REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 75 OF 2015

MUNAVER N. ALIBHAI T/A DIANI GALLERY.....PLAINTIFF

V E R S U S

SOUTH COAST HOLDINGS LIMITED .....DEFENDANT

J U D G M E N T

1. By his plaint dated the 5/6/2015, the Plaintiff pleads that on or about January 2015 the Defendant unlawfully barricaded the entrance of his shop by putting chains on the front entrance and padlocking the same on the pretext of rental arrears without any prior notice or demand.

2. The Plaintiff states that since January 2015, he has been unable to run his business on the premises but the Defendant has threatened to levy distress upon his goods being jewelry amounting to over Kshs. 3,000,000/= which have been locked up in the premises and the Defendant is also continuing to charge him rent.

3. On those pleaded facts, the plaintiff sought the following orders:

a) Order requiring the Defendant to open the shop and allow the Defendant possession of the same;

b) Order restraining the Defendant from levying distress on the premises or from interfering with the Plaintiff's tenancy in any way;

c) Order requiring the area police to assist in the opening of the shop;

d) Loss of sales income, General damages together with interest at courts rate.

e) Costs of and incidental to this suit

f) Any other relief this Court deem fit.

4. When served, the Defendant filed an amended statement of defence and Counterclaim on 13/12/2018 denying all the allegations in the amended plaint save for the descriptive paragraphs 1, 2, & 3. The Defendant further stated that several demands and notices had been issued to the Plaintiff to settle his arrears in an amicable was which demands the Plaintiff refused ,neglected and or ignored willfully.

5. The Defendant also denied the jurisdiction of this Court and gave notice of its intention to raise a preliminary objection in regards thereto. However, no preliminary objection was formally raised.

6. In its counterclaim, the Defendant stated that the Defendant in the counterclaim had breached various provisions of the written lease agreement and various implied conditions in periodic tenancy after the expiry of the lease by failing to pay rent as and when it fell due. As a result, the Plaintiff in the counterclaim incurred and suffered colossal damage, both monetary and otherwise as well as loss of business. The Plaintiff in the counterclaim sought Judgment to be entered against the Defendant in the counterclaim as follows:

a) Kshs. 1,869,928/=being the monies payable as arrears of rent and services charge due and payable to the Plaintiff during the pendency of the lease herein uo to 30th November 2015.

b) Kshs. 1,977,915/= being amounts due and payable to the Plaintiff/Defendant herein from the 1/12/15 when the lease terminated up to 30/4/18 when the Defendant surrendered possession.

c) Interest on the total amounts due at the prevailing Court rates of 145

d) Any other relief as may appear just in the circumstances.

e) Costs of this action and the counterclaim.

7. In support of its case, the Plaintiff called **the Plaintiff as its sole witness** to prove its case. The Defendant, on its part, relied on the evidence of its Director **Mr. Sultan Khimji**. All the witness relied on and adopted their respective witness statements as evidence in chief and then produced the Bundles of Documents filed as exhibits.

Evidence led by the parties

8. The hearing of the suit commenced on the 8/10/2018. On that day **PW1 MUNAVER N. ALIBHAI testified and stated that he had** signed a letter of offer but never entered into a lease agreement with the Defendant and that in December the year 2014 his landlord forced him out of his premises and locked them up to January 2016 yet he was not in arrears and the locking of his premises had not been sanctioned by any Court order.

9. The Plaintiff states that because of the closure of his business, he lost his regular clientele and from his income tax paid in the year 2014, he made a total of Kshs. 1,442,500/=and in the year 2015 he had projected as increase of 10% to his income which would have amounted to Kshs. 1,580,000/=. Further, the Plaintiff stated that even when this Court ordered on the 21/12/2015 for his shop to be opened, the Defendant opened it in January 2016, only for the Defendant to begin harassing him by disconnecting electricity. In the end, the plaintiff had to close the shop again in 2017.

