was not alone but with market officials. She said that as they were removing the goods, the young man kept



watch and that none of the things were thrown away but they kept them. The shop belonged to her late husband but she gave it out to the Plaintiff at Kshs 6,000/= per month either in 2010 or 2011. The Plaintiff only paid for 2 or 3 months. When he went to demand for rent, the Plaintiff refused to cooperate and thus the difference.

11. The market officials intervened and the Plaintiff admitted to owing me rent and was asked to pay within (two) 2 weeks. On the date of payment, he made a complaint to the DO who gave him (one) 1 month to pay. He again did not pay but instead went to the Minister on the allegation that he could not pay the Defendant wholly but wanted to share the rent between the Defendant and co-widow. Despite that, he still did not pay. This was in 2011 – 2012. She confirmed that she was paying rent to the County Government. She produced her documents dated 17th September, 2014. In conclusion, she stated that the things they removed being empty drums and sacks could not be even Kshs 100,000/=.
12. On cross examination, she confirmed that the Plaintiff was his former tenant who was supposed to be paying rent directly to her. She stated that the Plaintiff only paid Kshs 3,000/= to her and Kshs 3,000/= to her co-widow. She added that it was an agreement that when the Defendant would require the stall, the Plaintiff would leave. She confirmed that she did not give the Plaintiff notice of her intention to remove his things. She denied breaking open the stall as it was open. She confirmed that she had young men to assist her remove the goods. She stated that she called all those who had goods in the shop and in the presence of the Plaintiff's worker, they took their things. The young man had told her that some of the things belonged to others who were nearby and they came and took their goods. She finished at about 5pm and the Plaintiff was standing nearby but did not come.
13. On re-examination, she stated that they had agreed before the Minister that the Plaintiff pays rent or moves out.
14. Peter Kangwaru Nyaga testified as DW2. He stated that the Plaintiff was in the Market Committee as Vice Chair and a businessman at the market. He came to know the Defendant through the Plaintiff. He adopted his witness statement as his evidence in chief. On cross examination, he confirmed that he was not at the scene on 20th June, 2014.
15. Biasha Hamisi Mwanjama testified as DW3. He adopted his witness statement as his evidence in chief. He stated that in 2014, he was the chairman of the market traders. He confirmed knowing the Plaintiff as one of the traders in the retail market who was selling empty bags, drums and jericans. He was also storing goods for others and letting out an M-Pesa shop.
16. On cross examination, he stated that he did not know the people the Plaintiff was storing goods for. He confirmed that there were sub-tenants operating M-Pesa, someone making sugarcane juice and another lady storing onions. He stated that he knew all this information as he was a worker leader. He confirmed that the market In-charge was present and told people to remove their goods. He stated that the stall belonged to the Defendant. The bags of onion were taken by the owner. After things were removed, the Plaintiff brought a guard to take care.
17. In re-examination, the witness confirmed that he was present when the things were removed. He stated that the things were removed neatly and placed outside. They were sacks, jericans and empty bags. He estimated the jericans at around 35 and he did not count empty bags.
18. Ali Alfani Mtsumi testified as DW4. He stated that he was a trader at Kongowea market and he knew both the Plaintiff and the Defendant. He confirmed that when he was treasurer, the Plaintiff was the vice chairman of the Central Committee. He adopted his witness statement as his evidence in chief. On cross examination, he stated that the stalls belong to the County Government of Mombasa which allocates to individuals. On disputes, he stated that they are resolved by the County and market leaders.



On the subject matter, he confirmed that it went to the County and the Plaintiff was given time to leave upon being given an extension. The Minister of Trade had given the Plaintiff notice to move out. On 20th June, 2014, he was away.

19. On re-examination, the witness stated that the Plaintiff had been given many notices to leave including one where he was supposed to have moved out by 13th June, 2014.
20. Julius Ntarangui testified as DW5. He adopted his witness statement as evidence in chief. He confirmed that he knew the Plaintiff since he used to keep his goods in his stall. He stated that on 20th June, 2014, he was notified to go and remove his goods. He further stated that he was not the only person who kept his wares there. There were also onions and jericans inside the stall. He had been keeping his wares there for about four (4) months at Kshs 100/= per day. He stated that there was no business going on in the stall other than storage. On cross examination, he stated that he knew the Plaintiff as the person in whose store he was keeping his wares though he did not leave any document to show that he was keeping his wares there. That marked the close of the defence case.
21. Parties agreed to file written submissions which they duly complied.

Plaintiff's Submissions

22. The Plaintiff filed his submissions dated 29th January, 2019 on 31st January, 2019. The Plaintiff submitted three (3) issues for determination being: -
 - a. Whether the Plaintiff had any rent arrears for stall No 4E at Kongowea Market as at 20th June, 2014;
 - b. Whether the Defendant and her agents threw away the Plaintiff's goods from Stall No 4E on 20th June, 2014;
 - c. Whether the Plaintiff is entitled to the damages and reliefs as sought in the Plaintiff as against the Defendant
23. On the first issue, on the strength of M-Pesa statements, the Plaintiff submits that he was a lawful tenant at Stall No 4E duly paying rent. Therefore, the Plaintiff submitted that the Defendant was estopped from denying the relationship. The case of *Serab Njeri Mwobi v John Kimani Njoroge* [2013] eKLR was cited for the issue of estoppel. On the second issue, the Plaintiff submitted that the Defendant instructed and removed his goods unlawfully occasioning him great loss as he was solely depending on the business as his source of income. Photographs produced as Exhibits 11 (a) to 11 (i) were said to have placed the Defendant at the scene thus he prayed that judgement be entered against the Defendant for unlawfully evicting him from the stall and removing his goods. Reliance was placed in the case of *Gusii Mwalimu Investment Company Ltd & 2 others v Mwalimu Hotel Kisii Ltd*, Civil Appeal No 160 of 1995 [1995 – 1998] 2 EA 100.
24. On the third issue, the Plaintiff submitted that he gave evidence and produced receipts as proof of the worth of his business as at the time the Defendant and her agents disrupted his business. To support the claim for special damages, the case of *Hahn v Singh* [1985] KLR 716 was cited. Reference was made to exhibit 12 as evidence of the net worth. On general damages, the Plaintiff submits that he was self-employed and on the day the Defendant disrupted his business, he was earning a living from it. The Defendant's actions thus occasioned him loss of business and goodwill. The case of *David Njuguna Ngotho v Family Bank Limited & another* was cited to buttress this claim. In totality, the Plaintiff prayed that his claim had merit and ought to be allowed with costs.



Defendant's Submissions

25. The Defendant filed her submissions dated 14th February, 2019 on the same date. The Defendant isolated seven (7) issues for determination which are as follows: -
- a. Who was the legal owner of Stall 4E Kongowea?
 - b. To whom was Stall 4E let out to and who was paying the rent?
 - c. Was there an occupancy relationship between the Plaintiff and the Defendant relating to Stall 4E?
 - d. Did the Defendant unlawfully close Stall 4E and throw out the Plaintiff's goods?
 - e. Did the Plaintiff suffer loss in the sum of Kshs 10,651,590/=?
 - f. Is the Plaintiff entitled to general damages?
 - g. Who should bear the costs of the suit?
26. On the first and second issue, it was the Defendant's submissions that Stall 4E was the property of the County Government of Mombasa and not an individual and it is let out to traders for a fee. The stall had been let out to the Defendant's deceased husband and after his demise, it was let out to the Defendant. The Defendant answered the third issue in the affirmative adding that there was no agreement between the Plaintiff and the Defendant's deceased husband. On the issue of default, the Defendant summarized the M-Pesa payments to show that indeed the Plaintiff was defaulting in rent payment.
27. On the fourth issue, the Defendant submitted that the Defendant did not unlawfully close Stall 4E and throw out the Plaintiff's goods. Defence witnesses evidence as well as letters were referred to in support of this ground. On the fifth issue, the Defendant submitted that the Plaintiff did not adduce any evidence to show that he suffered loss of Kshs 10,651,590/= or at all. According to the Defendant, the Plaintiff did not adduce any licence or legal document for the business he was carrying out. Similarly, no audited accounts, monthly records of his purchases and sales banking slips or statements were produced. The case of *Edith Muthoni Kirugumi v Juma Muchemi Adv & 2 others*, Civil Case No 2986 of 1994 was referred to.
28. On the sixth issue, the Defendant submitted that the Plaintiff is not entitled to general damages as he was given notice to vacate the stall and he himself even prayed for time and bound himself in writing to vacate on several occasions only later to refuse to vacate. On the issue of costs, the Defendant submits that since the Plaintiff did not prove his case, the same ought to be dismissed with costs in favour of the Defendant.

Analysis and Determination

29. I have considered the pleadings, the evidence tendered, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination: -
- a. Whether the Plaintiff specifically pleaded and proved his case for an award of Kshs 10,651,590/=;
 - b. Whether the Plaintiff is entitled to general damages;



c. What is the order as to costs?

30. On the first issue, it is not in dispute that the Plaintiff's main claim is a liquidated one seeking a specified amount. It is settled that in a special damage claim, a party is not only required to specifically particularly plead his claim but strictly prove the same. In *Hahn v Singh*, Civil Appeal No 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;

“...Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves...”

31. The Plaintiff's claim stems from an allegation that he was running a business at Kongowea Market specifically at Stall No 4E. Based on his testimony, this was a business that was doing well since it was earning him a profit of between Kshs 150,000/= - 300,000/= per month. This is by no mean standards a small business. However, as a result of the Defendant's interference, he lost his stock in trade to the tune of Kshs 10,651,590/=. This loss is pleaded and itemized at paragraph 10 of the plaint. For every figure itemized, a value was assigned to it and this is how the claimed figure was arrived at. I note that the Plaintiff produced several receipts which were identified as exhibit 12 in support of the claim. As held in Hahn's case above, special damages cannot be inferred. It is the particular loss that one suffered.

