



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sony Audio Corner Ltd v Mugo & another (Environment & Land Case  
180 of 2009) [2022] KEELC 2905 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2905 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 180 OF 2009**

**MD MWANGI, J  
JUNE 28, 2022**

**BETWEEN**

**SONY AUDIO CORNER LTD ..... PLAINTIFF**

**AND**

**JOSEPH MUCHOKI MUGO ..... 1<sup>ST</sup> DEFENDANT**

**JUSTUS MATUNDURA T/A JUMBO AIRLINK AUCTIONEERS .... 2<sup>ND</sup>  
DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit vide the Plaint dated 23rd day of April, 2009. The said Plaint was subsequently amended on the 11th May, 2017. In the Amended Plaint, the Plaintiff prays for Judgement against the Defendants jointly and severally for;
  - a. A mandatory injunction compelling the 1st Defendant by himself his officers, servants and/ or agents to reconstruct the property known as LR.No.209/2523 to its original condition as before the unlawful demolition and to reinstate the Plaintiff as a tenant on the same terms as existed before the unlawful demolition of the 11th April, 2009.
  - b. Damages for the loss of business and profit for the period of demolition.
  - c. Special Damages for Loss of Stock, Furniture and Fixtures during the demolition, Kshs. 11,703,559.00.
  - d. General Damages.
  - e. Punitive and Exemplary Damages.
  - f. Costs of the suit and Interest from the 11th day of April, 2009 until payment in full.



2. The Defendants on the other hand initially filed their Joint Statement of Defence dated the 22nd May, 2009 in response to the Plaint. The statement of Defence was on the 29th May, 2009 amended to introduce a counter-claim by the 1<sup>st</sup> Defendant.
3. In the counter-claim, the 1st Defendant prays for damages for loss of income and damages arising as a result of the loan repayment thereof for the period of the obstruction of the development on the suit property.

#### **Plaintiff's case**

4. The Plaintiff in its amended Plaint avers that it was a lawful tenant of the 1<sup>st</sup> Defendant occupying a shop in the property known as L.R No. 209/2523 carrying on the business of electronics, both in wholesale and retail. The monthly rent was Kshs.17,250/-.
5. The Plaintiff alleges that the 1<sup>st</sup> Defendant obtained a judgement on the 11th November, 2008 from the Business Premises Tribunal ordering the tenants, including the Plaintiff to vacate before the 1st January, 2009. The Plaintiff and his co-tenants however, preferred an appeal against the said judgement in the High Court at Nairobi being HCCA No. 637 of 2008 in which they obtained stay of execution orders. The stay orders were on condition that each of the tenant/appellant deposits a sum of Kshs. 500,000/- in Court as a security within 15 days by way of cash or bank guarantee or file a record of appeal with 60 days, which orders the Plaintiff alleges to have complied with.
6. The Plaintiff avers that, in total disregard of the court orders, the 1st Defendant commenced demolition of the suit property arguing that the tenants had agreed to vacate. The Plaintiff moved to arrest the alleged contempt and was issued with a restraining order.
7. The 1st Defendant alleges that the 1<sup>st</sup> Defendant engaged the 2nd Defendant to purportedly levy distress claiming non-payment of rent, which allegation the Plaintiff denies on the basis that it had issued 2 cheques but the 1st Defendant declined to accept the cheques in payment of rent.
8. The Plaintiff further alleges that the 1st Defendant in continued defiance of the court orders, proceed to demolish the premises, cart away all the Plaintiff's goods and office furniture that were in the premises as at that time. This occasioned immense loss and damages to the Plaintiff which have been quantified at Kshs. 11,703,559/- particularized as special damages. The Plaintiff contends that in mitigation of the damages caused to its business by the Defendants, it had to search for alternative premises to continue with its business.

#### **1<sup>st</sup> Defendant's Claim**

9. The Defendants in their statement of Defence and counter-claim denied the Plaintiff's claim arguing that the Plaintiff had failed to comply with the court orders issued in the Appeal case before the High Court on 4<sup>th</sup> February 2009. Further that besides failing to comply with the explicit orders the court, the Plaintiff who was at the time a tenant was also in rent arrears. The Defendants denied any wrong doing on their part and prayed for the dismissal of the Plaintiff's case.
10. In his counter-claim, the 1<sup>st</sup> Defendant sought special damages for loss of rental income for two years at the rate of Kshs. 1,740,000/- per month totaling Kshs. 41,760,000/- together with Kshs.268,700/- for payment on loading zone and hoarding approval fees.
11. The matter proceeded to full hearing. The Plaintiff called one witness. The 1<sup>st</sup> Defendant testified in his own case. The 2<sup>nd</sup> Defendant did not participate in the case. Actually, the Advocate for the 1<sup>st</sup>



Defendant informed the court that he had unverified information that the 2<sup>nd</sup> Defendant had since passed on. Proof of death was however not availed.

### **Plaintiff's Evidence**

12. Mr. Muktar Ahmed Parker (PW 1) testified in support of the Plaintiff's case. He is a director of the Plaintiff Company. He stated that his company trades in electronic products and other accessories. He adopted his Witness Statement dated 2nd March 2012 as his evidence in-chief. He also produced the documents on the Plaintiff's Bundle of Documents dated 2nd March, 2012 as 'PE 1-12'.
13. He confirmed that the Plaintiff had been a tenant of the 1<sup>st</sup> Defendant in the plot L.R No. 209/2523 since 1981. That the dispute arose after the 1<sup>st</sup> Defendant served him with a termination notice on the basis that he wanted to demolish the premises. Being dissatisfied with the notice, he challenged it at the Business Premises Rent Tribunal alongside the other tenants but they were unsuccessful. They instituted an appeal at the High Court where they were granted conditional orders of stay of execution of the judgement of the Business Premises Rent Tribunal ('PE 2').
14. PW 1 averred that the Plaintiff duly complied with the orders of the High Court by depositing Kshs. 500,000/- within 15 days as ordered. However, he accused the Landlord of defying the stay orders when he proceeded to evict them and demolished the premises.
15. The witness further stated that though the Plaintiff was not in rent arrears, the 1<sup>st</sup> Defendant purported to levy distress for rent using the 2<sup>nd</sup> Defendant. He stated that he had forwarded the payment Cheques to the then 1st Defendants Advocates but they declined to accept the cheques. The witness stated that the Plaintiff lost furniture as per the list of the furniture and fixtures that he produced in court with the estimated values all valued at Kshs. 5, 410,000/-. Further, he produced a list of the merchandise he alleged was at the shop valued at Kshs. 6,293,559.
16. During cross-examination, PW1 averred that he first entered the suit premises in 1981 as a tenant. His space measured about 500-600 square feet. He further stated that he was not aware that the building had been condemned.
17. PW 1 stated that he was not sure if between November 2008 and 4th February, 2009 he had any order from the High Court. He confirmed that he complied with the Order produced as 'PE 2' by depositing the security as ordered within the timelines set by the court. Regarding the condition in the court order to file the record of appeal within 60 days, the witness stated that he was not sure if his lawyers complied. He was not aware that the appeal was dismissed but he confirmed that he didn't pursue the appeal to its logical conclusion.
18. Pw 1 confirmed that he had been in arrears of rent for the months of January, February and March 2009. The arrears, according to PW 1 arose because the Defendant refused to collect the cheque which had been drawn in his favour and paid to the Defendant's advocates. He averred that an auctioneer was sent to his premises to levy distress for rent but neither a proclamation was done nor a notification of sale issued to him. He had already instituted court proceedings hence he did not move to court to stop the sale. He is not sure if he reported the incidence to the police.
19. The witness in regard to the claim for special damages stated that the inventory of the stock produced as evidence was prepared from his computer system at the head office. He did not engage an Assessor or a value establish the value of the furniture and fittings. He did it on his own.
20. Further PW 1 confirmed that he filed two applications for contempt of court against the Defendants. One of the applications he was sure was dismissed but he had no information about the other one. He also stated that his applications to court seeking to stop the 1<sup>st</sup> Defendant from re-building on the suit



premises was not granted. He was aware that a new building was constructed on the suit property but he never requested for rental space in the new building.

21. In re-examination, PW 1 informed the court that he did not find it necessary to report the Auctioneer to the Auctioneer Licensing Board or to the Police as it was not a Criminal case. He stated that the Auctioneer's inventory was not accurate in terms of the value of the items proclaimed. He stated that he did not have receipts to support his claim since he had been at the shop for over thirty years.

### **1<sup>st</sup> Defendant's Evidence**

22. Mr. Joseph Muchoki Mugo testified as DW 1. He adopted his Witness Statement dated the 20<sup>th</sup> February, 2013 as his evidence in-chief. He also produced documents on the 1st Defendant's Bundle of Documents dated the 20th February, 2021 in support of his case. He produced them as 'DE 1-9'.
23. The 1<sup>st</sup> Defendant testified that at the time the demolition of the premises, there was no existing court order. He was never served with any court order. Further that the Court found him innocent on the accusation of contempt.
24. By the time he instructed the Auctioneers, the 1<sup>st</sup> Defendant stated that the Plaintiff was in rent arrears. He had not never any cheques from the Plaintiff as alleged. Further that at the time of demolition, there was no court order restraining him from demolishing the premises.
25. On the counterclaim, DW1 stated that the basis of his claim was that the Plaintiff had refused to vacate his premise thereby occasioning him loss of rental income.
26. On cross-examination, DW1 stated that he was not in breach of any court order. He confirmed instructing the Auctioneers, the 2nd Defendant herein to levy for distress and demolish the premises. That he was not aware if the Plaintiff deposited Kshs. 500,000/= security as directed by the High Court.
27. He further testified that he had difficulties paying a loan he was servicing although he had no documents to confirm the alleged loan. The Plaintiff's refusal to vacate from his premises therefore caused him great financial loss. He further stated that he did not seek the tribunal's authority before evicting the Plaintiff. That the Auctioneers informed him that the Plaintiff had only left behind a junk of television set in the premises. There were no furniture or fittings or other merchandise in the premises at the time of demolition as alleged by the Plaintiff. It is the non-compliance of the High Court's order by the Plaintiff that informed the 1<sup>st</sup> Defendant's move to instruct the Auctioneers to take action.
28. In re-examination, DW 1 stated that it is only the Plaintiff who paid the Kshs. 500,000/= in compliance with the High Court orders. The Plaintiff did not however file the Record of Appeal within 60 days as directed by the Court. The 1<sup>st</sup> Defendant confirmed that he was never cited for contempt as the order had lapsed at the time of the demolitions. The Proclamation form by the Auctioneers indicated the items that were proclaimed from the Plaintiff's shop.

### **Court's Directions**

29. The court directed parties to file written submissions. Both parties complied. The Plaintiff filed its submissions dated 11th March, 2022 whereas the 1st Defendant filed its submissions dated the 21st April, 2022. The court has had the opportunity to read the submissions.



## Issues for Determination

30. I agree with the Plaintiff's averment that the fate of this case rests on the interpretation of the order issued by Lady Justice Okwengu in HCCA No. 637/2009 on the 4<sup>th</sup> February 2009. Accordingly, having considered the pleadings filed by the parties in this case, the evidence adduced during the hearing and the submissions filed, the issues for determinations in this case are: -
- a) Whether the Plaintiff fully complied with the orders issued on 4<sup>th</sup> February 2009 in HCCA 637/2009.
  - b) Whether the 1<sup>st</sup> Defendant was justified in taking possession of the suit premises.
  - c) Whether the Plaintiff is entitled to the orders sought.
  - d) Whether the 1<sup>st</sup> Defendant has proved his counter claim against the Plaintiff.
  - e) Who shall bear the costs of this suit?

## Analysis and Determination

### A. Whether the Plaintiff fully complied with the orders of 4<sup>th</sup> February 2009 in HCCA 637/2009

31. As noted earlier, the Plaintiff in this case with his four other co-tenants had filed the appeal in the High Court challenging the decision of the Business Premises Rent Tribunal, hereinafter referred to as the Tribunal (allowing the termination of their tenancy(s) by the 1<sup>st</sup> Defendant and directing the plaintiff and his co-tenants to vacate the suit premises). Pending the hearing and determination of the appeal, the tenants made an application to stay the execution of the judgment of the Tribunal. The Hon. Lady Justice Hannah Okwengu (as she then was), conditionally allowed the application for stay of execution of the judgement and issued the following orders:
- i. That the order of the Business Premises Tribunal made on the 14<sup>th</sup> day of November 2008 be and is hereby stayed pending the hearing and final determination of the Appeal.
  - ii. That the Applicants shall each provide security by way of cash or bank guarantee for Kshs. 500,000/- within 15 days from the date hereof.
  - iii. That the Applicants shall file and serve a record of appeal within 60 days from the date hereof and take all necessary action to facilitate the speedy disposal of this appeal.
  - iv. That in the event of the Applicants failing to comply with (ii) and (iii) above, the order for stay of execution shall lapse.
  - v. That in the event that the Appeal is not disposed of within 9 months from the date hereof, the order of execution shall be discharged unless otherwise extended by court.
32. The orders of Hon. Justice Okwengu in this court's opinion were unambiguous and need no expounding.
33. As Trevelyan J, clearly stated in the case of *Kuna Arap Rono-vs- Swaran Singh Dhanjal* (1966) EA, 'The court sits to administer justice, and not to supervise a game of forensic dialectics.'
34. The Plaintiff's testimony was that on his part he deposited the security of Kshs 500,000/- in court within the timelines given by the court in accordance with paragraph (ii) of the order. This has not been disputed by the 1<sup>st</sup> Defendant.



35. Paragraph (ii) of the order was unequivocal that each of the Appellants was to deposit a security of Kshs. 500,000/- either in cash or by way of a bank guarantee. The order was not that the Appellants were to jointly deposit a lump sum of Kshs 2,500,000/- as alluded by the 1<sup>st</sup> Defendant in his testimony and submissions. So, as far paragraph (ii) of the order is concerned, the court is satisfied that the Plaintiff indeed complied.
36. There was however, a third paragraph in the said order of Lady Justice Okwengu. The import of that paragraph was that even though the Plaintiff had complied with paragraph (ii) as held above, he was obligated to file a record of appeal and serve it upon the Respondent (the Defendant in this case) within 60 days from the date of the order. There was no use of the word ‘or’ as the Plaintiff mischievously put it in his plaint. The conditions (i) and (ii) were to be sequentially fulfilled.
37. The court order was explicit that failure to comply with the two conditions, would automatically discharge the order of stay. The Plaintiff needed to have complied with both conditions. It was not a matter of ‘either or’ as he attempted to put it.
38. This is actually what happened. The Plaintiff, did not file and serve the record of appeal within the 60 days from the date of the order. He confirmed that in his testimony.
39. The consequence of the Plaintiff’s failure to comply with paragraph (iii) of the order was that the conditional order of stay of execution granted on 4<sup>th</sup> February 2009 lapsed on the 61<sup>st</sup> day from the date of its issue.
40. The court’s finding is that the Plaintiff did not fully comply with the orders of 4<sup>th</sup> February 2009 issued in HCCA 637/2009.

#### **B. Whether the Plaintiff was justified in taking possession of the suit premises.**

41. After the lapse of the orders of stay of execution on the 61<sup>st</sup> day, the situation then reverted as it were, prior to the issuance of the said orders. The situation prior to the issuance of the order was as explained in paragraph 3 of the Plaintiffs submissions. The Plaintiff explains that; “on the 4<sup>th</sup> day of November 2008, the tribunal delivered its judgment vide which the Tribunal allowed the notice to terminate the tenancy and directed the Plaintiff amongst the other tenants to vacate the demised premises.”
42. The lapse of the orders of stay of execution left the 1<sup>st</sup> Defendant at liberty to execute the judgement of the Business Premises Rent Tribunal. The Tribunal had upheld the 1<sup>st</sup> Defendant’s notice to terminate the tenancy with the Plaintiff and ordered the Plaintiff together with the other tenants to vacate the 1<sup>st</sup> Defendant’s premises. The 1<sup>st</sup> Defendant therefore had the authority to take possession of the suit premises. The Plaintiff was no longer a tenant. The Plaintiff had no right to remain in the 1<sup>st</sup> Defendant’s premises. His right ceased the moment the orders of 4<sup>th</sup> February 2009 lapsed on the 61<sup>st</sup> day from the date of their issue.
43. Notice to terminate the tenancy had been given way back in the year 2007. The 1<sup>st</sup> Defendant was at liberty not only to exercise his rights over the suit premises but also to levy distress for any rent arrears that may have been due without resulting to the Tribunal. The Business Premises Tribunal had already pronounced itself on the issue. The controlled tenancy had been terminated.

#### **C. Whether the Plaintiff is entitled to the orders sought.**

44. This court’s finding on the first issue on the Plaintiff’s failure to fully comply with the orders of the court in HCCA 637/2009 has a domino effect on the Plaintiff’s entire case. The Plaintiff had correctly



noted in its submissions that this suit's fate lay squarely on the interpretation of the orders of 4<sup>th</sup> February 2009. The rest then is fait accompli.

45. The Plaintiff's claim was based on the premise that the actions by the 1<sup>st</sup> Defendant of taking possession of the suit premises was unlawful and in contravention of the orders of 4<sup>th</sup> February 2009. The court however has found that the 1<sup>st</sup> Defendant acted lawfully after the lapse of the orders of 4<sup>th</sup> February 2009. He did not move to take possession until after the expiry of the 60 days given in the order for the Plaintiff to file his record of appeal.
46. Justice works both ways. The land lord is entitled to as much protection by the law as the tenant.
47. The Plaintiff seeks orders of a mandatory injunction compelling the 1<sup>st</sup> Defendant to reinstate the suit property to its original condition as it were before the unlawful demolition and to reinstate the Plaintiff as a tenant on the same terms as existed before the demolition of 11<sup>th</sup> April 2009, damages for loss of business and profit for the period of demolition, special damages for loss of stock, furniture and fixtures during the demolition amounting to Kshs. 11,703,559/=, general damages and punitive/exemplary damages.
48. The Plaintiff needed to have established and proved that the 1<sup>st</sup> Defendant's actions were unlawful for him to be awarded the prayers sought. Having failed to do so, he is not entitled to the orders sought. In any event, the Plaintiff's witness in his own words confirmed that a new building had been constructed on the suit land. The best he would have sought was for him to be given office space in the new building. Issuing the Plaintiff a mandatory injunction as sought would have meant bringing down the new building. That would not only be unreasonable and unconstitutional but also against public policy of promoting enterprise and economic growth.
49. I will dwell on the Plaintiff's claim for special damages for loss of stock, furniture and fixtures during the demolition amounting to Kshs 11,703,559 a little more. The Plaintiff had particularized the claim at paragraph 17 of the amended plaint as follows; -
  - a. Furniture & fixtures-Kshs 5,410,000.00
  - b. Stock in trade – Kshs 6,293,559.48
  - c. Loss of business opportunities.
50. In his testimony the Plaintiff's witness produced a list of the items allegedly lost with the estimated values indicated alongside the items. He confirmed that he is the one who assigned the value on the said items. He did not engage a property valuer or a loss assessor. He did not also avail before the court the documentary evidence in form of receipts, delivery notes or any other solid evidence to confirm that the items actually were in existence as alleged. It was only his word that the court was supposed to believe and award him the special damages claimed. He stated that he knew his shop and knew what was in it at the time.
51. In regard to claims for special damages, the law is well settled to the effect that, special damages need to be pleaded before they can be awarded; further, they must also be strictly proved before they can be awarded.
52. The Court of Appeal in the case of *Coast Bus Ltd-vs-Sisco E. Murunga Danyi & 2 others*, Civil Appeal No. 192 of 1992 restated the position in the following terms: -

“We would restate the position (that) special damages must be pleaded with as much particularity as circumstances permit”.



53. Addressing a situation similar to what is before me, where a party merely listed special damages without proof and expected the court to allow them, the court of Appeal in *Capital Fish Limited –vs- Kenya Power Lighting Company Limited* (2016) eKLR, re-affirmed the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved. The court was categorical that it is not enough for a party to throw an ‘abstract figure’ to the court with a mere statement that....’this is the loss the Appellant suffered.....please award it to the Appellant.’ Credible documentary evidence must be adduced to prove the pleaded special damages.
54. In the case of *David Bagine Vs Martin Bundi* (1997) eKLR, the Court of Appeal made reference to the Judgment by Lord Goddard CJ. in *Bonham Carter vs Hyde Park Hotel Limited* (1948) 64 TLR 177), where he stated that:
- “The Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”
55. In the case of *Kenya Women Finance Ltd vs Martha Wangari Kamau* (2021) eKLR, Justice Chacha Mwita cited with approval the Nigerian case of *Union Bank of Nigeria PLC – Vs- Albaji Adams Ayabule & another* (2011) JELR 48225(SC) (SC 221/2005(16/2/2011), where Mahmud Mohammed, JSC, delivering the judgment of the supreme court of Nigeria stated that:
- “I must emphasize that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a Plaintiff....Therefore, as far as the requirements of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.”
56. The Plaintiff in this case actually did what the Court of Appeal in the case of *Ryce Motors Ltd & another vs Elias Muroki* (1996) eKLR, referred to as ‘putting forward pieces of paper to prove loss.’ The list that the Plaintiff’s witness produced as evidence to prove the alleged loss does not amount to credible evidence that could prove the special damages sought.

#### **E. Whether the 1<sup>st</sup> Defendant has proved his counter-claim against the Plaintiff**

57. The 1<sup>st</sup> Defendant’s counter-claim suffers the same fate as the Plaintiff’s claim for special damages. He sought special damages for loss of rental income for two years at the rate of Kshs. 1,740,000/- per month totaling to Kshs. 41,760,000/- together with Ksha.268,700/- for payment on loading zone and hoarding approval fees.
58. The 1<sup>st</sup> Defendant did not avail any material evidence in support of the counter-claim. It must fail for want of proof.

#### **Conclusion.**

59. In conclusion, the Court finds that the Plaintiff has not proved its claim against the Defendants. The Plaintiff’s claim against the Defendant is therefore dismissed in its entirety. Likewise, the court finds that the 1<sup>st</sup> Defendant has not proved his claim against the Plaintiff. It is dismissed in its entirety.



60. On the issue of costs, and going by the above conclusion, the court orders that each party bears its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JUNE 2022

M.D MWANGI

JUDGE

In the Virtual Presence of:-

Ms. Migiro for the Plaintiff

Mr. Mwangi K. for the Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE

