



Macharia t/a Gusii Properties Club v Dakianga Distributors Limited (Environment & Land Case 29 of 2015) [2023] KEELC 16938 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16938 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 29 OF 2015**

JM ONYANGO, J

APRIL 20, 2023

BETWEEN

JUSTUS MUNYINYI MACHARIA T/A GUSII PROPERTIES CLUB. PLAINTIFF

AND

DAKIANGA DISTRIBUTORS LIMITED DEFENDANT

JUDGMENT

1. By a plaint dated 13th June 2012 the plaintiff filed suit against the defendant seeking the following reliefs:
 - a) Special damages of Kshs.9,929,765/=
 - b) Aggravated damages for embarrassment, ridicule and inconvenience occasioned as a result of the unlawful eviction.
 - c) Costs of this case.
 - d) Interest on (a), (b) and (c) at court rates.
2. The circumstances giving rise to the plaintiff's case are that his late mother Abigail Wanjiru Mbiri filed a case in the Business Premises Rent Tribunal (BPRT) challenging a notice of termination of tenancy issued by the Defendant. The Tribunal ruled against her. She then filed an appeal against the decision of the BPRT vide Nairobi HCCA No. 950 of 2005. While the appeal was still pending, the defendant evicted the plaintiff's mother from the suit premises and threw out her goods and equipment occasioning her loss and damage. She subsequently obtained an order for reinstatement into the suit premises but the defendant had already leased the premises to a third party. The plaintiff therefore claims special and aggravated damages as indicated above.
3. The defendant filed a Defence dated August 7, 2012 denying the plaintiff's claim. In particular, he denies that there were interim orders of stay of execution at the time of eviction. He further states



that by the time the plaintiff moved the court for orders of reinstatement, and setting aside of the decision of the BPRT, the said decision had been adopted as a judgment of the court in Kisii CM Miscellaneous Civil Application No. 58 of 2006. He states that the proceedings and judgment in CM Miscellaneous Civil Application No. 58 of 2006 have never been varied or set aside. He contends that the plaintiff acted in breach of the terms of the tenancy agreement and he is therefore not entitled to the reliefs sought.

4. The suit was initially filed in the High Court in Nairobi before it was transferred to Kisii High Court and eventually to the Environment and Land Court. The hearing commenced before Justice Mutungi when the plaintiff and his witnesses testified and the plaintiff's case was closed. I then proceeded with the defence case.

Plaintiff's Case

5. The plaintiff testified as PW1 and called one witness. He adopted his witness statement dated 13.6.2013. In the said statement he stated that his mother Abigael Wanjiru Mbiri (deceased) was a tenant for many years on the premises situate on land parcel number Kisii Municipality/Block 3/107 (hereinafter referred to as the suit premises) where she operated a business. She had a hotel on one part of the suit while she sub-let the other part to sub-tenants who used to pay her monthly rent totaling Kshs.22,500. On or around December, 2004, the defendant purchased the suit premises from the previous owner and immediately issued his late mother with a notice terminating the tenancy on 11th January, 2005. His mother challenged the notice vide BPRT Case No. 2 of 2005 but the Business Premises Rent Tribunal ruled in favour of the defendant.
6. Being aggrieved by the decision of the Tribunal, his mother lodged an appeal in the High Court vide NBI HCCA NO. 950 OF 2005 and obtained an order of stay of execution. Before the appeal could be heard the defendant evicted his mother and threw out her business goods and equipment thus damaging them. He stated that some of large equipment and fixtures remained in the suit premises and they were unable to recover them. The eviction was carried out pursuant to an order obtained from the Chief Magistrate's Court in Kisii CM Miscellaneous Civil Application No. 58 of 2006. His mother sought an order for reinstatement into the suit premises but this could not be granted as the defendant had leased the premises to another tenant. The appeal was finally heard and determined in his late mother's favour and the Court held that she was entitled to damages for the wrongful acts of the defendant. The plaintiff produced a copy of the judgment in HCCA No. 50 of 2005 as Plaintiff's exhibit 1.
7. In his statement the plaintiff stated that they had carried out improvements to the suit premises which were assessed by a valuer in the sum of Kshs.960,000/=. He further stated that the hotel business was well established and they were earning a monthly income of Kshs.200,000/=.
8. Upon cross-examination, the plaintiff stated that they were earning a rental income of Kshs.22,500/= from 6 sub-tenants. He said they spent Kshs. 960,000 on improving the premises and they did not recover it from the previous landlord. The said improvements were authorized by the previous landlord.
9. Amos Githaiga Wambugu testified as PW2. He introduced himself as an Accountant. He testified that they had been instructed to prepare the accounts for Gusii Proprietary Club for the period 2004 and 2005. The said accounts were signed by his late colleague Phares Mugo Gathitu. He produced the report as Plaintiff's exhibit 3.
10. Since the valuer who prepared the valuation report was said to have relocated to the United States of America, the plaintiff was recalled to produce the valuation report as the same had earlier on been



produced before the Tribunal and the maker had been cross-examined on the same. The same was marked as Plaintiff's exhibit 4.

Defendant's Case

11. The Defendant called two witnesses. Charles Nyamumbo Mageto who introduced himself as one of the directors of the defendant company testified as DW1. He relied on his witness statement dated September 28, 2020. He told the court that soon after the company acquired the suit premises, they issued a notice to the tenants terminating the tenancy. The late Abigael Wanjiru Mbiri who was one of the tenants filed a case at the Tribunal challenging the termination notice but the tribunal ruled in favour of the defendant. He stated that the decision of the tribunal was adopted by the court and they were given the go ahead to evict the tenants. He stated that he was not aware that there was an appeal and he only learnt of the appeal after eviction. He stated that there was no order for stay of execution at the time of eviction. He told the court that they evicted several tenants who were carrying on business in the suit premises including a hotel. He said he did not know whether the previous owner of the suit premises had given the plaintiff consent to sub-let the premises.
12. In cross-examination, he stated that he was aware that when Abigael filed an appeal against the decision of the Tribunal, the High court in its judgment advised her to file a case for recovery of damages. He admitted that they filed an application in the lower court seeking adoption of the Tribunal's decision and eviction without disclosing that there was a pending appeal. He stated that as part of the eviction process they demolished all the structures on the suit premises as they had bought the premises together with the structures on it.
13. Wilberforce Ocharo Ongaro testified as DW2. He adopted his witness statement dated April 1, 2019 which is similar to the statement of DW1. He said that he worked for the defendant company as an accountant. He produced the documents in the defendant's list of documents, which were marked as Defendant's exhibits 1-8. He stated that he was aware that the plaintiff used to occupy the suit premises but he was evicted by the defendant. He said he was conversant with the cases that had been filed by the defendant and the plaintiff regarding the suit premises.
14. After the close of the defendant's case, the parties were granted time to file their submissions.

Plaintiff's submissions

15. Learned counsel for the plaintiff summarized the plaintiff's case and submitted that in Nairobi HCCA No. 950 of 2005 *Justus Munyinyi Macharia (suing as the legal representative of the estate of Abigael Wanjiru Mbiri) v Dakiang'a Distributors Limited* which was determined on December 20, 2011, the court found that the defendant was liable to pay compensation to the plaintiff for unlawful eviction and directed the plaintiff to file suit for assessment of damages. It was his submission that the defendant had not appealed against the said judgment.
16. It was counsel's submission that the plaintiff had proved that he suffered special damages which he itemized under various limbs. The first limb is loss of business earnings. Under this limb counsel submitted that the plaintiff had been operating his business with his late mother on the suit premises for more than 20 years. He had sub-let part of the suit premises from which he earned a monthly income of Kshs.22,500/= which works out to an annual income of Kshs.270,000/=. He urged the court to award the sum of Kshs.1,350,000/= being the amount lost in a period of 5 years. He submitted that this amount was captured in the valuation report by Legeno Real Estate which was produced as plaintiff's exhibit 4.



17. The second limb of damages is loss of hotel business. Counsel submitted that the plaintiff had been operating a hotel business whose annual net income was Kshs.1,475,000/= as per the financial report prepared by Gathitu & Co. Certified Public Accountants which was produced as Plaintiff's exhibit 3. He submitted that that plaintiff was entitled to the sum of Kshs.7,379,765/= for loss of hotel business for a period of 5 years.
18. The third limb of damages claimed is loss of goods and fixtures. Counsel submitted that the plaintiff incurred the sum of Kshs.960,000/= to carry out improvements to the suit premises as depicted in plaintiff's exhibit 4. The fixtures were demolished in the course of eviction.
19. The fourth limb of damages is loss of goods and equipment. It was counsel's submission that the plaintiff should be awarded a sum of Kshs.240,000/= for the loss and damage suffered when his goods and equipment were thrown out of the suit premises at the time of eviction. Though this figure was not supported, he argued that it was a reasonable figure as it was ¼ of the assessed value of improvements.
20. Counsel also submitted that the plaintiff was entitled to aggravated or exemplary damages as the manner in which he was evicted exposed him to ridicule and embarrassment among his peers and the public and subjected him to financial loss. He also urged the court to take into account the fact that the defendant had lied to the lower court that there was no appeal pending so as to get an eviction order. Counsel relied on the case of *Godfrey Julius Dumba Mbogori & Another v Nairobi City County* [2018] eKLR where the court held that the object of exemplary damages is to punish and deter.
21. With regard to exemplary damages, counsel urged the court to award the sum of Kshs.20,000,000/=. He relied on the cases of *A S T/A Business 2000 v Lakhamshi Virpal Shah & Others* [2016] eKLR; *Pampa Grill Limited & Another v North Lake Limited & another* [2021] eKLR; *Stelco Properties Limited & Another v Njugi Ventures Limited & another and Abdullabi Mohammed Farah & 3 others v County Government of Mandera & another* [2022] eKLR. He further submitted that in view of the fact that the events leading to this matter commenced in 2006, the above-mentioned awards ought to attract interest from the June 2, 2006.
22. On his part, learned counsel for the defendant summarized the pleadings and framed the following issues for determination.
 - i. Were there interim orders in place at the time of eviction
 - ii. Did the plaintiff act in breach of the statute and implied terms of the tenancy agreement?
 - iii. Do damages arise from an illegal act where there is a breach of tenancy agreement?
 - iv. Is the plaintiff entitled to the reliefs sought in the plaint?
 - v. Who should bear the costs of this suit?
23. With regards to the first issue counsel relied on the ruling of Nambuye J (as she then was) on an application for contempt of court in this HCCA No. 950 of 2005 where she made a finding that the proceedings in Kisii CM Misc App No.58 of 2006 arose because the interim orders granted in the appeal had lapsed. She further held that the jurisdiction of the appellate court was limited to reinstating the stay orders and that the court had no jurisdiction to declare the orders in Kisi CM Misc App No. 58 of 2006 null and void and order reinstatement of the plaintiff into the suit premises as this exceeded the powers conferred on the court under section 78 of the *Civil Procedure Act*. She was of the view that the plaintiff should have moved the court to set aside the ex-parte orders failing which an appeal should have been filed in the High Court. The other options open to the plaintiff were to apply for



judicial review to quash the orders of the court or file a declaratory suit followed by an application for mandatory injunction to reinstate the appellant into the suit premises.

24. With regard to the second and third issues, counsel submitted that the plaintiff did not obtain consent to carry out permanent improvements from either the landlord or Business Premises Rent Tribunal pursuant to section 12 (g) of the *Landlord and Tenant, (Shops, Hotels and Catering Establishments) Act* cap 301 of the Laws of Kenya. He further submitted that the plaintiff breached the implied terms of the tenancy agreement by sub-letting and partitioning the suit premises and he was therefore not entitled to recover any damages.
25. It was counsel's contention that this suit ought to have been filed in the Business Premises Rent Tribunal pursuant to section 12 (i) cap 301 and section 91 of the *Civil Procedure Act* as it arose from the decision of the BPRT which was reversed.
26. Counsel submitted that the plaintiff did not prove the special damages pleaded and he was therefore not entitled to the same. He relied on the case of *Hahn v Singh* Civil Appeal No. 42 of 1983 (1985) KLR 716 where the court held that special damages must not only be pleaded but also strictly proved.
27. Having considered the pleadings, evidence on record and the rival submissions, the following issues fall for determination.
 - i. Whether the plaintiff was entitled to sue for recovery of damages for wrongful eviction.
 - ii. Whether the plaintiff is entitled to the reliefs sought.
28. The plaintiff filed this suit pursuant to the judgment in Nairobi HCCA No. 950 of 2005 *Justus Munyinyi Macharia (suing as the legal representative of the estate of Abigael Wanjiru Mbiri) v Dakianga's Distributors Limited* which was determined on December 20, 2011. In its judgment the court held in part as follows:

“The landlord had purchased the premises. The law required that they wait for five years before terminating the tenancy but did not. We would hereby hold that the decision of the Hon. Chairperson was contrary to law. The appeal is accordingly allowed, the judgment of the Hon. Chairperson of the tribunal is set aside.

We also hold that the doctrine of *lis pendentes* (sic) would apply to this case. That pending the determination of the matter before the court in land matters, no transaction is to be undertaken on the land and property till the determination of the case is finalized.

We further hold that the landlord being alive to the existence of this appeal awaiting determination proceeded “though in bad faith” to evict the tenant, to thereafter place a new tenant on a three- year lease in the premises then thereafter to demolish the premises and thus depriving the rights of the said tenant to the said tenancy and protection of the tribunal. The rule of law must at all times be maintained. In this case it was not.

