REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 7 OF 2003

RAPHAEL M. MUIU. ……..……..…….PLAINTIFF

VERSUS

THE DIRECTOR SOCIAL SERVICES & HOUSING

THE DIRECTOR CITY INSPECTORATE

THE TOWN CLERK

THE CITY COUNCIL OF NAIROBI…….....……DEFENDANTS

JUDGEMENT

The Plaintiff in a plaint filed on 17th July 2003, claimed against the Defendants herein,

a) A sum of Kshs. 5,724,901.

b) costs of the suit plus interest thereon at court rates.

c) Interest on (a) and (b) at court rates till payment in full.

d) any other relief the Honourable Court might deem fit to grant in the circumstances.

In the said plaint it has been pleaded that the Plaintiff has been a tenant of the 4th Defendant's House No. 103 Mariakani Estate in South B Nairobi Area until 11th February 2002 where he was regularly paying all the requisite rents as required of him. He further pleads that on the 11th February 2002, the 1st, 2nd and 4th Defendants maliciously, unreasonably and unprocedurally authorized its officers to conduct an eviction of the Plaintiff from the aforesaid house and proceeded to impound, remove and detain assorted goods therefrom which included stock for business and other household goods as particularized in paragraph 10 with each property's value.

That the said goods were impounded and destroyed in the process of being taken to the 4th Defendant's depot in Dagoretti Corner and attempts to get them back has proved futile. That as a result the Plaintiff suffered loss and damage amounting to Kshs. 5,724,901.

In their defence the Defendants denied in general terms each claim in the plaint and sought proofs. It however also specifically stated in the alternative and without prejudice to the denials that if the Plaintiff was evicted from the suit premises as alleged, then such eviction was undertaken lawfully and for just and proper cause. It was further stated that if the said goods were taken to the 4th Defendant's depot then such action was taken purely to ensure safe custody and which are available to the Plaintiff upon meeting its outstanding financial obligation to the 4th Defendant and satisfying reasonable storage charges thereof.

During the hearing, the Plaintiff produced his Witness statement filed on 16th February 2012 as his evidence-in-chief (PExh.1) and his list and bundle of documents as PExh.2. He gave evidence confirming that the 4th Defendant entered his house and destroyed his goods in Nairobi South-B estate. That the said goods have never been recovered.

Upon cross-examination, he asserted that he had lived in the home for about 15 years and had always paid rent timeously for which he kept receipts. That he did not receive any notice to vacate. He insisted that when his house was raided all his records were taken away but he managed to get copies of the receipts from the Defendants. That he lived with 8 members of his family in the house which was a 3 bedroomed flat. He maintained that the raid took place when only the maid and a small child were present as the rest were either in school or at work. That though all the goods he listed were taken from the house when it was raided, he managed to collect some from Dagoretti two weeks later. That he also went to see the town clerk who organized for him to get the house back. When he proceeded to collect the goods he was surprised to find them missing.

In re-examination he asserted that 20 years later, it was difficult to find the witness called Ndutawho alerted him that his home was being raided. That he could also not trace the maid. That he wrote a letter dated 15th February 2002 to the town clerk complaining about his rent not being accepted citing a plan by a Councillor to allocate the house to his daughter. That in a letter dated 13th September 2002 written by the 4th Defendant addressed to the Plaintiff's Advocates, it was claimed that in view of the Plaintiff's allegations of unlawful damage and loss of his property, a detailed report was being compiled and they would revert once it was ready. This report according to the Plaintiff was never compiled. Finally he prayed for judgment.

The Defence witness was Joshua Otieno (DW2), the Housing Officer in the Department of Social Services with the 4th Defendant. He produced his witness statement as his evidence-in-chief (DWExh1). He described the Plaintiff as a former tenant of the 4th Defendant residing at Mariakani Estate House No. 103. According to him, in 2001 he did not pay rent and normally a 24 hour notice is served on a tenant to pay rent and if he does not comply another notice is served which they did with the Plaintiff. The two notices were produced in evidence as DExh. 2 and 3. He also produced an internal memo dated 21st January 2002 from the Chief Revenue Officer with a list of rent defaulters the Plaintiff listed as No. 3 with arrears of Kshs. 58,500/-. Other documents produced in evidence included –

- DExh. 5- Memo from Director Social Services and Housing to Director City Inspectorate confirming that the Plaintiff had been evicted for non-payment of rent and his household goods impounded and requesting for him to be allowed to collect the same from the Dagoretti Depot.
- DExh. 6 – Memo from the Director Social Services and Housing addressed to the acting Town Clerk with reference to this suit and giving a chronology of events from eviction to reinstatement of the Plaintiff back to the house.
- DExh.7 – Rent bills sent by 4th Defendant to Plaintiff.

He explained that they enter the houses forcefully if rent is in arrears to evict a tenant and cart away goods to their Dagoretti Depot. An inventory in usually made and after payment the tenant is requested to pick the goods after payment of storage charges. That the house was partially occupied as only one bed-room out of the three was inhabited. DW1 asserted that the tenant did not clear the arears of Kshs. 54,500/- and only paid Kshs. 30,000/; he also did not pay the penalties and new deposit as provided for in the rules. However, he was reinstated in the house which he stayed up to 2007. He further explained that

the Plaintiff had the option to reject the goods if he found some of them missing.

Upon cross-examination, he stated that in 2002 he was acting housing officer 2. That notices are served on the tenant using the physical address and if he is present he makes a commitment to pay the arrears. The officer serving notice then signs it and leaves a copy with the tenant. A copy is then filed in the revenue office. If the tenant is not present during service, a copy is pinned on his door or placed behind the door and this is indicated in the copy that is filed in the revenue office.

In this particular case, he admitted that he did not serve the notice and could not positively state that the Plaintiff was served with notice. The DExh.3 shows that the notice was to expire on 11th December 2002 instead of 11th December 2001 adding that it was done in error as the notice expires in 24 hours. He denied that the Plaintiff paid rent which was not credited to his account or that there was a deliberate attempt to kick him out from the house. He insisted that after investigations into the eviction incident were conducted, the goods impounded were collected by the Plaintiff. As he was present during the eviction, he insisted that only the sitting room and one bedroom were occupied. Goods were removed from those rooms in the absence of the Plaintiff. That he wrote the inventory of the goods impounded which was neither dated nor signed. Though the authority to serve notices is given by the Chief Revenue officer, the notices served on Plaintiff did not have any authority attached to them. The witness maintained that the Plaintiff only started defaulting on rent in 2001 and 2002 otherwise prior to that he did not exhibit those problems. When asked to produce his employment card, he stated that he had not carried it with him.

During re-examination, he stated that rent was to be paid on the 1st day of every month and if not paid eviction notices were issued by the Chief Revenue Officer.

That was the totality of the evidence tendered in court. Parties filed written submissions.

On behalf of the Defendants it was argued that though the Plaintiff asserted that he did not have rent receipts for the year 2001, rents paid in 2002 for the year 2001 proved he was actually in arrears. The Defendants were therefore entitled to exercise the rights stipulated in the rent card to remedy the default in payment of rent amounting to Kshs. 58, 500/-; that the Defendants were allowed to re-enter premises to distress for rent with or without notice (Clause 18 of the 'Rent card') but went out of their way to serve the Plaintiff with notices; That the act of the Plaintiff collecting the goods pointed to the fact that he was satisfied that they represented the goods impounded from his house which the Plaintiff did not deny in cross-examination; that the receipts produced by Plaintiff in support of his case for loss he incurred don't bear a name. It was asserted that independent evidence was necessary as to the true value of the goods at all material times and that the goods were actually in the house at the time of eviction considering some of the goods particularized are stocks meant for a business premises.

On behalf of the Plaintiff it was submitted that the defendants did not demonstrate any arrears of rent they claimed from the Plaintiff. The plaintiff insisted that it had proved difficult to get back the goods impounded by the Defendants.

As to the legality of the eviction, there appears to have been no need for notice as long as the tenant fell into rent arrears. The Plaintiff claims he was not granted notice yet a look at clause 18 of the '*Housing Estates Rent Card*' appearing in his bundle of documents –

> **"…if and whenever any part of the rent is in arrears for seven days (whether formally demanded or not) or if and whenever there shall be a breach by the tenant of any of the foregoing conditions to tenancy the Council may re-enter upon the premises and thereupon the tenancy shall determine as if written notice to quit has been due, given and expired"**

The next question that begs an answer is whether the Plaintiff was in arrears of rent. During the period in contention being the year 2001 when eviction notices were sent to the Plaintiff, there is no indication of whether he actually paid rent or not and apart from him saying so, no evidence was adduced to prove that

he had actually paid rent as required of him. The letter dated 15th February 2002 that the Plaintiff wishes to rely on to push forward his allegations that the Defendants had ulterior motives in evicting him, was written way after the eviction took place and cannot be a serious allegation against the Defendants. This court is thus satisfied that on a balance of probabilities that the Plaintiff was in arrears of rent and the eviction was a direct result of this.

It is also noted that the Plaintiff did not really deny that he picked his goods from the depot. He only stated that he picked a few of his goods as the others had been destroyed. It is not in doubt that during the eviction many goods could have been destroyed especially considering many people were involved in loading the goods, many could have gotten lost in the process, but as correctly pointed out by the Counsel for the Defendants, nothing stopped the Plaintiff from refusing to collect the goods if he did find some missing and or destroyed and then later claim for all of them in this suit. It is a challenging task for this court to ascertain that the list and particulars of goods listed by the Plaintiff is authentic, considering that he did not call any other witness to corroborate his assertions that the list he provided in court was accurate. Moreover, the issue whether some goods were returned to him or not only came up during cross-examination meaning the Plaintiff did not find the need to disclose this to the Court. That can only lead to the conclusion that has been less than candid with this court.

Furthermore, the Plaintiff occupied the house as a residential flat but most of the goods listed would ordinarily be in a business premises.

Besides, it is trite that special damages must be specifically pleaded and strictly proved. As was pointed out in **Peter Mark Gershom Ouma v Nairobi City Council [1976] eKLR -**

> **"Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damage, *Ratcliffe v Evans* (1892) 2 QB 524 where Bowen L J said at pages 532, 533:**
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> **"The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."**
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> **In the instant case there was an allegation and a list of some stolen or broken property of the plaintiff. This was in the pleading, but certainty and particularity of proof were lacking. In the circumstances the claim for specific damages must fail, and it is dismissed."**

In view of the foregoing, this suit is dismissed. Parties shall bear their own costs. It is so ordered.

Dated and delivered at Nairobi this 10th Day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE