



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 185 OF 2013

BEGUM KASSAMALI LIMITED.....1ST PLAINTIFF

FANTASY ELECTRONICS LIMITED.....2ND PLAINTIFF

VERSUS

HIGHBURY PROPERTIES LIMITED.....1ST DEFENDANT

KINUTHIA KAHINDI & CO. ADVOCATES

(Sued as a firm).....2ND DEFENDANT

JUDGEMENT

1. Begum Kassamali Ltd and Fantasy Electronics Ltd, being the 1st and 2nd plaintiffs respectively sued Highbury properties Ltd and Kinuthia Kahindi & Co. Advocates being the 1st and 2nd defendants vide the plaint dated 16th April 2013 in which they sought for judgement in the following terms.

- a. **Special damages (to be assessed)**
- b. **General damages**
- c. **Exemplary and aggravated damages**
- d. **Costs of the suit**
- e. **Interest at court rates from the date of filing suit.**

The defendants each filed a defence to deny the plaintiffs' claim.

2. When the suit came up for hearing, three witnesses testified in support of the plaintiff's case Riaz Sadrudin Manji (PW1) informed this court that he is a director of the Fantasy Electronics Ltd (2nd plaintiff) which operated an electronic shop as a tenant on the ground floor of the building known Murang'a properties standing on LR no. 209/2743, Luthuli Avenue. PW1 stated that the 2nd plaintiff operated the shop for over 10 years. The other important witness who testified is Yasmin Madhani (PW 3) She stated that she was the manager of the Begum Kassamali Ltd, the 1st plaintiff which operated a shop also located on the ground floor of the building known as Murang'a Properties on LR 209/2743,

Luthuli avenue. The shop has been in operation for 45 years with an average of 100 customers daily and was popularly known as **Princess**.

3. Both PW1 and PW 3 told this court that some unknown assailants descended on their business premises and violently removed goods from the shops on 30th July 2011. They said the assailants were in company of police officers. They claimed that they reported the incident to Kamukunji police station. PW1 said he took photographs showing the extent of the destruction which took place. PW1 produced those photographs as exhibits in evidence. When PW1 and PW3 confronted the hooligans, they said they were informed that there was an eviction order issued vide Milimani **C.M.C.C no. 2458 of 2011 Highbury Properties Ltd =vs= Fantasy Electronics Ltd & 5 Others**. The duo claimed that they were taken by surprise to learn of the existence of a court order yet they had not been served with court processes. The plaintiffs moved to court to obtain an order for stay but unfortunately the order was secured when demolition of their business premises was complete. PW1 and PW3 managed to obtain the proceedings in **Milimani C.M.C.C. no 2458 of 2011** which shows that the 1st defendant herein had filed the aforesaid suit against the plaintiffs through the aid of the 2nd defendant to seek for vacant possession of the suit premises on the ground that the building had fallen in a bad state of disrepair. The perusal of the proceedings revealed that service of process was effected upon the plaintiffs by Michael Mulei Masua (PW2). The record shows that on 29th July 2011, the Chief Magistrate's Court being satisfied that the service was effected proceeded to grant a temporary order of eviction.

4. PW2 testified and denied effecting service upon the plaintiffs. He denied executing the three affidavits of service allegedly sworn on 21st July 2011, 25th July 2011 and 28th July 2011. PW2 dismissed those affidavits as forgeries. PW3 stated that he established from the pleadings in Milimani C.M.C.C 2458 of 2011 that the imprint of the stamp affixed by the 1st plaintiff to the pleadings were forgeries. The plaintiffs further produced in evidence proceedings showing that the plaintiffs obtained temporary orders of injunction to restrain the defendants from putting up new buildings on 2nd February 2012. The plaintiffs also presented documentary evidence showing that the 2nd defendant was referred to the disciplinary committee of the law Society of Kenya for facilitating gross abuse of the court process in view of the fact that PW 2 turned out to be a stranger to the 3 affidavits of service alluded hereinabove. Though a court order to hold further construction was issued it would appear the same was ignored paving the way for the defendants to complete construction thus effectively evicting the plaintiffs from the suit premises. It is the plaintiffs' submission that the defendants' action caused untold damage to their business as stock in trade was looted and the plaintiffs' were prevented from trading as they had no alternative locations. It is also argued that the plaintiffs goodwill and reputation was entirely diminished.

5. The defendants on their part vehemently denied the defendants case. The defendants maintain the suit should be dismissed.

The defendants did not present evidence to support their defences.

6. I have considered the evidence presented by the plaintiffs. I have further considered the rival submissions together with the authorities filed by learned counsels from both sides. I have already outlined the prayers sought by the plaintiffs. The defendants closed their case without tendering any evidence and after the plaintiffs had presented the evidence of three witnesses. The parties did not file agreed issues. However, the defendants filed their own set of issues. I have considered the issues put forward by the defendants and the material placed before this court I am of the view that the following issues arose for the determination of this court:

- i. **Whether or not the plaintiffs were unlawfully evicted by the defendants from the premises standing on L.R. no. 209/2743?**
- ii. **Whether or not the plaintiffs are entitled to the orders sought in the plaint?**
- iii. **Who is to bear the costs of this suit?**

7. On the first issue as to whether or not the plaintiffs were unlawfully evicted by the defendants from L.R. no. 209/2743, the evidence tendered must be critically examined. There is no dispute that the plaintiffs were tenants of the 1st defendant in premises standing on L.R. no 209/2743. There is affidavit evidence of John Karanu Ikimi showing that the 1st defendant is the registered proprietor of the aforesaid. The evidence of Riaz Sadrudin Manji (PW1) and Yasmin Madhani (PW3) indicate that the plaintiffs business premises were descended on and goods forcefully removed by hired goons on 30th July 2011. Photographs were presented to this court showing the kind of destruction visited on the plaintiffs' premises. The defendant pleaded in their defences that they evicted the plaintiffs from the suit premises using a court order they obtained from Milimani Chief Magistrate's court vide **Milimani C.M.C.C no. 2458 of 2011, Highbury Properties Ltd =vs= Fantasy Electronics Ltd & 5 others.**

8. The plaintiffs on their part tendered evidence showing that they were never served with the suit papers and the eviction orders. In fact the plaintiff summoned the process server namely Michael Mulei Masua (PW2) who denied effecting any service upon the plaintiffs contrary to the averments made by the defendants. No evidence were presented to controvert the evidence of PW2. From the evidence of PW1, PW2 and PW3, I am convinced that the plaintiffs were never served with the suit papers which gave rise to the orders which were used to evict the plaintiffs from L.R. no. 209/2743. I am further convinced by the evidence of PW2 that he did not execute the affidavits of service indicating that he effected service of process upon the plaintiffs. In my humble appreciation of the evidence I am satisfied that the evidence indicts the defendants as having actively subverted the judicial process in order to obtain unfair advantages over the plaintiffs in order to unlawfully evict them from their business premises. The plaintiffs were never served and the affidavits of service alleged to have been executed by PW2 appear to have been doctored to serve the aforesaid purpose.

9. Michael Mulei Masua (PW3) informed this court that he was shocked when he was called by William Kinuthia who practices in the firm of Kinuthia Kahindi & Co. Advocates, the 2nd defendant to familiarise himself with three affidavits sworn on 20th, 22nd and 28th July 2011 for purposes of cross-examination before this court. PW2 vehemently denied having prepared nor signing the aforesaid affidavits. It is clear in my mind that those affidavits were used to mislead the court below that service had been effected upon the plaintiffs. In the end I am convinced that the plaintiffs were unlawfully evicted by the defendants from L.R no. 209/2743.

10. Having found that the plaintiffs were unlawfully evicted, the next issue to determine is whether or not the plaintiffs are entitled to damages as prayed in the plaint. The plaintiffs in my view are entitled to damages for losses they incurred as a result of the unlawful eviction.

11. One of the prayers sought is special damages. In the plaint stated that they will cause special damages to be assessed. It is trite law that special damages specifically pleaded and proved. In the case before this court the plaintiffs did not specify the special damage they were seeking. I will not therefore award them that prayer.

12. The other prayer the plaintiffs prayed for is general damages.

The plaintiffs averred that during the unlawful eviction they lost all stock in trade and documentation they possessed to show their earnings and value of their business which were looted and destroyed. The 1st plaintiff is said to have been in business for 45 years. PW3 further stated that as of July 2011 1st plaintiff made purchase worth ksh.3,732,215/= which its assets were worth ksh.2,720,000/=. The 1st plaintiff asked to be paid general damages of ksh.5,452,215/= in **South C Fruit Shop Ltd =vs= Housing Finance Company of Kenya Ltd (2013) eKLR**, the Court of Appeal held inter alia, that the basis of damages is to return the aggrieved party to the position it would have been in, had the wrong complained of, not occurred.

13. I am convinced that he 1st plaintiff is entitled to this prayer but I think the figure sought is on the higher side. I will instead award a global figure of kshs.4 million.

It is the evidence of the 2nd plaintiff that it dealt with electronic products for over 10 years and since electronic products are of high value it should be awarded a sum of kshs. 10 million as reasonable amount. Just like in the case of the 1st plaintiff, I will award the 2nd plaintiff ksh. 4 million of this head.

14. The plaintiffs each asked for ksh. 5 million for aggravated damages. It is the argument of the plaintiffs that since the defendants acted in a callous manner in effecting their eviction they should be ordered to pay aggravated damages. I have already analysed in detail the manner the eviction was carried out. In the circumstances of this case I am satisfied the plaintiffs are entitled to aggravated damages. The figure suggested by the plaintiffs appear to be exorbitant and exaggerated. I think a sum of kshs.1,000,000/= should be awarded as reasonable.

15. The other prayer sought is exemplary damage. This prayer is punitive in nature as opposed to aggravated damages which is more of compensation. The conduct of the defendants in this matter boarder on deceit and dishonesty. It is apparent from the evidence that the defendants abused the court process and obtained unfair advantage in order to benefit at the expense of the plaintiffs. This conduct is more serious for the 2nd defendant being a firm of advocates who are officers of this court. The plaintiffs asked for ksh. 5 million. Again, I think the figure suggested is on the higher side. I instead award the plaintiffs each a sum of kshs.500,000/= as exemplary damages.

16. The plaintiffs are successful litigants. Costs follows the event. I award them costs plus interest at court rates from the date of judgement.

17. In the end judgement is entered in favour of the plaintiffs and against the defendants in the following terms:

- i. General damages8,000,000/=
- ii. Aggravated damages 2,000,000/=
- iii. Exemplary damages1,000,000/=
- iv. Costs of the suit.
- v. Interest on (i) – (iv) at court rates from the date of judgement until full payment.

Dated, Signed and Delivered in open court this 19th day of February, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant