



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO. 600 OF 2010

PAUL MUIYORO NJUGUNA

T/A SPOTTED ZEBRA.....PLAINTIFF

VERSUS

BULENT GULBAHAR.....1ST DEFENDANT

REMIX REALTORS.....2ND DEFENDANT

JUDGMENT

By a plaint filed on 8th December 2010 the plaintiff filed this suit claiming for special damages of Kshs. 3,800,000/=general damages, loss of business, costs of the suit with interest, injunction against the defendants from interfering with the quiet possession and enjoyment of the suit premises .The plaintiff states that he was a tenant at SPACE F1 ON LR NO.1/229Argwing Kodhek road which is owned by the 1st and 2nd defendants either singularly or jointly. That the 1st and 2nd defendants have been landlords to the plaintiff in the premises. On or about 28th July 2010 the plaintiff purchased Club D'Mills located at the premises owned by the plaintiff and paid a sum of Kshs. 3,800,000/=which transaction was approved by the defendant s who re-offered the space on new terms to the plaintiff and the plaintiff accepted the offer ad kept his part of the agreement. However, the defendant refused to get into the formal lease agreement with the plaintiff despite constant reminders and have disconnected power to the club which is a bar and Restaurant. That the defendants on 24th October 2010 unlawfully issued a notice to terminate the tenancy which was for 5 years. On 29th November 2010 the defendant sent auctioneers to levy distress for rent yet there was no outstanding rent. The auctioneers then backdated the proclamation to read 20th November 2010.The defendant also issued a termination notice on fictitious, false and non-existent grounds. The plaintiff filed BPRT No. 756 of 2010 and BPRT N. 903 of 2010 between the same parties herewith but the chairperson upon being persuaded by the defendants advocate made a decision that the tribunal has no jurisdiction and therefore downed her tools. The plaintiff on 4th November 2010 paid Kshs.81,000/= for the electricity bill outstanding and the same was to be deducted from the November 2010 rent as ordered by the tribunal and contends that the defendants have hatched a wider scheme to frustrate his business and cause him financial loss. The plaintiff now pleads breach of agreement leading to huge financial loss on the following grounds:-

- a. Failure to provide agreed service
- b. Construction and depositing of building materials at the entrance of the plaintiff premises
- c. Interruption and disconnection of electricity supply
- d. Unlawful and premature termination of tenancy
- e. Unlawful levying of distress for rent
- f. Lack of quiet & peaceful enjoyment of premises
- g. Failure to provide receipts for payments.
- h. Unnecessary expenses on generator services to supply water

The plaintiff also seeks compensation for the following; Kshs 3,800,000(Three million eight hundred only), costs of running generator during power disconnection and Loss of business. He prays for judgment jointly and severally against the defendants for;

- a. Special damages Kshs 3,800,000/-
- b. General damages
- c. Loss of business
- d. Costs of this suit with interests
- e. Injunction against the defendant from interfering with the quiet possession and enjoyment of the suit premises

The defendants entered appearance by M/s Wandabwa Advocates but failed to file their defence consequently interlocutory judgment was entered on 23rd February 2011. Parties proceeded for formal proof.

On 21st February 2013 PW1 stated that he bought the bar and restaurant in late July 2010 and paid Kshs 3,800,000/=. That he paid a small amount for goodwill. That he signed an agreement with the previous owners. He produced the agreement for sale the plot No. LR 1/229 . That he was frustrated by the landlord as the landlord was constructing in the place and placing cement at his doorstep . That he was at the premises from 28th July 2010 to 16th December 2010. He testified that the auctioneers took his furniture stock and grounded his business and lost revenue of Kshs 5000/= to Kshs 6000/= a month .He believes that the landlord wanted him to vacate the premises for him to develop for when he vacated the place the landlord built a mall within a few months of his leaving. That he lost Kshs 3,800,000/=which was spent to buy the business. He stayed without electricity for 4 months and lost Kshs 1,000,000/=. That his financial projections for 2010-2015 he would have made Kshs. 10,300,000/= within three years. That when the auctioneers came and took away his goods he pulled down the structure and concluded that he had been forced out of the place. He produced photographs to show the pulled down structures. He did not get his goods from the auctioneers since December 2010. His estimation of the value as well as stock he held was about Kshs 700,000/=He took action against the auctioneers by taking them to the Auctioneers Licensing Board as he was not in arrears of rent he decision for doing so was because the auctioneers failed to release the goods. He produced the decision of the Auctioneers Licensing Board. That he lost business due to frustrations by the landlord. The landlord gave a refund of Kshs.69, 000/= but he did not bank it because he felt that accepting the cheque would imply that he agreed to vacate the premises. He produced the cheque in Court as Exb.6. On re-examination he stated that he claiming Kshs. 3,800,000/= as special damages, general damages and loss of business and an injunctive relief. That the loss of goods was 16th December 2010. That the premises was demolished by him and not by City Council as he moved out. That he paid Kshs 496,000/= as goodwill and Kshs 2,800,000/= for the structure and from July to December 2010 but had difficulties due to lack to electricity. That the Auctioneers Licencing Board stated the proclamation was properly issued and that the return of goods was entered after he agreed to vacate. He stated that rent wasn't outstanding when he was forced to leave.

By consent the parties agreed to reopen the case after plaintiff had made an application dated 25th February 2013 on 7th March 2013. PW2 Mr. Isaack Mutiso Kanyiri stated that he knew the plaintiff as he contracted him to do some work. He was contracted to keep books of account and to prepare a profit and loss account. He came up with a report that analysed sales and revenue which resulted to gross profit and a percentage expenses to arrive at operating profit. He was contracted to do analysis from July to

December 2010 and his findings were that the plaintiff was incurring expenses from July and he got a profit of Kshs 25,542/- all the way to December 2010. He factored in electricity cost of cost of Kshs 12,000 and cost of generation and fuel and sale .The total profit for the year 2010 was Kshs 486,451/= for the period of 23rd July 2010 to 16th December 2010.He also projected growth of 25% per year and stated that for the period of 2010 up to the end of the lease it would cost Kshs 10,265,958/= On cross examination he said he was given receipts. He stated that the profit and loss statement gives the client an overview on whether the business is making a profit or loss. He stated that rent paid was not an expense but there was an expense to offset with electricity the return of Dec 2010 2010 was nil. That one could look at the documents and tell that there was offset with electricity. He stated that in July and August 2010 the business ran smooth and one could use it as the base .He could not tell whether plaintiff paid tax of 2010.In October November, December the business was in decline.

The plaintiff filed his submissions on 22nd March 2013. In his submissions he stated that the defendants' in late 2010 in the periods between August and December started engaging in acts of sabotage which sabotage was to have the plaintiff move out of the premises so that the defendants can construct a shopping mall. That it is not in dispute and the plaintiff proved the same in pictures that 2 months after he had been forced out, a shopping mall came up very fast. On special damages, the plaintiff stated that he purchased the property at Kshs 3,800,000/= and owing to the actions of the defendants he lost all his investments through the auctioneers and the landlord. The plaintiff however admitted pulling down the wooden structures which structures he said was worthless and cannot be compared to an erect and functioning structure. On the issue of loss of business he stated that the lease was to be for a period of 5 years. That PW2 an accountant provided his financial projections and explained how he did his calculations and factored in all considerations and prayed for Kshs 10,265,958/= for loss of business. On the issue of general damages the plaintiff submitted that during his tenancy at the premises the defendants sabotaged him leading to loss of colossal amounts through the defendants deeds with an aim of getting rid of him and proposed a figure of Kshs 1,250,874/=. On the issue of the goods sold by the auctioneers the plaintiff submitted that his goods were attached and unlawfully sold by the auctioneers while there was no rent outstanding .The auctioneer was punished by the Auctioneers Licencing Board .He produced a list of sold items which were not there when he purchased the business and prayed for value of goods sold at Kshs 669,767/=. On the issue of rent deposit he submitted that the deposit of Kshs 200,000/= had not been refunded to date. He produced a cheque of Kshs 69,000/=drawn by the defendant in favour of the plaintiff an indication and proof that no rent was ever due. The plaintiff concluded by submitting that he prays to be awarded the following:-

