



Njenga t/a Wazo Jipya Cafe v Masterway Properties Ltd & another (Environment and Land Case Civil Suit 6 of 2008) [2022] KEELC 2872 (KLR) (12 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2872 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 6 OF 2008**

JA MOGENI, J

MAY 12, 2022

BETWEEN

TABITHA WANJIKU NJENGA T/A WAZO JIPYA CAFE PLAINTIFF

AND

MASTERWAY PROPERTIES LTD 1ST DEFENDANT

GATATHA FARMERS CO-OP LTD 2ND DEFENDANT

JUDGMENT

Introduction

1. By an Amended Complaint dated 26/09/2011 the Plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -
 - a) An order of injunction restraining the Defendants or their agents from leasing out Shop No. 7 situated on land parcel L.R No. 209/163/1/60, Gatatha House.
 - b) In the alternative, the Defendants to compensate the Plaintiff by paying her the value of the goods carried away by the Defendants and her investments in the suit premises valued at Kshs 829,450/-
 - c) Loss of earnings at the rate of Kshs 80,000/- per month for the remaining duration of tenancy of 24 months.
 - d) Cost of the suit.
 - e) Interest on (b), (c) and (d) above.
 - f) Any other just relief that the Court may deem fit to grant.



Plaintiff's Case

2. It was the Plaintiff's contention that at all material times relevant to this suit the 2nd Defendant was the registered proprietor of I.R No. - 209/163/1/60 whereupon was erected Gatatha House while the 1st Defendant was the Managing agent.
3. The Plaintiff avers that sometime in November 2003, the Defendant leased to the Plaintiff Shop No. 7 situate on the ground floor of Gatatha House owned by the 2nd Defendant and managed by the 1st Defendant.
4. It is her claim that it was a term of the agreement that the tenancy was to be for a period of 6 years commencing 15/11/2003. Sometimes on or about the night of 28/07/2007 -29/07/2007 the Plaintiff's rented premises (Shop No. 7) caught fire and the Kitchen was slightly burnt but the other parts of the hotel remained intact and were not affected by the fire.
5. The Plaintiff contends that the Defendants entered into a mutual agreement with her and it was agreed that the Defendants would renovate the premises and hand it over back to the Plaintiff upon renovation so that the Plaintiff could continue to operate the hotel as before.
6. It is her allegation that sometime in October 2007 the Defendants broke into the suit premises (Shop No. 7) and carried away all her goods(items), furniture and fittings in the suit premises and took them to an unknown destination. She contends that this was in breach of the mutual understanding between the parties herein.
7. The Plaintiff avers that the acts of the Defendants in carrying away her property (items of trade) from the rented premises without her knowledge and/or consent are meant to frustrate her and drive her out of business which has caused her irreparable loss and damage.
8. In further breach of the mutual understanding, she avers that the Defendants have now demolished the Plaintiff's hotel and portioned it into small stalls, a clear sign that the Plaintiff is not welcome back.
9. The Plaintiff therefore prays for an order of injunction to stop the Defendants from letting her rented premises during the pendency of the tenancy as she is still ready and willing to continue with the tenancy until the date of termination. In the alternative, she contends that the items/goods carried away by the Defendants and her investments in the suit premises are valued at Kshs. 829,450/-. She further avers that she used to make a profit of about Kshs. 80,000 per month which she is claiming as loss of user for the remaining duration of tenancy of 24 months.

Evidence by the Plaintiff

10. PW1 – Tabitha Wanjiku Njenga relied on her bundle of documents dated 11/11/2011 which she produced as exhibits 1 to 5. She reiterated what she had deponed in her amended plaint. She testified that she attempted to pay the rent for September vide letter dated 8/09/2007 but the Defendants refused to accept it. She further informed the court that she was not able to get any of her goods and property from the premises and that the Defendants did not call her to collect the same. She prayed for the court to order that the Defendants pay for the costs of her things in the premises as well as the profits she could have made for the remaining term of the lease and costs of the suit.
11. During cross examination, she testified that she undertook some renovations when she entered the premises. She changed the floor from PVC to tiles, partition, wall tiles in the kitchen as well as installing a chimney to the roof. She added a floor to the premises too. She admits that she did not have any document showing approval from the landlords to undertake the said renovations. She also installed



- electrical wiring and sockets. She admitted that she had not been given any approval to do so by the landlord. She confirms that she did not ask for any approval as she did not know whether she was required to do so which was ultra vires to clause 12(b) of the lease agreement (exhibit 1). She contends that the Defendants were aware of the renovations, and they did not stop her from doing the same.
12. It is the Plaintiff's evidence that she did not take out any insurance against damage by fire as was required by the lease agreement as per clause 12(i).
 13. She avers that other than the fire that broke out on 28/07/2008, she is not aware of any other fire that had previously broken out on the premises.
 14. It is the Plaintiff's evidence that she used to make a profit from the premises since December 2003, but she has not produced any evidence in terms of bank statements in court.
 15. The mutual agreement between the Defendants and the Plaintiff was not in writing.
 16. PW2 – Royford Mwenda Muthamia is a loss assessor and administer. He has a certificate from *the Constitution* of Insurance and was issued with a license in 2006. His number is 993. He informed the court that he had been instructed by the Plaintiff on 11/11/2007 to carry out an assessment of a commercial premises located in Ngara which had a fire incident and some property had been destroyed. He produced a report dated 4/12/2007 as evidence that he will rely on. He testified that it would cost Kshs. 829,450.00 to reinstate the loss. He carried out the assessment when the restaurant was not running, and the premises had not been renovated.
 17. With that evidence, the Plaintiff closed her case.

Defendants' Case

18. The Defendants entered appearance on 23/1/2008 and filed a defence dated 14/04/2011 wherein they pray that the Plaintiff's suit be dismissed with costs.
19. The Defendants admit that there was fire that broke out on the night of 28/7/2007 which damaged a large part of the entire premises and not just the kitchen area as alleged by the Plaintiff in paragraph 7 of the amended plaint.
20. The Defendants aver that there was communication between themselves and the Plaintiff which was very clear as per the Defendants' letter dated 30/07/2007 which stated that the landlord would review the Plaintiff's tenancy after renovations in view of the damages that had occurred and the grave danger posed by the Plaintiff to other tenants in the building.
21. They aver that the Plaintiff removed most of her goods willingly after the Defendants wrote a letter dated 30/07/2007 to the Plaintiff but she left some of the goods at the area where electricity meters are situated. Later on, KPLC officials implored upon the Defendants to remove the goods as the same could cause obstruction in case of an emergency. The goods have since been kept safely at the 2nd Defendant's store and have always been available for collection by the Plaintiff at any time.
22. The Defendants reiterate that the Plaintiff collected her goods save for those she kept at the area where the electricity meters are situated as stated above.
23. The Defendants deny that there was breach of mutual understanding as alleged in the amended plaint.
24. The Defendants aver that the Plaintiff's occupation of the 2nd Defendant's premises was hazardous to other tenants and the safety of the entire building and therefore the orders sought should not be granted as the premises have been occupied by other tenants and are no longer available.



25. They contend that they are not aware of the cost of damage alleged by the Plaintiff as the Defendants have their own assessment documents of the damage caused to the premises as a result of the Plaintiff's negligence which occasioned fire to the building. The Defendants deny that the Plaintiff has lost any earnings as alleged or at all and deny that the Plaintiff is entitled to any money as claimed or at all.
26. The Defendants aver that no demand or notice of intention to sue has been served at all. Furthermore, they deny that the Plaintiff is entitled to any of the reliefs sought and pray that the Plaintiff's suit be dismissed with costs.

Evidence by the defendants

27. DW1 – Geoffrey Muchiri Gitonga informed the court that he is the property manager of the 1st Defendant and that he has managed Bano House on LR No. 209/163/1/60 for 10 years. He produced and relied on documents in the Defendants list of documents dated 5/2/2013 (exhibit 1 to 5) and supplementary list of documents dated 1/11/2013. He testified that the Plaintiff had been running her café very well until 2005 when there was a fire breakout on the premises which was contained. He avers that the second fire broke out on the night of 28/07/2007 and from their investigations, the origin of the same was the kitchen. The city council of Nairobi fire brigade put out the fire. He contends that they had a consultant who assessed the damage caused and made a report dated 16/08/2007 (Ex. 1 of the document dated 4/02/2013). He however informed the court that the expert had died on 24/04/2011, and a death certificate was availed.
28. It is his evidence that they informed the Plaintiff, through a letter dated 21/12/2007, that the landlord did not wish to renew her lease because of the costs caused by the fire. Further, he avers that the value of the goods given by the Plaintiff is over calculated, but they are available for her collection. It is his evidence that the Plaintiff's claim for loss of earning at Kshs. 80,000.00 per month needs to be proved.
29. The 1st Defendant avers that the renovations cost around Kshs. 500,000.00 and that they too suffered loss as they lost income during the renovation. He admits that he did not produce any evidence in court to confirm this amount. It is his contention that the decision to terminate the Plaintiff's tenancy was justifiable as the threat was to the entire building. He asked the court to dismiss the Plaintiff's claim with costs.
30. During cross examination, he testified that the Plaintiff gave the key to the premises to the landlord on 30/07/2007. He added that the Plaintiff had been asked to remove her goods after the fire which she did, what she was unable to carry was placed at the electricity meter place, but KPLC told the Defendants to remove them. This was when the goods were moved to the landlord's place. The Plaintiff was not present at the time.
31. The Defendants closed their case.

Plaintiff's reply to the 1st and 2nd defendants' statement of defence

32. The Plaintiff contends that only the Kitchen was affected by the fire. She reiterates the contents of paragraph 8 of the amended plaint. The Plaintiff avers that it had been mutually agreed that the demised property would be given back to her upon the repairs being done.
33. The Plaintiff contends that she has never removed any of her goods from the demised premises as alleged by the Defendants.



34. The Plaintiff avers that she is not aware that the Defendants have kept her goods at the 2nd Defendants store as alleged. At no time have the Defendants ever indicated to the Plaintiff where they took and/or stored her items/goods.
35. The Plaintiff avers that the Defendants breached their mutual understanding and that her occupation was not hazard to other tenants as alleged. In any event, the tenancy agreement was mutual and the Defendants knew the nature of business that the Plaintiff intended to carry in the demised premises.
36. The Plaintiff contends that she has suffered loss and damage due to the acts of the Defendants and that she is entitled to both special and general damages. She prays that the Defendants defence be struck out with costs and judgment be entered as prayed for in the Plaintiff.

Plaintiff's written submissions.

37. The Plaintiff's submissions are dated 3/12/2021. Their claim is against the Defendants as outlined in the Amended Plaintiff dated 26/09/2011 and sought the orders stated therein. The Plaintiff testified in court during hearing and produced a list and bundle of documents dated 11/11/2011.
38. Aside from the summary of the Plaintiff's case on record, it is the Plaintiff's submission that her suit against the Defendants is for breach of contract. It is also her submission that the Defendants had asked her not to continue paying rent of Kshs. 11,500 as they renovated the premises after the fire broke out. She contends that in August 2007, the Defendants took away her hotel's accessories and placed them in an unknown area and that she was not invited to witness the action. The Plaintiff avers that the Defendants did not take out an inventory of the items they took away.
39. She submits that from the terms of the lease, it was for a period of 6 years commencing 1/11/2002, by the time the hotel got damaged by the fire, the lease was still operational, and the Defendants should have allowed her to renovate the hotel and operate until the end of the lease which was to expire in 2009.
40. As a result of the breach, the Plaintiff submits that she lost her sole source of income and therefore prays that she be compensated for the lost items as well as loss of earning amounting to Kshs. 80,000.00 per month for 26 months which comes to a total of Kshs. 2,080,000.00. she further submits that her evidence was not rebutted by the Defendants and prays that the court finds that she has proved her case on a balance of probabilities and proceed to award her prayers as prayed.

Defendants' submissions

41. The Defendants did not file any written submissions.

Analysis and Determination

42. The Court has now carefully read and considered the pleadings, the submissions and the evidence adduced and the exhibits thereto and renders itself as follows:
43. The Court finds the issues for determination are as follows;
 1. Whether the Defendants were in breach of contract.
 2. Whether the Plaintiff is entitled to the orders Sought
 3. Who should bear the costs of this suit



1. Whether the defendants were in breach of contract.

44. According to the Amended Pleadings, the Plaintiff and the Defendants entered into a lease agreement on 13/02/2004. The object of the lease was for the Plaintiff to carry on business as a restaurant. The Plaintiff averred that the Defendants demolished the Plaintiff's hotel and partitioned it into small stalls after they had mutually agreed that she hands over the premises to the Defendants for renovations following the fire that broke out on 28/07/2007.
45. It is not in dispute that the lease agreement dated 10/11/2003 was for a term of six (6) years commencing on 1/11/2003 and was set to lapse on 1/11/2009. I have perused the same and found that it does not bear a termination clause. I have also noted that the lease agreement is not registered. It is the Court's view that an unregistered lease is only a mere contract between the parties. See section 36(2) of the *Land Registration Act* 2012.
46. Black's Law Dictionary, 9th Edition, Page 213 defines a breach of Contract as;
- “a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”
47. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of *Rufale vs Umon Manufacturing Co. (Ramsboltom)* (1918) L.R. 1KB 592, Scrutton L.J. held as follows:
- “The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”
48. Equally in the case of *Attorney General of Belize et al Vs Belize Telecom Ltd & Another* (2009), 1WLR 1980 at page 1993, citing Lord Diplock in *Trollope Colls Ltd Vs Northwest Metropolitan Regional Hospital Board* (1973) 1 WLR 601 at 609, held as follows:
- “The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”
49. This Court will not purport to interpret the terms of the agreement at this stage. The Court will be guided by what is plainly provided.
50. Based on the above decisions, the starting point for me will be the agreement that the parties signed and the terms therein. According to the agreement the term of the lease was to run until 1/11/2009 and it did not have a termination clause therein.
51. From the pleadings, following the fire incident, it appears that there was a mutual agreement that the Plaintiff would vacate the premises on a temporary basis to enable the Defendants to carry out repairs. This meant that the Plaintiff expected to repossess the premises after the repair works were done.



