



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.317 OF 2014

JACK & JILL SUPERMARKETS....PLAINTIFF

VERSUS

VICTOR MAINA NJUNJIRIDEFENDANT

JUDGMENT

By a plaint dated the 6th day of October, 2014, the plaintiff filed this suit against the defendant seeking the following orders;

- a. Special damages in the sum of Kshs.703,642,423.00
- b. General damages, exemplary and punitive damages
- c. Costs of the suit
- d. Interest on all sums due to the plaintiff
- e. Any other or further relief as this Honourable Court may deem fit and fair to grant.

The plaintiff avers that since the year 1988, he had been a tenant on parcel of land known as L.R. No. 209/869 (hereinafter called the suit premises) situated along Temple Road in Nairobi, where it had been carrying on business of wholesale and supermarket.

That in the year 2006, the defendant bought the suit premises from the previous owners, Ravinder Lakhamshi Shah and Nilesh Dayalji Shah, with all the tenants still in occupation including the plaintiff herein, who continued to be a protected tenant and who continuously and without fail fulfilled its obligations including but not limited to paying monthly rent to the defendant and to maintain the condition of the premises in a habitable state.

The plaintiff further avers that, the defendant failed in according it the quiet possession and peaceful enjoyment of the premises since the year 2006 to 2013 which period was associated with violence, threats, intimidation, harassment and embarrassment meted upon the plaintiff by the defendant in an attempt to evict it from the suit premises during which period, several suits were filed by the plaintiff in various courts, particularly the Business Premises Rent Tribunal.

That on the 23rd day of May 2013, the defendant and his agents invaded the plaintiff's business premises and demolished the walls, which resulted to extensive damage and facilitated looting of goods from the plaintiff's supermarket bringing the plaintiff's business to an abrupt end despite the fact that the plaintiff had obtained a temporary stay of execution of the orders that had been issued in favour of the defendant for the plaintiff to vacate the suit premises to facilitate repair of the same but for only a period of not more than three months.

The plaintiff contends that the defendant's acts and/or conduct leading to the demolition of the suit premises and forceful eviction of the plaintiff was extremely tortuous, it was trespass and gross conversion occasioning gross loss and injury to the plaintiff's business. The particulars of loss and damage, malice and those of special damages are enumerated in paragraph 31 of the plaint. Additionally, the plaintiff has sought general damages for the loss of invaluable and irreplaceable documents and records that were kept in the premises and which were ultimately destroyed, lost and/or stolen.

The defendant has denied the plaintiff's claim in the statement of defence filed in court on 4th day of November, 2013. In the said defence, the defendant admits inter alia that the plaintiff was his tenant on the suit premises to which he is the proprietor, and that the plaintiff was a protected tenant. He denies that he brought the suit premises with tenants in occupation carrying on business, that the plaintiff fulfilled its obligations as to paying rent or keeping the premises in a tenable condition. The defendant further denies invading the plaintiff's business premises, looting or facilitating. looting of the plaintiff's goods and contends that the action of entering the premises on the 23rd day of May 2013, was a lawful enforcement of the orders of the court. He denies that the plaintiff had any goods in the premises worth the amounts

stated in the plaint or any good will as claimed or any other sum at all. The particulars of damage and loss set out in the plaint are thus denied.

The defendant contends that the suit as filed constitutes a gross abuse of the process as the plaintiff has filed and/or constructively aided in filing of multiplicity of suits now pending in the High Court touching on the same subject matter. He further contends that the plaintiff's claim does not lie, for the manifest and unreasonable failure by the plaintiff to mitigate the losses appropriately or at all. The particulars of such failure are enumerated in paragraph 33 of the defence.

Further and without prejudice, it was contended that the plaintiff's repeated failure to vacate the premises even in the face of offer for alternative premises, amounts to unlawful and forceful take over of the defendant's property, in total breach of the constitution. He denies being liable to the plaintiff as claimed in the suit and has asked the court to dismiss the plaintiff's suit.

The plaintiff filed a reply to defence on 13th November, 2014 in which it denies that it failed in its obligation, or putting the premises in a good and tenable state and further asserts that the premises were in a habitable state albeit requiring non-major repairs and refurbishment to the structure which responsibility lay with the defendant who failed to comply with directives issued by the City Council of Nairobi, and court orders. The plaintiff denies that the defendant offered to grant it alternative premises and avers that its occupation of the suit premises was lawful and could not amount to unlawful and/or forceful takeover of the defendant's property. The plaintiff prayed for judgment as per the plaint.

At the hearing, one Schen Ahmed Nooran gave evidence as PW1. He identified his witness statement filed in court on 10th October, 2014 and applied for it to be adopted as his evidence in chief. He also sought to rely on his list of document filed on 10th October, 2014, supplementary list of documents filed on 6th February 2015 and a further supplementary list filed on the 21st September, 2015. He told the court that he is the Chairman of the plaintiff and that the plaintiff had since 1988 run a supermarket business on the suit premises which business retailed all manner of goods some of which have a low and high turnover in terms of sale. That the defendant is the owner of the suit premises having acquired the same from the previous owners with all the tenants including the plaintiff, still in occupation and carrying on their respective businesses.

That since October, 2007 the defendant and the plaintiff were embroiled in a landlord/tenant disputes culminating in the violent eviction of the plaintiff from the suit premises as well as malicious destruction and looting of the plaintiff's property. It was his testimony that the genesis of the dispute was the issuance by the defendant, upon the plaintiff and other tenants to the premises a notice to terminate or alter the terms of the tenancy in August 2007. It purported to terminate the tenancy on the grounds that the defendant was desirous of building and constructing a modern building on the suit premises and therefore wanted to demolish the existing building. That the plaintiff successfully challenged the said notices and the same was found to be defective and was struck out and though the defendant filed an Appeal to the High Court in Civil Appeal No. 570 of 2008 Viktar Maina Vs. Jack and Jill Supermarket, the defendant subsequently withdrew the said Appeal.

It was his further evidence that on or about the 30th October, 2008, the defendant once again served the plaintiff with yet another notice to terminate or alter the terms of tenancy dated 27th October 2008 in which he sought termination of the tenancy on the ground that the defendant intended to carry out substantial work of construction on the suit premises and he could not do so without obtaining possession of the premises. That the plaintiff again challenged the notice and though the Business Premises Rent Tribunal declined to strike out the same, the plaintiff appealed to the High Court in Civil Appeal No. 710/2009 whereby the High Court upheld the Appeal and struck out the said notice.

The witness stated that even before the reference could be heard, the plaintiff was served with notices Nos. 5445 and 5446 from the city council which, according to him were issued at the instance of the defendant so that he could get an opportunity to unlawfully evict the plaintiff and other tenants from the suit premises. That the plaintiff in response to the said notices, moved to the High Court in judicial Review Cause No. 185/2009 seeking to quash the said notices, and the High Court on 27th March, 2009 issued a stay order against the city council and prohibited the eviction, demolition of the premises.

That on the 21st day of March, 2009 the defendant had moved into the premises in the company of his servants and/or agents and had started demolishing the suit premises, with a view to evicting the plaintiff and other tenants therein following which, they filed various suits in the BPRT and the Tribunal on 3rd April 2009 suspended the monthly rent payable to the plaintiff as the premises had been extensively damaged and its business severely disrupted and on 7th May 2009, the Tribunal issued an order prohibiting the defendant from setting foot on the premises and further harassing the plaintiff.

The witness further testified that on the basis of the defendant's conduct and/or behaviour, of 21st day of March, 2009, whereby he had moved into the premises in the company of his agent and/or servants, the plaintiff lodged a complaint with the police and he was arrested and charged which case was still pending by the time this matter was heard that is criminal case No. 2228 of 2009 (R. Vs- Victor Maina & 4 others) That on 16th February 2011 the High Court in Judicial Review Cause No. 185/2009 (Jack and Jill Supermarket Limited -Vs- The Principal Magistrate's City Court Nairobi & 2 others found the defendant in contempt of court orders and fined him kshs.200,000/- or imprisonment for a period of four (4) months in default.

That, still undeterred in the relentless pursuit to evict the plaintiff, the defendant on 25th March 2013 filed civil suit No. 1589 of 2013, at the Chief Magistrate's Court Milimani seeking eviction of the plaintiff from the suit premises. That the court ruled in favour of the defendant and on 21st May 2013 the court ordered the plaintiff to temporarily vacate the premises for a period not exceeding three months to facilitate repairs. The court gave the plaintiff leave to Appeal against the said ruling and granted the plaintiff 7 days within which to vacate the premises.

He further testified that on the 23rd May 2013, it obtained an order staying execution of the orders issued in civil suit No. 1589 of 2013 in which the court had ordered the plaintiff to vacate the suit premises but on the same day, the defendant and his agents invaded the plaintiff's

business premises, demolished the walls of the building using a bulldozer which demolition caused extensive damage to the plaintiff's property and further facilitated the extensive looting of goods from the plaintiff's supermarket.

He testified that the plaintiff was not able to salvage anything. That the defendant proceeded to demolish the whole building to the ground effectively sounding the death knell to the plaintiff's business that had run successfully for 25 years. That as a consequence, the plaintiff has been threatened with law suits by its suppliers who are demanding payment for the goods supplied to the plaintiff on credit. That the defendant's action has taken a toll on the plaintiff's employees who have lost jobs and a source of making a living and he too, lost a source of income and have over the years had to endure the mental anguish and psychological torture of having to deal with the defendant.

The plaintiff's second witness was Robert Kadogo Karamba. He identified his statement and applied for it to be adopted as his evidence in chief. He told the court that he is a photographer based in Nairobi. It was his testimony that on the 23rd May 2013 he was telephoned by Mr. Noor of Jack and Jill Supermarket Limited who requested him to go to the plaintiff's premises and take photos and videos of a possible imminent eviction and demolition of the supermarket.

That he arrived at the scene at about 3.30p.m. and immediately noticed two caterpillar tractors and one of them was in the process of digging a trench across the entrance and the adjacent wall to the supermarket. He started taking photos and shooting videos. The caterpillar had pulled out the doors of the entrance of the supermarket and there was a crowd of onlookers who gained their way to the supermarket and started looting goods from therein and by this time, the caterpillar had destroyed a significant portion of the wall of the premises leaving a gap in the wall that granted unfettered access to all and the sundry.

It was his testimony that when he left the scene at 7.00p.m, people were still looting and when he passed there again at midnight, looting was still going on and it continued until the following day.

Samuel Njihia Gachau testified as PW3. He told the court that he is an accountant by profession with CPJ and associate which is an audit firm where he had worked for seven (7) years by then. In his testimony he stated that when the supermarket was demolished, they were called to assess the loss that the plaintiff suffered. That CPJ had earlier been appointed by the plaintiff to do the accounts for the years between 2009-2010 and that he was responsible for preparation of financial statements of the plaintiff from the year ended 30th September 2010 upto the year 2012. He referred to the accountant certificate which they issued, to confirm the loss that was suffered by the plaintiff, following the destruction that took place on the 23rd May, 2013.

He stated that they could do stock takes monthly and according to him, the value of the stock was ranging between 80-90million. He stated that the last stock take was done on 30th April 2013 and that they used to attend whenever the plaintiff was taking audits to witness and after the conclusion of the physical stock count, they could confirm the stock shifts with physical stock counts. That in coming up with the loss of stock, they used a back up of stocks of the plaintiff and they came up with a total figure of Kshs.86,212,024.

In addition to loss of stock, he gave evidence on loss of property, plant, and equipment that had been installed by the plaintiff in the premises which, he stated was kshs.46,199,788 and not the Kshs.49,199,788 as claimed in the plaint. Loss of profit mark up on the stock in hand, loss of profit for 5 years, cash loss, goodwill, loss of pre-paid expenses and loss of valuable documents. I propose to deal with his detailed evidence, in the analysis of the evidence, item by item.

The Plaintiff's fourth witness was Benson Odala Thomas who testified as PW4. He stated that he was an I.T. technician working with the defendant at the material time. He adopted his statement as his evidence in chief. He stated that on 23rd May 2013, he reported to work at 7.45a.m. and it was business as usual. That at around 4p.m. while at work, he heard a loud bang from the front side of the supermarket and a few minutes later, there was a lot of commotion, shouting and screams from outside the supermarket. That he, together with other employees, ran outside to check what was happening only to find a caterpillar had struck the supermarket and had destroyed a significant portion of the wall of the plaintiff's premises.

That the caterpillar proceeded to demolish the plaintiff's premises while goons and hooligans entered into the premises and began demolishing the supermarket using all sorts of crude weapon including axes and hammers. As the demolition went on, passers-by and idlers took the opportunity to loot goods from the premises including the computers.

The defendant gave evidence as the sole defence witness. He adopted his witness statement dated 3rd November, 2014 and filed in court the same day. It was his evidence that he is the registered proprietor of the property known as L.R. No. 209/869 which he acquired in the year 2006. He testified that the plaintiff together with other 5 tenants were in occupation of the suit premises when he acquired the same and that the plaintiff was a protected tenant and was obligated to pay rent monthly and to maintain the suit premises in a good and habitable state which duty he failed to do which resulted to the issuance by public health department of City Council of Nairobi, of notices nos. 5445 and 5446 which compelled the defendant to undertake substantial repairs on the suit premises but he was unable to comply with the notices.

The defendant stated that on the 23rd February, 2009 the city planning department of City Council of Nairobi gave him authority to not only repair the premises but was issued with a hoarding and scaffolding licence following which, he obtained the assistance of police officers to ensure that the exercise was carried out peacefully. Accordingly, on the 21st March 2009 he sought to re-enter the premises with a view to erecting a hoarding thus complying with the aforesaid notices and therefore as at 24th March 2009 his actions were perfectly lawful. That he carried out substantial repair works and reconstruction on the premises previously occupied by the 5 other tenants, save for the shop occupied by the plaintiff as there existed injunctive orders issued against him in favour of the plaintiff. He stated that sometimes on 7th August 2012, due to the deplorable state of the premises, the City Council of Nairobi issued him with another notice to undertake further repairs on the premises which he failed to comply with leading to his arrest and subsequent prosecution in case No. 599A of 2012 for failure to comply with the notice. That the learned magistrate made an order for the inspection of the premises following which the structural Engineer concluded that the said structure had an alarming propensity to collapse any time, to the detriment of the general public. He recommended the immediate evacuation in order to obviate loss of lives and property and closure of the suit premises pursuant to section 120(9) of the public health Act cap 242 laws of Kenya. That in consideration to the recommendation made in the said report, Hon. Omido issued a closure

order on 1st day of March 2013 under the provisions of section 120(9) of the public Health Act and gave 72 hours within which to secure the entire premises by hoarding and/or fencing the same.

The defendant further testified that following the closure order, he moved to the Chief Magistrate's Court in Civil Case No. 1589/2013 seeking assistance to ensure compliance with the said order when the court directed the plaintiff to vacate the premises temporarily for a period not exceeding three months, to enable the defendant comply with the notices issued by the public health department. That since the 30 days given by Hon. Omido were due to lapse on 24th May 2013, and being apprehensive that he would be committed to civil jail for non-compliance, he fervently set out to fence and/or hoard the suit premises. On the 23rd May 2013, he did so in lawful enforcement of the orders of the court and he is therefore not liable for the purported loss and damage allegedly suffered by the plaintiff.

The plaintiff filed submissions on the 18th April 2018 in which he summarized the evidence on record as adduced by the parties and their witnesses. Counsel for the plaintiff set out twelve issues for determination which he addressed under four headings which I wish to summarise as follows:-

a. whether the plaintiff complied with its obligations under the tenancy.

It was submitted that save for instances when the BPRT suspended rent payable to the defendant, the plaintiff diligently observed its duty to pay rent. That the defendant did not produce any evidence of demand of unpaid rent. In any event, the issue of non-payment of rent is immaterial as the defendant has not made a counter-claim for unpaid rent. It was further submitted that the notices issued by the City Council addressed structural defects of the entire building owned by the defendant and did not specifically identify any defects relating to the suit premises occupied by the plaintiff, which were in a separate wing.

That though the defendant claims that, it is the plaintiff who barred him from effecting repairs, the plaintiff averred that upon being issued with notices 5445 and 5446 the defendant neglected to take any steps to effect the repairs as directed which resulted in the defendant being convicted and it was only after the said conviction that the defendant applied and obtained a hoarding licence and sought assistance from the police to do so, but there is no evidence as whether he hired the police officers or not. The plaintiff submitted that the defendant had no intention of repairing the building but at all times sought to demolish so that he may erect new premises.

b. Whether the defendant acted lawfully in re-entering the suit premises on 23rd May 2013.

The plaintiff averred that the defendant upon being issued with orders to secure and hoard the building that accommodated the suit premises by the City Court in Criminal Case Number 599A/2012 instead of seeking a hoarding licence opted to seek orders in Civil Suit No. 1589 of 2013 which court, declined to issue eviction orders but ordered the plaintiff to temporarily vacate the premises for 90 days to allow the defendant to make repairs. The court gave the plaintiff seven days to vacate which period had not lapsed by 23rd of May 2013.

c. Whether the defendant illegally evicted the plaintiff from the suit premises, looted or facilitated looting of the plaintiff's goods on 23/5/2013

The plaintiff submitted that the defendant's unlawful re-entry into the suit premises was tantamount to unlawful eviction. That by forcefully removing the doors to the suit premises the defendant's intention was to create an inhabitable environment that would compel the plaintiff to abandon the premises.

That, despite the court awarding the plaintiff 7 days to vacate, the defendant paid no heed to the court orders, he harassed the plaintiff by requiring it to move out immediately as evidenced by the letter issued by the defendant dated the 21st May 2013. The plaintiff relied on the case of **Barkett Vs. Brucato (Civil Appeal No. 15517- First Dist, Div. One. Dec. 28,1953)** where the court held that the breach of the covenant of quiet enjoyment accomplished by a series of intentionally announcing acts designed to compel the tenant to vacate, constituted the tort of willful wrongful eviction. The plaintiff also relied on the case of **Azim Sameja t/a Business 2000 Vs. Lakhamsi Virpal Shah & 5 others (2016) eKLR** where the court found that the destruction of the premises occupied by the tenant by the Landlord using a bulldozer constituted an illegal eviction. The plaintiff herein urged the court to make a finding that the defendant did illegally evict the plaintiff.

The plaintiff further submitted that but for the defendant's action of demolishing sections of the suit premises, the wanton looting and destruction of its goods and equipment would not have occurred. That the looting was the direct consequence of the defendant's aforesaid actions since the looters took advantage of the stripped partially demolished and gaping countenance of the plaintiff's supermarket and took away goods and assets.

On whether the plaintiff suffered loss and damage, counsel submitted that the plaintiff being a protected tenant who was entitled to peaceful and quiet possession of the suit premises, the defendant violated its rights by re-entering the premises without lawful authority and willfully destroyed the premises and therefore, the plaintiff is entitled to general damages for the tortious action of the defendant. The plaintiff relied on the case of **Titus Gatitu Njau -Vs- Municipal Council of Eldoret (2015) eKLR at paragraph 22** where the court awarded general damages in the sum of Kshs.500,000/- for trespass in the case of demolition of the plaintiff's premises.

The plaintiff urged the court to award exemplary damages and relied on the case of **Aim Sameja t/a 200 Vs. Lakhamsi Vipral Shah and 5 others** and that of **Gusii Mwalimu Investments Limited & others Vs. Mwalimu Hotel Kisii limited CA No. 160 of 1995 (UR)** and urged the court to award Kshs.15million in exemplary damages.

The plaintiff submitted that the defendant's conduct went beyond the mere negligence and rose to the level of recklessness and willful negligence and averred that all the five requirements for the tort of negligence have been met to wit: the duty of care, breach of the duty of

care, damage, casual connection between the defendant's conduct and the damage and the particular kind of damage not being remote.

On special damages, the court was asked to consider the Accountant's/ Auditor's report and certificate as well as the financial statements and management Accounts. The plaintiff asked the court to proceed and assess the special damages on the basis of report supplied by PW3 noting that he had intimate knowledge of the plaintiff's business having been the audit manager for three years and also the fact that the defence having not offered their own expert to rebut or otherwise challenge PW3's report.

The defendant filed his submissions on the 10th may 2018 and identified ten (10) issues for determination. The defendant started by bringing to the attention of the court several incidents in our country that have marked certain relations between the landlords and tenants and have led to painful loss of lives and property; The defendant listed several buildings that have collapsed between 2011 and 2016 and invited the court to have regard to the said incidents even if, only, by way of judicial notice.

The defendant submitted that the suit premises had been condemned in criminal case No. 599A/2012 because it was in a bad state and posed danger to the general public. That, the tenant never prepared any contradictory structural report on the building. That the order issued on 25/4/2013 required the defendant to comply with the closing order of 1st March, 2013 and secure the premises within 30 days from 25th April, 2013. That by virtue of that order, the plaintiff was in contempt of court and was the author of its own misfortunes by his failure to vacate the premises before the expiry of the duration given in the order and that the plaintiff did not appeal against the closure order.

The defendant further submitted that there is no evidence placed before the court to link the defendant with the order to condemn the building.

The defendant argued that the plaintiff was responsible for wastage of the building in that, on various instances, the plaintiff refused to grant him entry into the premises to effect the necessary repairs despite the various notices that were issued by Nairobi City Council.

On whether the plaintiff has suffered loss to the tune of Kshs.703,642,423 or at all, the defendant averred that liability of the defendant has not been proven but without prejudice to the foregoing, the court was asked to consider the approach of the courts on the standard of proof in respect of special damages. The defendant, relied on the cases of **Hahn Vs. Singh (1985) KLR 716**, **Ryce Motors Limited & Another Vs. Elas Muroki, Civil Appeal No. 119/1995** and that of **Zachariah Waweru Thumbi Vs. Samuel Njoroge Thuku Civil Appeal No. 445/2003**. The defendant considered the various heads claimed under special damages and submitted that special damages were not pleaded and proven as required by the law.

On whether the plaintiff took reasonable steps to mitigate his loss, the defendant relied on the case of **African Highland Product Limited Vs. John Kisomo, Civil Appeal No. 264/1999** where the court stated:

“It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues and he cannot claim any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract, or tort, and he is then bound to act as best he may, not only in his own interest but also in those of the defendant. He is however, under no obligation to injure himself, his character, his business, or his property; to reduce the damages payable by the wrongdoer. He need not spend money to enable him minimize the damages, or embark on dubious litigation. The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendants.

The defendant thus submitted that the plaintiff if it suffered loss, was under an obligation to mitigate the losses, if any, having been aware of the orders issued by Hon. Omido in Cr. 599A/2012 and considering the fact that the defendant had offered it alternative premises which the plaintiff flatly rejected.

On general damages the defendant contended that the plaintiff is not entitled to any.

The plaintiff filed a reply to the defendant's submissions on the 11th June 2018. He averred that the defendant in his submissions introduced new evidence that was not produced at the hearing, being mention of an Audit Report of buildings that collapsed between 2011 and 2016. The plaintiff argued that new evidence cannot be produced after the close of pleadings, without the leave of the court, as that would not only be irregular but such evidence if admitted would be greatly prejudicial to the plaintiff who has not had an opportunity to test and counter the same.

With regards to the mitigation of damages, it was submitted that; the plaintiff could not take any action when it was unaware of the court ruling delivered in Cr. Case No. 599A of 2012 as it was not a party to that case and it was not served with the order arising from the said ruling. That the plaintiff was only made aware of the order, when the defendant filed civil suit number 1589 of 2014 which it vigorously defended and challenged the subsequent unfavourable ruling and in the process obtained an order which meant that it did not have to more until the Appeal was determined and therefore it was lawfully in the premises.

The court has carefully considered the pleadings as filed, the evidence on record, the exhibits as produced and the submissions together with the authorities relied on. From the analysis of the evidence as set out hereinabove, I consider the following to be issues for determination.

1. whether the public health Department of the City Council of Nairobi (as it then was) condemned the suit premises and if so, if it was done at the instance of the defendant.
2. who between the plaintiff and/or the defendant was responsible for the neglect and wastage of the suit premises.

3. whether the defendant illegally evicted the plaintiff from the suit premises
4. whether the plaintiff ignored the orders of the court to vacate the suit premises
5. whether the plaintiff suffered loss and damage as claimed in the plaint, if at all.
6. whether the plaintiff is entitled to the reliefs sought
7. Who should bear the costs of the suit?

Before I proceed to consider the issues identified hereinabove, it is not in dispute that the plaintiff was a tenant of the defendant in the suit premises from the year 2006, when he acquired land Parcel L.R. 209/809 from the previous registered owners and at the material time, the plaintiff was in occupation of the premises and was carrying on the business of a supermarket namely Jack and Jill Supermarket Limited. There were other tenants in the premises but we are not concerned about those because they are not parties to this case. Upon purchase of the suit premises, the plaintiff and the defendant herein bore the responsibility and enjoyed rights and benefits respectively accruing from the Landlord/tenant relationship.

From the pleadings and the evidence on record, it is clear that from the word go, the relationship between the two parties herein was never smooth and it was marked by hostility and mistrust which culminated into filing of numerous cases that saw the parties engaged in litigation a better part of their time during the currency of the tenancy until the 23rd day of May 2013 when their legal relationship came to an abrupt and unfortunate end culminating to filing of the matter herein in which the plaintiff blamed the defendant for the loss that it suffered as a consequence of what it alleges was an illegal eviction. It will be noted that I have deliberately set out in great detail the evidence of PW1, who is the director of the plaintiff and that of DW1 (the defendant) so that the long history of the dispute herein can come out clearly as it will come in handy when considering some of the issues for determination.

On the first issue, the plaintiff produced notices that were issued by Nairobi City Council being notices 5445 and 5446 produced and marked as plaintiff's exhibit 5 and 6 respectively. The notices address structural defects of the entire building owned by the defendant part of which, was occupied by the plaintiff as the suit premises. As correctly noted by the plaintiff, the notices did not specifically identify any defects relating to the premises occupied by the plaintiff noting that the building was occupied by other tenants apart from the plaintiff. The plaintiff has referred to ruling No. 2 in Tribunal Case No. 357, 358, 359, 360, 361, 362 and 363 of 2009 (Jack & Jill Supermarkets Limited Vs. Victor Maina Ngunjiri. In that case, the Chairman of BPRT visited the suit premises and made an observation that, the demolition of the partitioning wall between the premises adjacent to the plaintiff could not have weakened the building occupied by the plaintiff. She also observed that there were no cracks on the external walls of Jack and Jill Supermarket (the plaintiff herein).

According to the defendant, the city court in Criminal Case Number 599A of 2012, pursuant to the provisions of section 120(9) of the Public Health Act, issued a closing order prohibiting the use of the premises until further orders of the court. The defendant who was the accused in that case was ordered to secure the entire premises by fencing the entire area and in any event, within 72 hours from the date of the ruling, which was on 1st March 2013. This court has perused the said ruling and it's true that a closure order was issued as stated above. What is apparent is that the plaintiff was not a party to this case and there is no indication as to whether he was served with the court order and/or notified of its existence. The defendant alleges that the plaintiff was made aware of the same in good time which the plaintiff denies and avers that it became aware of the same when civil case 1589/2012 was filed and which it defended as the defendant was seeking its eviction. In view of the two versions given by the parties herein, the court wishes to make the following observations:

- a. The ruling in 599A/2012 was delivered on 1st March 2013.
- b. The defendant was given 72 hours to fence the entire area including the suit premises
- c. The defendant did not comply with the order within the stipulated period of 72 hours.
- d. Time within which to comply was extended by another 30 days to 28/5/2013 from 25th April 2013 when the order for extension was given.

What is not clear is whether the plaintiff was served with that order or not. The plaintiff's evidence is that it learnt of the existence of the order when civil case No. 1389/2012 was ongoing and in the said suit he was given 7 days to vacate. None of the parties have offered any useful evidence to the court to help it determine the exact date when the plaintiff became aware of the order. In the absence of such evidence, the court finds that though the suit premises were ordered closed due to the poor state they were in, the plaintiff was not made aware of the order until it was too late in the day, and shortly thereafter, he obtained a seven days stay order and it is within those 7 days that the premises were demolished.

The defendant on his part contended that he gave a notice to the plaintiff to remove and/or secure his goods to enable the defendant enforce the orders issued by Hon. Obulutsa and that of Hon. Mr. Omido. This was done vide a letter dated 21st May, 2013 by the defendant to the plaintiff, the reference being "Notice to Remove/Secure goods" and marked "hand delivery". A clear reading of that letter shows that the plaintiff had an option of removing or securing the goods that were in the demised premises. The plaintiff denied having received that letter. Secondly, the plaintiff had the option of continuing to stay on and secure the goods. It is worth noting that the defendant did not tell the court the time the letter was delivered to the plaintiff, if at all. The plaintiff denied having been served with the said letter. Even assuming that the letter was delivered to the plaintiff, it was given only one day to either remove or secure the goods. Considering that this was a supermarket that had stock in it, one day would not have been sufficient for the plaintiff to either remove or secure the goods. The notice was unreasonably short. It is also important to note that one of the reasons given in the notice was to enable the defendant to enforce the orders of Hon. Obulutsa.

Looking at Hon. Obulutsa's order, it was issued on the 21st May 2013 and on the same date, the plaintiff who was the defendant in the matter before Hon. Obulutsa was given 7 days to vacate to enable the defendant herein to repair the suit premises. In the suit before Hon. Obulutsa, the defendant herein had sought eviction orders against the plaintiff, which therefore means that with the stay given by Hon. Obulutsa, the plaintiff was to continue enjoying the premises until the said period had lapsed. Further to this, the plaintiff moved to High Court and obtained orders staying Hon. Obulutsa's orders. The same was given on 23rd day May 2013 and issued on 24th May, 2013 in Civil Appeal No. 266 of 2017. It is not clear whether the order was served upon the defendant herein but given that it was issued on 24th May 2013, there is a high possibility that, it was not served on him at least not on 23rd May 2013 when the said demolition is said to have been done. But the order of the High Court notwithstanding, the order by Hon. Obulutsa was in force and the defendant was aware of it.

It is important for this court to comment on the orders issued by Hon. Omido and those by Hon. Obulutsa. The two orders were in force at the same time, that is to say, as at 23rd May 2013. Hon. Omido's order had been issued earlier and it had directed the defendant to secure by hoarding/fencing, the entire premises. The order had been issued on 1st March 2013 but it was extended until the 28th May 2013. That order did not direct the plaintiff to move out of the premises. In civil suit 1589/2013, the substantive order sought therein was for eviction and though the court ordered the plaintiff to move out of the premises albeit temporarily, the court gave the plaintiff a reprieve of seven (7) days within which to do so. As I already pointed out, the letter dated 21st May 2013 gave the plaintiff only one day to remove or secure his goods.

Who then between the plaintiff and the defendant was responsible for the neglect and wastage of the suit premises. As noted elsewhere in this judgment, the relationship between the plaintiff and the defendant was hostile from the word go with one party blaming the other for the wastage of the suit premises. The record will show that the plaintiff at some point had been given permission by the BPRT to repair the premises and recover the money from the rent. There is no evidence that this was done. It is noted that from 15th December 2009 to 3rd August, 2012 the defendant did not have access to the premises having been so restrained by an order issued by the Business Premises Tribunal in case number 791/2008.

The record will show that on the 23rd February 2009 the defendant was given authority by the then City Council of Nairobi to repair the premises and the same authority was valid for 3 months. To enable him undertake the repairs, he was issued with a hoarding order, vide a letter dated 25th February, 2009. In preparation of the said repair, he applied for security by way of private hire of police officers on the 19th March 2009 but he could not repair because shortly thereafter, an order was issued preventing him from accessing the suit premises which order was in force until August 2012. That was a period of three years which by any standard was not short and during which time the suit premises must have deteriorated to a great extent. Even if the defendant had wanted to repair the premises he could not have done so in the presence of the court order aforesaid.

Thereafter, when the defendant moved into the premises to repair the same, the plaintiff went to court in Tribunal Case No. 359 of 2009 and on 10th August, 2012 another order was issued against the defendant to keep of the plaintiff's premises. Though the plaintiff contended that the defendant was found guilty for contempt of court in J.R. 185 of 2009 on 6th February 2011, the defendant stated that he appealed against that order and by the time this matter was heard, the Appeal had not been determined.

On record are two notices being Nos. 5445 and 5446 issued by the City Council of Nairobi to the defendant requiring him to repair the demolished premises. As evidenced by the order issue in J.R. Misc. Appl. 185/2009, the defendant was unable to comply with that order because the plaintiff moved to court for leave to quash the aforesaid notices. These notices were issued in the year 2008 shortly after the defendant purchased the suit premises. This therefore, means that as at the time he purchased the same, they were not in a good state of repair. The events that happened thereafter which involved multiple cases against the defendant could not have made it possible for him to repair the premises. He testified that the tenants who were occupying the premises ganged up against him and every time he wanted to enter the premises for repair, they became hostile to him. This is supported by his letter asking for police officers to offer him protection. The plaintiff did also not make it easy for the landlord to repair the premises. It did not offer a conducive environment to enable him do so, instead, it kept him busy with endless litigation.

On whether the defendant illegally evicted the plaintiff from the suit premises, this court has already observed that there were two orders in force as at 23rd May 2013. The defendant moved in to enforce the orders issued by Hon. Omido to hoard and fence the entire premises. The defendant has argued that the plaintiff ought to have commenced vacation of the suit premises on the 21st May 2013, being the commencement of the 7 days period granted by Hon. Obulutsa. This court begs to differ with that assertion by the defendant. According to the order, the plaintiff had 7 clear days within which to vacate the premises, it was within his discretion to do so on the first or the last day. The defendant ought to have waited until the end of the 7th day from 21st May 2013. To the contrary, he entered the premises on 23rd May 2013, enforcing the court order to hoard the suit premises and in the process, he interfered with the walls of the premises which caused damages and loss to the plaintiff. The plaintiff cannot be said to have ignored orders to vacate as the same had been stayed by Hon. Obulutsa by seven (7) days which period had not lapsed when the defendant moved in. The court therefore finds that the defendant was liable for the damage suffered by the plaintiff.

The plaintiff has claimed damages under various heads as stated in paragraph one of this judgment. The court shall consider them under three categories.

(a) Special damages

Under this head, a sum of Ksh.703,642.423.00cts. has been claimed. The same is pleaded in paragraph 32 of the plaint. It has been claimed under 10 different categories:

A. Loss of stock: This is the stock that is said to have been in the premises as at 23rd May, 2013. A sum of Kshs.86,249,950 has been claimed. This has been claimed on the basis that the goods of the plaintiff were set to be sold at a profit and thus the plaintiff was deprived from realizing that profit following the looting and destruction of its property. The plaintiff has relied on a text from MC Gregor on Damages, 15th edition in which the court stated;

“where the plaintiff’s goods have been damaged he may be allowed damages for loss of profits, or where no specific profit can be shown, he may be awarded damages for general loss of use, or in default an award of interest may be given; similarly, where goods have been destroyed, successful claims have ranged from damages for loss of profits to awards on interest”

In support of special damages, the plaintiff relied on the evidence of PW3, one Samuel Njihia Gachau. He told the court that he is a certified accountant working with CPJ & Associates at the material time. He had worked for the said company for 7 years and the same is an audit firm.

The company was appointed by the plaintiff to do the accounts for the years between 2009-2010. He was responsible for preparation of financial statements of the plaintiff. After preparing the accounts, the firm issued accountant Report/Certificate to the plaintiff which has detailed the loss by the plaintiff that occurred on the 23rd May, 2013. In support of loss of stock, he produced the documents on pages 16-45 of the plaintiff’s supplementary bundle of documents which is stock movement schedules as at 30th April, 2013. He stated that the document is a stock sheet taken from their back-up. It was his evidence that they could do stock taking monthly and it ranged between 80-90 million. They based the figure on the stock that was there as at 30th April, 2013.

Looking at the said documents, they set out an inventory at cost of various goods, the quantities, pieces, cost per unit and the total cost. Apart from itemizing them, there is no evidence before the court to show that the goods were in the supermarket as at 23rd May, 2013. It was not enough for the plaintiff to just list them without any accompanying documents to prove their existence at the material time. Though PW3 stated that they obtained the list from their back-up of stocks, nothing was shown to the court to support that back-up. It was just the plaintiff’ and PW3’s words which are not sufficient to prove the claim, being a special damage claim.

(b) Loss of property, plant and equipment installed by the plaintiff

These are said to be fixed assets that the plaintiff lost on the 23rd May 2013. A total of Kshs.49,199,788 is claimed under this head. This is supported by the documents on pages 46-47 of the supplementary lists of documents filed on 9th February 2015. He stated that the amount claimed is Kshs.46,199,788 and not Kshs.49,199,788/-. It was his evidence that when they did the verification a lot of invoices and delivery notes had been lost in which case, they look at how they could assess the loss based on accounting policy, by getting the replacement costs from the suppliers. They determine the value by getting the plaintiffs to get quotations from the suppliers through proforma invoices. The documents are on pages 48-63 of the supplementary list. The court has perused those documents. They are all invoices and quotations from different suppliers. It is unfortunate that those documents were not supported by receipts. The claim is for special damages and in absence of receipts, the court cannot make any award under this head.

(c) Loss of building improvements and major repairs.

A sum of Kenya shillings 56,502,053 is claimed under this head. It is said to be for floor tiles, partitions and wall decorations. It was the evidence of PW2 that they liaised with the suppliers of the plaintiffs to give them the figures. The supporting documents are found on pages 65-79 of the supplementary list. The documents are all quotations and invoices from different suppliers save for one receipt from Unit Metal Fabricators for steel doors and aluminum locks plus labour costs all amounting to Kshs.1,508,000/-. It is unfortunate that the other amounts are not supported by receipts. The court can only award a sum of Kshs.1,508,000/- under this head.

(d) Salaries to employees from 23rd May 2013 to 30th April 2014.

It is pleaded that the employees were to be paid by the plaintiff from the profits of business, notwithstanding the demolition. A total of Kshs.10,873,740 is claimed under this head. PW3 stated that they had to be compensated for the dismissal which was not planned. This is captured on pages 80 and 81 of the supplementary list. A list of names, ID nos; NSSF Nos, gross salary and years worked is listed down.

As submitted by the defendant, no NSSF or NHIF or PAYE returns were produced by the defendant. No contracts of employment to authenticate the salary payments to any of the alleged employees were produced. The defendant relied on the case of **Johnson Mugwe Wanganga V. Joseph Nyaga Karingi (Civil Appeal No. 4/2011)** and argued that the damage is too remote and it has not been shown that the said employees, if at all, were paid by the plaintiff. This claim therefore fails.

(e) Redundancy payment

A total of Kshs.7,415,364 has been claimed under this head. The documents relied on are on pages 81 and 82 of the supplementary list. Again, with due respect to counsel for the plaintiff, there was no prove of such payment to the employees to entitle the plaintiff to claim the same.

(f) Loss of profit mark up on the stock in hand

Under this head, a sum of Kshs.7,762,495 has been claimed due to the loss on damaged stolen goods for resale. It is alleged that the plaintiff suffered a loss on profits expected from those goods. The documents relied on are on pages 82 and 83 of the supplementary list. According to PW3, the figure is based on gross profit ratio which was 9% of the total stock. The figure was arrived at by looking at the trend and average gross profit ratios. Neither the plaintiff nor PW3 justified how the figure was arrived at. Though PW3 stated that the figure was arrived at using previous financial statements, the said statements were not produced and for that reason, this claim also fails.

(g) Loss of profit for 5 years

This has been referred to as the consequential loss as a result of business demolition. A sum of Kshs.179,701,337 has been claimed. The

documents relied on are on pages 84-85 of the plaintiffs supplementary list. PW3 stated that it is the projection of plaintiff's business in the next 5 years as at 23rd May 2013. The defendants have objected to the claim on the basis that the same is too remote and uncertain to be regarded as a special damage and that, it has not been proven. The court has perused the documents relied on, entries are made but there are no documents to support the same, there are no financial statements to support the projected sales and profits if any. It is also noted that the projected profits are also made based on assumptions for example that sales figures would grow by 20% on yearly basis. This was not guaranteed. Neither the plaintiff nor PW3 gave evidence to prove that indeed the supermarket would have made profit for the five years. The court cannot assume that the plaintiff would automatically have made profit and not loss. In business, profit and loss goes together. The claim therefore fails.

(h) Cash loss

This was said to be cash at hand in the premises during the demolition. A sum of Kshs.5,200,936 is claimed. It is the cash from sales for previous day. This can be seen on page 86 in the plaintiff's supplementary list. PW3 was given that figure by the plaintiff. According to that document, there was a total of Kshs.2,200,000 being pambazuko money recovered at the rate of Kshs.100,000 per day from 1st May 2013 upto 22nd May 2013, change float at Kshs.1,500,000, Insurance amount Kshs.220,000, Chairman's salary Kshs.300,936 and cash in the Till drawers Kshs.980,000/-. As submitted by the defendant, the plaintiff did put forth a grain of evidence on the existence of cash in the building at the material time. I fully concur with that submission by the defendant and make no award under this claim.

(i) Loss of prepaid expenses

A total of Ksh.736,760 is claimed under this head. It is said to be loss of un-refundable prepaid expense. The court has perused the documents relied on, on pages 91-105. It has not been explained and/or shown how the figure was arrived at. If this expense had been incurred, nothing would have been easier than for the plaintiff to attach evidence from the various companies/entities that had been paid. This claim also fails.

(j) Goodwill

It is said to be goodwill generated for over 30 years. A total of Kshs.300,000,000 is claimed. According to PW3, it is an amount paid for a business which is a going concern. It is paid over and above the asset of the company. It is estimated based on the location of the business and its loyal customers. It was contended that the business was located in a very central point and the location was good. That the plaintiff would do sales of Kshs.2,000,000 a day. In support of this claim the plaintiff has relied on the case of **Commissioner of Inland Revenue Vs. Muller & Co. Morgarine Limited (1901) AC 217; (1900-1903) All ER 43**. where the definition of goodwill was given as

“a thing very easy to describe, very difficult to define. It is a benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in customers. It is the one thing which distinguishes an old established business from a business at its first start. The goodwill of a business must emanate from a particular centre or source however, widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates”

The court was urged to take cognizance of the fact that the business had existed for 30 years in addition to the fact that it was in a strategic location and that it had grown to the value of Kshs.400,000,000. According to PW3 goodwill of a company is estimated at 75% of the net value of the business.

On his part, the defendant relied on the case of **Ramadhan Mohammed Vs. Hashim Salim Ghania Civil Appeal No. 32 of 2013** where the court in rejecting a claim for goodwill concluded;

“whether considered as part of the real property on a sale of that property and accounted as such for purposes of stamp duty, or merely as a transfer of a business, is not the concern of a land or upon termination of a tenancy. The lessee is entitled to remove at any time during the continuance of the lease, all things which he has attached to the earth provided he leaves the property in the state on which he received it sections 108(B) and (L)”.

The court has considered the claim under goodwill and the submissions by the counsels. In the case of **Attorney General Vs. Africa Commuter Services Civil Appeal No. 311 of 2009**. The court rejected the Respondents claim on good will and one of the reasons was that, since the Respondent never went back to the business it was doing before the cancellation, it was not possible to ascertain how much goodwill it would have retained or lost had it re-opened its business. We are not satisfied that the loss on goodwill had been proved to the required standards.

The defendant contended that the plaintiff is no longer a going concern and therefore, the claim on goodwill is untenable and it is not possible to ascertain how much business the plaintiff would have lost had it gone back to the supermarket business.

With regard to the claim of goodwill, the court of Appeal in the case of **Johnon Mugure Wanganga Vs. Joseph Nyaga Karingi** (supra) had this to say.

“A regards the claim for goodwill, it is our considered view that goodwill is a claim for special damages which must be proved and particulars given. In the instant case, there are no particulars of the goodwill pleaded in the plaint and the Honourable Judge erred in not indicating how the sum of Kshs.542,820 was arrived at representing lost goodwill. We are also of the considered view that damages for loss of goodwill is remote in respect of a landlord/tenant relationship and it was not proved as between the appellants and the respondent who owned the goodwill in respect of the demised premises”

In my considered view the claim was not proved. There was no evidence tendered before the court to show how much the plaintiff's business was worth and that it was making sales of Kshs.2,000,000 a day. As I have analysed hereinabove and in all the special damage claims, no tenable evidence was produced before the court to show how much the business was worth and how much stock was in the supermarket at the material time. The claim of goodwill at Kshs.300,000,000/- is far fetched and unfounded. No specifics were given in support of that claim. The claim therefore fails.

The claim of Kshs.703,642,423 by the plaintiff is a special damage claim. The law is clear that special damages have to be specifically claimed and strictly proved for they are not the direct nature or probable consequence of the act complained of and may not be inferred from the act. See the case of **Hahn Vs. Singh (1985) KLR 716**. The case of **Ryce Motors Limited & Another Vs. Elas Muroki Civil Appeal No. 119 of 1995** is also helpful in this regard where the court held;

“These pieces of paper do not show at all if the alleged accounts were in respect of “the matatu” or the two matatus owned by the plaintiff, or included the business of the plaintiff as a shop keeper. The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing income of Kshs.4,500/- per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs.2,830,500/- for special damages and we set aside the award in its entirety.

Hon. Justice Mutungi in the case of **Zachariah Waweru Thumbi Vs. Samuel Njoroge Thuku Civil Appeal No. 445/2003** defined special damages thus;

“If I were to explain or define special damages to a layman, I would say “they are a reimbursement to the plaintiff/victim of the tort, for what he has actually spent as a consequence of the tortuous act(s) complained of. This point cannot be overstressed; that the claimant of special damages must not only plead the claim but also go further and strictly proof usually by documentary evidence, that he has actually spent the sum claimed. In medium claims the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice is not sufficient only a receipt for the payment will meet the test.

I wholly concur with the findings by my learned colleagues and find that the claim for special damages was not proven save for Kshs.1,508,000 which I hereby award.

By way of a parting shot under the claim of special damages, let me quote the case of **Lalji Vs. Toka (1981) eKLR Civil Appeal No. 46 of 1980** in which Law J.A. cited with approval the following dicta of Lord Goddard in the **Bohham – Carter Vs. Hyde Park hotel Ltd (1948) T.L.R at Page 178**

“on the quantum of damages, I am left in an extremely unsatisfactory position. Plaintiff must understand that if, they bring actions for damages, it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court saying;

“This is what I lost; I ask you to give me these damages; They have to prove it”

In this case, the plaintiff produced particulars which were inconclusive.

General damages

The claim for general damages must be considered along with that of loss of stock and fixtures and fittings. This court finds itself in a very awkward position in respect of this claim as no evidence was placed before it on the basis of which it can assess and award general damages. The court having found that the claim of loss of stock and fittings was not proven, it cannot be able to put a figure on this claim. This loss cannot be quantified on the basis of the material available to this court. This court cannot pluck some figure out of the air and award it to the plaintiff as general damages. It is very unfortunate that the plaintiff suffered loss and this court sympathizes with him but such loss has to be proven for the court to enter judgment in its favour. The plaintiff's case was mainly on special damages and since none was proven save for the Kshs.1,508,000/- the hands of the court are tied when it comes to the question of general damages because the two are related and once the claim for special damages fail, it automatically follow that, the one for general damages fall as well.

Exemplary damages

Exemplary damages are punitive in nature in that, they are given as a way of punishing the defendant or as a deterrent, and are not limited to compensating the plaintiff for the defendant's act. In my view, this is a fit case for award of exemplary damages. In the case of **Rookes Vs. Barnard (1964) I ALL ER 367**, the court held that exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial at the expense of the plaintiff.

The case of Brooks has been applied in Kenya in various cases. The case of **Obongo Vs. Kisumu Council (1971) EA 91** where the court stated as follows;

“I am therefore of the opinion that this court should regard Brooks Vs. Barnard as authoritatively settling out the law of England as to exemplary damages in tort, which law was applied in Kenya by the Judicature Act, 1967”

The award of exemplary damages is at the discretion of the court depending on the circumstances of the case. The defendant in this case entered the plaintiff's business premises when there was a court order restraining him from evicting the plaintiff. Though the defendant in his defence, stated that he had been given an order to hoard the premises, he could have done so without interfering with the plaintiff's premises. Further, as the court has noted, the letter requiring the plaintiff to remove his goods from the premises is dated the 21st May 2013 and there is no evidence that the same was served upon it. It is also important to note that there was no evidence that the order that the defendant had been given to hoard the premises was served upon the plaintiff and he only came to learn of its existence a few days before the 23rd May, 2013 when the premises were destroyed.

In my opinion, a sum of Kshs.20 million in exemplary damages should be fair in the circumstances. In arriving at this figure I have been guided by the decision in the case of **Titus Gitau Njau Vs. Municipal Council of Eldoret (2015) eKLR** where a sum of Kshs. 15million was awarded.

In the end, the court enters judgment against the defendant as follows;

- a. Special damages – Kshs.1,508,000/-
- b. General damages – Nil
- c. Exemplary and punitive damages – Kshs. 20,000,000

Costs of the suit are awarded to the Plaintiff.

Special damages to earn interest from the date of filing and general damages from the date of judgment.

Dated, Signed and Delivered at Nairobi this 25th day of October, 2018

.....

L. NJUGUNA

JUDGE

In the presence of:-

..... **For the Plaintiff**

..... **For the Defendant**