



**Wambua v Kenya Railways Corporation (Environment & Land Case
52 of 2018) [2022] KEELC 4752 (KLR) (30 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 4752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 52 OF 2018
EK WABWOTO, J
AUGUST 30, 2022**

BETWEEN

JACINTA MUTHOKI WAMBUA PLAINTIFF

AND

KENYA RAILWAYS CORPORATION DEFENDANT

JUDGMENT

Introduction

1. This matter was commenced by the plaintiff who *vide* a further amended plaint dated February 28, 2020 sought for the following orders against the defendant.
 - a. A declaration that the defendant's action in evicting the plaintiff from the suit premises is null and void and of no legal effect.
 - b. General, punitive /exemplary damages for unlawful eviction and loss of property.
 - c. A sum of Kshs 17,481,250 and USD 9,980 being the costs of damaged goods / goods unlawfully taken.
 - d. A mandatory injunction directed at the defendant, its agents and or servants to return to the plaintiff all the unvalued and undamaged household/goods which were unlawfully taken away.
 - e. Costs.
 - f. Interest in (b) , (c) , and (e) at court rates.
2. The defendant entered appearance and filed a statement of defence date April 3, 2018 when they prayed for the plaintiff's suit to be dismissed with costs.



The Plaintiff's Case

3. It was the plaintiff's case that she was a tenant of the defendant in respect to house No 6 (six) Riverside Estate, Nairobi. The terms of lease agreement dated January 1, 2015 were *inter alia* that the plaintiff was to pay a deposit of Kshs 70,000 and a monthly rent at a sum of Kshs 35,000 for a term of two years. The lease was renewable for a further 2 years.
4. It was also the plaintiff's case that on or about January 26, 2018, the defendant evicted the plaintiff from the property by taking away all the plaintiff's goods which have never been released to date.
5. During the hearing of the suit on February 8, 2022, the plaintiff testified as the sole witness in respect to the plaintiff's case. She adopted her amended witness statement dated March 8, 2018 and produced the bundle of documents dated November 12, 2021 in support of her case.
6. It was her testimony that while being a tenant at the defendant's premises, she received a letter dated October 2, 2017 which was in essence a notice to terminate the tenancy on allegations that she was in breach of the tenancy agreement by allegedly using the suit premises for provision of catering services. She further stated that on January 26, 2018, the defendant's agents and or servants descended upon the premises in her absence and purported to evict her. She later moved to court and secured an order against the said eviction; which order was produced as plaintiff's exhibit 8 at page 23 at the plaintiff's bundle of documents.
7. She further stated that despite the existence of the order, the defendant effectively evicted her from the premises by carting away and loading all her household goods into trucks and a container. According to the plaintiff, the said eviction was carried out in an inhuman and brutal manner despite her having a young family and children. The said items have never been returned to her.
8. During cross examination, she admitted that there was a time that she ran into arrears during the doctor's strike. She also stated that she had sought for clarification on the termination notice from the defendant who informed her that the same was issued on the basis of a misunderstanding.

The Defendant's Case

9. The defendant filed a statement of defence dated April 3, 2018. In the said defence, the defendant maintained that the plaintiff's eviction was done in accordance with the law since the plaintiff had failed to observe and or perform the conditions of the lease agreement.
10. The defence case equally proceeded for hearing on February 8, 2022 wherein Racheal Kimanzi testified as DW1. She testified that on September 26, 2017, the defendant received a formal complaint from Kileleshwa Ward Association (KIWA) that the plaintiff's rented premises were being used for commercial services by providing hospitality services which was contrary to the terms on the lease.
11. The witness also stated that the plaintiff had erected a 40 ft. container on the premises without the defendant's consent and contrary to the tenancy. In view of this action, the defendant served the plaintiff with a notice to terminate the tenancy on October 2, 2017 and on January 15, 2018 they proceeded to evict the her from the demised premises.
12. The defendant witness also added that the plaintiff was evicted from the premises in the presence of her husband Dr Mathew Mutangili and she had voluntarily procured a truck to carry her goods. It was also her testimony that the plaintiff failed to remove the 40 ft container from the premises as directed which prompted the defendant to remove the same from the site and have it transported to the defendant's workshop.



13. In respect to the court order barring the eviction, the witness stated that the same was obtained after the eviction had been carried out by the defendant and the plaintiff had ceased being a tenant since the premises had already been occupied by another tenant.
14. On cross-examination, she stated that the defendant carried the container because the plaintiff had failed to remove the same. She further stated that the plaintiff had breached the terms of the tenancy agreement and hence they did not require an order from the court to evict her. She further stated that they were required to sale the plaintiff's goods by auction so as to recover any pending rent arrears which was Kshs 32,000/-.

Plaintiff's Submissions

15. The plaintiff filed her written submissions dated May 26, 2022 through the firm of EK Mutua & Co Advocates. Counsel outlined two issues for consideration by the court namely: whether the defendant acted unlawfully in evicting the plaintiff and whether the plaintiff is entitled to special damages of Kshs 17,481,250 and USD 9980 together with general and punitive damages.
16. On whether the eviction was unlawful, counsel submitted that the same was unlawful since it was done without any approval from the court. Counsel relied on section 73 to 75 of the Land Act which deals with the procedure for forfeiture of lease or re-taking possession by a landlord. Section 73 of the Land Act provides as follows.

Lessor's right of forfeiture.

- (1) Subject to the provisions of section 76 and to any provisions to the contrary in the lease, the lessor shall have the right to forfeit the lease if the lessee –
 - a) commits any breach of, or omits to perform, any agreement or condition on his part expressed or implied in the lease; or
 - b) is adjudicated bankrupt; or
 - c) being a company, goes into liquidation.
 - (2) The right of forfeiture may be –
 - a) exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land; or
 - b) enforced by action in the court
 - (3) The acceptance by the lessor of any rent after the service of a notice of forfeiture under section 75 does not operate as a waiver of the lessor's right of forfeiture unless the lessor has by any other positive act shown an intention to treat the lease as subsisting”
17. It was also submitted that whereas the lease agreement provided for the right to re-enter and retake possession, the defendant was obligated to issue a notice under section 75 of the land Act No 6 of 2012 which provides as follows: -

“Notwithstanding anything to the contrary contained in the lease, no lessor shall be entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease,



whether expressed or implied, until the lessor has served on the lessee a notice of not less than thirty days –

- a) specifying the particular breach complained of; and
- b) if the breach is capable of remedy, requiring the lessee to remedy the breach within such reasonable period as is specified in the notice; and
- c) in any case other than non-payment of rent, requiring the lessee to make compensation in money for the breach, and the lessee has failed to remedy the breach within thirty days thereafter, if it is capable of remedy, and to make reasonable compensation in money”.

18. In buttressing this position, counsel argued that the notice dated October 2, 2017 was not for 30 days as was stipulated since it required the plaintiff to hand over possession on or before October 31, 2017.
19. It was further submitted that in the instant case, no auctioneers were involved and there was also no approval from the court. Counsel relied on the cases of *Gusii Mwalimu Investment Ltd* [1996] eKLR and *Ripples Limited v Kamau Mucuba* Nairobi HCC No 4522 of 1992.
20. On special damages, counsel submitted that the defendant damaged the plaintiff goods in the course of the eviction and further went to hold them for over 4 years now as a result of which the goods were no longer in a good condition. Counsel made reference to plaintiff’s exhibit 20 which were a bundle of receipts for purchase of the plaintiff’s goods amounting to Kshs 9,919,587 and USD 10,666.30. Counsel relied on the case of *Christine Mwingira Akunga v Samuel Kairu Cheru* [2017] eKLR in support of the same.
21. In respect to general damages counsel argued that the defendant’s action warranted the grant of the same. Reference was made to the case of *Mattarella Limited v Michael Bells & another* [2018] eKLR where the court awarded general damages of Kshs 2,000,000/= for unlawful eviction.
22. In respect to the exemplary and punitive damages, counsel submitted that the defendant’s action was not only oppressive and arbitrary but was well calculated to make a profit by installing a new tenant into the premises. Counsel relied on the case of *Godfrey Julius Ndegwa Mbogori & another v Nairobi City County* [2018] eKLR and *Stelco Properties Limited and Another v Ngugi Ventures Limited & another* [2021] eKLR in submitting for an award of Kshs 10,000,000/= as exemplary damages payable to the plaintiff.

The Defendant’s Submissions

23. Counsel for the defendant filed submissions dated June 9, 2022. Counsel outlined five issues for determination by this court. These were:-
 - i. Whether the plaintiff entered into a tenancy agreement with the defendant.
 - ii. whether the plaintiff breached the terms of tenancy agreement.
 - iii. Whether the plaintiff was issued with a notice to terminate the tenancy agreement.
 - iv. Whether the plaintiff was justified in exercising the remedies in the event of breach.
 - v. Whether the plaintiff is entitled to the prayers sought and who should bear the costs of the suit.
24. On whether the plaintiff entered into a tenancy agreement with the defendant, counsel submitted that the same was not disputed since a valid tenancy agreement existed. On whether the plaintiff had



breached the terms of the tenancy agreement, counsel submitted that the plaintiff had failed to observe and perform the conditions of the tenancy including clause 1(g) concerning the use of the demised property exclusively for residential purposes. In support of this allegation, counsel made reference to the letter dated October 2, 2017 from Kileleshwa ward Association (KIWA) which had indicated that the plaintiff was providing hospitality services at the premises.

25. It was also submitted that the plaintiff had failed to pay the monthly rent on the specified date contrary to clause 1(a) of the tenancy agreement. Counsel referred to section 36(2) and 43(2) of the [Land Registration Act, 2012](#) and stated that the tenancy agreement was a contract which had been breached by the plaintiff. Reference was made to the case of [Mwangi v Kiiru](#) [1987] eKLR and [Ongecha v the City Council of Nairobi](#) [1982] KLR 155, where the courts had stated that failure to perform obligations whether total or partial constitutes a fundamental breach which goes to the root of the contract.
26. On the issuance of the requisite notice to terminate the tenancy agreement, counsel submitted that the same was admitted by the plaintiff as having been issued.
27. On whether the defendant was justified in exercising the remedies in the event of breach, counsel argued that the tenancy was in accordance with the express terms of the agreement and the law as evidenced by the notice of termination dated October 2, 2017. It was contended that clause 3(a) of the agreement provided for the landlords right of re-entry into the demised premises in the event of a breach. Counsel cited the case of [James Kariuki Kanyeki & another v Blue Water Properties Limited](#) [2021] eKLR, [National Bank of Kenya Limited v Pipeplastic Samkolit \(K\) Ltd and another](#) [2001] eKLR and [Edward Mugambi v Jason Mathu](#) [2007] eKLR and submitted that there was a fundamental breach by the plaintiff which necessitated the defendant to terminate the tenancy and evict her.
28. In respect to the provisions of section 73 of the [Land Act](#), Counsel submitted that pursuant to the said provision, the defendant in pursuing the right to forfeiture, had the option to choose to either enter and remain in possession of the demised premises or exercise it by court action where the landlord makes an application to the court to forfeit. Counsel argues that the underlying word is “may” which is discretionary rather than mandatory.
29. On whether the plaintiff is entitled to the prayers sought, counsel submitted that general damages are not recoverable in cases of alleged breach of contract and he cited the case of [Kenya Tourist Development Corporation v Sundowner Lodge Limited](#) [2018] eKLR and [Securicor Courier \(K\) Ltd v Benson David Onyango & another](#) [2008] eKLR. Counsel also submitted that there was no enquiry as whether or not the items might actually be in storage in the subject container. Counsel urged the court to dismiss the plaintiff’s suit with costs.

Analysis and Determination.

30. From the pleadings, the evidence adduced and submissions, the issues framed for determination are :-
 - i. Whether the plaintiff’s eviction was lawful and justified.
 - ii. Whether the remedies sought are available.
 - iii. Who should bear the costs of the suit.

Issue No 1. Whether The Plaintiffs Eviction Was Lawful And Justified

31. In this case, it is not disputed that the plaintiff was a tenant in the defendants house No 6, Riverside Estate Nairobi *vide* a lease agreement dated January 1, 2015 which was renewable for a further 2 years.



32. It was the plaintiff's case that she was evicted by the defendant on January 26, 2018 which eviction was unlawful. The defendant's witness on the other hand Racheal Kimanzi maintained that the said eviction was lawful the same being due to the plaintiff's breach of the fundamental terms of the existing lease agreement. The defendant argues that a proper notice was issued to the plaintiff, the said notice being dated October 2, 2017.
33. The court has perused the said notice that was produced in court as P exhibit 15, requiring the plaintiff to vacate the said premises by October 31, 2017. During the hearing of the suit, the plaintiff in her testimony acknowledged receiving the said notice which according to her was dropped at her office. She however contested that the same did not provide the required 30 days.
34. The court notes from the said notice, at paragraph 3 of the same stipulated as follows:-
- “In this regard, the corporation is terminating your tenancy with effect from October 2, 2017 by invoking clause No 3 (c) of your lease agreement by giving you 1 month written notice of its intention to do so”.

In this regard, the plaintiff's contention that the notice did not give 30 days' period is clearly misplaced.

35. It was also the plaintiff's case that the eviction was done without any court order approving the eviction and further that at the time of the eviction on February 20, 2018, there existed a valid court order restraining her eviction. On this issue, the defendant argued that section 73 of the Land Act, 2012 did not necessarily require the defendant to obtain a court order to evict the plaintiff since the said provision provided an avenue where the defendant may elect to either physically re-enter the property and bring the lease to an end or to go to court and secure a remedy. In the instant case the landlord opted for the former.
36. From the evidence that was adduced by the plaintiff and defendant's witness and also upon perusing the eviction report dated February 9, 2018 which was produced as P exhibit 19, it is evident that the plaintiff was evicted on January 26, 2018 which was before the court order dated February 8, 2018 that was served upon the defendant on February 12, 2018. In the circumstances, the plaintiff's contention that the evidence by the defendant was done contrary to an existing court order is erroneous since the said court order was obtained past the event. My finding on this issue is that the eviction carried out by the defendant was lawful.

Issue No 2. Whether The Remedies Sought Are Available

37. The plaintiff sought for several reliefs including, general punitive exemplary damages for unlawful eviction and loss of property, special damages of Kshs 17,481,250 and USD 9,980 being the cost of damaged goods unlawfully taken, mandatory injunction directed at the defendant to return to the plaintiff all unvalued and undamaged household goods which were unlawfully taken away and costs of the suit together with interest on the same.
38. Having found that the eviction of the plaintiff was in accordance with the law, the court cannot grant the prayer for general damages as sought by the plaintiff. In respect to the prayer relating to special damages and interest thereon. It is settled law that a claim for special damages must be specifically pleaded and proved. The court of Appeal emphasized this legal principle in Banque Indosuez v DJ Lowe Company Limited [2006] eKLR as follows:-

“Though special damages were specifically pleaded or claimed, they were not proved at all. It is simply not enough for the respondent to pluck figures from the air and throw them in



the face of the court and expect them to be awarded. It is trite law that the special damages must not only be claimed specifically but also proved strictly for they are not direct natural nor probable consequences of the act complained of and may not be inferred from the act”.

39. In the instant case, while the defendant had a right to terminate the tenancy and evict the plaintiff, they had no reason whatsoever to take away the plaintiff's goods on January 26, 2018 when the plaintiff was evicted. It was also admitted by the defendant's witness that they took away the plaintiff's goods so that they could auction them to recover the rent arrears. The defendant's witness was not able to demonstrate what was the pending rent arrears that was due. Since the defendant was not in any way levying distress for rent. However, upon cross examination the plaintiff by the court, the plaintiff admitted to having arrears of Kshs 32,000/=.
40. I have painstakingly gone through the documentary evidence presented to this court by the plaintiff in support of her claim for special damages. It mostly consists of receipts. The plaintiff's claim of special damages was particularized at paragraph 12(a) of the further amended plaint dated February 28, 2020. The plaintiff exhibited receipts amounting to a total of Kshs 9,699,587.00 and USD 9,980.00. While the court is alive to the fact that some items though precious to the plaintiff but could not be quantified it was still an obligation of the plaintiff to attach some value to the same. Consequently, the prayer of special damages is awarded to the plaintiff for Kshs 9,699,587.00 and USD 9,980.00 which was pleaded and proven. However, the same will be paid less Kshs 32,000/= which was the pending rent arrears at the time of the eviction. I decline to award the other items of special damages which were not proven.

Final orders:

41. In light of the above findings, the plaintiff's suit against the defendant partly succeeds in the following terms.
- a) A sum of Kshs 9,667,587.00 and US\$ 9,998.00 are awarded as special damages.
 - b) Interest on (a) above from the date hereof until payment in full.
 - c) Each party to bear own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST 2022

EK WABWOTO

JUDGE

In the virtual presence of: -

Mr Musili holding brief for Mr Eric Mutua, SC for the plaintiff.

Mr Ondari for the Defendant.

EK WABWOTO

JUDGE

