REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 145 OF 2000

HARRY KITULO MUMO..... PLAINTIFF

VERSUS

1. MUNICIPAL COUNCIL OF MOMBASA

2. AMIN HASSAN SALIM.....DEFENDANT

J U D G M E N T

1. By his plaint dated the 12/4/2000, amended on 18/3/2005 and further amended on the plaintiff pleads having been a tenant of the 1st defendant at all material times upon those premises situate in Mombasa and known as PLOT N. 985, Section XVIII by virtue of a tenancy agreement dated the 28/2/1985.

2. The dispute arose on 24/3/2000 when the plaintiff alleges that the defendant by own agents and servants broke into the premises and carted away all the goods therein thereby damaging the plaintiffs said goods including furniture, household effects, personal belongings including clothing, jewelry, fixtures, fittings and money and proceeded to evict the plaintiff therefrom and installed another person 2nd defendant as a new tenant. These actions were termed unlawful in that the plaintiff was at that time a lawful tenant having paid the reserved rent up to the 30/4/2000.

3. On those pleaded facts the plaintiff sought orders that he be reinstated to the premises together with general damages for unlawful eviction and pleaded special damages in the sum of Kshs.885,600/=.

4. When served, the two defendants filed separate statements of defenses. For the 1st defendant a defense dated 3/6/2008 was filed on 01/07/2008 while the 2nd defendant filed a defense dated 19/4/2005 on 17/8/2001. The 1st defendant's statement of defense filed denies all the allegations in the amended plaint save for the descriptive paragraphs 1, 2 & 3. Even the particulars of special damages were denied and strict proof invited. Of note is however the fact that no justification was pleaded for the acts complained about

5. For the 2nd defendant there was a denial of the plaintiffs tenancy, the allegations of illegal eviction and alleged irregular allocation of the suit premises to the 2nd defendant with an ascertain that the 2nd defendant was procedurally and regularly allocated with a further addition that there was never prior notification of the existence of this suit. He, the second defendant, denied having been served with a notice before action and invited strict proof thereof.

Evidence led by the parties

6. The hearing of the suit commenced before Mohammed Ibrahim J, on the 23/6/2010. On that day the plaintiff testified and said that he was a tenant to the 1st defendant for upwards of 10 years at **Buxton, flat no. B23**, duly met his obligations as a tenant until he was evicted for no reason. He produced as exhibits, a lease agreement 28.021985, (EXHB P1), rent receipts (EXHB P2-5) among other documents. On 24.03 2000, he said, he was at his rural home in Mariakani when he was called by a neighbor to the effect that the defendant's employee had broken into his house and carted away his goods to the council stores. He came to the premises and found two young people who denied him entry to the premises. He made a report at the police station, was accompanied by OCS to the house and found the two young men who told them that they were under instruction of the 1st defendants' housing Committee chair to guard the house till the next day. He later visited the manager housing department but he refused to talk to him hence he decided to file suit.

7. His further evidence was that on eviction the house was damaged to an extent that he was compelled to repair door locks, lighting system and repaint the house at a cost of Kshs.80,000/= but did not have any receipts for such repair except a receipt for Kshs.6,900/= for three ceiling fans which he produced as exhibit P9. He marked for identification a quotation for repairs in the sum of Kshs.885,600/= The quotation was ordered to be identified and marked by the plaintiff but could only be produced by the marker.

6. For the goods which were confiscated he said only a few were returned but even those returned were unusable and he had to keep them aside. He approximated the value of the unreturned goods at Kshs.370,600/= while the returned but unusable at Kshs.435,000/=.

7. The plaintiff went on to state that he was embarrassed and was unable to tell his neighbours why he was being evicted and that with no alternative house in town, he was compelled to move his family to his rural home in Mariakani, some 40 km away, from where he commuted to town daily so that the children could continue with school as he and wife continued with work. He said his neighbours must have thought he was unable to pay rent for which reason he said he had no way of expressing his injured feelings due to the fact that even his children would feel too exhausted to do even homework due to long daily journeys. He said the person to whom the house was given after his eviction was the chairman of the housing committee who subsequently became the deputy major and that his eviction was wholly unjustifiable. He said he was reinstated pursuant to a consent court order and therefore sought damages for unlawful eviction and special damages on account of repair costs.

8. On cross examination, the witness said that as at the date of testifying he was a tenant of the defendant but the house was occupied by an employee of his who worked in his shop but himself continued to stay in Mariakani. He was shown condition No. 1 in **exhibit P1** which forbade subletting.

9. On the date of eviction the plaintiff said, him and the wife were both away at home and it was a neighbor who informed them by phone that his things were being taken away.

10. On reinstatement the witness said the intermediate tenant damaged the house and he was forced to effect repairs. On his stay in Mariakani he said he was now staying there voluntarily as his staff stayed in the suit house.

11. In re-examination, the witness said that he was not present at the premises when the inventory marked DMFI 1 was made. He however pointed out that it was not signed by anybody. On who damaged the house, the plaintiff said he did not know who did so as two tenants occupied the house in the intervening period.

12. That was the only evidence led for the plaintiff and at its end the plaintiffs case was closed even without the need to produce the quotation which had been marked DMFI – 1.

12. Even though the 1st defendant had indicated that it would call two Witnesses, none was ever called because when parties attended court on the 17/5/2016, Ms Nasimiyu, for the 1st defendant opted not to call any witness but sought to address the defense issues by written submissions. Even the 2nd defendant did not call any evidence in that despite service, no attendance was made on his behalf on the numerous hearing dates.

Submissions by the parties

13. The plaintiff's submissions are dated 16/8/2016 and filed in court on 17/8/2016 while those by the 1st defendant are dated 21/11/2016 and filed in court on 23/11/2016. Those submissions were highlighted by counsel on 29/8/2018. In those submissions the plaintiff holds very strongly and urges the court to find for it that he was unlawfully and wrongfully evicted from the suit premises when he was up to date with this tenancy obligations particularly payment of rent. To the plaintiff the only time the 1st defendant would be entitled to re-entry pursuant to close 3 of the lease is when there is a default to pay rent and non-observance of the conditions of the lease. He stressed the fact that exhibits 2, 3 & 4 were all evident that there was no arrears of rent. It was also pointed out that no evidence was led to show that there was any non-observance of any of the conditions of the lease since none of the defendants ever offered any evidence.

14. The decision by the Court of Appeal in ***Gusii Mwalimu Investments Co. Ltd & 2 Others vs Mwalimu Hotel Kisii Ltd [1996] eKLR*** was cited for the proposition that unless a tenant concurs to give up possession, the landlord has no otherwise but to seek and obtain an order or a competent court or statutory tribunal for possession. It was pointed out that in this case there was no such order and therefore the eviction or dispossession was unlawful and wrongful. In any event exhibit P6 was an order of this court given by consent of the parties which signals an acknowledgement of the wrong by the defendant in dispossessing the plaintiff.

15. The plaintiff then submitted that on the basis of the pleadings filed, there were only two issues for resolution by the court:-

- **Whether the plaintiff was unlawfully evicted.**

- **Whether the plaintiff is entitled to the remedies sought being a permanent injunction, special damages and general damages**.

16. For the remedies sought the plaintiff submitted that it having been proved that the plaintiffs was unlawfully evicted, he deserves a permanent injunction to protect future transgression and general damages for the wrongful acts.

17. For special damages, it was submitted that the plaintiff had complied with the legal requirement that special damages be specifically pleaded and strictly proved. It was printed out the sum claimed were set out at paragraphs 9 of the further amended plaint and details there of given. It was however noted that the plaintiff was unable to produce the receipts of the goods lost and damaged because all his documents including receipts were carted away by the defendant on the date of eviction except a receipt produced as Exhibit P9 for ceiling fans. For the goods lost and damaged the plaintiff gave a list and an approximated value of the items at Kshs.805,600/= which together with cost of repairs in the sum of Kshs.80,000/= gave the aggregate special damages of Kshs.885,600/=.

18. Being aware of the challenge of the need for strict proof, the plaintiff cited to court the decision by Nduma J, in ***Pelican Haulage***

Contractors Ltd vs Joel Kinyanjui Kengethe [2016] eKLR in which the judge quoted Geoffrey Omondi vs Emergency Assistant Radio Services for the proposition of the law that strict proof depend on the circumstances like the character of facts producing damage and that at times it would be the '*vainest travesty*' to insist on receipts as the only way of strict proof. For this case, the plaintiff asks the court to consider that the receipts were lost in the eviction as a relevant factor.

19. Reliance was also put in the decision by the Court of Appeal in ***Mohammed Ali vs Sagoo Radiators Ltd [2013] eKLR*** where the court said that an assessor's estimate was sufficient proof of costs of repairs. It was then submitted that the estimation of the value of goods by the plaintiff was a sufficient proof.

20. For general damages for unlawful eviction, the plaintiff cited to court two decisions by the High Court; **Museu vs Karinga [2004] eKLR** and **Francis Githuku Kabue vs Kimani Chege [2009]** where awards of 300,000 and 400,000 respectively were made for unlawful eviction. The plaintiff then relied on the testimony by the plaintiff that he was forced to commute from Mariakani with family as an aggravating factor and ask court to award to him the sum of Kshs.2,500,000/= for general damages.

21. On behalf of the 1st defendant submissions were offered to the effect that no injunction should issue because the plaintiff is only but a tenant and the tenancy agreement can be terminated at any time in accordance with its terms of in accordance with the law. In addition the court was asked to take notice that the plaintiffs quiet possession has been restored and no injunction needs to issue to protect the same.

22. For special damages, the 1st defendant submitted that there was no strict proof of the losses even though the pleadings were specific and detailed. The counsel pointed out that there was no evidence of the goods removed and not returned as well as those removed and returned damaged by way of an inventory. To the defendant the plaintiff was obligated to come up with an inventory even if with the assistance of the police rather than picking the figures from the air. It was added that the list prepared with the help of a shop called 'Salyani shop' was never produced and the same could not be relied upon. However, the 1st defendant added that if the court was to award any sum, Kshs.40,000/= was sufficient under this head.

24. For the goods returned in damaged and unusable conditions the 1st defendant observed that indeed photographs produced as exhibits showed mattresses, clothes, and sofa sets as returned goods, but submitted that the amount pleaded was too high and in any event an inventory ought to have been made and produced. To the 1st defendant a sum of Kshs.50,000/= for good returned but damaged would be sufficient if the court was to be minded to make any award.

25. On cost of re-wiring, the submissions were reiterated and addition made that the alleged repairs having been undertaken after the reinstatement, the plaintiff had no reason not to have the receipts. The 1st defendant then sought to distinguish the two cases cited by the plaintiff. **The pelican's case** (supra) was said to be incomparable while that of **Mohammed Ali** was said to have been decided on the availability of an expert motor vehicle assessor's report unlike here where the plaintiff came up with own figures.

26. Reliance was then placed on the decision in **Douglas Odhiambo Apel vs Telkom Kenya Ltd CACA 115 of 2006** where the court held that cases are decided on the basis of actual evidence tendered in court and that unless there be a consent judgment on a specific sum, it behoves the plaintiff to prove his claim. Equally relied upon was the decision cited by the plaintiff, **Mureu's case** in which the court declined to award special damages because the same were never specifically pleaded nor strictly proved.

27. I have pointed out before that the 2nd defendant did not attend at trial neither did he offer any submissions.

Issues, analyses and determination

28. The dispute being here as pleaded and on the evidence led, the issues can only be those two as proposed by the plaintiff. It is of note that the defendants have taken no issue with those proposed issues. I do agree that these two issue are sufficient to dispose of the suit between the parties. The issues are:-

a) Was the eviction of the plaintiff lawful?

b) Is the plaintiff entitled to the remedies sought?

c) Costs.

Legality of the Eviction

29. That the plaintiff was a tenant of the 1st defendant up to the date of eviction has not been disputed. It is also not controverted that the rent was paid in advance prior to the date of eviction as shown in exhibits 2, 3 & 4 (receipts).

30. The plaintiff also gave evidence that he was at all times in full observance of the tenancy conditions. He was in effect asserting absence of default. In those circumstances, since the plaintiff could only assert observance, if there existed any default, the burden was then on the 1st defendant to prove same. The 1st defendant did not plead any default or non-observance of the tenancy conditions and totally failed to offer any evidence to rebut that tendered by the plaintiff. To that extent I do find that there was no violation or default to comply with any of the agreed tenancy conditions as to entitle the defendant to re-entry under the tenancy agreement.

31. But even if there had been default, the crystalised rule of law in *Stare-decisis* and the Land Act 2013 is that a landlord is obligated to seek and obtains a judicial order for possession unless the tenant voluntarily yields up possession to the landlord.

32. That is the learning from Gussii Muhimmu Co. Ltd vs Mwalimu Hotel Kisii ltd (supra) whose principles are now enacted under Sections 75, 76 and 77 of the Land Act.In **Mattarelo Ltd vs Michael Bell & Another Mombasa HCC No. 39 of 2015,** the court said of the position of the law in this regard:-

> **"*Secondly under part VI, the Land Act, section 75 in particular, a lessor is only entitled to forfeiture after service of a Notice of at least 30 days. Here no iota of evidence of any notice was ever led nor alluded to go as to comply and satisfy the requirements of the law. Once again the statute would deem the forfeiture by the defendant in locking the premises unlawful.***
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> ***The law in this country is that even for re-entry the rule of law must be complied with if no consent is achievable. 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:-***
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> **"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 demised 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".**
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> ***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."***

34. In the absence of proof of default nor notice of such default in compliance with the law, the eviction by the 1st defendant must be seen as brazen, outrightly unlawful and wrongful. I therefore do find that the eviction of the plaintiff by the 1st defendant was unlawful and unjustifiable and the plaintiff is therefore entitled to damages.

Is the plaintiff entitled to the remedies sought?

35. While it is on record that the plaintiff was reinstated to the premises by a consent order, there was offered to court no assurance that the unlawful acts will not recur. One can only hope that with the advent of a new constitutional dispensation and increased public awareness of right coupled with the change of guard by the arrival of the County Governments, such shall not recur. However, the rights of the party once violated cannot be left to the goodwill of the defendant and the trust and expectation that it shall answer to its obligation as a government agency especially where there is a shown deserved remedy. Moreover the grant of order to obviate a recurrence will visit no prejudice upon the defendant as far as all it seeks is to enforce the rule of law.

36. I do grant a permanent injunction directed at the defendant and restraining it, by its officers, agents and employees from unlawfully evicting or seeking to evict or terminate the plaintiff's tenancy otherwise than in accordance with the law.

General damages

37. This court in deciding that the plaintiff was lawfully evicted has held and found that he was unlawfully evicted. As held in **Mattarelo's case**, (supra) a violation of a right or just breach of the law ought to attract reprieve to the violated. I am in no doubt that the plaintiff is entitled to damages for the wrongful eviction and in this case it is noted that a government agency created by a statute, the law, was itself violating the same law. That is never expected of a creature of the law.

38. Considering that the plaintiff was put to the hardship of having to commute for more than 40 kilometers away, with a family including school-going children, and the fact that he must have been portrayed as a person not able to meet his rental obligation or just one undesirable being not fit to live where he had been living, I award to the plaintiff the sum of Kshs.2,000,000/=. This decision has been persuaded by what has been decided by courts in comparable cases [1] I have also taken into account that the plaintiff was deprived use of his items for a considerable period of time and that when the property was returned not all was returned and the ones returned turned out to be of no use to him

special damages

39. In the further amended plaint, special damages are disclosed to consist of value of the removed goods which were never returned and those returned damaged together with cost of repairs. While I do appreciate that receipts are not the only way to prove loss in the form of special damages and without downsizing the loss and injury thereby occasioned, I am bound by the law that there ought to be some evidence of the loss. In this matter the evidence of the loss does not seem sufficient to the court save for the cost of ceiling fans in the sum of Kshs 6,900 which the plaintiff said he installed at a cost of kshs to make a total of kshs 7,500. That is the sum I find to have been sufficiently proved to the requisite stands and which I award to the plaintiff.

40. In summary judgment is entered for the plaintiff against the defendant in the sum of **Kshs 2,007,500** plus costs and interests.

41. Interests on special damages shall be calculated from the date of the suit while those on general damages shall be from the date of this judgment.

Dated, signed and delivered this 19th day of October 2018.

P J O OTIENO

JUDGE

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[1] Mureu vs karuga (2004) eKLR, francis Githuku Kabue vs Kimani Chege (2009) and mattarelo vs Michael bell (supra)