



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 234 OF 2011

HANA NZAVI MUSILU PLAINTIFF

- V E R S U S -

SAMDOVE (K) LTDDEFENDANT

JUDGEMENT

1. Hana Nzavi Musilu, the plaintiff herein filed a compensatory suit by way of the plaint dated 21st July 2011 against Samdove (K) Ltd, the defendant herein. The suit arose from a lease agreement entered between the parties on the 24th March, 2008 in respect of the property known as L.R. No. 3734/1984, Riverside Drive, Nairobi. The defendant filed its defence dated 16/06/2010 denying the plaintiff's claim.

2. When the suit came up for hearing, the plaintiff was allowed to proceed *ex parte* when the defendant failed to attend court. The plaintiff (PW1) testified without summoning independent witnesses in support of her case. PW1 filed a list and bundle of 12 documents, which were produced as Pexh 1 to 12.

PW1 stated that she is the registered proprietor of the property known as L.R. No. 3734/1984, Riverside Drive, Nairobi. There existed a lease agreement as seen in bundle 1 of the documents at a monthly rent of ksh.154,000/= with an option of reviewing rent upwards by 10% upon renewal of the lease.

3. PW1 further stated that after the expiration of the said lease, the defendant declined to hand over possession of the suit premises to the plaintiff but instead orally sought extension of the lease on the terms subsisting in the lapsed lease. This request was dully accepted by the plaintiff. That on or about the 1st week of February 2010, the defendant without notice vacated the suit property leaving it locked and in rent arrears. Despite pleas and requests by the plaintiff, the defendant declined to hand over the key to the suit property. The plaintiff was prompted to apply for breaking in orders at her cost to enable her gain access to the demised property. Upon breaking in, the plaintiff found the suit property in a deplorable state and not in the situation as it was at the time of handing over to the defendant at the commencement of the lease agreement.

4. The plaintiff stated that through Ms Bealine Kenya, she distressed for rent and proclaimed the tenant's (the defendant) household goods and motor vehicles registration no.s KAQ 096K Pajero, KAS 989C pajero and KTV 989. The defendant moved and removed the proclaimed household goods and motor vehicles in order to avoid distress for rent without the knowledge of the plaintiff.

5. The plaintiff's claim against the defendant is for ksh.4,806,386.00 being the outstanding rent arrears, cost of breaking in order, costs of repairs and penalty for pound breach (treble damages) being 3 times the value of the distrained goods.

The particulars of loss and damage were stated as follows:

Rent arrears	516,000/=
Outstanding water bill	20,000/=
Outstanding electricity bill	55,000/=
Cost of break in order	50,000/=
Cost of repair	2,200,000/=
Total	2,841,386/=
Less security deposit	462,000/=
Balance due	2,379,386/=
Penalty for pound breach	
Treble value of destroyed goods	2,427,000/=
Total	4,806,386/=

6. The parties were invited to file and exchange their written submissions. The plaintiff was the only party who filed submissions.

7. The issues for determination by this Honourable court were identified are as follows:

- i. *Whether or not the plaintiff is entitled to compensation for loss and damages as per the particulars in the plaint in the sum of 2,379,386/=*
- ii. *Whether or not the plaintiff is entitled to general damages.*
- iii. *Whether or not the plaintiff is entitled to penalty for pound breach by the defendant in the sum of 2,427,000/=.*

8. On the first, that is whether or not the plaintiff is entitled to compensation for loss and damage in the sum of 2,379,386/=. In the plaintiff's list and bundle of documents dated 13th June 2013, the plaintiff availed uncontroverted proof in support of all the elements of her claim. These documents were produced as exhibits at the hearing.

9. Document 1 in the plaintiff's bundle of documents shows that there existed a lease agreement signed by the parties herein

The lease started from 25th March 2008 last until to 24th March 2009. PW1 stated that when the 1st lease expired, parties extended it orally under the same terms like the subsisting one. The defendant failed to pay the arrears of rent at the end of the last quarter of the year 2009. The plaintiff was forced to distress for rent. The outstanding arrears in rent was said to be Ksh.516,000/-

10. The plaintiff states that she found her property damaged and she undertook to rehabilitate it to its former condition. Receipts of repairs, water and electricity bills arrears have been documented and produced as exhibits before this court.

11. Having tendered evidence to prove the above claims and which evidence has not been rebutted by the defendant, the plaintiff submits that it is entitled to the special damages sought. The plaintiff cited the

case of **Maritim & Another –vs- Anjere (1990 – 1994) EA 312**, where the Court of Appeal held *inter alia* that: **“..... it is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”**

12. I have considered at the documents filed in support of the special damages claimed by the plaintiff and I am satisfied that they have been specifically been pleaded and proved.

13. The 2nd issue for determination is whether or not the plaintiff is entitled to general damages. The plaintiff submits that authorities on the award of general and punitive damages abound when one party is found liable for having breached its side of the bargain in an agreement. The plaintiff submits that the defendant conduct was actuated by sheer malice with which it breached the lease agreement. The defendant left the suit property in a deplorable condition warranting repairs. The defendant also locked the premises to prevent the plaintiff from accessing her property. The plaintiff had to procure a breaking in order to access her property. The plaintiff submits that the conduct of the defendant is a basis for the award of both general and punitive damages for breach of contract. The plaintiff cited the case of **Hadley =vs= Baxendale (1854) 9 Ex Ch 341** where the court stated *inter alia* that:

“Where two parties have made a contract, which one of them had broken, the damages which the other party ought to receive in receipt of such breach of contract, should be such as, may fairly and reasonably be considered, either naturally that is in accordance to the usual course of things, from such a breach itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it.”

14. The plaintiff also relied on the case of **Ramesh Manek –vs- Kenya Posts and Telecommunication Nairobi HCC No. 862 of 1993** where court awarded ksh.200,000/= in general damages and ksh.50,000/= as exemplary/punitive damages for breach of contract relating to restoration of the plaintiff’s telephone lines.

15. The plaintiff did not propose any amounts for general and punitive damages but she instead urged this court to exercise its own discretion.

16. I am convinced that it is important for the court to make orders which restore the parties to the position they were at the time they made the contract. In this case an award for general damages suffices as opposed to an award of punitive damages. Consequently I make an award of ksh.200,000/= in line with the **Ramesh Manek –vs- Kenya Posts and Telecommunication** case (*supra*)

17. The third issue for determination is whether or not the plaintiff is entitled to a penalty for pound breach by the defendant in the sum of 2,427,000/=. The plaintiff states that the defendant is guilty of pound breach contrary to Section 7 of the Distress for Rent Act Cap 293 Laws of Kenya. The penalty thereof is treble the amount that was distrained by the Auctioneers for rent i.e $809,000 \times 3 = 2,427,000$. The plaintiff urges this court to award it as claimed.

18. Section 7 of the Distress for Rent Act creates an offence and imposes a penalty. The offence is defined in the Interpretation and General Provisions Act Cap 2 Laws of Kenya as follows: **“offence means a crime, felony, misdemeanour, contravention or the breach of, or failure to comply with any written law, for which a penalty is provided.”**

19. In my view Section 7 creates a criminal offence which cannot be made by this court in exercise of its civil jurisdiction. The prayer is denied.

20. In the end, I enter judgment for the plaintiff and against the defendant in the following terms:

i. Special damages ksh.2,379,386.00

ii. General damages ksh. 200,000.00

iii. Total ksh.2,579,386.00

iv. Interest on (i) and (ii) above at court rates from the date of judgment until full payment.

v. Costs of the suit.

Dated, Signed and Delivered in open court this 24th day of November, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant