



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 157 OF 2003

EDICK OMONDI ANYANGA T/A

STUART'S SUPERMARKET.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND BOARD.....1ST DEFENDANT

DIKEMWA ENTERPRISES LIMITED.2ND DEFENDANT

JUDGMENT

1. Edick Omondi Anyanga T/A Stuart's supermarket, the Plaintiff herein filed this suit against National Social Security Fund Board and Dikemwa Enterprises Ltd, the 1st and 2nd Defendants respectively vide the Further, Further Amended Plaintiff filed on 23rd June, 2016 in which he sought for judgment as follows: -

- a) Special damages of ksh.7,128,164.60.*
- b) General damages for loss of user and profits between 2nd July, 2002 to the date of judgment.*
- c) General damages for trespass on the Plaintiff's premises.*
- d) General damages for conversion.*
- e) Interest of (a), (b), (c) and (d) above.*
- f) Such further of other relieve as this Honourable Court may seem just.*
- g) Costs.*

2. The Defendants denied the Plaintiff's claim by filing the further amended Defence dated 14th July, 2009 together with a counter-claim.

3. When the suit came up for hearing, the Plaintiff and two witnesses testified in support of the claim.

4. The Defendants on their part summoned a single witness to testify in support of their defence.

5. It is the submissions of the Plaintiff that the Defendants wrongly and in breach of the lease agreement and without his consent trespassed onto and entered into the demised premises and placed locks on its doors thereby excluding and effectively evicting the Plaintiff from the premises.

6. It is also stated by the Plaintiff that the 2nd Defendant proclaimed the entire of the Plaintiff's goods thus locking in the premises substantial property belonging to the Plaintiff when no rent was due in arrears.

7. The Plaintiff also pleaded that the purported distress and eviction was illegal and unlawful since the Defendant had obtained no court orders to evict the Plaintiff.

8. In its Further Further Amended Plaintiff, the Plaintiff alluded that most of the items which had been seized by the Defendants had either been damaged or spoiled, lost and or expired to the extent that the Plaintiff could not carry on any business of running a supermarket.

9. It is for this reason that he avers that he was deprived of use and sales of its goods and projects hence the claim for both general and special damages.
10. It is the evidence of Anne Anyanga (PW1) and Edick Anyanga (PW2) that the Defendants unlawfully terminated the lease through unlawful eviction leading to the Plaintiff's immense loss.
11. PW1 stated in her evidence in chief that the Plaintiff operated a supermarket but fell in arrears of rent forcing the 1st Defendant to distress. It is her evidence that the 1st Defendant was required to obtain a court order authorizing it to distress for rent. PW1 produced numerous documents as exhibits in evidence in support of the Plaintiff's case.
12. PW1 further stated that the 1st Defendant allowed the Plaintiff to settle the outstanding rent by installments and that the Plaintiff was still in arrears of rent by the time the 1st Defendant instructed the 2nd Defendant to distress.
13. PW1 further stated that at the time of the eviction the value of the missing stock and the damaged equipment stood at Ksh.7,128,164/-.
14. PW2 said that when he visited the supermarket on the material date, he found goods strewn all over the place. He stated that he gave cheques to the 1st Defendant's Property Manager to settle outstanding rent.
15. PW2 also claimed that though he was reinstated as a tenant, the goods and equipment inside the premises worth Ksh.7,128,164/- were lost and damaged, thereof there was nothing to continue trading with.
16. PW2 too admitted that he was in arrears of rent at the material time. The Plaintiff further admitted that he received a letter from the 1st Defendant notifying him to settle the outstanding rent of Ksh.372,315/75.
17. The Plaintiff summoned one Isaiah Otieno Obiero (PW3), a certified Public Accountant to testify over the audit he conducted on the Plaintiff's business between the years of 1999 and 2001.
18. PW3 stated that the business made a net profit of Ksh.4,900,000/- and ksh.8.5 Million in the year 1999 and 2000 respectively. PW3 claimed that the Plaintiff's business was on an upward trend in making profits.
19. The defendants summoned Silas Ng'ela (DW1) to testify in support of their defence. DW1 told this court that the Plaintiff was distrained by the 2nd Defendant on the instructions of the 1st Defendant for arrears of rent in the sum of Ksh.482,584/98 as of November, 2002.
20. DW1 further confirmed that the Plaintiff's goods were removed from the demised premises on the instructions of the 1st Defendant but were later returned in compliance with a court order.
21. At the close of evidence, learned counsels appearing in this matter were invited to file and exchange written submission. I have considered both the oral and documentary evidence presented by both sides together with rival written submissions plus the authorities cited.
22. It is not in dispute that at the material time the relationship between the Plaintiff and the 1st Defendant was that of landlord and tenant as regulated by the letter of offer dated 21st May, 1998. In clause 5 of the letter of offer, the term of the lease was fixed at 6 years.
23. The **first** issue which commends itself for determination is **whether or not the distress and eviction of the Plaintiff was lawful.**
24. The Plaintiff is of the argument that he could only be evicted after the 1st Defendant had followed the laid down procedures for the termination of a tenancy. The Plaintiff pointed out that the usual procedure was to issue a notice under the provisions of Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 laws of Kenya so that if the tenant fails to file a reference, the landlord is required to file a civil suit for vacant possession.
25. The Plaintiff cited the case of **Gusii Mwalimu Investments Co. Ltd & 2 Others Versus Mwalimu Hotel Kisii Limited, [1995-1998]2EA 100.**
26. It was submitted that since the Plaintiff's eviction was done without a court order, it can be presumed the eviction was illegal.
27. The 1st Defendant is of the submission that it had a right to levy distress for rent over the Plaintiff's goods since the action was occasioned by the Plaintiff's inability to pay rent which stood at Ksh.558,345/75 as of 27th May, 2002.
28. Having considered the rival submission, this court takes the following view in this dispute. The notion that a landlord cannot levy distress for rent without first obtaining a court's or a Tribunal's order must be disabused. **Section 3 of the Distress for Rent Act**, expressly states as follows: -

