



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 447 OF 1998

CALEDONIA SUPERMARKET LTD.....PLAINTIFF

VERSUS

THE KENYA NATIONAL EXAMINATION COUNCIL.....DEFENDANT

JUDGMENT OF THE COURT

The Pleadings

1. The Plaintiff commenced the suit herein vide a Plaint dated and filed herein on 3rd September, 1998. The plaint was subsequently amended on 17th September, 2002. The amended plaint sought *inter alia* special and general damages, aggravated or exemplary damages with interests and costs.

2. The defendant filed a defence on 28th January, 1999 in which they totally denied the Plaintiff's suit. However, the Defendant did not file an amended statement of defence.

The Plaintiff's Case

3. The Plaintiff's case is that it was carrying on the business of a supermarket on the ground floor of the suit premises. The said suit premises were later bought by the Defendant who then evicted the Plaintiff from the premises, allegedly causing the Plaintiff to suffer loss now the subject matter of this claim. The Plaintiff then went to court to seek injunction orders against the Defendant but the court by its ruling dated 9th December, 1998 refused to grant a temporary injunction and ordered the Plaintiff to vacate the premises which it did on 2nd March, 1999. However, the Plaintiff appealed the said Ruling and by its Judgment in **Civil Appeal No. 184 of 1999 Caledonia Supermarket Limited vs. the Kenya National Examinations Council** delivered on 22nd December, 2000, the Court of Appeal found that the Judge in the High Court had erred in refusing to grant injunction sought, a fact which had resulted in the Appellant's tenancy being illegally terminated. The Court of Appeal also found that the Appellant was entitled to recover damages from the Defendant for the loss and damages it suffered, and directed that the case be remitted back to the superior court for assessment of damages, the issue of liability having been determined in favour of the Appellant. It is then that the Plaintiff amended its plaint seeking orders as follows:

(1) An injunction to restrain the Defendant, whether itself or its servants or agents or bailiffs or auctioneers or otherwise howsoever until the hearing and disposal of this suit or until further order from interfering with the quiet possession and use of the portion of premises situate on plot No. 209/357/1, Dennis Pritt Road, Nairobi occupied by the Plaintiff or evicting the Plaintiff from the

suit premises.

(2) A declaration that the Plaintiff has a right to quiet possession of the said premises until lawful determination of its tenancy through the court or the Tribunal.

(3) Damages.

(4) Costs of the suit with interest thereon @ 19% p.a. from the date of filing the suit.

(5) Any other alternative relief that the court may deem fit to grant.

(6) Special damages in terms of paragraph 24 of the Amended Plaintiff with interest thereon @ 19% p.a. from the date of filing the suit.

(7) General damages, aggravated and/or exemplary damages with interest thereon at 19% p.a.

4. Therefore the issue before the court is purely assessment of damages which may be due to the Plaintiff.

The Defendant's Case

5. The Defendant filed a defence on 28th January, 1999 in which it generally denied the Plaintiff's claim. The Defendant did not amend its defence after the Plaintiff amended its plaint. The inference in law is that the facts alleged in the plaint are not controverted and it is upon the Plaintiff to prove the same.

The Hearing

6. The Plaintiff called two witnesses. The first was John Ndungu George, PW1 who was an accountant with M/s G. W. Joseph & Company. He produced a report of how interest accrued on the Plaintiff's alleged loss of Kshs. 17,167,666. PW1 took the court through the process of calculating interest at 16% compounded over the years since 1998 and testified on how the Plaintiff's cash flow was affected. The witness testified that from their calculations the principal sum plus interest accrued upto September, 2014 is Kshs. 115,623,634/=. On cross-examination by **M/s Kiarie** counsel for the Defendant PW1 testified that his instruction was only to compute interests. He justified his levying of interest at 16% p.a. noting that during the relevant period interest rates were going beyond 19% p.a. The witness testified in cross-examination that he was not aware that courts have their own interest rates applicable.

