



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 67 OF 2008

REV. SIMON NDUNGU MUNGAI1ST PLAINTIFF

PASTOR VINCENT MUNGAI.....2ND PLAINTIFF

**(T/A OVERCOMERS CHRISTIAN CENTRE & LIVELINK
COMMUNICATIONS)**

VERSUS

MUNICIPAL COUNCIL OF KIAMBU..... DEFENDANT

RULING

The plaintiffs filed the initial plaint on 6th March, 2008 claiming, *inter alia*, compensation for wrongful eviction by the defendant. On 16th April, 2008 the defendant filed a statement of defence and denied the plaintiffs' claim. Subsequently, the plaint was amended with leave of the court on 12th March, 2010. In the amended plaint, the plaintiffs stated that by a written tenancy agreement entered into on 1st February, 2005, the defendant leased out a hall to the plaintiff then trading as Overcomers Christian Centre. The lease was for a period of two years with effect from 1st of April, 2005. The monthly rent was Kshs.15,000/= . It was a term of the tenancy agreement that the plaintiffs would renovate and repair the leased premises at their own cost. However, the plaintiffs averred that the renovation cost is recoverable since the defendant evicted them unlawfully.

The plaintiffs further pleaded that they carried out extensive renovations to the said hall and started using the same as a church on Sundays and the premises were also used by Livelink Communications, as a Christian library, a printing press, a broadcast production studio and as a community upgrading centre, all sponsored by Overcomers Christian Missions Inc. of Atlanta Georgia, USA. The tenancy agreement expired on 31st of March, 2007 but both parties agreed orally to extension of the same. The plaintiffs

became month to month tenants.

The plaintiffs further pleaded as follows:

“7. On the 30th of June, 2007 the defendant unlawfully chased away the plaintiffs workers from the said premises and closed down the said premises claiming some arrears of the rent which the plaintiffs paid. The premises were opened on 1st July, 2007 but closed the same again on 2nd July, 2007.

8. On the 31st August, 2007 the defendant broke the plaintiffs’ padlock on the premises and removed the plaintiffs’ tools of trade and other equipment from the said premises, leaving a schedule of the said goods dated 31.08.2007.

9. The plaintiffs aver that there were other heavier equipment and furniture which were not carried on the said date and which were not recorded anywhere. On the 3.9.2007 the defendant recorded some of the unrecorded goods which the defendant removed from the premises on the 3.9.2007.

10. On the 3rd September, 2007 the plaintiffs instituted Kiambu CMCC No. 223 of 2007 when the court ordered that the plaintiffs would remain tenants pending the hearing and determination of their application on the 12th September, 2007.

11. In blatant disregard of the said court order the defendant on 4th September, 2007 carried away the equipments (sic) and purported to illegally install another tenant in the said premises.

12.

13.

13A On the 02.04.08 the plaintiffs agreed with the defendant that the defendant would release the said confiscated goods to the plaintiffs but on/or about the 11.04.08 at verification and inspection exercise the defendant released lesser goods than those that had been confiscated and some of the goods that were released were damaged beyond repair for which the plaintiffs claim their value from the defendant.”

The plaintiffs averred that many of the detained goods were for hire and were also generating income. Others were involved in a loan advancing project and by detaining the said goods they lost use of the same and the loan project was decimated.

The plaintiffs stated that the value of the renovations to the hall amounted to Kshs.1,430,305/=. They also claimed loss of business for printing, broadcast production and recording at Kshs.5,753,000/=. The value of the lost and damaged goods was stated as Kshs.16,651,950/=. In view of the foregoing, the plaintiffs sought judgment as hereunder:

“(a) An order for inspection, verification and release of the plaintiffs confiscated goods pending the hearing and determination of the suit.

(b) The value of any such goods that may (sic) well as loss of business in the sum of Kshs.22,404,950/=.

- (c) **Compensation for the renovation done in the sum of Kshs.1,430,305/=.**
- (d) **General damages for breach of contract, and unlawful eviction.**
- (e) **Loss of business.**
- (f) **Cost of the suit and interest.**
- (g) **Such other or further relief the court may grant.”**

In the statement of defence that was filed before the amendment of the plaint, the defendant admitted having entered into the said lease agreement with the plaintiffs trading as Overcomers Christian Centre but denied having orally extended the agreement. It stated that it wrote to the plaintiffs requesting them to apply for an extension which offer they declined. The defendant also denied having chased away the plaintiffs and averred that the plaintiffs were merely asked to clear their rent arrears and give vacant possession of the demised premises upon termination of the lease. The defendant further denied having refused to release the plaintiff's goods and equipment as alleged. Upon filing of the amended plaint the defendant did not deem it necessary to amend its defence. On 9th April, 2010 the plaintiff's advocates wrote to this court's Deputy Registrar and stated as follows:

“We refer to the order of amendment dated 22nd February, 2010. The defendant who has been served with the amended plaint has not filed any defence to the amended plaint and we would therefore be glad if you entered judgment in default of defence to the liquidated claim, in the sum of Kshs.23,835,255/=.”

The orders made on 22nd February, 2010 granted leave to the plaintiffs to amend their plaint within 21 days and the defendant was granted liberty to amend the statement of defence.

On 9th April, 2010 the Deputy Registrar entered judgment as prayed by the plaintiffs.

When the suit came up for hearing on 19th October, 2010 the defendant's witnesses were absent and an application for adjournment by the defendant's counsel was not granted. The hearing proceeded as scheduled and only the 2nd plaintiff testified. He stated, *inter alia*, that he is a founder member of Overcomers Christian Missions which was registered at Atlanta, USA. The 2nd plaintiff is also the Media Production Director of Livelink Communications, a subsidiary of Overcomers Christian Mission. He is also a director of Livelink Communications. He testified as to how the plaintiffs entered into a tenancy agreement with the defendant. The tenancy agreement was produced as **p.exh.4**. The same is for a period of two years with effect from 1st February, 2005. It was however renewable on expiry. Clause 5 thereof states as follows:

“That the renovations, repair etc would be at no cost to the council and the Overcomers Christian Centre would not seek refund of the money spent on the same and that the repairs would be done without affecting the architectural/structural design of the building.”

Upon signing the tenancy agreement the plaintiffs embarked on the renovations of the hall and according to the 2nd plaintiff, the defendant gave them a bill of quantities amounting to Kshs.855,305/= which was the amount required for renovations. They engaged a contractor to do the work but the bill of quantities was revised to about Kshs.1.4 million. However, the alleged bill of quantities was not proved by the plaintiffs. The plaintiffs were not able to prove the amount that was spent on the renovations.

The 2nd plaintiff further testified that apart from using the hall for their church meetings they were also carrying out other programmes therein. They had a community improvement initiative wherein they used to invite various experts to teach subjects like bee keeping and mushroom growing. There were also equipment that are used for media production. The plaintiffs also had heavy commercial print machineries for printing various books and other materials. The plaintiffs were also advancing loans on security of documents like log books and bank passbooks.

The 2nd plaintiff further testified that upon expiry of the tenancy agreement on 31st March, 2007 the defendant allowed them to continue in occupation and in turn they continued to pay rent as usual. But on 30th June, 2007 the defendant closed the facility without any notice. The defendant alleged that the plaintiffs were in arrears of rent. On the same day the plaintiffs paid Kshs.20,000/= to the defendant and the premises were re-opened.

On 2nd July, 2007 the defendant closed the hall again. The defendant was demanding arrears of rent but the plaintiffs were reluctant to pay, saying that the renovations had taken a lot of money. On 10th August, 2007 the plaintiffs paid Kshs.50,000/=. The premises however remained closed until 31st August, 2007 when the defendant's employees broke the padlocks and carried away most of the goods and equipment therein. Some of the goods were also vandalized. Some of the equipment in the hall were very heavy and could not be carried without a forklift but later on they were removed and the defendant gave to the plaintiffs a list of the confiscated items. The list is contained in the schedule of the plaintiffs' admitted list of documents. It is No. 7 therein. The plaintiffs went to the police and reported the incident. Later on they filed **Kiambu CMCC No. 223 of 2007**. The court ordered that the status quo be maintained and the order was served upon the defendant's Town Clerk. That notwithstanding, the defendants continued with the eviction, the 2nd plaintiff stated. The defendant said that there was another tenant who had rented the hall and that the plaintiffs were asked to refund that other tenant a sum of Kshs.45,000/= which he had paid, pending the hearing of the aforesaid case. However, the case was eventually struck out as the court held that the plaintiffs had no locus standi.

The plaintiffs' confiscated goods were not returned because the defendant required the plaintiffs to clear some outstanding arrears of rent. The plaintiffs were contending that there were no such arrears of rent.

The 2nd plaintiff further testified that as a result of the defendant's unlawful action its church members were scattered. The plaintiffs also suffered substantial financial loss because they were unable to follow up the people they had advanced loans to on security of various documents. The security documents had been taken away by the defendants. The borrowers were said to have been about 3,800 people. The plaintiffs were accused of having cheated their church members and borrowers generally. The plaintiffs also lost a lot of furniture and equipment.

Although the plaintiffs claimed accumulated sum of Kshs.23,835, 255/= as the quantum of the loss and damage suffered, that claim was not proved. It is trite law that special damage must be strictly proved. The plaintiffs ought to have produced documentary evidence in respect of the value of the loss suffered.

In cross examination, the plaintiffs admitted that as at the date when the defendant moved into the demised premises and carried away their goods they were in arrears of rent amounting to Kshs.66,000/=. They also admitted that after the goods were taken their advocate wrote to the defendant and requested for verification of the goods that had been taken. The verification was done 9 months after the goods were taken and the plaintiffs collected some of the goods that were available. Many items were missing and others had been destroyed. After the verification exercise a schedule of the goods was

prepared and signed by both parties. The schedule is contained in the plaintiffs' list of documents, see page 80 thereof. There is also a schedule which shows the items that were damaged and the alleged values thereof. As earlier stated, the alleged value of the damaged goods was not proved at all.

The parties filed their written submissions which I have considered. No agreed list of issues was filed but the plaintiffs filed their version of issues for determination. The issues are as hereunder:

- “1. What was the quantum of the sums the plaintiffs spent in renovating the suit premises?**
- 2. Would the defendant be liable to compensate the plaintiffs for the renovations done to the premises in the event the defendant terminated the tenancy agreement prematurely?**
- 3. Was the written tenancy agreement orally extended, if not is the defendant estopped from denying extension when it accepted rent beyond the tenancy period?**
- 4. Were the plaintiffs evicted from the suit premises or is it the tenancy that expired?**
- 5. What is the quantum of the damage the plaintiffs suffered out of their move out of their premises? Is the defendant liable to compensate the plaintiffs the said damage?**
- 6. Which party is to bear the costs of the suit?”**

Before I come to determination of the above issues, it is important that I first deal with the issue of the interlocutory judgment that was entered by the Deputy Registrar on 9th April, 2010. The same was entered because of the defendant's failure to file an amended defence to the amended plaint. The interlocutory judgment is in the sum of Kshs.23,835,255/=. **Order VIA rule 1(6)** states as follows:

“Where a party has pleaded to a pleading which is subsequently amended and served on him under subrule (1), then, if that party does not amend his pleading under the foregoing provisions of this rule, he shall be taken to rely on it in answer to the amended pleading, and Order VI, rule 10(2) shall have effect at the expiry of the said period within which the pleading could have been amended.”

What does **Order VI rule 10(2)** state? It is as follows:

- “10(2) Subject to subrule (3)-**
- (a) there is at the close of pleadings a joinder of issue on the pleading last filed; and**
 - (b) a party may in his pleading expressly join issue on the immediately preceding pleading.”**

Since the defendant did not file an amended defence it follows therefore that it relied on it in answer to the amended plaint and in terms of **Order VI rule 10 (2)** there was a joinder of issue on the pleading last filed. The defendant had denied the plaintiffs claim in its totality and averred that the suit is frivolous, vexatious and an abuse of the court process. In the circumstances, the interlocutory judgment was wrongly entered by the Deputy Registrar and is hereby set aside *ex debito justitiae*.

I now turn to the issues for determination as framed by the plaintiff's advocate.

- 1. Quantum of the sums spent by the plaintiffs in renovating the suit premises**

Although the plaintiffs claimed that they spent Kshs.1,430,305/= in renovating the hall, that claim was not proved. The plaintiffs stated that they did not know the exact amount that was spent. They were given a bill of quantities by the defendant indicating that a sum of Kshs.855,305/= was required to renovate the hall but added that the figure was revised to about Kshs.1.4 million. The plaintiffs alleged that they engaged a contractor by the name Safi Construction Company but the contract which would have shown the contract sum was not produced before the court. The cost of renovation of the hall was therefore not proved.

2. Is the defendant liable to compensate the plaintiffs for the renovations to the hall?

The tenancy agreement was for two years and in respect of renovations of the hall, it was clearly stated that **“Overcomers Christian Centre would not seek refund of the money spent”**. The 2nd plaintiff testified that they expected to be given a long term lease so as to recover the renovation cost. However, that was not the case since the parties voluntarily executed the tenancy agreement. The fact that the tenancy period was two years (renewable) there was no guarantee that the same was going to be renewed. Upon expiry of the two years there was no agreement that the defendant was going to compensate the plaintiffs for the renovation cost. There was also no provision that in the event the defendant terminated the tenancy agreement prematurely the latter would be liable to compensate the plaintiffs for the renovations done to the hall.

3. Was the written tenancy orally extended?

Upon the expiry of the two year period of the tenancy between the plaintiff and the defendant, none of the parties sought to terminate the tenancy. The plaintiffs paid rent as usual and the same was accepted by the defendant. By implication of the law, a periodic tenancy was therefore created. That being the case the plaintiffs were entitled to a month’s notice before termination of the tenancy. That was not done.

4. Were the plaintiffs evicted from the suit premises?

Although the defendant denied having evicted the plaintiffs, from the plaintiffs’ uncontroverted evidence it is clear that on 30th June, 2007 the defendant chased away the plaintiffs’ workers from the suit premises and closed them down. They did so because the plaintiffs were in arrears of rent. There is no evidence that any notice had been served upon the plaintiffs and in any event, the defendants’ action was unlawful. The defendant did not have any court order to evict the plaintiffs from the suit premises. In **Gusii Mwalimu Investment Company Limited and Another vs. Mwalimu Hotel Kisii Limited [1995 - 98] 2EA 100** it was held that the obtaining of possession by levying illegal distress was *per se* wrong. **“Where the tenant does not consent or agree to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal”** before he can lawfully terminate the tenancy. The defendants’ action of taking away the plaintiffs’ goods in the hall and thereby terminating the lawful tenancy was a violation of the law and caused the plaintiffs substantial loss and damage. The church congregation that was meeting in the hall was scattered and all the other businesses that were being conducted by the plaintiffs from the hall were abruptly brought to an end. Even if the plaintiffs were in arrears of rent the defendant’s action was unjustified, in the absence of a lawful order sanctioning its actions. I agree with the plaintiffs that the defendant’s unlawful action painted them in very bad light in the eyes of their church members and the people as well as the organizations they were doing business with.

5. What is the quantum of damages payable to the plaintiffs for the defendant’s unlawful acts?

The plaintiffs advocate urged this court to award a sum of Kshs.10 million as general damages for

unlawful eviction/breach of contract. He cited the case of **Francis Muringu Mureu T/A Jem Corner Bar vs. John Muranguri Karuga [2004] eKLR** where the court awarded the plaintiff Kshs.100,000/= as punitive damages and Kshs.200,000/= as general damages for unlawful eviction in a claim where the value of the goods lost, although not proved, was stated to have been about Kshs.100,000/=. Counsel submitted that in the instant case the value of the goods lost was in the region of Kshs.23,835,255/=. Although I have already held that that value was not proved, I have no doubt that the plaintiffs lost many valuable items. The lost and/or damaged items included a Phonic sound mixer, automatic control unit, Sony video, electric guitar, broadcaster studio mixer, keyboard, Sony TV, etc. Very many books were lost and/or damaged. Loan documents and/or records were also destroyed.

Considering the nature of loss and/or damage that the plaintiffs were put into as a result of the defendant's unlawful acts, I assess the damages payable for unlawful eviction at **Kshs.2 million** which I award the plaintiffs.

It is unfortunate that the plaintiffs did not prosecute their case properly and as such were unable to prove the monetary value of the lost and damaged goods. I am therefore unable to award them any special damages.

The first prayer is for an order for inspection, verification and release of the plaintiffs' confiscated goods pending the hearing and determination of the suit. I believe that prayer was overtaken by events. But in the event that the defendant is still holding any of the plaintiff's goods they should forthwith release the same to them. The defendant shall bear the costs of this suit plus interest on the awarded sum at court rates.

DATED, SIGNED and DELIVERED at NAIROBI THIS 31ST DAY OF JANURAY, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk

Mr. Kimani Charagu for the defendant

No appearance for the plaintiffs