“Subject to the provisions of this Act any other written law, any person having any rent or rent service in arrears and due upon a grant, lease demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the Common Law of England in a similar case.”

29. In the case of Raghavji Madhavji Vs. B M K Ogol Kisumu HCCC 122 of 1980 this court expressed itself inter alia: -

“.....The landlord’s right of distress for rent is a common law remedy available to the landlord, without legal process, to secure payment of rent by seizing his tenant’s goods and chattels upon the premises in respect of which the rent is due.”

30. The evidence presented before his court appear to show that the 1st Defendant followed the requisite procedure by issuing a notice upon the Plaintiff vide the letter dated 2nd April, 2002 in which the Defendant expressly stated that it was going to levy distress for rent against the Plaintiff after the expiry of 14 days.

31. Upon receipt of the aforesaid notice, the Plaintiff (PW2) approached the 1st Defendant to indulge him with time to settle the outstanding rent and was indeed allow up given upto 19th June, 2002. It would appear the Plaintiff proceeded to lock the premises after the expiry of the period given by 1st Defendant ostensibly to prevent the 1st Defendant from removing the goods from the suit premises.

32. The 2nd Defendant was therefore prompted to obtain break-in orders which enabled the 2nd Defendant break into the premises on 24th July, 2002.

33. In my view, the evidence tendered do not support the view that the 1st Defendant was hell-bent to evict the Plaintiff from the suit premises. In the end, I am satisfied that the 1st Defendant acted within the law in levying distress for rent against the Plaintiff.

34. The **second** issue which arose is **whether the Defendants are liable to the Plaintiff for conversion of the Plaintiff’s property**. It is the submission of the Plaintiff that the 1st Defendant took possession of the premises without first obtaining a court order and destroyed the Plaintiff’s property after breaking into the locked premises and that the Plaintiff could not continue running the business because some of the goods got expired, destroyed and or lost.

35. The Defendants are of the view that the claim is unsubstantiated. It was pointed out the Defendants that the Plaintiff failed to demonstrate that the 1st Defendant’s action to levy distress for rent falls under any of the forms of conversion.

36. I have already stated in the first issue that the 1st Defendant lawfully levied distress which action entails the carting away of the tenants property within the demised premises. The remedy of levying distress cannot, therefore, be regarded as one of the forms of conversion. I, therefore, find the Defendant not liable for conversion.

37. The **third** issue is **whether the Plaintiff is entitled to be paid general damages**. The Plaintiff submitted that the 1st Defendant admitted to mishandling the process of levying distress and in evicting the Plaintiff, therefore, it is bound to pay the Plaintiff damages as a consequence.

38. The 1st Defendant argued that the letter referred to by the Plaintiff cannot be construed to constitute an admission of liability on its part but the letter constitute privileged communication between the 1st Defendant and its then advocates. The 1st Defendant also pointed out that its erstwhile advocate was not authorized to share the letter with the Plaintiff.

39. With respect, I do not agree with the 1st Defendant’s assertion that the letter dated 21st February, 2003 should not have been given to the Plaintiff. It is apparent that the letter was copied to the Plaintiff, therefore it was intended to be disclosed to the Plaintiff.

40. However, the important relevant issue in my view is whether the aforesaid letter can be regarded as an admission. I have critically examined the letter and I am unable to take it as an admission. In the circumstances, I find the claim for general damages to be unavailable. The plaintiff failed to establish his claim.

41. The Plaintiff has also sought to be paid special damages and has heavily relied on the evidence of Isaiah Otieno Obiero (PW3), an auditor to establish this claim. According to the evidence of PW3, the Plaintiff’s business was on an upward growth.

42. I have carefully examined the audit report produced by PW3 and it is evident that the same is in respect of stock records of 7 days before distress was levied. There is no evidence that the Plaintiff took stock after the date distress was levied to ascertain the value of the goods distrained. With respect, I find no credible evidence proving the award of special damages claimed by the Plaintiffs namely missing/damaged stock and equipment. There is also no receipt or proof evidencing payment of Ksh.100,000/- as legal fees.

43. The question as to **whether the Plaintiff is entitled to the claim for loss of business** attracted serious arguments from the parties. The Plaintiff averred that he was able to show through the evidence of PW3 that his business was making an annual profit of ksh.2,200,000/-. He, therefore, claimed that his business would have earned a profit of Ksh.13,200,000/- within the lease period of 6 years.

44. The Defendants urged this court to find that the claim for loss of use and business falls within the realm of special damages which the Plaintiff failed to particularize nor prove on a balance of probabilities.

45. With respect, I agree with the Defendant’s submissions that the Plaintiff failed to specifically give the particulars of the claim and the attempt to use the audit report produced by PW3 to establish the claim cannot assist the plaintiff in the absence of the particulars.

46. The **final** issue is **whether or not the 1st Defendant proved its counter-claim**. In the Further Amended Defence dated 14th July, 2009, the 1st Defendant sought for inter alia: -

a) Kshs.1,198,697.13.

b) Increments on (a) above at Ksh.93,015/- per quarter from 2003 to the date of judgment.

c) Costs of this counter-claim.

d) Interest on (a), (b) and (c) above.

e) Such further reliefs as this Honourable Court deems fit and just to grant.

47. The Defendant's presented the evidence of DW1 in which he stated that the records held by the 1st Defendant indicated that the Plaintiff was in arrears of rent of Ksh.482,584/98 at the time of levying distress.

48. DW1 further stated that even after handing over the demised premises to the Plaintiff he still failed to open up the supermarket but instead opted to leave it locked.

49. It is the evidence of DW1 that the Plaintiff's action deprived the 1st Defendant the expected rental income and that as at November, 2003, the rent arrears due from the Plaintiff had accrued to ksh.1,198,697/13.

50. It was also stated by DW1, that at the material time, the Plaintiff had accrued arrears in service charge of Ksh.93,015/-.

51. In response to the evidence of DW1, the Plaintiff stated that the figures given by the 1st Defendant as arrears of rent kept on changing. The Plaintiff did not perse deny that he was in arrears of rent but what he appears to dispute is the actual figure of the outstanding rent.

52. Having considered both the documentary and oral evidence tendered by the 1st Defendant plus the written submissions, I am convinced that the 1st Defendant has proved on balance of probabilities the amount claimed in the counter-claim. Consequently, I enter judgment in favour of the 1st Defendant as prayed in the counter-claim.

53. In the end, the Plaintiff's suit is dismissed with costs to the 1st Defendant.

54. As regards the counter-claim, judgement is entered in favour of the 1st Defendant as against the Plaintiff as follows:

(i) Ksh.1,198,697/13.

(ii) The claim for Ksh.93,015/- as service charge is only given for the year 2003 since the lease was expected to lapse in 2004.

(iii) The aforesaid amount in (i) and (ii) above to attract interest at court rates from the date of judgment until the date of full payment.

(iv) The 1st Defendant to have costs of the suit and counter-claim.

Dated, signed and delivered at Nairobi this 28th day of February, 2019.

.....

J K SERGON

JUDGE

In The presence of

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant