



**Kamau v Horeria t/a Horeria & Co & another (Environment & Land Case  
1928 of 2007) [2023] KEELC 17871 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17871 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1928 OF 2007**

**EK WABWOTO, J**

**MAY 25, 2023**

**BETWEEN**

**HUDSON MAINA KAMAU ..... PLAINTIFF**

**AND**

**JK HORERIA T/A HORERIA & CO ..... 1<sup>ST</sup> DEFENDANT**

**OAKRIDGE INVESTMENT LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff in his re-amended plaint dated December 24, 2008 seeks for the following reliefs against the Defendants: -
  - i. Damages for loss of business, clientele and business reputation as a pharmacist.
  - ii. Special damages on the pharmaceutical drugs, ointments, medicines, perfumes, sprays, furniture and fixtures among others.
  - iii. Costs of the suit at court rates.
2. The suit was contested by the Defendants who filed a Statement of Defence dated November 17, 2021. In the said defence, the Defendants denied the allegations made by the Plaintiff in his defence and urged the court to dismiss the suit against them. The Defendants did not call any witness to testify on their behalf.

**The Plaintiff's case.**

3. In his plaint, the Plaintiff averred that the 2<sup>nd</sup> Defendant was the registered owner of the building erected on L.R. No. 209/4917/1 and registered as L.R. 2980/1 and the 1<sup>st</sup> Defendant was the Managing Agent/ Servant of the same.



4. It was averred that on or about December 20, 2000 the Plaintiff leased and the 2<sup>nd</sup> Defendant let out to the Plaintiff the suit premises known as shop number 2 on the ground and Mezzanine floors of the said premises for a period of 5 years three months with effect from 1<sup>st</sup> day of January 2001 on the following terms: -
  - a. From January 1, 2001 to December 31, 2002 25,000/- only per month payable as follows: -
    - i. Upon signing the lease 75,000/- plus a deposit equivalent to one month's rent that is Kshs 25,000/-
    - ii. Thereafter quarterly installments payable in advance of Kshs 75,000/-
  - b. From January 1, 2003 until the expiry of the remaining period, Kshs 30,000/- per month also payable by quarterly instalments of Kshs 99,000/- only payable in advance.
5. The Plaintiff averred that on or about December 2, 2005 he rendered a renewal of the lease on the suit premises for a further period of 5 years and 3 months. The Defendants despite being served never replied to the notice nor met the Plaintiff to discuss the renewal of the lease. The Plaintiff further averred that being desirous of renewing the lease went ahead and paid a sum of Kshs 90,000/- to the defendants on March 31, 2006 being rent for the month of April, May and June 2006 which was duly received by the 1<sup>st</sup> Defendant on behalf of 2<sup>nd</sup> Defendant. The Defendants later arbitrarily and unilaterally increased rent from Kshs 30,000/- to Kshs 90,000/- per month vide a letter dated March 31, 2006 which letter also sought an additional Kshs 55,000/- on account of deposit totaling to Kshs 295,000/-
6. It was also the Plaintiff's case that he was issued with a proclamation notice and before the same could expire on July 4, 2006 the Defendants on June 27, 2006 moved in and closed the premises and thus denying the Plaintiff access. Owing to the foregoing, the Plaintiff moved the Business Premises Rent Tribunal BPRT No. 315 of 2006 wherein the orders of status quo were ordered but the Defendants never granted any access to the Plaintiff upon which the Plaintiff was making a loss of Kshs 60,000/- per day.
7. At the trial, the Plaintiff adopted his witness statement dated January 10, 2022 as his evidence in chief and also produced his bundle of documents dated April 28, 2012. The Plaintiff added that he was opposed to the grant of the orders sought by the Defendants in their counterclaim for the reasons that for the period between July to December 2006 he had been evicted and thrown out of the premises and he had no access and hence therefore the sum of Kshs 470,000/- demanded by Defendants as rent is not payable. Plaintiff also abandoned his prayer on special damages.

#### **The Defendants case.**

8. The Defendants filed a statement of Defence and counterclaim dated November 17, 2021. They averred that the Plaintiff was in rent arrears of Kshs 173,000/- by January 13, 2005 and by October 2006 the amount had ballooned to Kshs 470,000/-. The amounts paid by the Plaintiff therefore were rent on account of arrears and not specifically rent for the months alleged.
9. The Defendants also averred they were not served with any order from the business rent tribunal.
10. In their counterclaim, the Defendants sought for payment of Kshs 470,000/- by the Plaintiff on account of rent arrears. The Defendants also prayed for costs and interest in their counterclaim.



11. During trial, the Defendants never called any witness to testify on their behalf and this prompted the court to close their case. Their application to reopen their case was also found to be unmerited pursuant to the ruling delivered by this court on 23<sup>rd</sup> March 2023.
12. Following the close of the Plaintiff's case as well as the Defendants case, the court directed the parties to file and exchange their written submissions.

**The Plaintiff's submissions.**

13. The Plaintiff's written submissions were filed by Karanja Kangiri & Co. Advocates dated 28<sup>th</sup> November 2022.
14. It was submitted that the dispute herein involved a lease which expired on 31<sup>st</sup> March 2006 wherein the Defendants did not sign a new lease yet they accepted the Plaintiff to continue as a tenant and received his rent for April to June 2006 and issued him with a receipt of Kshs 90,000/-. Nevertheless, inspite of issuing the receipt and acknowledging the Plaintiff's tenancy status through the Defendants own acts the Defendants proceeded to levy distress at an arbitrary rate of Kshs 80,000/- per month.
15. The court was urged to consider the following issues and make a determination,
  - i. Was the lease determination by the Defendant legal?
  - ii. Did the Defendant by locking the devised premises follow the law?
  - iii. By locking up pharmaceutical products; medicine and other related products was the Defendant observant to the law?
  - iv. Did the arbitrary rent increase without reference to the law legal or right?
  - v. Is the Plaintiff entitled to damages and costs as sought in prayer 3 A and 5 of the re-amended plaint?
16. While submitting in respect to those issues, the Plaintiff urged this court to find that the Defendants did not lawfully terminate the lease. There is no evidence on any notice to terminate the tenancy/lease was issued even after the Plaintiff paid the rent for three months after the expiry of the lease in January 2006.
17. It was also submitted that the Plaintiff was illegally evicted and that distress for Kshs 80,000/- per month whereas no formal lease had been executed after the expiry on the lease on 31<sup>st</sup> January 2006 was without any legal basis as the old rent had already been paid for the months of February to April 2006.
18. The following cases were cited in support of the Plaintiff's case: *Gusii Mwalimu Investment Co. Ltd v Mwalimu Hotel Kisii Ltd* (1996) eKLR, *Ripples Limited v Kamau Mucuba* Nairobi HCCC 4522 of 1992, *Matarella Limited v Michael Bell & Another* (2018) eKLR and *Munover N. Alibhai t/a Diana Galley v South Coast* (1995) eKLR.
19. The Plaintiff urged the court to award him general damages of Kshs 4,500,000/- on the basis of the authorities cited.

**The Defendants written submissions.**

20. The Defendants despite being granted time to file their written submissions, none had been filed by the time of preparation of this judgment. However, this court is still obligated to consider all the pleadings and evidence on record.



### Issues for determination.

21. I have considered the pleadings filed by all the parties and evidence tendered by the Plaintiff and I am of the humble view that the following issues arise for determination by the court.
  - i. Whether there existed a valid lease agreement between the parties.
  - ii. Whether there was any breach of the terms of the said lease.
  - iii. Whether the Plaintiff has proven his case to warrant the issuance of the prayers sought.
  - iv. Whether the Defendants have proved their counterclaim to warrant the orders sought in their counterclaim.
  - v. What orders should issue as to costs.

### Analysis and Determination.

#### Issue No. 1

Whether there existed a valid lease agreement between the parties.

22. It was the Plaintiff's case that on or about 20<sup>th</sup> December 2020, he entered into a lease with the 2<sup>nd</sup> Defendant in respect to shop number 2 on the ground and Mezanine floors of the 2<sup>nd</sup> Defendant's building erected on parcel L.R. No. 209/4917/1 and registered as L.R. No. 2980/1 situated in Nairobi. The terms of the lease agreement were as follows:
  - a. From 1<sup>st</sup> January 2001 to 31<sup>st</sup> December 2002 25,000/- only per month payable as follows: -
    - (i) Upon signing the lease 75,000/- plus a deposit equivalent to one month's rent that is Kshs 25,000/-
    - ii. Thereafter quarterly installments payable in advance of Kshs 75,000/-
  - b. From 1<sup>st</sup> January 2003 until the expiry of the remaining period, Kshs 30,000/- per month also payable by quarterly instalments of Kshs 99,000/- only payable in advance.

According to the Plaintiff even though that lease expired on 31<sup>st</sup> March 2006, he sought for its renewal and even paid rent for April to June 2006 and was issued with a receipt of the said amount of Kshs 90,000/-
23. The Defendant's on the other hand disputed the existence of a current lease which according to them had expired.
24. From the evidence that was adduced it is not disputed that there existed a lease between the parties. However, what is in contention was whether upon expiration of the said lease on 31<sup>st</sup> March 2006, it could be inferred that there still existed any lease between the parties.
25. The *Blacks Law dictionary* 11<sup>th</sup> Edition, page 1066 defines a lease as:-

“A contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, rent. The term can be for life, for a fixed period, or for a period terminable at will.”



26. Legal authorities in *Cherire, Fitoot and formstons, The Law of Contract*, 14<sup>th</sup> Edition stated in page 34 and 35 that:

“The first task of the Plaintiff is to prove the presence of a definite offer made ...proof of an offer to enter into legal relation, upon definite terms must be followed by the produce of evidence from which the court may infer an intention by the offeree to accept that offer”.

27. Whereas the foregone are only persuasive they set out the correct legal principles applicable in contract law generally. Therefore, the approach by a court in considering whether a contract exists is an objective one as opposed to a subjective one.

28. In *Rose and Frank Co. v J. R. Crompton & Bros Ltd* (1923) 2 KB it was held that:

“To create a contract there must be a common intention of the parties to enter into legal obligations mutually communicated expressly or impliedly”.

In the Court of Appeal case of *William Muthbe Muthami v Bank of Baroda* (2014) eKLR , it was stated that :

“In law of contract, the aggrieved party to an agreement must in addition, prove that there was offer, acceptance and consideration . It is only when those three elements are available that an innocent party can bring a claim against the party in breach”.

29. On implied contracts, the Court of Appeal in *Ali Mohammed v Kenya Shell & Co. Ltd* (2017) eKLR referred to the following persuasive decisions.

“.....in *Lamb v Oraro* (1893) 1 CH 218, Bowen LJ stated :

The common law, it is true, treats the matter from the point of view of an implied contract and assures that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have and without it would be futile’.

Bingham L J in the *Aramis* ( 1989) 1 Lloyds Rep 213 made some general observations about the circumstances in which a contract might be implied at pages 223 Col. 1 he said;

“As the question whether or nor any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case and the different sets of facts which arise for consideration in these cases as legion. However, I also agree that no such contract should be implied on the facts of any given case unless it is necessary that is to say, in order to give business reality to a transaction and to create a flexible obligation between parties who are dealing with the one another in circumstances in which one would expect that business reality and those enforceable obligations to exist”.

30. The foregoing reveals several legal imperatives may be in writing or implied, that whether a contract is in writing or is implied the elements of offer, acceptance and consideration must be proved on implying a contract the conduct of the parties remain paramount, that an objective approach in contract interpretation is to be adopted among others.



31. In the instant case, the Defendants did not offer any written lease agreement upon expiry on 31<sup>st</sup> March 2006, however it was evident that they received payment of rent for April to June 2006, payment of Kshs 90,000/- which was acknowledged and receipt issued to the Plaintiff.
32. Both parties agree that the lease had expired on 31<sup>st</sup> March 2006 and that since then, there has been no other consensus ad idem in respect of the suit property that was reduced into writing by the parties. However as earlier stated the Lessee made payment after expiry which was acknowledged and accepted by Leasor.
33. Section 60 of the Land Act, 2012 stipulates as follows:
- 60.
- “ (1) If a lessee remains in possession of land without the consent of the lessor after the lease has been terminated or the term of the lease has expired, all the obligations of the lessee under the lease continue in force until such time as the lessee ceases to be in possession of the land.
- (2) A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired, shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land, or as having given up on any of the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease, and if the lessor continues to accept rent from a tenant who remains in possession for two months, after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force.”
34. In view of the foregoing, it is the finding of this court that the payment of rent which was accepted by the Defendants and the continued stay by the Plaintiff culminated into an implied contract thus creating binding and legal obligations between the parties to the effect that there existed a valid lease agreement between the parties.

### **Issue No. II Whether the Plaintiff has proved his case to warrant the prayers sought**

35. On whether the Plaintiff has proven his case to warrant the issuance of the prayers sought in the Plaint, It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows:
- “ (1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
36. Sections 109 and 112 of the same Act states;
- “ 109. 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.



“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

37. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea v David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’mairanyi & Others v Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

38. With respect to the burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR, posited thus:

“Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

39. The Court will be guided by the foregoing. In the instant case it is not in doubt that the Plaintiff during trial was able to demonstrate how the Defendants closed his premise despite clear orders from the Business Premises providing otherwise. The Landlord never followed due process as a result of which the Plaintiff suffered losses and damages owing to the products which had been locked up there.

40. Therefore, this court finds that no cogent explanation has been offered by the Defendants to justify the Defendants actions against the Plaintiff.

### **Issue No. III Whether the Plaintiff is entitled to the prayers sought in the plaint.**

41. The Plaintiff prayed for several reliefs in his re-amended plaint however during trial he dropped the prayer seeking special damages. This left the Plaintiff to peruse only the claim for damages for loss



of business, clientele and business reputation as a pharmacist and costs of the suit together with its interest.

42. In his submissions, the Plaintiff urged the court to grant him Kshs 4,500,000/- in damages. While it would be the natural consequence that the plaintiff lost business due to what I have found to have been unlawful and wrongful locking up of his premises, such a loss when made quantifiable at the date of filling suit is in the nature of special damages. It ought to have been specifically pleaded and strictly proved. In this matter, the Plaintiff did not plead with particularity any figures either in the body of the plaint or in his prayers as to disclosed a claim for special damages. Considering that the Plaintiff's claim was based on alleged loss of business earnings, it follows that a claim for loss of sales arising out of a breach of such a contract are in the nature of special damages which must not only be specifically pleaded but must also be strictly proved as well. Without having been specifically pleaded or proved, the Plaintiff's claim for loss of sales fails. This position was also reiterated by the court in the decisions of *National Social Security Fund Board of Trustees v Sifa International Limited* (2016) eKLR, *Macharia & Waiguru v Muranga Municipal Council & Another* (2014) eKLR and *Provincial Insurance Co. EA Ltd v Mordekai Mwanga Nandwa*, KSM CACA 179 of 1995 (ur). In the latter case the Court was emphatic that:

“ ... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”

43. I must point out that parties are bound by their pleadings. The Plaintiffs re-amended plaint sought for damages for loss of business, clientele and business reputation as a pharmacist together with costs of the suit and interest. As earlier stated even though the Plaintiff claims loss of business, he did not produce any documentary evidence to show how much profit he was making from his business. This claim therefore fails since in Civil Cases, a court can only grant the reliefs that have been pleaded by the parties. Had the Plaintiff pleaded and sought for damages then this court would have granted the same.
44. The upshot of the foregoing is that I cannot grant the relief sought and as such the Plaintiff's claim against the Defendant fails.

**Issue No. IV - Whether the Defendants have proved their counter claim to warrant the orders sought in their counterclaim.**

45. In the counterclaim, the Defendants had sought for payment of Kshs 470,000/- on account of rent arrears. However, during trial, the Defendants never called any witness to lead evidence in respect to the same. A counter claim is just like a suit which ought to be proved to the required standard. In view of the foregoing, the Defendants counterclaim has not been proved to the required standard to warrant the grant of the reliefs sought in the counterclaim.
46. On the issue of costs, the same follow the event unless otherwise stated. In the instant case, I have considered the circumstances of this case and I direct each party to bear own costs of the suit and counterclaim.

**Final orders**

47. In the end, the suit by the Plaintiff and the counterclaim by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are disposed as follows:
- a. The Plaintiff's suit is dismissed.



b. The counterclaim by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is dismissed.

c. Each party to bear own costs of the suit.

48 Judgment accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY 2023.**

**E.K. WABWOTO**

**JUDGE**

In the presence of:

Ms.Mugo h/b for Mr. Kangiri for the Plaintiff.

Mr. Gaturu h/b for Mr. Kimani for the Defendants.

Court Assistant – Caroline Nafuna.

