



IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 2986 OF 1994

EDITH MUTHONI KIRUGUMI PLAINTIFF
VERSUS
JUMA MUCHEMI ADV & 2 OTHERSDEFENDANTS

JUDGEMENT

Coram: Mwera J

Nduati for plaintiff

Munyalo for 2nd, 3rd defendant

Njoroge court clerk

This suit was instituted by filing a plaint on 17.8.94. A defence was filed on 31.1.95. Over the period there were amendments to pleadings and the last upon which judgement will be based as far as the record can show, are:

- 1) The Re-amended plaint dated 13.11.01
- 2) The Amended Defence dated 18.5.05

The parties filed separate sets of issues: the plaintiff's 17 issues dated 22.7.96 and the defendant's set of seven dated 215/97.

Before the trial got under way on 10.6.10 counsel addressed the court on previous interlocutory proceedings including rulings. It was noted that the ruling of Shah J of 28/9/94 was to the effect that the plaintiff had been evicted from the business premises where she had been a protected tenant illegally. And so the hearing was confined to assessing damages only.

In the re-amended plaint the plaintiff averred that the 1st defendant was the registered owner of a property known as Eastlands Cinema Building while the 2nd defendant was his managing agent, leasing out the premises and collecting rents. The 3rd defendant was only described as an adult male of sound mind trading as Palmann Investments. That on 9.8.94 the 1st and 2nd defendants broke into the plaintiff's establishment in the said building without justifiable cause and carried away business goods and equipment and installed the 3rd defendant therein – all in disregard of a lease between the plaintiff and the 1st defendant. All that caused loss and damage to the plaintiff estimated at sh. 6000/= per day. She proceeded to list items of goods taken away, some with values shown, others not – deep fat fryers, potato peelers, chairs tables, bicycles, a water tank and heater, cabins, sinks etc so she sought a mandatory injunction to have her reinstated into the premises and have her goods returned. For prayers the plaintiff sought general damages following the illegal closure of the rented place and dispossession of the same resulting in loss of business.

And that the 1st and 2nd defendants be compelled to release and install in the premises the plaintiff's

goods illegally carted away.

In the amended defence it was denied that the defendants illegally broke into the business place of the plaintiff and took away her goods. Or that such an action caused the plaintiff loss and prejudice for 4 months. It was further denied that the plaintiff's loss/damage was sh. 6000/= per day. The plaintiff was required to avail proof of every item allegedly removed by the defendants. And that the plaintiff's claim based on alleged illegal closure and removal of her property from the premises was misconceived.

The plaintiff (PW1) told the court that she started business of a catering outfit in the subject premises in 1982. She bought the business from a 3rd party and she developed it over time supplying meals to clients in Industrial Area, schools etc. She turned to her bundle of documents (Exh P1) and continued. She alluded to supply agreements with ASK on 25.7.90 at Kasarani (Exh P1 – 9) and also Solonin Paints (Exh P1 – 10). Upper Hill School was another client (Exh P1 – 11). She used to earn sh. 5000/= to sh 6000/= per day. By the time of eviction the plaintiff said that she did not owe any rents. But that on 21.7.94 one Charles Onyancha, an agent of the 1st defendant had claimed that the plaintiff owed sh. 20,000/= in rents (Exh P1 – 6). She paid it on 1.8.94 and a letter from the defendant's lawyers, M/s Gatonye Waweru & Co. confirmed that (Exh P1-8). But then she was unlawfully evicted on 9.8.94, when she was not present. When she came on site the plaintiff could not access it and she was served with an inventory of her goods that were taken away (Exh P1-4) by the 2nd defendant/auctioneer and agent of the 1st defendant. To her the inventory was not complete. There had been more goods in the place. She produced her own inventory (Exh P1-5) – an insurance cover for the property between **15.12.92** and **15.12.93**. The goods were covered for sh. 554,300/= against fire. Without inquiring what goods were in the premises as at 9.8.94 when they were alleged removed, the court was told that in his ruling Shah J, had ordered that she pay sh. 20,000/= before she got her goods back. She paid the sum (Exh P1 – 17) on 27.4.95 but still did not recover her goods. That payment was however declined by the defendants' lawyers (Exh P1 – 18) citing lack of instructions. So the plaintiff lost the equipment, she was locked out of the premises and could thus not earn a living or pay her mortgage with Housing Finance Company. Her house was sold. The plaintiff then identified the annual accounts report for the year ending 31.12.93 made by M/s Gathura Nduati & Company (Accountants).

In cross – examination, the plaintiff told the court that she did not know the 3rd defendant even if they may have been trading in the same building. She had bought the business (Exh P1–2) with equipment inside. As to her income, the plaintiff said that an accountant could give testimony. She did not have income tax returns. Hers was a daily business operation and she kept balance sheets, income and expenditure sheets which were there.

As at 1.8.94 when the defendant's lawyers wrote to her (Exh P1 – 8) she was owing sh. 56,000/= in rents. She paid sh. 20,000/= and left sh. 36 000/= outstanding. But she thought she had no rent arrears. However, reading from her own bundle of documents (Exh D1 – 3) it revealed that as at October 1991 she owed sh. 31,385/=. She was evicted on 9.8.94, when there was nobody in the business at the time. She had closed it for some reason or another. She had no evidence that her children were in the premises between January and August 1994. Her own documents e.g. a letter of 8.8.94 admitted that rents were owed. She had written (Exh D1 – 22) that there be a meeting with the 2nd defendant on 9.8.94 but she could not remember whether one took place. Her children ran the business and she could not tell if one of her sons opened the premises for the 2nd defendant on that 9.8.94. Shown the inventory made by the 2nd defendant on 9.8.94 the plaintiff said that she could not tell how he got into the premises. In her further documents there was a note to the effect that she had closed the premises in 1994. The plaintiff answered that she had insurance cover for 1992/93 over her business but none in 1993/94 year. The schedule to the insurance cover (Exh P1 – 5) showed 5 deep fryers, a potato peeler, tables and 21 seats with values different from what had been claimed in the plaint. The explanation was that the plaintiff bought those items in 1982 at a lower price. They appreciated in value over time. And that Shah J's ruling indicated that on paying rents, the plaintiff could collect her goods. To mitigate her loss, the plaintiff passed sh. 20,000/= to her lawyer to pay over and that the audited report dated 18.6.04 was made for the sake of these proceedings. She did not have audited accounts from 1982 to 1992.

James Nduati (PW2), a certified accountant was once instructed by the plaintiff to do her business accounts up to 31/12/93. Sources of information were: vouchers, schedules and estimates oral information. The exercise was difficult to the extent that the witness could not make a reasonable opinion. That there were missing documents said to be in possession of the other party. But PW2 made a general assessment that the plaintiff's business was a going concern from which she earned income. His report was produced as Exh. P2, it was made in June 2004 long after the business was closed. PW2 did not know when. The client had told the witness that he was having this case. That PW2 did not prepare this report. Its maker died. PW2, although he did not make the report testified that there were no receipts, no lists/schedules but reference was made to vouchers. He denied that the report was made solely on information and it was limited to the year ending 1993 only. It could not go outside. Even after disclosing that the maker of the report PW2 was referring to died the witness claimed that he was given a schedule of property to work out depreciation at 12.5% per annum. Most of the documents and receipts relating to the furniture were not shown to PW2. He only guessed the values. That profit figure of sh. 937,598/= was given by the plaintiff. PW2 himself could not say that the plaintiff made that sum as at December 1993. The plaintiff's case closed.