32. I have considered the receipts produced and as correctly pointed out by the Defendant, the receipts sum up to Kshs 1,697,500/=. I will leave this here for now. In his evidence in chief, the Plaintiff stated as follows; “...At the time of breaking, the goods I had were worth Kshs 10,651,590/=” At paragraph 10 of the plaint, the itemized goods are listed in terms of quantity, unit price, total price and the grade which I believe is quality of the goods. For the Plaintiff to be this particular, this information contained at paragraph 10 of the plaint must have been obtained from somewhere. The surest way to prove these items was through production of an inventory showing what was in the stall on 20th June, 2014. I have considered the exhibits produced and none is an inventory.

33. Similarly, on cross examination, the Plaintiff had the following to say; “...I used to bank at K-Rep, Ecobank and Faulu...” If this was the case, nothing was easier than to obtain and produce bank statements from the said banks. It has been held time and again that whoever alleges must prove. Section 107 of the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 108 is also to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, while section 109 states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

34. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal had the following to say; -

“...It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali*



v Jackson M. Nyambu t/a Sisera store, Civil Appeal No 5 of 1990 (unreported) and *Idi Ayub Sabbani v City Council of Nairobi* (1982-88) IKAR 681 at page 684:

"... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it..."

35. I think I have said enough to show that the claim for Kshs 10,651,590/= cannot pass muster. Back to the receipts totaling Kshs 1,697,500/=, I have no quarrel with the receipts. However, the question that has bogged this court's mind is, was the Plaintiff in business of buying and selling? Witnesses who testified including Plaintiff's own witness confirmed that there were people who were storing goods in the stall run by the Plaintiff. PW2 who confirmed to have been in Kongowea market since 1988 had the following to say on cross examination; "...I do not know what business the Plaintiff was undertaking in that stall..." This is an interesting description of a party who claims to be running a business that makes a profit of between Kshs 150,000/= - 300,000/= per month. Worse still, the person describing the Plaintiff is someone whose stall is directly opposite that of the Plaintiff.
36. I have looked at the receipts. In ordinary business practice, it is the buyer of the goods who is issued with the receipt. Other than the receipt dated 20th January, 2011, the rest do not show who was the buyer or the seller. Relying on such documents to award special damages would be to make mockery of what special damages are.
37. On the first issue, I return a finding that the Plaintiff failed to prove that he lost anything to warrant a sum of Kshs 10,651,590/= or at all.
38. On the second issue, award of general damages is discretionary. Therefore, before such an award is made, a party must lay a basis for such award. In the present case, the Plaintiff stated that he was in business when the Defendant interrupted him thus losing his source of income. At this juncture, it is imperative to consider the relationship between the Plaintiff and the Defendant. It is not in dispute that the Plaintiff was the tenant of the Defendant. However, the market stalls belong to the County Government and it is only lets out to traders at a fee. The Stall No 4E had been let to the Defendant's deceased husband. However, upon his demise, the then Municipal Council of Mombasa through a letter dated 7th September, 2012 authorized the Defendant to operate the said stall. The Plaintiff and the Defendant thereafter entered into a verbal agreement where the Plaintiff was to pay the Defendant rent of Kshs 6,000/= per month. This amount rose to Kshs 7,000/= and finally to Kshs 8,000/=.
39. From the Plaintiff's M-Pesa statement which he produced, it is not in doubt that the Plaintiff was not paying his rent regularly. For instance, between 3rd December, 2012 and 18th April, 2013, no payment was made and if any was, it was the Plaintiff's duty to tender such. Considering this failure, problems started and this culminated in an agreement dated 11th April, 2014 between the Plaintiff and the Defendant. The agreement provided that the Plaintiff was to vacate the stall on 11th May, 2014. A letter dated 12th May, 2014 by the Market Superintendent was issued to the Plaintiff to vacate the stall. Upon his own request, the Plaintiff was granted another month to clear his merchandise and this was to lapse on 13th June, 2014. However, by the said date, he had not vacated the premises. Based on the foregoing,



despite being given sufficient notice to organize his affairs, the Plaintiff decided to voluntarily extend his stay. As such, he cannot turn around and say I suffered loss and thus a basis for damages.

40. The upshot for the foregoing is that the Plaintiff's plea for general damages fails.
41. On the issue of costs, section 27 of the *Civil Procedure Act* decrees that costs follow the event. However, this court retains its discretion to order otherwise. In the circumstances of the case, I order that each party shall bear their own costs.
42. Following the foregone discourse, the following orders do hereby issue: -
 - a. The Plaintiff's suit is found to be without merit and it is hereby dismissed.
 - b. Each party to bear its costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF MAY, 2023.

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F. WANGARI

JUDGE