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|------------------------------|--------------------|
| a. Special damages | Kshs 3,800,000:00 |
| b. Loss of business | Kshs 10,256,955:00 |
| c. General damages | Kshs 1,250,874:00 |
| d. Goods sold by auctioneers | Kshs 669,767:00 |
| e. Rent deposit | Kshs 200,000:00 |

TOTAL Kshs 16,177,099:00

The defendant on his part also filed his submissions on 4th April 2013.He submitted that the plaintiffs claim of Kshs 16,177,099/= is unmerited and has not been proven to the required standards because the plaintiff obtained interlocutory judgment against the defendants which meant that liability had already been determined and it was the plaintiffs task to proof quantum.

On special damages PW1 stated that he paid Kshs 2,800,000/= for erecting structures Kshs 496,000/= goodwill, Kshs 100,000/= trading stock, Kshs 404,000/= for other stock. That PW1 confirmed he operated business from July to December 2010 and so trading stock was sold. PW1 confirmed that the other stock was attached by auctioneers and that he has judgment against them for the same. PW1 confirmed that he mitigated his damages by pulling down the structures fixtures and fittings and that he holds the structure, fixtures and fittings and has not suffered any loss thereto. The defendants submitted that loss of business was not pleaded in the plaint and therefore the same should be dismissed. The

defendants relied on **Wilson Gitau-vs-Philip Kuria Wainaina(2006)e KLR** where Court stated that “*It is trite law that special damages must not only be pleaded but must be specifically proved*” He stated that the plaintiff did not produce receipts that was relied upon by PW2 to generate the profit and loss statement and relied on **Mark Khan Transporters Ltd-vs-Peter Mbugua CA Nai 311 of 2003** where the Court of Appeal held that “*as regards the point concerning the loss of user of the matatu the court is aware that by a stream of authorities it has held that this must be claimed as special damages and the loss suffered must be proved strictly and that two lower court was satisfied with the evidence in support of the claim which included a book setting out the daily income of the matatu receipt including the number of days the vehicle was not in use*” he submitted that the plaintiff did not produce his tax returns to show how much profit he officially declared.

On General damages the defendants submitted that the plaintiff was suing under contract and stated that general damages are not recovered under contract and relied on **Johnson Joshua Kinyanjui &Anor-vs-Rachel Wahito Thade & Others CA. Nai 284 of 1997**. That the plaintiff is relying on projection and quoted **Waweru-vs- Ndiga [1983] KLR** which no one has been told how the figure was arrive at goods sold by auctioneers. That this item was not prayed for in the plaint, the proclamation was done legally and what was illegal was the sale which was not the fault of the defendants.

I have read the pleadings, considered the evidence tendered in court by the plaintiff and PW2 and the submissions filed by the parties together with the authorities cited by the Defendants counsel. It is trite law that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Act Cap 21 Laws of Kenya, the trial Court by dint of Order 20 Rule 4 of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the courts determination. In **Gandy –vs- Caspair[1956]EACA 139** it was held that unless the pleadings are amended the parties must be confined to their pleadings ,otherwise to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record and in the case of **Fernandes –vs- People Newspaper Ltd[1972]EA 63** Law AVP said “*A civil case is decided on issues arising out of the pleadings*”. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. Further in the case of **Galaxy Paints Co.Ltd –vs- Falcon Guards Ltd [2000]2 EA** Court of Appeal held that “*The issues for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court’s determination, unless pleadings are amended parties were confined to their pleadings*”.

I note that the plaintiff in his plaint pleaded for; Special damages of Kshs 3,800,000/= , general damages , Injunction and costs of this suit.

In the submissions he filed in court on 22nd March 2013 he pleads for; Special damages of Kshs 3,800,000/= , loss of business Kshs. 10,256,955/=, general damages Kshs. 1,250,874, goods sold by auctioneers Kshs 669,767/= and rent deposit Kshs. 200,000/=.

Damages can be termed as compensation or indemnity which may be recovered in the Courts by any person who has suffered loss, detriment or injury, whether to his person, property or rights through the unlawful acts or omission of another. In this instance the plaintiff has pleaded general and special damages. It therefore flows that Special damages are those which are actual but not the necessary result of the injury complained of and which in fact follow as a natural and proximate consequence in the particular case that is by reason of special circumstances or conditions. In my considered view loss of business, goods sold by auctioneers and rent deposit all fall under special damages since they must be specifically pleaded and proved in order for the Court to award it as it deems fit. The next question I must consider is whether these special damages were pleaded in the plaint. I have as above noted that only special damages of Kshs 3,800,000/= was pleaded and the plaintiff during formal proof produced a sale

agreement for sale of business between Club D-Mills and Sported Zebra signed on 27th July 2010 in which at page 4 of the agreement the amount of Kshs 3,800,000/= is broken down in the purchase of chairs and tables, sound and TV system, Kitchen, Building cost, stock and goodwill. Therefore since loss of business and rent deposit was not pleaded I will not consider the same in this decision. I also ask myself, were the defendants privy to the sale between the Club D-Mills and Sported Zebra? The relationship between the plaintiff and the defendants was that of Tenant Landlord so I can carefully conclude that there was no link between the plaintiff and the defendants in the sale since he did not benefit monetarily or otherwise from this sale therefore the plaintiff cannot claim special damages from the defendants on this issue. The plaintiff has not shown evidence of sale other than the agreement of sale to show that there was payment of consideration from the plaintiff to the proprietor of Club D'Mills.

On the issue of goods sold by auctioneers amounting to Kshs. 669,767/= the plaintiff produced Exb. No 4. The tribunal in disciplinary cause No.49 of 2011 found that he had refused to release the goods after he had instructed to do so by the advocate and was penalised a fine of Kshs 50,000/=and ordered to pay Kshs 20,000/= to the plaintiff. He did not appeal neither did he set aside the orders of the tribunal. He however attached Exb No. 5 a table titled "*valuation of goods collected by auctioneers*" This table is incomplete as it fails to state who the valuer was and even so the valuer was not produced in court, one cannot even tell who prepared the document. I do not find the same authentic and would not consider this form in my decision.

On the issue of general damages, I have stated that general damages are those that have occurred from the wrong complained of for the reason that they are its immediate, direct and proximate result or such as did in fact result from the wrong directly and approximately and without reference to the special character, condition or circumstances of the plaintiff. The plaintiff in his submissions stated the amount of Kshs. 1, 250, 874/- as general damages. It is not denied by the plaintiff that there was a lease agreement that was not favourable to him and from the evidence he tendered in Court, he showed correspondences between him and the defendants and defendant's agents. He also stated that he signed a letter of offer and goes on to state that he faithfully paid his rent and indeed rent for the time he conducted business on the said premises he paid rent and that it was the defendant who frustrated him. It is trite that in certain circumstances evidence of surrounding circumstances may be admissible to interpreted thus it can therefore be deduced that there was an implied form of contract since the actions of both the plaintiff and defendant connote some semblance of a contract where there is an offer and acceptance and also consideration. It is therefore in order that the plaintiff cannot claim for damages for breach of contract. Although this suit came for hearing by way of formal proof the plaintiff has failed to formally proof his claim as a result, this suit is dismissed with costs to the defendants.

Orders accordingly.

Dated, signed and delivered this 31st day of May 2013

R. E. OUGO

JUDGE

In the presence of:-

..... Plaintiff

.....1st and 2nd Defendants

.....Court Clerk