



**Shade Manufacturers & Hotel Limited v Sarah Mweru Mutuu, Grache Gaciku Virginia Wanjiru & Louis Waithera (All Legal Representative of the Estate of the Late J.M. Kangara) & another (Civil Suit 178 of 2020) [2021] KEHC 426 (KLR) (Commercial and Tax) (17 December 2021) (Judgment)**

Neutral citation: [2021] KEHC 426 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 178 OF 2020  
MW MUIGAI, J  
DECEMBER 17, 2021**

**BETWEEN**

**SHADE MANUFACTURERS & HOTEL LIMITED ..... PLAINTIFF**

**AND**

**SARAH MWERU MUTUU, GRACHE GACIKU, VIRGINIA WANJIRU & LOUIS WAITHERA (ALL LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE J.M. KANGARA) ..... 1<sup>ST</sup> DEFENDANT**

**PETER MWANGI GATHOGO T/A DAYSTAR AUCTIONEERS .... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By Plaintiff filed on 16<sup>th</sup> June 2020 by the Plaintiff against the Defendants, The 2<sup>nd</sup> defendant is a duly licensed auctioneer practising in the name and style of Daystar Auctioneers who was working under express instructions as an agent of the 1<sup>st</sup> Defendants at all times to carry out eviction orders.
2. At all material times relevant to this suit, the Plaintiff had been running, a business in the name and style of Shade Manufacturers and Hotel Limited and had been in occupation of the subject premises that belongs to the 1<sup>st</sup> defendants by virtue of being the legal representatives of the Estate of the late J. M. Kangari.
3. There existed a Landlord – Tenancy relationship between the Plaintiff and the 1<sup>st</sup> Defendants which commenced on 27<sup>th</sup> January, 1981 wherein the Plaintiff as the tenant, rented of L.R.No.192/19 Karen Nairobi (herein referred to as the suit premises) and had been in occupation of the suit premises for



- over thirty (30) years wherein the Plaintiff ran a hotel and restaurant business that offered conference facilities, accommodation, holding various functions on weekends and holidays among other services.
4. However, a dispute arose between the Plaintiff and the 1<sup>st</sup> Defendants and the matter proceeded before the Business Premises Rent Tribunal (BPRT) being Tribunal Case No. 95 of 2015 whereby the 1<sup>st</sup> Defendants sought vacant possession of the suit premises and upon conclusion of the same, the Chairman at the Business Premises Rent Tribunal ruled in favour of the 1<sup>st</sup> Defendants and the Plaintiff was ordered to vacate the suit premises.
  5. The 1<sup>st</sup> Defendants thereafter filed a Miscellaneous Application being Misc. Civil App. No. 723 of 2018 at Milimani Commercial and Chief Magistrates Court seeking the court to adopt the Chairman's decision at the Business Premises Rent Tribunal wherein the Honourable Court sitting at Milimani Commercial Courts adopted the Chairman's decision as a judgment of the court.
  6. On the 7<sup>th</sup> December, 2018, the Honourable Court sitting at Milimani Commercial Courts issued eviction orders in favour of the 1<sup>st</sup> Defendants but upon satisfaction on the following conditions;
    - i. The Court directed that eviction shall be commenced in respect to Section 152(e) and 152(g) of the Land Act.
    - ii. The Court having issued eviction orders as indicated above and upon the 1<sup>st</sup> Defendants instructing their agents, they shall comply with the above Sections while carrying out the eviction process.
    - iii. The 1<sup>st</sup> Defendants shall carry out the eviction after three (3) months upon issuance of the Court order and as a mandatory requirement, the eviction notice shall be served upon the Plaintiff.
  7. On 24<sup>th</sup> January 2019, before the expiry of the stated mandatory notice and without service of the eviction notice, the 1<sup>st</sup> defendants through their duly authorized agents and/or auctioneers Peter Mwangi Gathogo T/A Daystar Auctioneers unlawfully and unprocedurally proceeded to evict the Plaintiff from the Business premises.
  8. That the said eviction was unlawful and was blatantly carried out by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without observing and complying with the orders of Hon. E. Wanjala (Mrs), (SRM) sitting at Milimani Commercial Courts that the said eviction was to be carried out in compliance with the relevant provisions of the land Act being Sections 152(e) and 152(g).
  9. That subsequently due to non-compliance of the provisions and regulations on how to carry out the eviction process, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have occasioned the Plaintiff loss of earnings, business sales and damage of the Plaintiff's properties and working tools amounting to Kshs 206,711,578.60/-.