52. The above position was also affirmed vide the Defendants' letter dated 30/07/2007. The said letter informed the Plaintiff that the landlord would review the tenancy with a view to ensure that damages of that nature (that caused the fire) did not occur again. That did not mean that the tenancy would be terminated upon review.
53. It appears that the Defendants took the opportunity to renovate the place into small stalls which would no longer be suitable for the Plaintiff to operate a hotel as before. The Defendants took the opportunity presented by the fire to terminate the Plaintiff's tenancy.
54. Furthermore, the Defendants went ahead and issued a letter dated 21/12/2007 terminating the tenancy during the pendency of a valid and subsisting lease which was still running.
55. Having carefully analyzed the available evidence, the Court finds and holds that the Defendants are in breach of contract for unlawfully terminating the lease agreement and evicting the Plaintiff before the tenancy period lapsed.

2. Whether the Plaintiff is entitled to the orders Sought

56. The Plaintiff has sought for orders as laid down in the Amended Plaint dated 26/09/2011.
57. The court cannot render itself on prayer (a) on an order for injunction as it has been overtaken by events and it will be no more than an academic exercise. The Defendants admitted that they have already leased out Shop No. 7 situated on land parcel L.R No. 209/163/1/60, Gatatha House and thus no longer available. Therefore, prayer (a) cannot be granted.
58. Similarly, the order of injunction cannot issue because the Plaintiff has also admitted that she no longer occupies the suit premises after the fire that broke out on 28/07/2007.
59. In order to allow prayer (c), the Plaintiff needed to satisfy the Court that indeed she has suffered loss of earnings at the rate of Kshs. 80,000.00 per month. PW1 pleaded that the Court orders the Defendants to pay the profits she could have made for the remaining term of the lease. The Plaintiff contended that she used to make a profit from the premises since December 2003, but she did not produce any material in terms of bank statements or business returns to lend credence to the claim that she used to make profits in the amount pleaded. See section 112 of the *Evidence Act*.
60. In the case of *Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Limited* [2016] eKLR, the Court of Appeal held that:

“No evidence whatsoever was led by the appellant on this aspect. This, as we already stated elsewhere, was an abstract figure which was thrown to the court with a mere statement that “this is the loss the appellant has suffered. Please award it to the appellant.”
61. Further, in the case of *SJ vs. Francesco Di Nello & Another* [2015] eKLR the Court of Appeal held that:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved.”
62. In associating myself with the decisions cited above and applying them to the current circumstances, I opine that the burden of proof was upon the Plaintiff to prove how she had arrived at the



aforementioned proposed figures. The Court finds that the Plaintiff did not particularize the loss of earnings and has failed to tender evidence to support her claims.

63. Lastly, I note that the Plaintiff managed to itemize her claim for compensation for the goods carried away by the Defendants and her investments in the suit premises valued at Kshs. 829,450/-. PW2, a loss assessor was called to produce the report dated 4/12/2007 whereby he testified that it would cost Kshs. 829,450.00 to reinstate the loss. The valuation report was not contested by the Defendants. The 1st Defendant produced a report dated 16/08/2007 purporting to assess the damage caused by the fire which report did not particularize any amount. Furthermore, the 1st Defendant testified that the renovations costs were around Kshs. 500,000.00 but failed to tender evidence in support of the claim for loss of income during the renovation. It is also the 1st Defendant's evidence that they moved the Plaintiff's things without notifying her, so she was not present as her goods were moved.
64. Based on the facts as presented, I believe an award of Kshs. 829,450/- would suffice and will proceed to award Kshs. 829,450/- plus interest at court's rate.

3. Who should bear the costs of the suit

65. It is trite that costs usually follow the events. Section 27 of the *Civil Procedure Act* gives the Court discretion to grants costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the Plaintiff being the successful litigant is entitled to the costs of the suit.
66. Consequently, I think I have decided all issues in this matter. I now make the following final orders:-
- i. I enter judgment for the Plaintiff against the Defendants herein jointly and severally for the sum of Kshs. 829,450/- being costs to reinstate the loss and the Plaintiff's investments in the suit premises with interest at court rates with effect from the date of this Judgment until the date of payment in full.
 - ii. I award the Plaintiff the costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2022.

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MOGENI J

Judgement read in virtual court in the presence of:

N/A For the Plaintiff

Mr. Gaita for the 1st & 2nd Defendants

Mr. Vincent Owour- Court Assistant.

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MOGENI J

