Stuart & another v Ngundo & another (Environment & Land Case 317 of 2021) [2023] KEELC 18264 (KLR) (19 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18264 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT & LAND CASE 317 OF 2021

AE DENA, J

JUNE 19, 2023

BETWEEN

COLIN STUART ..... 1ST PLAINTIFF

LITTLE BAY INVESTMENTS LIMITED ..... 2ND PLAINTIFF

AND

NEW CALABASH LIMITED ..... 1ST DEFENDANT

CHARLES WACHIRA NGUNDO ..... 2ND DEFENDANT

JUDGMENT

Plaint

1. The 2nd defendants is the owner of Apple Mango Apartments & Villas (hereinafter referred to as the establishment) sitting on title numbers Kwale/Diani Settlement Scheme/1292 and 1293 whose operations were overseen by the 1st defendant its director. The establishment offers self-catering holiday destination services for guests visiting Diani.

2. The suit was commenced vide an amended plaint dated 14/4/2021. It is the Plaintiffs case that the 1st plaintiff and 1st defendant had a mutually beneficial business relationship for over 2 years with prospects of forming a joint venture. According to the 1st plaintiff, he gave his insight on how to revamp the establishment and they had agreed with the 1st defendant that after purchase of the 1st plaintiff's farmstead the plaintiff would from the proceeds purchase shares in the 2nd defendant. The 1st Plaintiff avers that he carried out the necessary revamping and refurbishing of the establishment and undertook management of the same. That it was agreed the revenue generated would go into the 2nd Plaintiffs account at Barclays Bank and that the Plaintiffs would offer full accounts as well as reports on the status of the establishment.

3. The 1st Plaintiff avers that the 1st Defendant reneged on the agreement and without notice forcibly ejected the plaintiffs from the establishment. That this exposed the plaintiffs to irreparable loss and damage being costs of refurbishment and repairs, commission for time and effort in running the establishment. Others were compensation for value input into the establishment, damages for illegal eviction, economic and reputational injury.

4. The plaintiffs pray for judgement against the defendants jointly and severally for;

    1. A declaration that the forcible eviction of the Plaintiffs and agents from Apple Mango Apartments & villa near Baharini plaza shopping Centre, Ukunda Diani sitting on title numbers Kwale/Diani Settlement Scheme/1292 and Kwale/Diani Settlement Scheme/1293 by defendants, their agents and proxies was illegal and unlawful.

    2. Reimbursements and compensation as pleaded at paragraph 31 totaling Kshs 258,524.65/-

    3. General damages for illegal eviction

    4. General damages for economic and reputational injury

    5. Interest on 2 above from the date of filing suit

    6. Interest on 3& 4 above from the date of judgement till payment in full

    7. Costs of the suit

Defence

5. The suit is defended through 1st and 2nd Defendants Defence and Counterclaim filed on 7/6/2021. The defendants deny the contents of the amended plaint and aver that the plaintiffs cunningly took over the establishment and diverted funds from it. The defendants

    raised a counterclaim pleading fraud whose particulars were highlighted at paragraph 30 of the defence. The defendants pray for the following orders against the plaintiffs;

    a. The amended plaint be dismissed.

    b. An order be issued to the defendants to relinquish/handover all login credentials of the Plaintiff's hotel and or business in the internet, social media, physical or virtual accounts.

    c. Reimbursement of the money totaling to Kshs 15,000,000/- as pleaded in paragraph 35 of the counterclaim

    d. General damages

    e. Costs of the suit

    f. Interest

Plaintiffs Case and Evidence

6. PW1 Colin Stuart adopted his witness statement dated 22/3/2022 as his evidence in chief. In addition, he testified that the Plaintiffs engagements with the Defendants go back to the year 2018. They had a cordial and mutually beneficial business relationship for over 2 years and had prospects of forming a joint venture structured around his farmstead in Msambweni and the Defendants' Apple Mango establishment in Kwale. That during their conversations the 1st defendant would point out that prior

to the year 2018, the establishment was losing its edge and visibility due to his absence. Over time the 1st defendant sought his advice on revamping the business to be a world class holiday destination.

7. According to PW1, sometime in August 2018 it was mutually agreed that PW1 manages the establishment and restore it to the above vision. Towards, the joint venture, the 1st Defendant explicitly committed to purchasing his farmstead in Msambweni.

8. PW1 told the court that it was agreed the revenue generated would be applied towards the direct operations and revamping the business as well as sprucing the Msambweni farmstead ready for purchase by the 1st Defendant. Further that the revenue collected would go into the 2nd Plaintiff's account held at Barclays Bank as it is the Plaintiffs who undertook the day-to-day management of the business which entailed sourcing clients, managing bookings, contracting suppliers staffers and service providers, paying utility bills et al. This was subject to the plaintiffs giving regular status reports, satisfactory accounts of the revenue generated and its application. The plaintiffs complied to the 1st Defendant's satisfaction.

9. PW1 further testified that from the time plaintiffs took over operations, they skillfully, dutifully and transparently managed the establishment and would at times inject funds from the plaintiffs own sources into the establishment. That under PW1 management, occupancy shot up, averaging 75% as well as online visibility owing to the innovative reservation system he deployed.

10. PW1 states that in October 2020 the defendants reneged from their agreements both on the management and commitment to buy the plaintiffs farmstead. They also demanded for termination of operations and immediate handover of the establishment. The defendants on 19/10/2020 forcibly ejected them from the establishment. The Plaintiffs contend that the forcible eviction exposed them to irreparable loss and damage. The plaintiffs seek for recompense from the defendants for their input value to Apple Mango, expenses and direct funds injected into Apple Mango.

11. In support of his case PW1 produced a bundle of two volumes containing among others email correspondence, WhatsApp messages, agreement dated 3/8/2020, Booking records, demand for payment reimbursement, Ledgers & Account Statements and Bank statements PEXH 1 and PEXH2.

12. In cross – examination PW1 testified that he got into Apple Mango between April to December 2018 and end of 2019. That his review of the business showed it was performing poorly. That the Manager had resigned without notice and it was mutually agreed the Plaintiff steps in to run the business using proposals that the plaintiff had prepared for the 1st defendant. PW1 stated he had no idea how much the business used to make though in 2019 it earned Kshs. 4.6 million and of which an unknown sum was remitted to the 1st defendant. On being shown paragraph 26 of his witness statement he conceded 2019 earned Kshs 3.8 million. According to PW1 the 15% claim for commission was agreed with the defendant and was explained in all the correspondence and referred the court to paragraph 7 of the 1st defendants witness statement admitting the same.

13. On the claim for refurbishment PW1 stated the bank statements showed the costs incurred. He stated he spent more money than generated by the business He denied he diverted money but utilized it for the establishment and made disclosure as reflected in the correspondence as agreed. He stated that he also used wired transactions from bank to bank as he did open online travel agents used by clients to book. That payment was through the agents and pay to him by wire transfer. He stated booking dot.com was not under his control.

14. On reexamination PW1 stated he had todate not been charged with any offence relating to the investigation of his accounts. That he no longer controlled the OTA sites.

15. With the above the plaintiff closed his case.

Defence Case and Evidence

16. DW1 Charles Wachira gave evidence for himself and as a director of the 2nd defendant. He adopted his statement filed on 5/5/2022 as part of his evidence. It was his testimony that he had run the business for over 7 years and the plaintiff brought regular customers. That he had interacted with the 1st plaintiff over purchase of land parcels Kwale/Mchingirini 379 & 380 but after due diligence he found that the parcels were not salable due to default on a security by Barclays Bank and debt recovery by auctioneers. That he managed to negotiate with the Bank and stopped the sale.

17. DW1 further testified that on learning the plaintiff was bringing customers to the business the 1st defendant instructed the Manager (one Esther) to continue with the arrangements at 10% commission. That the 1st defendant left for Nairobi but after a few days the plaintiff informed him the Manager was stealing from the establishment and on reporting to the police the Manager left leaving the business unattended and the Plaintiff took over without any form of agreement in this regard.

18. On the refurbishment DW1 informed the court that it was the plaintiff's idea to refurbish to enhance Apple mango's potential, that he DW1 never used any of his money. However, he allowed the Plaintiff use part of the collections and some the plaintiff banked for a while. That performance was better with the previous Manager.

19. DW1 told the court that the 1st plaintiff failed to render correct accounts, refused the same be audited forcing the defendant to report to the police. He also sent home some of the employees of the establishment. That he obtained a court order allowing the investigation of the 1st plaintiffs accounts where the money was being diverted and which the 1st Defendant was not a signatory. The police found from immigration the plaintiff did not have a work permit That the Plaintiff sometimes gave him business proposals which he never agreed to. That PW1 had also opened pay bill without the Defendants authority and was using his company the 2nd plaintiff instead of the 2nd defendant. The witness estimated his alleged loss at about Kshs 4 million for six months and therefore the total amount for the entire period would be Ksh15 million.

20. In addition to the above DW1 testified that the plaintiff advertised in the websites as owner of the Apple Mango and being an IT expert blocked the defendants from getting another website, diverted bookings to other hotels making the business loose. He sought damages. According to the 1st defendant, the plaintiff never invested a single penny into the establishment and had survived off Apple mango and could not claim the Kshs.5.8 million.

21. In support of his case DW1 produced the documents in the Defendants List of Documents dated 6/5/2022 as exhibits namely, copies of email dated 10/01/2019 from the Plaintiff, ruling delivered on 11/03/2019, Auctioneers letter of redemption dated 20/03/2019, letter dated 20/03/2019 from the 1st Plaintiff, emails dated 14/07/2019 & 9/10/2020 from the 1st Plaintiff, emails dated 10/10/2020 & 16/10/2019 from the defendants, request letter to renew passport dated 28/01/2019, court order dated 9/11/2020 in MCCR Misc E007 of 2020, Hotel rooms rates 2020/2021, Notice dated 22/10/2020 by the 2nd Plaintiff, Little Bay Investment Deposit schedule & Bank Records, 1st defendant statement recorded at Kwale Police Station, letter dated 10/11/2020 from DCI, letter dated 18/11/2020 from Ministry of Interior, letter dated 14/12/2020 from Murithi Masore Advocates, letter dated 21/12/2020 from Mwangi Kihira Advocates, Agreements/Terms of usage of websites and List of websites dated 6/01/2021.

22. On cross examination DW1 confirmed he first met the plaintiff when he was selling his land. He told the court that only registered operators were entitled to commission. That he had agreed to pay 10% commission only when the 1st plaintiff referred customers to the business. DW1 denied ever inviting the 1st plaintiff to his business. On the sale of the shamba he referred the court to paragraph 3 of the Defendants witness statement and paragraph 17 of the Defence & Counterclaim where he stated the plaintiff had failed to disclose material facts on the shamba. On being shown page 7 & 8 of the Plaintiffs bundle (email dated 25/2/19 and 8/4/19 from the plaintiff and his response) he denied knowing the intercompany account at all and further pointed that in his response he only noted the email content but did not comment on the intercompany account. He conceded he did not take any issue with the intercompany account in his response.

23. On being shown page 16 being his statement with DCI and where he states he thought he could bring the Plaintiff to Apple Mango his response was that the statement was a dictation but admitted it was part of his bundle. He admitted that he authorized the plaintiff to supervise the workers.

24. DW1 testified that he became aware of the refurbishment because the plaintiff was using the defendant's money. He conceded that in the email dated 23/01/2019 he informs the plaintiff he is happy with the progress and that the accounts were very clear (page 12 of plaintiff's bundle) and agree with its content. He also admitted that the plaintiff sent him money by mpesa though 3 or 4 times totaling Kshs 200,000/- but he could not produce mpesa records on the same. DW1 Confirmed that the plaintiff managed the business for 2 years during which period to he was sure the establishment lost 'approximately' Kshs 15 million. He admitted he had not presented to court an auditor's report in this regard. On DEX 14 he confirmed it was not on letter head, not prepared by him but by his accountant, was not signed and further conceded that it showed no methodology on how the Kshs. 4,426,640.40 was arrived at.

25. DW1 acknowledged using police assistance to gain entry into the establishment for his own safety, that the hotel was fully booked at the time and stated that he did not need any court order for this. He confirms the clients left on their own volition though through the plaintiff's instigation but he allowed them to sleep over. He could not confirm if any charges were preferred against the plaintiff. He confirmed bookings were made by the 1st plaintiff and stated that it is the plaintiff who had disclosed loss of funds in the business.

26. In re-examination DW1 pointed that the attachments shown at the bottom of page 7 of vol 1 of the plaintiff bundle referred to small scale vegetables, poultry accounts which was not business undertaken by Apple Mango.

27. With the above the defendant closed his case.

Submissions

28. Parties filed and exchanged submissions.

Plaintiffs Submissions

29. Rehashing DW1 statement recorded at Kwale Police Station on how he brought the 1st Plaintiff to manage and the establishment it was submitted there was no basis for the allegation that the 1st Plaintiff took over operations of the apartments cunningly and without approval. That this is also admitted at paragraph 13 of the defendants witness statement. That the matters raised by the 1st Defendant about work permit and immigration status were non-issues.

30. It is submitted that emails exchanged evidenced the Plaintiff discharged his part to the 1st defendant's satisfaction and that it would have been impractical for the business to run efficiently in the absence of a convenient bank account. It was submitted that the plaintiff had discharged the burden of proof.

31. On whether the Plaintiffs were entitled to commission on work done, it was submitted that 1st defendant agreed that 10% commission was commonplace in the hotel industry. That the plaintiffs were forcibly ejected by police accompanied by the 1st defendant from the apartments when there were bookings thus the need to grant the prayers sought.

32. On unlawful eviction the holding in *M/S Gusii Mwalimu Investment Co. Ltd & 2 Others v M/S Mwalimu Hotel Kisii Ltd* [1996] eKLR where the court held that the defendants seized possession extra-judicially which the law does not support. Further reliance was placed on the case of *Munaver N Alibhai t/a Diani Gallery v South Coast Holdings Limited* [2020] eKLR for an award of Kshs. 2,000,000/= for unlawful eviction.

33. The plaintiffs also sought for reimbursement for the out-of-pocket monies spent towards repair and refurbishment programmes at the apartments and commission as pleaded and relied on the reasoning in *Joyce Mukulu Kilonzo v Purity Kanyaa Mwangangi* [2020] eKLR.

34. On the prayer seeking damages for economic and reputational injury the court was urged to apply the case of *Carilus Osero Nyawiri v Royal Media Services Limited* [2021] eKLR. The Plaintiffs proposed an award of Kshs. 2,000,000/=, and interest in accordance to Section 26 of the *Civil Procedure Act*. The court was further urged to consider Section 27 of the *Civil Procedure Act* and award costs of the suit to the Plaintiffs.

35. With regard to the counterclaim it was contended that the Kshs. 15,000,000/= claimed was a mere approximation and not justified. That the Defendants failed the test of expressly pleading the claim which was in the nature of a special claim as reasoned in *Joyce Mukulu Kilonzo* (*supra*). Additionally, that no credible evidence was offered to substantiate the claim. The 1st defendant conceded he did not prepare the document titled Little Bay Investment Deposit Schedule showing a sum of Kshs. 4,426,640/=. That he testified he received money from the 1st plaintiff from time to time through M-PESA though he was unable to quantify the sum he had received.

Defendants' Submissions

36. The Defendants submitted the plaintiffs had failed to show how much each client paid yet the commission payable was pegged to this and was also not payable on intellectual resources applied.

37. It was urged that no evidence was tendered in proof of alleged funds injected by the plaintiff. Conversely the fact that the plaintiffs received money was against the purpose of commission-based transactions.

38. It was the defendant's submission that the plaintiffs have failed to show any interest in Apple Mango Apartments or the two parcels herein and to whom they belonged if at all they exist, which forms the basis of adjudication of matters in this Court and what entity Apple Mango Apartments exists as.

39. It was contended that mere chats, emails and screenshots of websites cannot constitute a contract whether express or implied. The court was led to the 1st plaintiff admission that there was no agreement on refurbishment, proposals, opening of accounts or the 15% commission which were admitted to be industry based.

40. The defendants submit that although the plaintiffs claim they worked for them it is not clear why they incorporated the 2nd plaintiff with his wife as co-director, opened up Bank Accounts in their own name and banked money from the business into their accounts without the defendants' knowledge, were it not to siphon money. That they entered into contracts with service providers without the defendants' knowledge or authority, received bookings and deposited the money into their accounts and still filed a suit claiming the same money.

41. Counsel for the defendants submits that even though the plaintiff alludes to having brought profitability in the defendants' business, he contradicts this position by stating that the businesses actually suffered losses in his tenure.

42. The defendants finally submit that the plaintiffs' actions reek malice andought to be dismissed since they approached the court with unclean hands and that the suit was ill motived.

43. On damages Counsel relied on *Simona Rizzoti V Kenya Way Limited* (2021)1 eKLR; Civil Appeal No. 115 of 2006 *Douglas Odhiambo Apel & Emmanuel Omoto Khasin -Vs-Telkom Kenya Limited* where the court stated that special damages must not only be specifically pleaded with a great degree of particularity but also be proven by way of tangible evidence and which the plaintiff had failed to do in the present case.

44. The court was urged to dismiss the plaintiffs suit and allow the counterclaim.

Issues for Determination

45. Based on the pleadings, the evidence adduced as well as the submissions of the parties, the following issues stand out for determination; -

    1. Jurisdiction

    2. Whether the plaintiff has proved his claim to warrant entitlement to the reliefs sought.

    3. Whether the Defendant is entitled to the reliefs sought in the counterclaim.

    4. Who bears the costs of the suit and counterclaim?

Analysis and Determination

Jurisdiction

46. At the commencement of this suit the defendant raised a preliminary objection on jurisdiction, urging the suit did not contain any issues related to land and environmental use. On 21/01/21 the plaintiffs made an application to amend the Plaint to include events of their alleged forceful eviction from the Apple Mango by the Defendant. Justice Sila Munyao granted leave and directed that upon the amendment the defendant was to assess whether they would still want to argue the preliminary objection. The Plaint was amended accordingly and the defendant accordingly responded by amending his defence & Counterclaim and which did not raise the issue of jurisdiction. The suit was transferred to Kwale Environment & Land Court following the posting of a judge in July 2021.

47. It is imperative in my view the matter of jurisdiction is laid to rest. It is trite that jurisdiction is everything and without it the court cannot move one more step. Jurisdiction must be acquired before judgement is given. This was the holding in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. It is therefore in my view not too late for this court to satisfy itself that it is seized with the requisite jurisdiction to render a judgement in this matter.

48. The jurisdiction of the Environment and Land Court is derived from Article 162 (1)(2)(b) of the *Constitution* to hear and determine disputes relating to environment, and the use and occupation of , and title to land. This article is read together with the *Environment & Land Court Act* Sec.13 which confers this court with jurisdiction as hereunder; -

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes;-

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) .....

(4) .....

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

49. My review of the amended plaint and my understanding of the claim is that it is not in dispute that the plaintiff took over the operations of the Apple Mango apartments/cottages owned by the 1st defendant. After sometime there was disagreement over the said management accompanied by eviction threats by the 1st defendant. The plaintiff then approached the court for orders of injunction to preempt the threatened eviction and takeover of the operations. Before the above application was heard the plaintiff alleged he was forcefully ejected and this necessitated the amendment of the plaint when the cause of action was stated as compensation for value input to apple mango, reimbursement of monies spent, damages for illegal eviction among other damages allegedly ensuing therefrom (see paragraph 33 of the Amended Plaint). Had there not been a threat of the eviction and the alleged eviction itself then the

Plaintiff would not have approached this court. Infact the defendant through the firm of advocates on record for him herein, actually issued a notice dated 21/12/20 (see page 20 of the defendants' bundle) wherein it is intimated a suit for against the plaintiff would be instituted for interalia mesne profits.

50. In my view eviction falls under use of land for which this court is seized of jurisdiction. To me everything else flows from the said impugned eviction from the apple mango and its operations. Having satisfied myself on the issue of jurisdiction I will then proceed to render myself on the substantive issues.

51. My understanding of the Plaintiffs claim is that he was illegally evicted from the Apple Mango establishment whereas it had been mutually agreed with the 1st defendant that he would step in to manage the business and which over time he treated with the prospects of being a joint venture which was the initial intention of the parties. That following this understanding he took over management of the apartments where he refurbished them, deployed his expertise in matters tourism and turned around the business which had been performing very poorly. The cause of action has already been stated earlier.

52. It is trite that he who alleges must prove. Section 107(1) 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."

53. The Plaintiff alleges that he was forcibly evicted from Apple Mango apartments & villa and that this was illegal and unlawful. It is not in dispute that this establishment belonged to the 1st defendant who was operating the apartments using what is now popularly known AirBnB near Baharini plaza shopping Centre, Ukunda Diani.

54. To determine if the eviction was lawful it behooves this court to interrogate the circumstances under which the plaintiff entered the establishment. It was PW1 evidence that he stepped in and took over the day to day running of the establishment in the year 2018 after Esther the previous manager left the business without notice. Though DW1 denied ever inviting the 1st plaintiff to his business he confirmed during cross examination that the plaintiff managed the business for 2 years. DW1 also produced a statement he recorded at the Kwale Police station where he stated thus 'I thought I could bring him to Apple apartments ...I told him to help supervise the workers.' Clearly this was an invitation. I asked myself how it was expected that supervision would be done remotely without the Plaintiffs presence considering that Esther was no longer there, DW1 too stayed in Nairobi and additionally how someone could have run the business for 2 years as admitted without having been physically at Apple apartments. Clearly the Plaintiffs presence at Apple mango apartments was with the blessings and knowledge of DW1.

55. I will then proceed to deal with the issue of the eviction and whether it was illegal as alleged. The plaintiff claims that the forcible ejection was illegal as there was no adequate notice to vacate and no eviction order from a competent authority. That it was also an act of intimidation and harassment. Arising therefrom the Plaintiff claimed loss and damages from among others contracts with suppliers and cancelled bookings.

56. Was the Plaintiff entitled to notice to vacate or was the defendant required to obtain an eviction order for this purpose? DW1 stated at paragraph 19 of his witness statement that the plaintiff denied him entry into the premises claiming that he owned the place. It is after this that he reported the matter to the police and who assisted him to gain entry after much resistance. DW1 during his evidence in chief stated he was kept out for over 4 hours.

57. A look at the email correspondence produced by the plaintiff most of which is addressed to DW1 depicted PW1 as having fully entrenched himself and in paragraph 11 of the Plaintiffs witness statement which he adopted it is stated; -

> 11. From when we took over operations at Apple Mango, we skillfully, dutifully and transparently managed the establishment.

58. It is also admitted by DW1 that the plaintiff run the establishment for 2 years before the impugned eviction. In his statement to the DCI (page 16 of the Defendants bundle) DW1 narrates his interactions with the plaintiff and how they met and he DW1 felt he could bring him to Apple. Clearly the defendant welcomes the Plaintiff into his property not as a guest. What then would one term this nature of 'affair'. To me it leaned towards a licence or permission to make use of the premises for a particular purpose without conferring an interest. I find support in Black's Law Dictionary 8th and 11th Editions which define License in the context of property law as an authority to a particular act or, upon another's land without possessing any estate therein. Therefore, there was no justification for the plaintiff to call this his place even in the wake of the alleged anticipated joint venture.

59. Having said that, in my view the plaintiff deserved notice given the circumstances and having been permitted therein by the Defendant. He could not just walk out as if he had been there for one or two days. While this court may understand the Defendants anxiety the forcible eviction without notice was uncalled for. Counsel for the plaintiff referred to the holding of the Court of Appeal in *M/S Gusii Mwalimu Investment Co. Ltd & 2 Others v M/S Mwalimu Hotel Kisii Ltd* [1996] eKLR which made a finding that the defendant seized possession extra-judicially. I note that the arrangements between the parties in this precedent were based on a landlord tenant relationship unlike in the present case there was no tenancy. I however agree with A. B. Shah JA when he categorically stated that he would not sanction a situation of obtaining possession without a court order. Indeed, the court cannot allow the law of the jungle to take over. I have already observed that the manner in which the DW1 gained possession with the help of the police was uncalled for. The dispute was purely civil in nature relating to the management of the Apple Mango Apartments. One wonders why the 1st defendant could not obtain an order of the court or even seek a mention date for further directions under the current proceedings which were already pending before court, yet when he wanted to investigate the Plaintiffs banks accounts he duly obtained the requisite orders from the Magistrate court.

60. Based on the foregoing I find the eviction herein to have been unlawful.

61. I have already reviewed elsewhere the circumstances under which the plaintiff came into managing Apple Mango and came to a finding that it was on the invitation and blessings of the 1st defendant. From the email correspondence produced no reasonable man would come to a conclusion that the plaintiff was not in the business with the approval of the Plaintiffs. My review of the evidence and bundle of documents availed further revealed that at all times there were business operations which were ongoing for the two years above and the defendant was aware of the same. PW1 produced a bundle of email correspondence exchanged between the plaintiff and the 1st defendant. It is noteworthy that the email addresses used being colin@webengines.co.ke and cwngundo@yahoo.com for the communication between the Plaintiff and the Defendant respectively were not disputed.

62. The only problem with the arrangements herein is that there was no framework put in place by PW1 and DW1 to regulate and or guide their engagement. The expectations and or agreements were not documented. Indeed, DW1 stated in his testimony and correctly so that there was no written agreement. It is pleaded at paragraph 20 of the Amended Plaint that from January 2019 to the date of filing the Plaintiffs had skillfully, dutifully and transparently managed Apple Mango. DW1 confirmed

that the plaintiff managed the business for 2 years albeit with losses. The services were therefore rendered and I agree with Counsel for the plaintiff in this regard except the terms which are contested.

63. To me the above is not the issue with the plaintiff but what is pleaded at paragraph 31 of the Amended plaint that the 1st defendant had backtracked from the understanding from the purchase of the 1st plaintiffs land and prospects for a joint venture and which the plaintiff and contends that the 1st defendant must recompense the plaintiffs Kshs. 13,258,524.65/- for the input value to Apple Mango. This is the gist of the plaintiffs claim and which is denied by the defendants. DW1 told the court in cross examination that he agreed to pay 10% commission only when the 1st plaintiff referred customers to the business. PW1 evidence was that it was all clear in the correspondence exchanged that the arrangement was beyond commission and there was a mutual agreement in this regard. I note that counsel for the Plaintiff did not dwell much on this point while counsel for the defendant mentioned in their submissions that display of websites and charts did not constitute a contract.

64. The burden of proof lay on the plaintiff to prove that it was intended for him to manage the apartments as a partner or shareholder or any other terms other than on commission basis perse. This court's decision will depend on whether the plaintiff who is the party concerned has satisfied the particular burden and standard of proof imposed on him.

65. It is trite that contracts can be implied. Justice A.C. Mrima in the case of *Caleb Onyango Odongo Vs. Bernard Ouma Ogor* (2020) eKLR cited interalia the Court of Appeal in the case of *Abdulkadir Shariff Abdirahim & Another vs. Awo Sharriff Mohammed t/a A. S. Mohammed Investments* (2014) eKLR where it was held that there is no general rule of law that all agreements must be in writing. He also cited the Court of Appeal decision in *Ali Abdi Mohamed vs. Kenya Shell & Company Limited* (2017) eKLR which cited various persuasive decisions on implied contracts and the circumstances in which a contract may be implied In *Lamb v. Evans* [1893]1 Ch 218, *The Aramis* [1989] 1 Lloyd's Rep 213.

66. Upon review of the above Mrima J observed thus;-

> 23. The foregone reveal several legal imperatives. They include that a contract 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, in implying a contract the conduct of the parties remain paramount, that an objective approach in contract interpretation is to be adopted, among others.
>
> 24. In this case there was no written contract. Therefore, this Court is enjoined to ascertain whether the pleadings, the evidence and the general conduct of the parties reveal any contract. If that tour yields in the affirmative, then a contract may be implied.

Applying the above to the facts of the present case this court made several observations as follows; -

67. From the facts there was the Plaintiffs narrative which is already stated in the amended plaint, reiterated in his witness statement as well as his evidence in chief. The facts are consistent with the fact that indeed there was an agreement between the two parties for the plaintiff to step in to manage apple mango except for the terms that are in contestation. PW1 on cross-examination stated there was a mutual agreement in the email communication and referred the court to the email volume 1 pg 3-26 and specifically the emails dated 14/07/20 and 7/01/20 for KCB and Solar Power Project. My review of the content of the later revealed that basically the plaintiff was making an offer to the 1st defendant and invites discussions. I did not come across the email dated 14/7/2020 but there was one dated 14/7/2019, probably there was a mix up. This email also makes an offer on disposal of apple mango

and also shows there was no agreement that had crystallized. What captured my attention is where the plaintiff states that;-

> The departure of Esther was handled by me stepping in to ensure Apple Mango is cared for and have some market generated for it. (Some other business ideas have also been discussed). I have viewed these things as a holding operation pending our engagement, fortified by your continued assurances that we are proceeding.' The plaintiff's own admission shows that he just stepped in. At paragraph 11 of the amended plaint it is pleaded that it was agreed that the 1st plaintiff steps in to oversee, care and manage Apple mango. There is no reference to his being recompensed for what he is claiming or that such would be the expectation. The plaintiff is bound by his pleadings.

68. The plaintiff pleaded at paragraph 13 of the amended plaint that there was unequivocal commitment to purchase the plaintiffs shamba however from the correspondence and bundle of documents the deal for purchase did not go through because of the issues attached to it including litigation which went on upto the court of appeal. Infact from plaintiffs exhibits at page 18 is the 1st plaintiffs email to the 1st defendant where the plaintiff shelves the issue of shamba sale process for later implementation. DW1 produced a copy of the Auctioneers letter of redemption dated 20/03/2019, email dated 14/07/2019 from the 1st plaintiff which has also been produced by the 1st plaintiff which admits the process to acquire the shamba has taken some time. DW1 evidence was that the land was not saleable and I agree.

69. In the same email of 14/7/2019 PW1 does not refer to a partnership but requests DW1 to consider the effort he had made, these months be remunerated as part of that possible sale for Apple mango and also its sale to include provision to move forward on the shamba. Infact as at October 2020 the plaintiff in an email dated 8/10/2020 produced by the defendant titled Msambweni shamba and Apple Structure Suggestions it is apparent there was no deal that crystalized on the purchase of the shamba and proposals were being made at this stage where for the first time in the email correspondence exchanged some purchase prices are emerging. I further noted that the entire letter entails proposals for which the plaintiff did not give any evidence were accepted by the defendants. In my view this was a late effort to documenting the agreements, bring in shareholding structure and concretize them. Infant soon thereafter the 1st defendant replies by email dated 14/10/2020 seeking interalia accounts, inventory for the two years and directing where money collected should be banked.

70. DW1 email dated 23/01/2019 responding to PW1 email of the same day acknowledges progress report of Apple Mango apartments and promises to keep update the Plaintiff on the project offer by German investors. There was no evidence led by the plaintiff to show that this project crystallized and he was left out. In any case it is clear it was pegged to the sale of the Plaintiffs land which was not sellable as mentioned earlier.

71. Clearly there was nothing to compel this court to imply there was an agreement that would obligate the defendant to recompense the plaintiffs for the input value to the establishment.

72. Even assuming this court was wrong on the above conclusion the court would still have challenges with awarding the claims. For instance, refurbishment repairs and revamping programmes have all been lumped together for the year 2019 and 2020 without further particulars showing a breakdown of each. Clearly these are special damages. I find support in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 where the Court of Appeal stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of

a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

Also see *Capital Fish Kenya Limited V. Kenya Power & Lighting Company Limited* (2016) eKLR which cited *National Social Security Fund Board of Trustees vs Sifa International Limited* (2016) eKLR, *Macharia & Waiguru vs Muranga Municipal Council & Another* (2014) eKLR and *Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa*, KSM CACA 179 of 1995 (ur). Even if they were particularized I will show in this judgement how the plaintiff fell short of proving the same to the required standard.

73. There is the claim for direct funds injected by the 1st plaintiff towards Apple Mango's operations. Again, they are lumped and not broken down with precision. Further there was no documentary proof on how these funds were injected and from where. The court would have expected to see evidence showing the movement of these funds from another account belonging to the plaintiffs into the operations. Otherwise a movement from the Little Bay account opened by the plaintiff for the purpose of apple mango would not suffice because these would be funds derived from the Apple mango apartments. No efforts were made during the viva voce evidence to show how these funds were injected by the plaintiff from the bundle of statements produced. It is not enough to plead but the claimant must discharge the burden of proof.

74. On the issue of commission let me state that from the amended plaint and the facts pleaded there is no mention of arrangement to pay commission. It only crops up at paragraph 31. However, I will leave this to pass. However, in accordance with the DW1 own admission he agreed to pay the plaintiff 10% for clients he brought in. The plaintiff's position is that it is on 15% basis but on total revenue generated as pleaded. I did not come across any agreement in this regard or any authoritative communication say from the Ministry of tourism to confirm the industry practice. Even assuming the commission was based on the clients brought in there were no specifics to show the clients brought in by Collins. Indeed, it is expected that there would be walk in clients, return clients, clients brought in by the defendants, no evidence was tendered that would differentiate and zero in to the ones brought by the plaintiffs. Again, these are special damages which must be specified and proved. To show bookings was not enough what was required was the actual check in and corresponding payment for each client. And this takes me to the next point as to what would prove the actuals.

75. This court reviewed the accounts presented in the plaintiffs bundle of documents. These largely formed alleged progress reports cash flows, expenditure among others. They refer to attachments and from the ordinary accounting perspectives this is where the actual details would be contained. My observations were firstly that the actual attachments were not presented to the court as part of the evidence. They are just shown as attachments to the emails. In re-examination DW1 pointed that the attachment shown at the bottom of page 7 of vol 1 of the plaintiff's bundle referred to small scale vegetables, poultry accounts which was not a business undertaken by Apple Mango. The court also noted descriptions reading aquasun/projects/small scale, veg, poultry. And in fact, at page 5 which attaches PDF file for Charles/Little Bay intercompany account there are six attachments which do not correspond with the details stated to have been attached leave alone the failure to print the same and present them as part of the evidence. I would have found it difficult to believe the veracity of the same as evidence. See *Kenneth Nyaga Mwige Vs. Austin Kiguta & 2 Others* (2015) eKLR on the process an exhibit goes through before it is accepted to be of evidentiary value. In addition, I found it strange that the plaintiff would refuse to let the accounts be audited in the first place.

76. Moreover I found the claim for commission for the Plaintiffs efforts time and intellectual resources applications completely misguided and the computation given without any scientific back up. For example, with respect to intellectual resources how was this quantified in the absence of the intellectual property to the same. In my view it cannot be based on the income generated and assuming it could be based on the income generated it would be necessary then to provide the income for the period before the deployment of the said intellectual resources for comparison with the period when the same is said to have been deployed. Even then I don't think I would be convinced as a court without expert guidance or opinion. As to Commission on the plaintiff's efforts I agree with the Defendants counsel submission that there cannot be commission on efforts. How would this be measured in any case by an 'effortmometer'? The claim to me would just be a non-starter.

77. I will now address myself to the claim based on the refurbishments, repair and revamping programmes at Apple mango for the 2019 Kshs.5,899,557/- and 2020 Kshs. 3,494,787/-. I will read the revamping programme ejusdem generis to mean the refurbishments and repairs. It is not in dispute refurbishments were undertaken. At page 19 (vol 1 of the plaintiff's bundle) the 1st defendant authorized repair works to continue but systematically. At page 14 (Vol 2) of the plaintiffs bundle of documents is an email dated 18/7/19 from the plaintiff to 1st defendant giving an outline of small refurbishment for 8 apartments for Kshs. 415,860. Pg 16-17 Email dated 26/12/19 stating cash inflows have been ploughed back into mostly repairs and refurbishment however the attached cashflow has not been printed as part of the documents the figure is therefore not known at the same time the actuals are promised to be available when the plaintiffs wife returns from Uganda. At page 95 is an MPESA output for materials worth Kshs. 102,795 showing amounts withdrawn. Again, there is no corresponding data on the actuals of what these materials were, where were they purchased from, invoices and receipts for payment. There was no single document to prove the actual expenditure of Kshs. 102,795. Moreover, it was not clear to me how the figures claimed under this head were arrived at as against the actual expenditure/purchasers. It was also not clear why the Plaintiff would claim the amounts for refurbishments which he says were derived from the business and ploughed back, business which did not belong to him. I think I have said enough to show how the evidence furnished fell short of proving the claim, one would say it was opaque.

78 Based on all the foregoing I make a finding that the Plaintiff did not prove to the required standard entitlement to the compensation of Kshs. 13,258,524.65 million.

79. On damages for reputational injury stemming from the defendants action the plaintiff pleaded that they had secured bookings at Apple Mango all the way to 30/4/21 and which bookings had been processed in their names. That they the plaintiffs suffered immense reputational injury and lost revenues when they were forced to cancel the bookings on a whim. The question that lingered in my mind was if the business was for Apple Mango why the bookings were being secured under the Plaintiffs names. The establishment was Apple Mango and not Little Bay. There was nothing presented before court by the plaintiff to show that before his stepping into the Apple Mango the plaintiff used to run his own establishment and which had become a reputable brand name in such business. To me then if the plaintiff did acquire a name it was through his riding under the Apple Mango establishment brand.

80. This court has elsewhere made a finding that the eviction or repossession of the establishment in the manner it was undertaken was uncalled for and therefore illegal. Be that as it may it is my view that a pecuniary award as submitted for Kshs.2,000,000/- would not be appropriate in the circumstances of the case. The plaintiffs operated the establishment almost to their exclusive benefit and survived under it for two years. That should in my view be their compensation. However, it would also be wrong for the court to let the 1st defendant off the hook in this regard. This court strongly reprimands the action

taken by the 1st defendant for abusing the criminal justice administrative machinery in a matter where the police ought not to have been involved in the first place but a court bailiff acting on a proper orders of the court.

The Counterclaim

81. The suit was defended and a counterclaim lodged. The gist of the counterclaim has already been set out. For ease of reference I will retain the use of the parties as plaintiffs and defendants as referred to in the main suit. The defendant alleges the plaintiff cunningly got into the business with the aim of defrauding the defendants of the proceeds therefrom. It is pleaded that the plaintiff deactivated the hotels website and social media pages and replaced them with their own, impersonated the ownership of the hotel, incorporated the 2nd plaintiff to substitute the 2nd Plaintiff, received hotel bookings through websites unknown to the defendants, registered a Safaricom Paybill and Bank Accounts at ABSA Bank in the name of the 2nd Plaintiff through which he diverted and pocketed room sales meant for the defendants, masqueraded as owner of Apple Mango Apartments as a company which was non existent and which was not representative of the 2nd defendant New Calabash.

82. It was also pleaded that preliminary audit revealed that the establishment had lost Kshs. 4,443,810/- and upon further investigations of the above Absa Account and the Mpesa paybill pursuant to a court order Kshs. 15 million had been lost and which forms the basis of the counterclaim. The defendant also alleged that the Plaintiff did not have capacity to run any business for want of a Kenyan work permit. That following the removal of the plaintiff from the establishment he continued to receive money from customers when he knew he was not in a position to offer accommodation. In addition, the defendants crave an order be issued to the defendants to relinquish/handover all login credentials of the Apple Mango Hotel and General damages.

83. I will not deal with the allegations of the plaintiffs working illegally in Kenya, that is not within the jurisdiction of this court and is domiciled with the relevant enforcement mechanism under these country's immigration laws. Let the relevant agencies deal.

84. It is trite that a counterclaim stands as a suit of its own. It was incumbent upon the party raising the counterclaim to prove on a slightly higher threshold above a balance of probabilities the particulars of fraud pleaded See *Ratil Patel v Lalji Makanji* EA [1957] and *Virjay Marjaria v Nansigh Darbar & Another* [2000] eKLR.

85. As part of proof to the above DW1 presented a copy of court order dated 9/11/2020 in MCCR Misc/ E007/2020 by Hon. C.K. Auka then the Resident Magistrate Kwale issuing a warrant to the DCI to investigate Account No. 2037621237 held at ABSA Bank Ukunda Branch belonging to Little Bay Investment for the period January 2019- October 2020 as well as the PayBill No. 303030 also registered in the name of Little Bay Investment. This is the account that the 1st defendant alleged in his evidence that the monies were being diverted to and during the time the plaintiff managed the business it lost 'approximately' Kshs 15 million. No report of the outcome of the investigations was presented. During cross- examination DW1 could not confirm if any charges were preferred against the plaintiff. On reexamination PW1 stated he had by the date of the hearing of this suit not been charged with any offence relating to the investigation of the accounts and pay bill.

86. The defendant produced as part of his evidence a copy of Little Bay Investment Deposit schedule and a copy of Little Bay Investment Bank Records (DExh 14). Upon cross examination on the exhibit DW1 confirmed it was not on letter head of the 2nd defendant, that the same had not been prepared by him but by his accountant and was not signed. He further conceded that it showed no methodology on how the Kshs. 4,426,640.40 was arrived at. The court was invited by counsel for the Defendant to

consider the evidence tendered by the defendants through the bank records to establish siphoning of money from the defendant's accounts.

87. My review of the document dubbed Little Bay Investment Deposit Schedule Payments Schedule also confirmed the above concerns that came out during DW1 cross -examination. The same were just a print out from a plain paper and one could not tell the origin, the same were not signed for ownership. Even if the accountant was called as a witness, though he was not called, I do not see how he would convince this court of its veracity. To me it also fell short of the professional standards for preparing accounting documents. There was also page 15 of the defendants bundle of documents dubbed Account Transaction Listingfor the ABSA account herein. But aren't these the same accounts that were subject of investigations under the court order earlier stated yet the outcome of the investigations were not tendered before this court. My review of the entire bundle presented by the defendants did not reveal the claimed sum of Kshs. 15 million. Again, there was nothing present to juxtapose these accounts with previous accounts before the plaintiff's entry into the operations which in any event were said by DW1 to have been better during Esther's (previous manager) time.

88. I will proceed to pronounce myself on the order that the plaintiff relinquish/handover all login credentials of the Defendants hotel and or business in the internet, social media, physical or virtual accounts.

DW1 testified that the plaintiff advertised in the websites as owner of the Apple Mango and being an IT expert blocked the defendants from getting another website, diverted bookings to other hotels making the business loose. Copies of Agreements/Terms of usage of websites and List of websites dated 6/01/2021 was presented. But was this enough to substantiate this claim. In my view this clearly is a claim that required expert opinion such as an IT forensic expert to help the court in unravelling the same amidst DW1 own evidence that the plaintiff was able to do this from a superior knowledge in IT. How was the court expected to make a determination on this head without the defendants putting their best foot forward to prove this claim.

89. Based on the evidence presented before this court by the defendants in proof of its counterclaim it is my finding that the counterclaim has not been proved to the standard required and which is slightly higher than that of a balance of probabilities.

Determination

90. The upshot of the court's discussions of the main suit and counterclaim as well as the various findings, is that the

    i. Plaintiffs suit in the amended plaint dated April 14, 2021 partly succeeds and judgment is hereby entered against the defendant jointly and severally and a declaration be and hereby issues that the forcible eviction of the Plaintiffs and agents from Apple Mango Apartments & villa near Baharini plaza shopping Centre, Ukunda Diani sitting on title numbers Kwale/ Diani Settlement Scheme/1292 and Kwale/Diani Settlement Scheme/1293 by defendants, their agents and proxies was illegal and unlawful.

    ii. The 1st defendant in the Amended Plaint be and is hereby strongly reprimanded for the manner he undertook the eviction of the plaintiffs from the Apple Mango Apartments & villa above.

    iii. That prayers 2, 3, 4 5, 6, of the amended plaint dated April 14, 2021 are hereby dismissed.

    iv. The counterclaim is hereby dismissed.

v. Due to the nature and circumstances of the case this court makes no orders as to costs on both the amended plaint and the counterclaim.

91. Leave to appeal is granted if required.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 19TH JUNE, 2023.

A.E. DENA

JUDGE

This judgement was delivered by email following consultations with both counsels the court having undertaken to deliver the same by June 19, 2023.