Particulars of non-compliance by the 1<sup>st</sup> and 2<sup>nd</sup> defendants:

- i. Carrying out eviction unlawfully, unprocedurally and prematurely as the three (3) months' notice had not lapsed.
- ii. Not taking into consideration and observation of laid down procedure of Sections 152(e) and 152(g) of the Land Act which state that eviction shall be carried out in a humane manner and shall be done in the presence of the affected party and the working tools shall not be destroyed and/or damaged.



- iii. The 2<sup>nd</sup> Defendant who is duly qualified and registered Auctioneer, failed to comply with the laid down procedures of the law, and blatantly proceeded to carry out unlawful eviction.
10. As a result of the unprocedural and blatant eviction carried out without due regard of procedure and in the absence of the Plaintiff, the working tools were vandalized and destroyed since the eviction was carried out in an improper manner.
11. There is no suit pending nor have there been previous proceedings in any court between the plaintiff and 1<sup>st</sup> defendants with regard to the subject matter of the suit herein.

#### Appearance

12. Memorandum of Appearance for the 1<sup>st</sup> defendant's entered by R. W. Chege & Associates dated 23<sup>rd</sup> June, 2020.

#### Defence of the 1<sup>st</sup> Defendants

13. The 1<sup>st</sup> defendants deny the allegations in paragraph 5 of the plaint and put the Plaintiff to strict proof and further state that the Landlord– Tenancy relationship between them and the Plaintiff commenced on 1/1/1988 vide the written lease agreement between them and the Plaintiff dated 11/4/88, for the period 1/1/88 – 31/12/1997, which lease was renewed vide a further lease agreement dated 4/11/1998 for the period 1/1/1998 to 31/03/2003.
14. The 1<sup>st</sup> Defendants of paragraph 7 state that they in their personal capacity on 22/01/2015 duly served a Statutory Notice dated 14/01/2015 upon the Plaintiff to terminate the tenancy between the Plaintiff and the 1<sup>st</sup> Defendants in respect of the rented premises L.R. No. 192/19 Karen with effect from 1/4/2015 which notice the Plaintiff opposed and filed the reference under Business Premises Rent Tribunal Case No. 95 of 2015; Nairobi against the 1<sup>st</sup> Defendants which reference was determined in favour of the 1<sup>st</sup> defendants upholding the notice to vacate the rented premises and by a court order made on 13/10/2017 the Plaintiff was ordered to vacate the rented premises by the date 1/05/2018 failure to which the Plaintiff be evicted from the premises.
15. The 1<sup>st</sup> Defendants of paragraph 9 and 10 state that they filed CMCC, MISC APP NO. 723 OF 2018 – Milimani for purposes of execution of the eviction order dated 24/10/2017 issued in BPRT case No. 95 of 2015 Nairobi. The eviction order was not issued in CMCC MISC. APP No. 723 of 2018; the Commercial Court procedurally was executing the orders of the Business Rent Tribunal.
16. The 1<sup>st</sup> defendants state that they issued the mandatory notice to the Plaintiff to vacate the rented premises vide the notice dated 14/01/2015 served upon the Plaintiff on 22/01/2015 and the Plaintiff was ordered to vacate the premises by the date 1/05/2018 failure to which eviction to issue thus the Plaintiff is dishonest in alleging that it was evicted prior to expiry of the notice. The Auctioneers were only engaged to enforce the orders that the Plaintiff had defiantly disobeyed and opted to engage in serial litigation to defeat the orders of the court with impunity in abuse of the process of court. The Plaintiff had made several applications seeking to stay the eviction in different courts all which application were dismissed amongst them the following: -
  - a. ELCA NO. 41/2017 Nairobi dated 15/12/20217
  - b. CA civil app. No. Nairobi 207/2018 dated 16/07/2018
  - c. CMCC MISC.APPL NO. 723/2018 dated 26/10/2018; 25/01/2019



d. JR. PET. NO. 433/2018 NAIROBI – dated 3/12/2018.

17. The 1<sup>st</sup> defendants stated that the eviction was carried out by the 2<sup>nd</sup> defendant who is an officer of the court and thus individually responsible for his actions in executing orders of the court in any event.
18. The 1<sup>st</sup> defendant stated that the Plaintiff had no right to be on the rented premises in any event and the court order made on 13/10/2017 for the Plaintiff to vacate the premises by 1/05/2018 gave the Plaintiff more than adequate time to relocate the business elsewhere if the plaintiff was so minded.

#### Request for Judgment

19. The Plaintiff requested for judgment to be entered against the 2<sup>nd</sup> defendant herein who failed to enter appearance. This request for judgment is for:
  1. The sum of Kshs. 206,711,578.60/- together with interest at court rates from 3<sup>rd</sup> June, 2020 until payment in full.
  2. Costs of this suit and interest thereon at court rates from the date of judgment until payment in full and
  3. Such other further relief that this Honourable court may deem just and fit to grant.

#### Interlocutory Judgment

The Request for judgment was by the Plaintiff's advocate Nyangito & Associates dated 16<sup>th</sup> October 2020. At the time the 2<sup>nd</sup> Defendant failed to enter appearance and file defense after the Affidavit of Service filed on 16<sup>th</sup> October 2020. The Deputy Registrar entered Interlocutory judgment on 4<sup>th</sup> November 2020.

#### Formal Proof Proceedings for the 2<sup>nd</sup> Defendant

20. On 24<sup>th</sup> February 2021, Ms Chege for 1<sup>st</sup> Defendant informed the Court that she was not served with hearing notices of previous sessions and chanced to see the matter on the Cause List. Counsel for 1<sup>st</sup> Defendant sought directions as she was in a dilemma how formal proof proceedings commenced against the 2<sup>nd</sup> Defendant yet they were sued by the Plaintiff jointly and severally for the amount of damages sought in the Plaint.
21. Counsel for Plaintiff indicated that the matter was for formal proof as interlocutory judgment was regularly entered. Since Counsel for 1<sup>st</sup> Defendant was in Court she could participate in the proceedings.
22. The Court observed a regular Interlocutory judgment was entered 4<sup>th</sup> November 2020. The Defendants did not make any attempt to set aside the Interlocutory judgment. The hearing proceeded on 21/07/2021.
23. The Plaintiff stated that he was running his business at Shade Hotel when the Auctioneer came and broke the items threw out his goods. The Plaintiff stated that the Trial Court in Milimani HCC 723 of 2018 had given him 90 days vide a Court Order dated 6/12/20218 to vacate the premises whereby the Auctioneers came on 23/01/2019 and the 90 days period were not over.
24. His advocate Mr. Nyangito went to Milimani Court on 24/01/2019 and the Court gave order on 25/01/2019 and they were served and they refused and the 2<sup>nd</sup> Defendant removed his goods and



demolished the makeshift and water reservoir and they threw out the goods and his goods were destroyed and as a result he suffered health issues and had to go to India for treatment.

25. He stated that he had been in the business for 30 years and had goodwill and had been paying rent and had attached a bundle of documents to support his case.
26. As a result of the eviction he lost his business and his name destroyed and lost many customers. He lost all his income and funds. He made Ksh 1,000,000/- a month. He diligently paid rent contrary to the Defendants' allegations and sought damages in order to restore his business.
27. The Plaintiff relied on the following documents to support his claim; Valuation Report of 20<sup>th</sup> November 2018; photographs, Court Order by Hon Wanjala of 6<sup>th</sup> December 2018; Court order by Hon G.A.Mmasi of 25<sup>th</sup> January 2018; Accounts prepared by Accountants of 8<sup>th</sup> August 2019 by Fredrick Kiptanui Maritim and David Gitau Theuri.

#### Submissions

##### Plaintiff's Written Submissions

28. The Plaintiff submitted that the 1<sup>st</sup> Defendants unprocedurally proceeded to unlawfully evict him from his business where he was their tenant in their business premises for over a period of thirty (30) years and within the period he had built a good hotel business which was famous and reputable hotel.
29. He stated that the 1<sup>st</sup> defendant together with the 2<sup>nd</sup> defendant unlawfully before the expiry of the mandatory laid down ninety (90) days' timeline to carry out eviction, illegally proceeded to evict the plaintiff hence flawed the eviction procedures as laid down in the Land (Amendment) Act Sections 152(2) ad 152(g).
30. The Plaintiff prays that the court award the plaintiff a sum of Kshs.3,000,000/-, a sum of Kshs 7,000,000/- and another sum of Kshs. 70,000,000/- for the torture, pain, agony and embarrassment and loss of reputation of his business. The Plaintiff has been subjected to degrading treatment, as result of the illegal eviction carried out which subsequently has made him loose his business as explained, and shown by the photographs under this he urges the Court award a sum of Kshs. 70,000,000/-.
31. The Plaintiff claimed from the Court orders on general damages of Ksh 80,000,000/- against the 2<sup>nd</sup> Defendant and special damages of Ksh. 206,711,578/-

#### Determination

32. The issue before the Court is whether the Plaintiff has proved his claim as hereunder;
  1. The sum of Kshs. 206,711,578.60/- together with interest at court rates from 3<sup>rd</sup> June, 2020 until payment in full.
  2. Costs of this suit and interest thereon at Court rates from the date of judgment until payment in full.
33. The Plaintiff describes the 2<sup>nd</sup> Defendant as a duly licensed Auctioneer practicing as Daystar Auctioneers. The 1<sup>st</sup> defendants moved the Court for eviction orders against the Plaintiff from the suit premises. The eviction was carried out by the 2<sup>nd</sup> Defendant as an agent acted on behalf and/or on instructions of the 1<sup>st</sup> Defendants. As an agent for 1<sup>st</sup> Defendants, the 2<sup>nd</sup> defendants, he provided eviction services to the 1<sup>st</sup> Defendants and thereby bound them in the eviction as he carried it out on their behalf. hence the Defendants were sued jointly and severally for general and special damages.



34. In General Principles of Commercial Law by Kibaya Kimaana Laibuta at Pg 100-101 commentary on damages;

The Aggrieved party may sue for financial compensation for breach of contract and the redress may take the form of either special or general damages or both. But general damages are not usually awarded for a breach of contract because damages arising from such breach are usually quantifiable and are not at large.....

In actions for damages it is not enough for the Plaintiffs to write down particulars of special damages. They must specifically prove the damages sought. In other words, special damages must not only be specifically claimed but also strictly proved.....

35. Due to the agency relationship between the Defendants and award of damages that must be subject to proof, it would not serve the justice of the case to pursue, consider and award damages against the 2<sup>nd</sup> Defendant alone and/or all defendants while the 1<sup>st</sup> Defendant who filed Defense has not been accorded fair hearing. It would lead to double jeopardy. Therefore, although there is a regular interlocutory judgment against the 2<sup>nd</sup> Defendant and documents and Court Ruling and orders have been produced, this Court cannot legally assess general damages and award special damages that shall also bind the 1<sup>st</sup> Defendant the known principal whose hearing is pending to be heard and determined.
36. In the circumstances therefore, this Court shall defer the assessment of damages with regard to the 2<sup>nd</sup> Defendant to the Trial Judge after hearing and determination of the claim against the 1<sup>st</sup> Defendants who are principals of the 2<sup>nd</sup> Defendant.

#### Disposition

1. The regular interlocutory judgment entered 4<sup>th</sup> November 2020 against the 2<sup>nd</sup> Defendant on liability remains in force unless and until it is successfully set aside.
2. The Assessment of damages against the 2<sup>nd</sup> Defendant shall be by the Trial Judge who will hear and determine the Plaintiff's claim against the 1<sup>st</sup> Defendants' who are principal to 2<sup>nd</sup> Defendant who was their agent and because they are sued jointly and severally over the alleged unlawful eviction that resulted in loss and damage of property and business.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 17<sup>TH</sup> DECEMBER 2021 (VIRTUAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