7. PW2 was Anastacia Wagiciengo who testified that she is a director of the Plaintiff well versed with the issues herein and with the authority of the other directors hence competent to make this statement. PW2 testified that the Defendant is the registered owner of Land Reference number 209/357/1 Dennis Pritt Road together with the building thereon having purchased the same on or about the month of March, 1998 from its previous owners. The Plaintiff had been carrying out the business of a supermarket on the aforementioned property from about the year 1989 to the 2nd March, 1999. On or about the 11th August, 1998 the Defendant herein served the Plaintiff with a notice to immediately vacate the premises failing to which the Plaintiff would be forcefully evicted. PW2 testified that on the 4th of September, 1998, the Plaintiff obtained injunctive orders against the Defendant restraining the Defendant and its servants or agents from interfering with the Plaintiff's quiet possession of the aforementioned property. However, despite the aforesaid injunction, the Defendant raised a perimeter wall on the aforementioned property from less than 2 feet to nearly 7 feet high thereby obstructing the view of customers resulting in loss of trade for the Plaintiff. PW2 testified that on the 27th of October, 1998, the Defendant and its servants or agents locked the entrance gates for the Plaintiff and placed two huge containers on the Plaintiff's premises on ground floor causing further inconvenience to the Plaintiff's customers and occasioning further loss of business. Further, the Defendant with the aid of armed police closed all the Plaintiff's gates and delivery vans of milk, bread and other perishables was denied entry. The customers were restricted from accessing the supermarket and the Plaintiff was forced to remain closed during Christmas until the expiry of the injunctive orders at the end of February, 1999. PW2 testified that the Defendant caused the

Plaintiff and its director's indeterminate losses and ridicule through its action of locking the premises and these events were highly publicized in the media. The witness testified that the Plaintiff prays for exemplary and/or aggravated damages apart from the special damages stated in the Amended Plaintiff. The witness testified that the Plaintiff was forced to dispose of its assets at unfavourable prices to offset its losses and pay off its employees and creditors. Further, the Plaintiff was put in disrepute in the eyes of customers, potential clients and landlords and as such has been unable to find alternative suitable premises for its business.

Submissions

8. On their part, the Defendant did not call any witnesses. Parties filed submissions which I have carefully considered. From the submissions the issues which need to be determined are as follows:

- (i) Whether the Plaintiff has proved special, general and aggravated damages;
- (ii) What interest rate, if any or at all, is applicable;
- (iii) Costs.

9. The Plaintiff's counsel **Mr. Wafula** submitted that the courts in their dicta have expressed the fact that it is of importance to prove special damages especially if one claims them. The principle of "He who asserts must prove" has been emphasized with gusto with respect to proving of special damages. The question in the present matter is whether the special damages have to be strictly proved through documentary evidence and what would be the case when the documentary evidence is lacking in some instances due to time and other factors. In this case, the Plaintiff in proving its claim for special damages relied on an interim bank statement of one of its bank accounts held at Barclays Bank for the period of 19th March, 1998 to 26th March, 1998. Counsel submitted that the Plaintiff's second witness, Anastacia Wariara Wagiciengo who was also a director of the Plaintiff, testified that the interim statement was testament to the volume of trade that was going on at the Plaintiff premises. Counsel submitted that deposits of significant amounts were being made almost daily which PW2 testified to be from proceeds of the business carried out by the Plaintiff at the premises. The interim statement showed a closing balance of close to Kshs. 800,000/= as at 26th March, 1998, which the Plaintiff testified was a clear indicator of the robust business being carried out.

10. Mr. Wafula referred to the cross-examination by the defence counsel who sought to challenge the testimony of PW2 on her averments as to the profitability of the Plaintiff business. The defence counsel had demanded for further documentary evidence in support of the assertions by the Plaintiff's witness. On this issue Mr. Wafula cited the Court of Appeal in **KIMATU MBUVI T/A KIMATU MBUVI & BROS VS. AUGUSTINE MUNYAO KIOKO [2006] eKLR** where the court stated that a party does not lose his remedy in damages merely because its quantification is difficult. The court stated thus:

"We appreciate the expectation of Mr. Inamdar that accounts books, income tax returns or audited accounts would have put the claim beyond doubt if it was pleaded as special damages or even as general damages. But there is dicta in decided cases that one does not lose his remedy in damages merely because quantification is difficult..."

11. The Court of Appeal in the same case further quoted Apaloo J (as he then was) in **WAMBUA VS. PATEL & ANOTHER [1980] KLR 33** where the Judge considered difficulties of proving damages. The court stated thus:

"I am bound to say that the evidence he led of his earning is of very poor account. He appeared to be a man of enterprise and was somehow exposed to banks and did business with a state of commission that is the Kenya Meat Commission, he kept no books of account or any business books. So his income and expenditure were all stored up in his memory... I think the figures the plaintiff gave as his business earnings and expenditure, must be considered with great care. Nevertheless, I am satisfied that he was in the cattle trade and earned his

livelihood from that business. A wrongdoer must take his victim as he finds him. The Defendant ought not to be heard to say the Plaintiff should be denied his earnings because he did not develop more sophisticated business methods.”

12. A similar position was espoused by the Court of Appeal in **JACOB AYIGA MARUJA & ANOTHER VS. SIMEON OBAYO [2005] eKLR** where the court stated:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that tis well and good. But we reject any contention that only documentary evidence can prove these things.”

13. Counsel submitted that these Court of Appeal decisions are binding to this court. This matter was instituted in 1998 and in consideration of the time period between institution of the claim and the Advocates who have handled the matter, it would be expected that records of the accounts and trade of the Plaintiff Company would not be completely intact. Despite the period lapse, the Plaintiff did produce an interim statement which was evidence that she participated in some trade which was profitable but ultimately closed down upon her eviction from the premises. It is also evident that the Plaintiff operated from a prime location on Dennis Pritt road near State House. Counsel for the Plaintiff submitted that the Plaintiff’s claim for special damages is grounded on paragraph 24 of the Amended Plaint wherein the Plaintiff sets out her claim for Kshs. 17,167,666.00/=. On this account, it was submitted that PW1 John Ndung’u George, an Accountant of 8 years produced a report on computations of interest accrued as at September, 2014. It was submitted that the said report was not challenged by a contradictory report of any other accountant.

14. As to whether the Plaintiff is entitled to general and exemplary damages, Mr. Wafula submitted that the answer is yes, and that the courts have made various decisions regarding the right of the individual wrongfully evicted to obtain general and exemplary damages. Counsel cited the case of **FRANCIS GITHUKU KABUE VS. KIMANI CHEGE & ANOTHER [2009] eKLR** where the court had this to say:

“...I do not hesitate to state that the action of the 1st Defendant, which is prevalent amongst Landlords... must be discouraged by all mean. The law protects both the weak and the mighty, tenants ought not to be left in the hands of greedy landlords whose aims is to maximize on rent irrespective of existing contractual obligations or the Laws of the Land... Having stated as above and in the absence of a court order, I find that the 2nd Defendant acted in total disregard of the law and together with his agents unlawfully evicted the Plaintiff from the suit premises. They also unlawfully removed his merchandize to an unknown place. The Plaintiff has sought for general damages for the said unlawful eviction. I am persuaded that he deserves to be compensated.”

15. In the case of **SIMON NDUNGU MUNGAI & ANOTHER VS. MUNICIPAL COUNCIL OF KIAMBU [2011] eKLR**, the Justice Musinga stated:

“...I have no doubt that the plaintiffs lost many valuable items. The lost and/or damaged items included a Phonic sound mixer, automatic control unit, Sony video, electric guitar, broadcaster studio mixer, keyboard, Sony TV, etc. Very many books were lost and/or damaged. Loan documents and/or records were also destroyed. Considering the nature of loss and/or damage that the plaintiffs were put into as a result of the defendant’s unlawful acts, I assess the damages payable for unlawful eviction at Kshs. 2 million which I award the plaintiffs.”

16. **M/s Kiarie** for the Defendant submitted that The Plaintiff through its director, Anastacia Wagiciengo filed a witness statement dated 30th April, 2015 and also filed a list of documents and a bundle thereof.

The bundle included an interim Barclays Bank of Kenya statement for the period 19th March, 1998 to 26th March, 1998. The said director also testified in court on the 29th October, 2015 as PW2. In her testimony, in connection with the interim bank statement produced in her bundle of documents PW2 stated that she had no other statements as the bank never keeps statements beyond twelve (12) years. On cross-examination by counsel for the Defendant PW2 stated that the Plaintiff was before 27th October, 1998 earning Kshs. 500,000 per month thus the claim for Kshs. 2,000,000/= in connection with loss of profits for the 4 month period between 27th October, 1998 and 2nd March, 1999. However, counsel submitted that the Plaintiff did not produce any evidence to prove that such amounts were being made.

17. On the claim for loss of fridges, M/s Kiarie submitted that PW2 did not produce documentary evidence to show that the Plaintiff had purchased the fridges or that the Plaintiff had in actual fact procured them at the amount shown in the Amended Plaint. Counsel further submitted that the Plaintiff could not also demonstrate through evidence that it had in its stock 3000 video cassettes procured at a total sum of Kshs. 300,000/= or that the Plaintiff had usual supermarket stock worth Kshs. 6,188,000/=, having bought the same at Kshs. 4,761,666/= and made a forced sale thereof to Safeway Supermarkets at Kshs. 3,094,000/= therefore suffering a loss of Kshs. 1,667,666/=.

18. Counsel referred to Plaintiff's claim for loss of business for the period 2nd March, 1999 to 3rd September, 2002 (the date the Plaint was Amended – a period of 42 months), amounting to Kshs. 12,500,000/= calculated at earnings of Kshs. 300,000/= per month. Counsel disputed the Plaintiff's testimony on cross-examination that the claim for the four month period (27th October, 1998 to 2nd March, 1999 at Kshs. 2,000,000/=) related to reduced earnings while the claim for the 42 months (2nd March, 1999 and 3rd September, 2002) related to total loss of earnings since she was unable to find an alternative premises that could host the Plaintiff's business. Counsel submitted that it does not therefore make sense for PW2 to calculate reduced earnings at Kshs. 500,000/= per month and total loss of earnings at Kshs. 300,000/=.

19. M/s Kiarie submitted that it is a recognized principle of law that a litigant has a duty to mitigate its loss in the face of a wrongful act that results in loss. It is not possible in light of this principle that the court can award a Plaintiff special damages for loss of profits for failure (if proved) to find alternative premises for a period of 42 months. Counsel submitted that all in all, the Plaintiff did not tender documentary evidence to support the income of the business and its stocks. Counsel submitted that the position in law with regard to claims for special damages is that such claims must be specifically claimed and proved. Counsel cited **Constitutional Petition No. 2 of 2016; Lloyd Patrick Wafula Wanyonyi T/A Lloyd (1996) Molasses Supply Agencies & Attorney General**, where the Petitioner claimed a special loss for raw molasses, loss of drums and crops and loss of business after police officers invaded his premises and poured out molasses in drums and carted away drums used to store the molasses, ruined crops and generally disrupted business. The court made the following observations regarding the claim;

“The petitioner, although (sic) attached a procurement permit failed to show by documentary evidence that prior to the alleged trespass by police officers he had procured and was therefore in possession of molasses which allegedly was poured by the said officers. The petitioner ought to have provided documentary proof that there was any such molasses as he pleaded which was poured. Instead the petitioner put figures in his petition which he pleaded that they represented the value of the molasses allegedly poured out; value of damaged crops; value of drums taken away during that trespass; and the loss of business. Without evidential proof of the stated loss this court can only conclude that the figures in the petition were plucked from the air and pleaded in the petition. The petitioner ought to have obtained an expert opinion on the value of the molasses and of the damaged crops. He also ought to have produced accounts of his business to prove that his business suffered loss following the alleged trespass. These claims were essentially special damages claim. They therefore ought to have been specifically claimed and proved.

20. As for the interest rate of 16% p.a., the Defenant's counsel submitted that the claim for interest does not lie as the Plaintiff has not proved to the legal standard required that it is entitled to be awarded the

special damages claimed in the Amended Plaintiff. It is the Defendant's submission that the Plaintiff does not deserve an award under this head as the Plaintiff has not proved that the Defendant acted with a high hand or wanton or violence. The Defendant at the outset did serve a 30 days' notice on the Plaintiff to vacate the premises (albeit under the mistaken belief that such a notice was valid) and after the Plaintiff obtained an injunction restraining the Defendant from evicting the Plaintiff the Defendant though needing to use the premises waited until the injunction was discharged by the court and the Plaintiff given a further three (3) months (between 9th December, 1998 and end February, 1999) to vacate the premises.

21. Counsel cited the case of **Peter Mark Gerishom Ouma vs. Nairobi City Council** where the Judge had this to say regarding the claim for an award of exemplary damages:

“The plaintiff had a legal right to the possession and use of the premises and that right was tortuously invaded by the council. He is entitled to damages for that invasion of his legal right. In my opinion this is a case where the damages are at large. The plaintiff in his closing submission requested the court to award exemplary damages if possible. Exemplary damages are punitive in that they are given by way of punishment of the defendant, or as a deterrent example, and are not limited to compensating the plaintiff for the defendant's act (see *Dumbell vs. Roberts* [1944] 1All ER 326, 330). In torts affecting property the court will allow exemplary damages if there has been a wanton intentional interference on the part of the defendant. The commonest example is trespass to land.

I am satisfied and have found that the Council's servants and/or agents trespassed to the plaintiff's premises. There was, however, no evidence of their acting with a high had or wanton or violence. There are no circumstances to justify an award of exemplary damages and I will not award the same.”

The Determination

22. I have carefully considered the submissions. I raise the following issues for determination.

- (i) Whether the Plaintiff has proved special damage.
- (ii) Whether interest is applicable, and if so, at what rate.

23. On the first issue, this court observes that liability in this matter was settled by the Court of Appeal which referred this matter back to this court for assessment of damages. It is also not in dispute that the Defendant used the most unorthodox way to evict the Plaintiff from the suit premises. The Plaintiff, being a supermarket, ought to have been given ample time to remove its merchandize or to find a buyer for them. The Defendant acted with high hand which resulted in wanton damage and loss of the Plaintiff's merchandize. Further, the Defendant put a perimeter wall which blocked the view of the Plaintiff's supermarket. That the Defendant acted high handedly and with malice towards the Plaintiff is not in doubt. Neither is it in doubt that the Plaintiff is entitled to punitive and exemplary damages. What is in doubt is how the special damage of Kshs. 17,167,666/= was arrived at. Be that as it may, this court is entitled to take judicial notice, a notice which was presented in evidence of PW2, that the Plaintiff ran a supermarket business. Every supermarket has certain items, facilities or equipment which enables it to carry on its business. Such equipment in this case included 3 huge fridges, various stocks, 3000 video cassettes, and of course expected profits. There is no documentary evidence to prove the purchase of the said fridges or video cassettes. It is then left to the court to determine the weight to put on the Plaintiff's evidence that such items existed. This court is persuaded that it is not necessary that all claims in a suit must be proved vide documentary evidence. Where a court has justifiable reason to believe a witness, documentary evidence would cement such belief, but is not necessary for the same. I accept the cases cited by the Plaintiff as follows:

(a) KIMATU MBUVI T/A KIMATU MBUVI & BROS VS. AUGUSTINE MUNYAO KIOKO

“We appreciate the expectation of Mr. Inamdar that accounts books, income tax returns or audited accounts would have put the claim beyond doubt if it was pleaded as special damages or even as general damages. But there is dicta in decided cases that one does not lose his remedy in damages merely because quantification is difficult...”

(b) JACOB AYIGA MARUJA & ANOTHER VS. SIMEON OBAYO [2005]

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that tis well and good. But we reject any contention that only documentary evidence can prove these things.”

23. Pursuant to the foregoing, I am satisfied that documentary evidence is not necessary to prove the Plaintiff’s los. However, that does not mean that the Plaintiff’s case is proved merely by taking as truth whatever is pleaded. It is the duty of this court to re-evaluate the schedules of lost items and come to a reasonable estimate commensurate with the size of the supermarket.

24. On loss of business profits, the Plaintiff claims Kshs. 2,000,000/= from October 27th, 1999 to 2nd March, 1999. Those are about four months. This means that the Plaintiff lost Kshs. 500,000/= per month by way of profits. This assessment does not seem reasonable. This supermarket appears to have been a small sized supermarket. To claim a sum of Kshs. 500,000/= per month net profit in 1999 does not seem reasonable. However, the Defendant did not challenge these figures either in amended defence or by evidence. It is the finding of this court however, that a net sum of Kshs. 300,000/= per month is reasonable, hence a total loss of Kshs. 1,200,000/= for the period in question.

25. The court accepts a loss of Kshs. 700,000/= for the three huge fridges, and Kshs. 300,000/= for lost stock of video cassettes. For the same reason of lack of accounting documents, and lack of defence on the same, this court gives half of what is claimed in terms of lost stock or value of supermarket i.e. Kshs. 833,833/= and also half of the loss of business profits for wrongful termination of tenancy aggravated and punitive damages based on monthly net work of Kshs. 300,000/= for a period of twelve (12) months hence Kshs. 2,400,000/=. This is so because the Plaintiff was expected to mitigate its loss and to look for other premises. The Plaintiff cannot therefore claim loss for 42 months. Twelve (12) months would be reasonable. In the upshot, the court is satisfied that the Plaintiff has proved its case on a balance of probability and makes awards as follows:-

(i)	Loss of profits	Kshs.	1,200,000.00
(ii)	Loss of video cassettes	Kshs.	300,000.00
(iii)	Loss of 3 fridges	Kshs.	700,000.00
(iv)	Loss of stock	Kshs.	833,833.00
(v)	Damages for wrongful termination of tenancy, and for los due to failure to secure alternative premises, limited to 12 months income of Kshs. 300,000/= per month	Kshs.	3,600,000.00

26. The second issue is applicability of interest. I am persuaded that the Plaintiff’s loss above should be

compensated with interest. The Plaintiff's witness PW1 testified that despite applicable interest at that time of 19% p.a., the Plaintiff is asking for interest of 16% per annum. I find that rate reasonable. This is so because the loss herein is a commercial loss which should attract interest at commercial rates.

27. In the end, Judgment is hereby entered in favour of the Plaintiff against the Defendant as follows:-

(a) Kshs. 6,633,833.00.

(b) Interest on (a) above at 16% p.a. with effect from 3rd September, 1998 until payment of the decree herein in full.

(c) Costs shall be for the Plaintiff.

That is the Judgment of the court.

E. K. O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF APRIL, 2017.

LADY JUSTICE G. NZIOKA

JUDGE

In the presence of: