



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 27 OF 2015

GODFREY KAMAU KIMANIPLAINTIFF

VERSUS

1. RUTH WAMBURA

2. CRISTINE WAMBURA

3. MONICA WAMBURA (Suing in their capacity as

the administrators of the Estate of the late Thomas Wambura)

4. OKUYOSI E. TIMOTHY

5. LAURENT PETER.....DEFENDANTS

J U D G M E N T

1. This is a claim by **Godfrey Kamau Kimani** who has sued the 1st to 5th Defendant. Although a joint Defence was filed on behalf of the 1st, 2nd and 3rd Defendants, no witness was called to prove that Defence. Since, no evidence was adduced in support of the Defence case, the Defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of **Edward Muriga through Stanley Muriga V Nathaniel D. Schulter Civil Appeal No. 23 of 1997**, where the Court of Appeal stated:

“In this matter; apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

2. The Plaintiff claim is pleaded in the amended plaint amended on the 16.10.2018 and filed in Court on the 30.11.2018 seeking the following orders:

a. A declaration that the Notice of proclamation dated 1st March 2012 and the subsequent attachment of the Plaintiff's properties tabulated at paragraph 43 of the Plaint was and is illegal.

b. The defendants be orders to release all the items tabulated at paragraph 43 of the Plaint to the Plaintiff unconditionally.

c. In the alternative to prayer (a) above, the Plaintiff be awarded general damages of the sum of Kshs. 368,770/= being the value of the items tabulated at paragraph 43 of the Plaint which the Defendant has failed to release to the Plaintiff.

d. General damages for loss of earnings at the rate of Kshs. 60,000/= per month from November 2011 when the Defendant illegally took over and/or locked the Plaintiff's kitchen to the date when the goods tabulated at paragraph 43 of the Plaint will be released to the Plaintiff or the Plaintiff is duly compensated for the said items.

e. Refund of Kshs. 32,000/= being the amount which the Plaintiff paid the late Thomas Wambura to be allocated an alternative accommodation.

f. Refund of Kshs. 20,000/= being the deposit paid for the suit premises.

g. General damages for maliciously destroying the Plaintiff's business and causing the Plaintiff untold mental anguish.

h. That the plaintiff be awarded general damages on exemplary and aggravated scale.

i. Interest on (c) above at Court rate from the date of filing the suit.

j. Costs

k. Any other or further relief that the Court may deem fit.

3. In support of his claim the plaintiff filed a witness statement dated 30.11.2018. During trial, he opted to rely on his statement filed on the 30.11.2018 together with a bundle of document accompanying the said statement. Before I proceed to the merits of this Court, this Court wishes to recognize the selflessness of **MR. Gikandi Ngibuini** whom upon being requested to take up this matter on a "pro bono" basis did not hesitate and accepted to represent the Plaintiff as an indigent.

Plaintiff's Case

4. The plaintiff adopted his statement as his evidence in chief and produced all the documents filed as exhibits no. 1-30. He testified that sometime in the year 2009, he acquired leasehold interests from one **Ann Karuri** who later on introduced him to the 5th Defendant who was agent/brother to **Thomas Wambura** (deceased) (herein referred to as Landlord). The 5th Defendant continued receiving rent on behalf of the landlord but acknowledging the same in the name of one **Ann Karuri**.

5. It is the Plaintiff's case that around the year 2011, the landlord informed him that he wished to utilize the suit premises he occupied. He offered to instead allocate him an alternative room which he was never allocated despite the landlord pocketing a sum of Kshs. 32,000/= .The landlord instead opted to frustrate the him by illegally ordering the 5th Defendant to repossess the his kitchen and converted it into a bedroom knowing very well that the his hotel business would be crippled as a result.

6. PW1 testified that landlord went ahead to put up his premises for lease while he was still in occupation which action prompted him to file BPRT case no. 271 of 2011. The landlord and the 5th Defendant were ordered not to evict him and the 5th Defendant was ordered to open his kitchen but the said orders were ignored as the landlord proceeded to disconnect electricity and water from the suit premises.

7. PW1 testified that his business collapsed in November 2011 as a result of the closure of his kitchen and as a result, he fell into arrears in the payment of rent. The landlord via letter 13.1.2012, acknowledged him as a tenant and demanded the rent arrears of Kshs. 30,000/= from him.

8. PW1 further testified that the landlord instructed the 4th Defendant who went ahead and proclaimed and seized all his business tools by breaking into his business premises and carted away items which were way over and above the alleged rent arrears. He continued to lose income which was equivalent to Kshs. 60,000/= per month, coupled with mental anguish.

9. On being cross examined PW1 stated that the lease between him and the landlord was verbal and that all the receipts were given in Anne Karuri who was the previous tenant and that the proclamation was done in **Anne Karuri'** name and not his but the Court in BPRT case no. 271 of 2011 declared him as the actual tenant and the declaration was before the proclamation of his goods.

10. PW1 also stated that he did not have receipts of the attached good as they were locked up and that he could not support the averment that he earned Kshs. 60,000/=per month.

Questions by the Court

11. The Plaintiff in response to questions put to it by the Court stated that the orders he got from the BPRT were ignored by the landlord and that his monthly rent was Kshs. 10,000/=per month.

Submissions

12. **Mr. Gikandi** Learned Counsel for the Plaintiff submitted that defendants had no colour of right to interfere with the Plaintiff's quiet occupation of the suit property as there were Court orders issued by the BPRT in case no. 271 of 2012 as well as High Court Miscellaneous Application 956 of 2011 which were completely ignored and disobeyed by the Defendants and as a result the Defendants ought not to have benefited from an illegality. To buttress his argument, he relied on the case of **Mistry Amar Singh v Serwano Wofunira Kulobya [1963] E.A 408**.

13. The Counsel further **submitted** that the Defendant are estopped from negating as to the subsistence of the Plaintiff's tenancy and the Plaintiff being a controlled tenant by dint of their tenancy not being reduced into writing, the landlord or his agent ought to have issued a statutory notice of termination of the tenancy and have the matter heard by the BPRT.

14. Further submission were made that it is prudent for the Plaintiff to be awarded general damages for the loss suffered and mental anguish caused by the Plaintiff. On special damages, Counsel prayed that the monthly rent payable be awarded as special damages. On the monthly

income, Counsel submitted that the Plaintiff should be awarded the pleaded amount of Kshs. 60,000/= as the defendants never attempted to disprove the earnings.

Defendant's Submissions

15. **Mr. Cheruiyot** Learned Counsel for the 1st, 2nd and 3rd Defendants submitted that there never existed a tenancy agreement between the landlord and the Plaintiff. He further submitted that the impugned proclamation and attachment was lawful as it was against **Anne Karuri** and the Plaintiff failed to challenge the same through objection proceedings.

Analysis and Determination

16. This court has carefully considered Plaintiff's pleadings, evidence and submissions. The court has also considered the relevant law and jurisprudence on the key issues falling for determination. The key issues emerge for determination, namely:

1. **Whether or not there was a controlled tenancy between the parties under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act;**
2. **Whether there was willful disobedience of Court orders by the Defendant and whether it resulted to constructive eviction of the Plaintiff.**
3. **Whether the Plaintiff is entitled to the reliefs sought.**
4. **What orders should be made as to costs.**

Whether there was a tenancy relationship between the parties.

17. From the Plaintiff's evidence, it is an uncontroverted fact that there was no written agreement between the Plaintiff and the landlord/or the 5th Defendant but they still acknowledged receipt of the monthly rent and issued receipts in the name of the Ann Karuri. However, vide demand letter dated 13.1.2012, the landlord duly instructed the law firm of **Areba & co. Advocates** to demand rent arrears for the month of November, December 2011 and January 2012. In the said letter, the Plaintiff is acknowledged as a rent paying tenant to the landlord's premises. The **BPRT case no. 271 of 2011** via an order issued on the 2.12.2012 recognized that the Plaintiff was a controlled tenant. That finding invites the application of estoppel by record and the defendants cannot be allowed to allege lack of tenancy between the parties.

18. In any event, Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, a controlled tenancy is defined as follows:

“means a tenancy of a shop, hotel or catering establishment-

(a) Which has not been reduced into writing; or

(b) ...

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as a landlord or as a tenant shall be a controlled tenancy.”

19. From the foregoing, I find and hold that the Plaintiff was indeed a controlled tenant because its tenancy in the suit premises has not been reduced in writing but was acknowledged by both the landlord and the BPRT.

Whether there was willful disobedience of Court orders by the Defendant and whether it resulted to constructive eviction of the Plaintiff.

20. Since the facts of this case as highlighted by the Plaintiff are not in dispute, I have had an opportunity of going through the order issued by the BPRT on the 2.12.2012 and the Court order issued in **High Court Misc. Civil Application No. 956 of 2011**. The said orders have never been vacated and/or varied. This Court notes that in blatant disobedience of the Court's orders, the landlord never reconnected electricity to the Plaintiff's premises and even went ahead to lock the front entrance to the Plaintiff's business premises even demanded that he uses the back door for him and his customers and it was during the pendency of **High Court Misc. Civil Application No. 956 of 2011** that the landlord locked the Plaintiff from the premises completely and thereby denied him total access and advertised the same for letting out. That is the conduct that cannot be countenanced by the Court or indeed any civilized society. It must instead be discouraged.

21. Nambuye J in **ARSHAD KHAN v DHIIREN HAIR DESIGNER LIMITED & another [2009] eKLR** stated as follows...

“...2. It is the duty of everyone to whom a court order, is addressed to obey the same.

3. **A court, will not hesitate to reinstate a tenant unlawfully evicted from rental premises. If it is demonstrated that the effected tenant has been evicted in a high handed, oppressive manner and with impunity.**

4. A litigant who has acted in blatant defiance of legal procedures and the law should not be allowed to benefit from his wrong.

5. Where a litigant has acted in a high handed and oppressive manner and in blatant disrespect of the law, will not escape an injunctive relief against him solely because he is in a position to pay damages.”

22. From the foregoing, I find and hold that the landlord was in violation of Court orders by denying the Plaintiff’s front door access to his business premises; by disconnecting of water and electricity from the business premises; by forcefully taking over the Plaintiff’s kitchen and converting it into a bedroom; by locking up the Plaintiff’s premises and by instructing the 4th Defendant to carry out an illegal proclamation. I therefore find and hold that the landlord’s conduct amounted to constructive eviction of the Plaintiff and that the same was wholly unlawful and attracts damages against the defendants.

Whether the Plaintiff is entitled to the reliefs sought

23. In view of the fact that there were two suits pending before the BPRT and this Court in **Misc. Civil Application No. 956 of 2011** and Court orders issued as a result against the landlord, as stated above, it was a brazen disobedience of Court orders for the landlord to levy distress without the leave of the Court. To date the distrained goods have never been returned to the Plaintiff.

24. Now that the Plaintiff has proved that the landlord maliciously and in disobedience of Court orders crippled his business and causing him mental anguish and loss of income to sustain his family, I hold that the plaintiff has established that he is entitled to general damages as prayed. The landlord and his agents ought to have obeyed the Court orders from the BPRT and this Court.

25. Considering the nature of loss and/or damage that the plaintiff was put into as a result of the defendant’s unlawful acts, including disregard of lawful Court orders and violation of the law, I assess general damages for trespass, called by the Plaintiff as crippling the Plaintiff’s business and for unlawfully eviction at **Kshs. 2,000,000/=(two million)** against the defendants jointly and severally.

26. I find and hold that the Plaintiff is entitled to the value of the items seized by the 4th Defendant. Since the sum of Kshs. 368,770/= pleaded at prayer (c) of the amended Plaint is not disputed the same is awarded as pleaded.

27. On the issue of loss of earnings at the rate of Kshs. 60,000 per month from November 2011, refund of Kshs. 34,000/= received by the landlord and Kshs. 20,000/=being the deposit payable for the business premises, I hold that such loss is a special damage and It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See 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 Mwangi Nandwa, KSM CACA 179 of 1995 (ur). In the latter case this 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 ...”

28. In Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v. Augustine Munyao Kioko [2006] eKLR the Court of Appeal was grappling, *inter alia*, with a claim for loss of butchery business which the plaintiff closed after sustaining injuries in a road traffic accident. The claim was opposed on the grounds, amongst other things, that account books, income, tax returns or audited accounts were not produced. Nevertheless, the Court, guided by the decision in Wambua v Patel & Another [1986] KLR 336 computed the claim on the basis of the evidence available.

“Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method”and added at p. 347 para 1 “But a victim does not lose his remedy in damages because the quantification is difficult.”

29. Though the special damages had been specifically pleaded, there was no credible evidence whatsoever that was availed to prove pleaded special damages. Instead, in cross-examination the Plaintiff confirmed that he had no evidence of earnings because the documents were locked and not availed to him. I therefore find in the circumstances of this case that the claim has not been proved and cannot be awarded.

30. In the upshot the judgment of this court in favour of the Plaintiff against all Defendants jointly and severally as follows:

a) Value of the of the distrained goods : Kshs. 368,770/=

b) General damages for crippling the Plaintiff’s business, causing him mental anguish and unlawfully eviction: Kshs. 2,000,000/=

Total: Kshs. 2,368,770/=

31. The sum awarded shall attract interest at Court rates as follows:

i) General damages from the date from the date of this Judgment.

ii) Value of the goods from the date of the suit.

Dated, signed and delivered at Mombasa

this 22nd day of January 2020.

P.J.O. OTIENO

JUDGE