The 2nd defendant then testified (DW1). Trading as Regent Auctioneers, DW1 was the 1st defendant's letting agent. The plaintiff was a tenant in the suit premises as well as the 3rd defendant. That the plaintiff was poor at paying rents. She issued bouncing cheques (Exh D1 – 5B, 3B) and so DW1 issued a notice to proclaim for rent arrears (Exh D1 – 24) on 5.3.93. Then proclamation issued on 9.8.94 (Exh D1 – 27). The plaintiff had left the premises owing sh. 56,000/= in rents. Her cheque for sh. 20,000/= in July had bounced. A sum of sh. 36,000/= was owing. It was never paid. The plaintiff stopped operating her business in April 1994 so when DW1 went there it was locked. In August the plaintiff promised to come, clear the place and also pay due rents (Exh D1 – 21, 22). The witness could then rent out the place. On 8.8.94 the plaintiff did not show up. On 9.8.94 she sent her son who used to operate the place (Exh D1 – 27) He came and opened the place. But all the valuables had been taken away. The witness made an inventory of what was left. He kept them in a store. He did not forcefully evict the plaintiff. On 10.8.94 the place was let to the 3rd defendant and this suit was filed on 17.8.94 DW1 kept the plaintiff's goods for long. At last he gave them to scrap dealers except some good items he sold in December 2004 to recover his expenses and even these were not fully recovered. The plaintiff did not mitigate her loss by paying sh. 20,000/= as ordered by Shah J and collecting her goods. At the end of the day the plaintiff owed rents as well as expenses to DW1. She left the premises with scratches, smoke spots etc. The witness thought the plaintiff's business was small, with deliveries being made by bicycle to customers in Industrial Area. If she was earning sh. 6000/= per month she could thus pay sh. 4000/= per month which she failed to do.

As at 5.3.1993 (Exh. D1-24) the plaintiff owed sh. 75,585/= in rents. She paid sh. 22,000/= on 11.5.11 (Exh D1 – 10) leaving a balance. The rent arrears grew from the time the plaintiff got into the premises. When the witness took her over in 1991 she had sh. 20,000/= in arrears.

The witness then went over times of arrears, bouncing cheques e.t.c and that his own records were properly kept. The witness referred to the plaintiff's letter of 8.3.93 (Exh D1 – 17) in which she acknowledged owing sh. 40,000/= in rent arrears promising to pay it over 5 months. Seemingly, that promise was not kept.

DW1 told the court that he did not need a court order to enter the premises and proclaim the plaintiff's goods on account of owed arrears. In this case the plaintiff's son opened the premises.

Reference was made to a letter dated 27.4.95 by the plaintiff's lawyers asking whether the defendants could accept sh. 20,000/= before repossessing the attached goods. DW1 said that such a letter was unnecessary in the light of Shah J's ruling. It had directed that the plaintiff pay that sum and collect her goods.

The witness was heard in reexamination but the parties had him recalled to clarify some things e.g. that rent increase from sh. 4000/= to sh. 7000/= per month had been sanctioned by the Business Premises Rent Tribunal. On 14.7.94 (Exh D1 -18) the plaintiff had requested for time to clear rent owing DW1 denied collusion with the 3rd defendant, to throw out the plaintiff so that that party would move into the

premises. The trial closed with the plaintiff withdrawing claims against the 3rd defendant. This meant that the suit against him be and was dismissed with costs. The rest of the parties then submitted.

Beginning with liability and quoting from Shah J's ruling of 28.9.94 it was all put at the feet of the defendants. The eviction of the plaintiff was illegal. She could proceed to seek damages. That was alluded to at the beginning.

To assess damages the court was urged to note that the 1st defendant did not defend himself here. But before saying more, this court was of the view that his agent, the 2nd defendant did as well as it was needed. After reviewing the evidence a sum of sh. 5,242,245/= was given as a grand award. Of this sh. 554,300/= was to represent the worth of the fittings and equipment which the plaintiff took on charge with the purchase of the business and then insured the same in 1992/93 against fire. No reference was made to depreciation and/or that there was no evidence that the same items of property were still in the premises and that they were not insured for the same value or less in 1993/94 when they were allegedly carted away by the 2nd defendant.

A sum of sh. 937,589/= was taken as annual loss of profits, apparently basing the figure on PW2's audited accounts. The plaintiff thought that she was entitled to the same sum over 5 years and so proposed that the court award her sh. 4,687,945/=.

The 1st and 2nd defendants' submission similarly went over the pleadings and the evidence and centered on lack of documents to support the claim that the plaintiff really supplied food to the places she claimed she did. She showed no receipts/accounts for the years 1982 to 1994 that he was trading. There were no tax returns or banking slips, statements etc. A sum of sh. 36,000/= was said to have been the rent arrears that was never paid to-date. The plaintiff did not pay sh. 20,000/= so that she could collect her goods. She closed the premises in April 1994 and did not meet the 2nd defendant on 9.8.94 to sort out the issue of the rent. She was thus not evicted from the premises.

Reference was made to the plaintiff's property not having been insured in 1993/94 and that the report produced by PW2 was manufactured for the sake of this case only. Thus as at December 31, 1993 no reliable report was properly compiled due to absence of many basic documents.

Then the defence evidence was gone into with the conclusion that the plaintiff's claim had been overtaken by events; she was in breach of tenancy agreement by owing rent arrears (sh. 36,000). The premises were not broken into. She closed it herself and goods were seized on a justifiable ground – outstanding rents and so she was not entitled to sh. 6,000/= for 4 months to cover loss of business. Neither was she entitled to the value of her goods or general damages for closure of the premises. Several cases were cited to support the position of the defendants.

As stated earlier this determination is limited only to assessing damages claimed to have been suffered by the plaintiff.

In her final submission the plaintiff said that the defendant unlawfully evicted her and closed her premises. Then she incurred loss of business and fittings and equipment. Accordingly she was entitled to **general** damages and **special** damages.

Beginning with special damages, the plaintiff demanded a total of sh. 5,242,245/= comprising the worth of her goods and loss of business for 5 years. The goods were said to have been worth sh. 554,300/= according to the evidence of insurance cover for the year 1992/93. There was no valuation and cover in 1993/94. One cannot therefore say whether the same quantities of goods were the ones the 2nd defendant took in August 1994, or if they were less in quantity. Definitely they had depreciated over the period. So this value claimed is highly speculative. Shah J directed in his ruling of 29.11.94 that on tendering/paying rent due and both sides appear agreed that it was sh. 20,000/=, the plaintiff would retrieve her goods. She did not do that. The 2nd defendant remained with the goods which he sold off ten years later – in 2004. They could neither pay rents owed in arrears nor his storage charges. The plaintiff did not mitigate her loss in any way. No explanation is given. She is thus not entitled for an award under this head.

The so-called business loss at sh. 937 589/= per annum was, in the view of this case, a dubious and fabricated sum. The report (Exh P2) which PW2 placed before court was unreliable in every respect. PW2 did not prepare it. The maker was said to have died. The report was made specifically for this suit and for one year only - 1993. There were no similar reports between 1982 and 1992 or for the 8 months in 1994 – i.e. up to the time of the alleged seizure of the goods and closure of the shop. And the report stated that many books, documents etc essential for a proper audit account were not available.

So relying on such a report could be greatly misleading and prejudicial to the other party. The court even wondered that if the plaintiff had made about sh. 1m per annum why did she default in paying rents at sh. 4000/= per month rising to sh. 7000/= ? Unbelievable. Hers must have been a small outfit supplying small amounts of snacks by bicycle in Industrial Area. She claimed that her 2 bicycles were taken away by the 2nd defendant. All in all this loss is not well or sufficiently proved to be considered for an award.

Coming to general damages it was based on a claim of illegal closure of the business and dispossession of suit premises. During these proceedings, it was heard from the plaintiff herself that she closed the premises in April 1994:

“We closed for a time but I cannot say exactly when this was..... yes. I had closed business in April 1994 – not for all times.”

Seen in the light of DW2’s evidence, the court was inclined to believe that the plaintiff herself closed down the business from as early as April 1994, up to 9th August 1994. On that day she did not come to open so that she would meet the 2nd defendant. Her son came and opened. But Shah J at an interlocutory stage was satisfied that under the guise of levying distress, possession of the plaintiff’s place was effected and the 3rd defendant was put into premises. The judge found that illegal. The ruling was not appealed against or reviewed. It still stands. The plaintiff therefore ought to get general damages on that account. That sum is given here on a nominal basis, owing to her own conduct in the whole case, put at sh. 36,000/=. But this shall not be paid by the defendants. She owed this sum in unpaid rents. Let her keep it.

In sum this suit succeeds to the extent of general damages. But costs will go to the 1st, 2nd and 3rd defendants.

Delivered on 8.12.11.

J. W. MWERA

JUDGE