We are concerned that a tenant who has been wronged by the unlawful use of the law should be left without redress. To this end we hold that the landlord by unlawfully evicting the tenant and demolishing the premises should be held liable for his conduct and action. We find this conduct very wrongful by the landlord towards the tenant, that amounts to an actionable tort.

As we cannot make a vain order to reinstate the tenant into the premises, the tenant nonetheless cannot go without redress. We therefore hold that the tenant is entitled to damages for the wrongful act/conduct of the landlord. The parties would in the



circumstances be hereby granted liberty to address this court on the assessment of quantum of damages that this court is likely to award.

We hereby allow the appeal to that extent with costs to the appellant/original tenant in this appeal and in the tribunal court”

29. The Defendant did not challenge the said judgment on appeal and this court can therefore not reopen the issue as to whether the eviction orders were in place at the time of eviction or whether the High court sitting as an appellate court against the decision of the Tribunal had jurisdiction to issue declaratory orders with regard to compensation as this would amount to sitting on appeal on a judgment of a court of concurrent jurisdiction.
30. I will also not revisit the issue as to whether this suit ought to have been filed in the BPRT pursuant to section 12(i) of cap 301 and section 91 of the Civil Procedure Act as this matter was raised by the Respondent as a Preliminary point and the court rendered its ruling on the same on September 29, 2021.
31. I will now proceed to determine if the plaintiff is entitled to the reliefs sought. In his plaint, the plaintiff pleaded and prayed for special damages of Kshs.9,929,765/= as well as aggravated damages. The particulars of special damages are set out in paragraph 11(a) – (d) of the plaint.
32. It is trite law that special damages must not only be pleaded but they must be proved. In the case of Hahn v Singh Civil Appeal No. 42 of 1983 [1985] 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.”
33. In the instant case, the plaintiff pleaded special damages under various limbs;
 - i) The first one was loss of rental income accruing from rental houses on the suit premises totaling Kshs.22,500/= per month. With regard to this item, the plaintiff did not produce any document to show how many sub-tenants he had and how much rent each of them was paying and it is therefore not possible for the court to award the same.
 - ii) Under the second limb the plaintiff claimed loss of earnings amounting to Kshs.200,000/= per month for a period of five years. However, the financial report produced by PW2 indicates that the plaintiff’s net annual profit as at 2005 was Kshs.1,475,953/=. PW2 explained that the financial report was prepared using primary documents furnished to him by the plaintiff and even though the same were not produced at the hearing, I accept the explanation that the plaintiff lost most of his important documents during the eviction. It is probable that the figure would have increased or decreased over time. However, if this is taken as the average annual income for a period of 5 years the plaintiff would earn Kshs.7,322,817/= within a period of five years.
 - iii) The third limb was loss of damaged goods and equipment. Although the plaintiff claimed Kshs.240,000/= under this category, the same was not supported by any document and it can therefore not be awarded.
 - iv) The fourth claim under special damages is Kshs.960,000/= being the value of improvements undertaken on the suit premises. The plaintiff stated on oath that the improvements were carried out with the permission of the previous landlord and the same were captured in the



valuation report which he produced as plaintiff's exhibit 4. Since there is no indication that the previous landlord was opposed to the said improvements, I find the claim reasonable and I allow it. I therefore award a total sum of Kshs.8,282,817/= as special damages.

34. The other broad category of damages claimed by the plaintiff is aggravated damages. The principles applied by the court in awarding aggravated damages were summarized by Spry V P in the case of *Obongo & another v Municipal Council of Kisumu* [1971] EA 91 at page 96 :

“It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress.”

35. The Plaintiff pleaded that he suffered ridicule, embarrassment and inconvenience as a result of his unlawful eviction. DW1 admitted that when he applied for the eviction, he did not disclose that there was a pending appeal. This was not only dishonest but it smacks of malice. In view of the malicious and humiliating manner in which the plaintiff was treated by the defendant, I award him Kshs.2,000,000/= as aggravated damages.

36. I therefore, enter judgment for the plaintiff in the following terms:

- (a) Special damages in the sum of Kshs. 8,282,817.
- (b) Aggravated damages in the sum of Kshs. 2,000,000.
- (c) The plaintiff is awarded the costs of this suit.
- (d) Interest on (a) and (b) at court rates from the date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM THIS 20TH DAY OF APRIL 2023

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J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Nyang'acha for Mr. Muchangi for the Plaintiff

2. Miss Nyaenya for Mr. Bosire Gichana for the Defendant

Court Assistant: Antony Oniala