10. The Plaintiff states that effective January 2016, he did not have any rent arrears but owed accumulated service charge and that the invoice dated 1/4/2015 is for service charge arrears in the sum off kshs. 210,052.28/= which was contrary to the agreement and that the invoice dated 2/4/2015 for rent between November 2014 to February 2015 together with service charge, yet during that period his premises had been locked.

11. The Plaintiff states that the statement showing rent arrears of Kshs.2,058,740/= has included the period he was not in occupation of his premises

12. On cross-examination by **Mr. Ngaine,** PW1 confirmed that he occupied the suit premises in the year 2011 but the letter of offer was in the year 2009 and further stated that between 2009 and 2015 he had never been in arrears and he was not aware that his premises were locked on account of rent arrears. He further confirmed that in his Plaint he had not quantified the loss he incurred and that he no longer needs police assistance as he already vacated the suit premises.

13. PW1 further confirmed that he was not aware that service charge would increase depending on the circumstances and that when he reported harassment by the Defendant to the police, no action was taken by the police.

14. In re-examination the Plaintiff stated that on the statement at page 29 & 30 of the Plaintiff's bundle of documents, one cannot tell if the debits made were rent or service charge. Further the Plaintiff averred that it was agreed that service charge was kshs.20/= per square foot in the letter of offer.

Evidence by the Defendant

15. **DW1, Mr. Sultan Khimji** testified and stated that the Plaintiff was their tenant at Centre Point Plaza in Diani, they had a letter of offer signed by both parties detailing the terms of relationship and the tenancy was for 6 years expiring on the 31/10/2015. The Plaintiff had paid a security deposit of Kshs. 76,800/=, service charge was Kshs. 20/= per square foot which was about kshs. 7600 adjusted annually and for the last year of the tenancy the monthly rent was Kshs. 34,188/=.

16. DW1 stated that they wrote to the Plaintiff on the 11/5/2015 informing him of his default in payment of rent and on the 4/9/2014 the Plaintiff was issued with a notice and demand arrears of rent in the sum of Kshs. 1,206,661.09/=, as at 20/7/2014. Further, on the 28/9/2014 an email was sent to the Plaintiff demanding the arrears for 18 months. The Plaintiff responded to the email and informed the Defendant that he had raised half of the outstanding rent arrears and he would pay the balance by December that year. He issued postdated cheques some of which were dishonored. DW1 further stated that on the 21/1/2015 he wrote to the Plaintiff demanding payment of the outstanding rent of Kshs. 871,449/= as at 31/12/2014 or else distress would follow.

17. DW1 testifies and states that the Plaintiff in a letter dated 5/5/2015 admitted being in arrears of Kshs 884,761 and requested that his shop be opened as he made arrangements to clear the arrears. He also states that the Defendant issued a final statement as at 6/8/2015 when the outstanding amount was Kshs. 1,049,383.92 which sum had escalated and stood at Kshs. 2,489,192/= as at 31/3/2017.

18. On cross-examination by **Mr. Moolraj**, DW1 stated that the agreement with the Plaintiff was based on the letter of offer because no formal lease was entered into and that the premises were locked in mid-2015 when the Plaintiff defaulted in the payment of rent and no order was obtained from Court to evict the Plaintiff. Dw1 further confirmed that the invoice at page 17 of the Defendant further list of documents is for service charge for the year 2011 but issued in July 2014 and further that all the demands for rent arrears and service charge were issued in 2014.

19. DW1 also confirmed that he did not avail receipts on how the shortfall of service charge was calculated and that he did not show the plaintiff how service charge was apportioned. He however insisted that at page 23 of the Defendant's further list of documents there is a

document that shows the details on how the rent arrears were calculated and that the rent arrears are for 72 months though the Plaintiff was not in occupation for entire period.DW1 also confirmed that under the Court order of 18/12/2015 at page 21 and 22 of the Plaintiff's bundle, it was stated that the period the Plaintiff's premises were locked should not be factored in the statement of rent arrears.

20. The witness went on and confirmed that in its statement on rent arears contained at page 25 of the Plaintiff's bundle, the sum indicated include VAT yet there is a second Application of VAT at the end of the same statement. He also confirmed that the figures claimed in the counterclaim are not accurate owing to the fact that the total amount charged had the double Application of V.A.T and that if the principal figure changed then the interest that was applied must also change.

21. DW1 confirmed that there had been a payment of Kshs. 2,637,446/= which was more than the rent arrears of Kshs. 2,058,740/= because of service charge shortfall and denied that they gave the statement of service charge shortfall in 2014 because they were tired of the tenant. When asked whether they relocked the Plaintiff's shop, DW1 stated that he could not confirm the same. There was a further confirmation by the witness that the last rent payable was Kshs. 34,000/=but the sum charged included service charge. He lastly admitted that a demand for the entire period was made to the tenant yet the tenant was not in possession for the entire period. Therefore, he conceded, the sums in the counterclaim needed to be relooked.

22. On re-examination, DW1 when showed letter dated 11/5/2015, he stated that the shortfall of the service charge is shared proportionately between the tenants based on the space occupied and that though the invoices were issued late, it was during the tenancy period.

23. When questioned by the court**,** DW1 confirmed that locked premises do not consume power, that the premises were locked in April 2015 and opened in January 2016 during which time he could not lawfully collect rent and further that it is not correct to charge VAT twice.

Submissions by the parties

24. The plaintiff filed submissions and reply to the defendant's submissions on on 6/12/2019 and 26/2/2020 respectively while those by the Defendant were filed in court on 12/2/2020. The counsel highlighted those submissions on 28/2/2020.

25. In the submissions, the Plaintiff Counsel **Mr. Moolraj** maintains that the there was a tenancy without a formal lease agreement hence a controlled tenancy resulted. During the subsistence of the tenancy, in January 2015, the Defendant padlocked the Plaintiff premises, on the pretext of rent arrears due, for the entire 2015, with the Plaintiff's goods inside. Counsel further stated that in a controlled tenancy, the Defendant did not have the right to forfeiture and for eviction without a Court order. Therefore, it was submitted, the defendants conduct and actions were contrary to Section 4 of the Landlord and Tenant (shops Hotels and Catering Establishment) Act, Section 2(2) (d) of the Auctioneer Act on evictions and Section 90 of the Penal Code on forcible entry.

26. Counsel further submitted that the plaintiff's claim from the Defendant is for a sum of Kshs. 1,584,760 being loss of sales incom and produced tax returns to prove that he made profits in operating the shop. He further claimed the a sum of Kshs. 3,000,000/= on account of general damages for the illegal eviction. Reliance was placed on the case of **Francis Githuku Kabue –v- Kimani Chege & Another [2009]Eklr pg.35.** Where the Court held that the Plaintiff was entitled to compensation in the sum of Kshs. 400,000/= for unlawful eviction.

27. **Mr. Moolraj** submitted that service charge could not be varied as a term of the lease without the sanction of the tribunal in accordance with **Landlord and Tenant (shops Hotels and Catering Establishment) Act, Cap 301(herein referred to as "the Act")** as it amounts to altering the terms of the tenancy and the actions by the Defendant are an illegality that ought not to be condoned by the Court. Consequently, she submitted, even if the Defendant proved the shortfall in rent the same is not awardable since the requisite statutory provisions were not followed.

28. On the counterclaim, Counsel submitted that the period charged by the Defendant for rent arrears and service charge included the period the Plaintiff was not in possession and further pointed out that in the statement supporting the counter-claim, VAT is charged twice a fact confirmed by DW1 to be wrong. It was pointed out that the calculation of the claim at Kshs. 41,500 per month was not a legitimate just as the service charge estimated in 2015 was admitted to be inaccurate.

29. On his part, **Mr. Karina,** Learned Counsel for the Defendant, submitted that there was a lease agreement contained in the letter of offer dated 17/10/2009 and that the letter of offer was accepted by the Plaintiff who took possession and started paying rent. He then added that if it the situation created a controlled tenancy then this Court lacks jurisdiction to determine the plaintiffs claim because under Section 12 of the Landlord and Tenant (shops Hotels and Catering Establishment) Act, Cap 301 it is only the tribunal that has exclusive jurisdiction to entertain the matter. Reliance was placed on the case of **Dhirajlal vs. Vijay [2018]eKLR.**

30. On damages, for loss of sales, Counsel submitted that the sums claimed by the Plaintiff were never specifically pleaded. On general damages, Counsel submitted that the Plaintiff claim is misconceived as pleaded because the claim is evidently a special damage claim that could have been calculated to the last cent but was never so calculated, pleaded and proved. He submitted that the plaintiff ought to have pleaded the specific damages it suffered. He added that because the Plaintiff did not pray for damages for wrongful distress, the same is not awardable. Reliance was placed on the case of **Athi River Development Authority v Joseph Mbindyo & 3 others [2013]** eKLR, where the Court of Appeal held and noted that the Respondent claim was in form of special damages, which ought to have been proved specifically

31. On the counterclaim, **Mr. Karina** submitted that their claim is accrued rent and service charge which led to the defendant to incur and suffer colossal damage and that the sum due and payable is for the period of the remainder of the lease and lost income during the period when the Defendant remained in the suit property without paying rent.

32. In her rejoinder to the defendant submissions **Mr. Moolraj** submitted that the Plaintiff was illegally evicted and that no distress was ever levied. He further stated that on the amount being claimed in the counterclaim, the Defendant never produced any receipts to demonstrate expenses incurred that led to the adjustment of the service charge.

33. Counsel further submitted that the act of arbitrarily locking the tenant out of his shop with all his goods in was vindictive, oppressive and as such, the Court is mandated to award damages in tort.

Issues, Analyses and Determination

34. The dispute being here as pleaded and on the evidence led, the issues can only be those as proposed by the plaintiff and which the defendants have taken no issue with. I do agree that these issues are sufficient to dispose of the suit between the parties. Building on the plaintiff's proposals, I have isolated the following issues as falling for determination by the court.

> **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 the Defendant issued a notice of termination under cap 301.**
>
> **3. Whether the service charge was validly increased and whether it was reasonable to pay the recalculated sum on the service charge after 3 years.**
>
> **4. Whether the Defendant was justified in locking up the Plaintiff premises**
>
> **5. Whether the Plaintiff is entitled to the reliefs sought.**
>
> **6. Whether the counterclaim is awardable.**

Whether there was a tenancy relationship between the parties.

35. On the issue of controlled tenancy, this Court in ruling delivered on the 18/12/2016 pronounced itself on the issue and the circumstances that led to that conclusion have not changed. Therefore, it remains unchanged that the Plaintiff herein was a controlled tenant.

Whether the Defendant issued a notice of termination

under cap 301.

36. In the evidence led, there was no doubt that no termination nor distress for rent notice was ever issued to terminate the tenancy. In **Caledonia Supermarket Ltd vs Kenya National Examinations Council [2000] 2EA 351**, the Court of Appeal held that in order to terminate a controlled tenancy, the landlord had to comply with section 4 of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act. The court also considered that even if the tenant had lost its status as a protected tenant, the landlord (the council) was still obliged to give notice to the appellant. The court expressed itself as follows:

> **"But even assuming for the sake of argument only that the appellant had lost its status of a protected tenant…then even in that situation the council was obliged by law to issue a proper notice of termination in accordance with section 106 of the Law of property Act of 1882."**

37. Having found that the Plaintiff was a controlled tenant, the Defendant was obligated to comply with the prerequisites set out in Sections 4(1), (2), (4) & (5) of the Act if they desired to terminate the tenancy. Those provisions provide:

> ***"4. Termination of and alteration of terms and conditions in, controlled tenancy.***
>
> ***(1) Notwithstanding, the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or conditions or right or service enjoyed by the tenant of any such tenancy shall be altered, other than in accordance with the following provisions of this Act.***
>
> ***(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant on the prescribed form.***
>
> ***....."***
>
> ***(4). No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party as shall be specified therein…….***
>
> ***(5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice; whether or not he agrees to comply with the notice."***

38. I do find that a controlled tenancy can only be terminated by issuing the notice prescribed under the Act as mandated by Section 4. See the holdings of the court in ***Tiwi Beach Hotel Limited v Juliane Ulrike Stamm [1991] KLR 658; Munaver N. Alibhai t/a Diani Boutique v***

***South Coast Fitness & Sports Centre Limited* [1995] eKLR (Civil Appeal 203 of 1994).**

39. From the Defendant list of documents, and the evidence by DW1, it is apparent that the Plaintiff has never been issued with a notice of termination. The letter dated 4/9/2014 was not a notice as envisaged under Section 4 of the Act because it only sought payment of the rent arrears and in default the Defendant threatened to exercise his right of distress for rent. Consequently, I find that the Defendant failed to give the requisite notice to the Plaintiff of its intention to terminate the lease and take over the suit premises.

Whether the service charge was validly increased and whether it

was reasonable to demand the recalculated sum on the service charge after 3 years.

40. I have looked at the Defendant's rent calculation for the term the Plaintiff was in possession as evidenced at page 25 of the Plaintiff's list of documents and it is noteworthy that the Plaintiff has been charged for both the base sum payable as service charge and he has also been charged for the service charge shortfall for the year 2011-2015. It is evident from Section 4(1), (2) and (4) of the Act hereinabove that if the Defendant wanted to adjust the amount payable as service charge and/or wanted the Plaintiff to cater for the service charge shortfall, it was required of it to serve the Plaintiff with a notice in the prescribed form, as provided under the Act. That recalculation of the service charge was an alteration of the terms of the contract as far as the consideration for the tenancy was concerned. Consequently, I find that the claim of the service charge shortfall, as recalculated, was contrary to the provision of Section 4(1), (2) and (4) of the Act because of want of notice and thus not recoverable being unlawful.

Whether the defendant had the right to lock up

the plaintiff's premises.

41. A tenancy vests upon the tenant a property right which like all possessions ought not to be deprived arbitrarily. In ***Gusii Mwalimu Investment Co. Ltd vs Muahimu Hotel Kisii Ltd, [1996] eKLR*** the Court of Appeal while addressing the right of a landlord to re-entry had this to say: -

> **"To obtain possession by carrying out illegal distress is per se wrong. ...if what the landlord did in the case is allowed to happen we will reach a situation where the landlord will simply walk into the diminished premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is a trite law that unless a tenant consents or agrees to give possessions, the landlord has to obtain all orders from a competent court or statutory tribunal (as appreciate) to obtain an order for possession".**

42. Similarly, In the Case of **Ripples Limited vs Kamau Mucuha Nairobi HCCC 4522 of 1992,** it was held that;

> ***"The landlord should only take one course against the defaulting tenant i.e either to distrain for rent or institute an action for forfeiture of the lease/tenancy and repossession. Here the defendant/response took both reliefs to his benefit. It cannot be. The law does not permit it and this court cannot allow it."***

43. In the absence of a court order, I find that the Defendant acted in total disregard of the Law when it unlawfully locked up the Plaintiff's premise thereby depriving the plaintiff of his possession. I am inclined to agree with the Plaintiff that it was actually constructively evicted from the suit premises. Since the proprietors of the suit premises did not obtain a court order for possession, the Plaintiff's eviction from the suit premises was illegal, unlawful and thus tortious.

Whether the Plaintiff is entitled to the reliefs sought

44. This court having found that the locking up of the Plaintiff's premises was unlawful, tortious and amounted to constructive eviction, it finds and holds that a breach of the law ought to attract reprieve to the violated. In **Mattarella Limited v Michael Bell & another [2018] eKLR** the Court awarded the Plaintiff damages in the sum of kshs.2,000,000/= and held as follows**:**

> **"While the defendants were not specifically levying distress for rent, what they sought to do and actually did was to take possession by use of the law of the jungle. That must be, as has always been, frowned upon by the courts. Not only frowned upon but equally remedied by award of damages so that everybody seeking to live within the territory of Kenya, a county whose citizens have chosen to be led by the rule of law, gets to know, if one be otherwise under some illusion, that arbitrariness and or just impunity is not a virtue but a vice. Vice cannot be countenanced but must be curtailed and discouraged. I am saying all the foregoing because I have come to the conclusion that a violation of a right, due process and the law invite a reprieve or remedy to the violated."**

45. I am satisfied that the plaintiff is entitled to claim general damages and I hereby award him Kshs. 2,000,000/= as damages of unlawful eviction.

Loss of business"

46. While it would be the natural consequence that the plaintiff lost business due to what I have found to have been unlawful and wrongful locking up of his premises, such a loss when made quantifiable at the date of filling suit is in the nature of special damages. It ought to have been specifically pleaded and strictly proved. In this matter, the Plaint did not plead with particularity any figures either in the body of the plaint or in his prayers as to disclosed a claim for special damages. Considering that the Plaintiff's claim was based on alleged loss of

business earnings, it follows that a claim for loss of sales arising out of a breach of such a contract are in the nature of special damages which must not only be specifically pleaded but must also be strictly proved as well. Without having been specifically pleaded or proved, the Plaintiff's claim for loss of sales fails. 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 Mwanga Nandwa, KSM CACA 179 of 1995 (ur)***. In the latter case the Court was emphatic that:

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

6. Whether the counterclaim is awardable.

47. Rent is the consideration a tenant pays to the landlord for the enjoyment of the premises let. Rent is that due when the enjoyment persists. When possession is taken away the right to receive rent cannot be retained. That is what section 77, Land act provides. It says:-

> **"Unlawful eviction**
>
> **A lessee who is evicted from the whole or a part of the leased land or buildings, contrary to the express or implied terms and conditions of a lease, shall be immediately relieved of all obligation to pay any rent or other monies due under the lease or perform any of the covenants and conditions on the part of the lessee expressed or implied in the lease in respect of the land or buildings or part thereof from which the lessee has been so evicted".**

48. Having found that the Plaintiff was a controlled tenant who was constructively evicted it follows that the landlord cannot be entitled to rent for the duration the plaintiff was deprived of possession. The defendants counter-claim being based on rent entitlement cannot in fairness include rent for the period of unlawful dispossession. It must exclude the period of the dispossession from January 2015 to January 2016. The plaintiff is therefore relieved from the obligation for the payment of all the sums claimed as rent and service charge for the period of dispossession. Having found that the recalculated service charge was not due for the period before the premises were locked that sum is equally not due for recovery by the defendant.

49. In as much as no defence was filed to the counterclaim, it was upon the Defendant to prove its claim before the court by tendering proper accounting documents. In cross-examination DW1 admitted that the counterclaimed sum was incorrect and needed an adjustment.

50. It is not disputed that the plaintiff was in possession and occupation of the premises for the period for the uninterrupted period between January 2016 and April 2018 when he vacated, a period of 28 months. For that period the plaintiff cannot escape the obligation to pay. Calculate the sun due based on the prevailing rent as follows: -

> **29 x 41,508=Kshs. 1,203,732/=**

51. In the end I do enter judgment for the plaintiff for general damages for wrongful eviction while the defendant gets judgment for the unpaid rent. Judgment is accordingly entered as follows: -

> **a) For the plaintiff, Kshs. 2,000,000/= being general damages for unlawful and wrongful eviction with interest thereon at court rates from the date of this judgment till payment in full.**
>
> **b) For the defendant, Kshs. 1,203,732/= being the outstanding arrears of rent with interest thereon at court rates from the date of the counter-claim till payment in full.**
>
> **c) I consider both parties have equally succeeded for which reason I make an order that each party shall bear its own costs.**
>
> **Dated**, **signed** and **delivered** at **Mombasa** this **26th** day of **May 2020**

P J O OTIENO

JUDGE