



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Case 3 of 2003

THOMAS MASARE

.....**PLAINTIFF**

-VERSUS-

1. **GEORGE ANYOKE ROGITO1ST DEFENDANT**
2. **SAMSON ACHOKI2ND DEFENDANT**
3. **PAUL K. OLE YAILE3RD DEFENDANT**
4. **JOHN KOE4TH DEFENDANT**

JUDGMENT

1. Procedure

1. The relationship between the parties is that of landlord and tenant Thomas Masare entered into a lease agreement with the landlords being William Nyabuto, Samson Achoki Ongera, Omega Siro, Gisemba and Anyoka Rogito. This agreement was for a period from 7th August, 2000 to 31st August, 2010 at a monthly rent of kshs. 2,500/=. There was a deposit of Kshs. 20,000 being eight months rent and thereafter payments to be made every three months.

2. It was one George Anyoka Rorito who agreed the lease with one witness being Samwel Nyanumba Mogeni and the tenant's witness.

3. On the 24th September, 2001 the landlord George Anyoka Rogito and Samson Achoki instituted auctioneers of levy distress for rent due to non payments of rents. The goods belonging to the plaintiff were collected by the auctioneers and sold. The effect of this was that the plaintiff was evicted from the business premises.

4. The records of the premises ledgers, receipts, cash money and books of trade were misplaced.

5. According to case plaintiff/applicant it appears that the said levy for distress of rent was unlawful and wished for the said court to so declare.
6. In brief of the facts before me, the plaintiff/applicant was the tenant in business premises L.R.NO. 631/253 situated at the Kericho municipality. It was a premise that was run by his wife while he was employed as a public officer with the armed force attached to the armed force Memorial hospital.
7. When the tenancy began, the rents were paid regularly. He was asked to vacate the premises. In order to do so, he then stated, that he had a deposit of kshs. 20,000/= which he was to stay on till it expired. The landlord did not see it this way and handed the matter to the advocates. For the tenant, he had paid his rents and owned nothing. To the landlords'. The tenant was in arrears at all times.
8. It was thus a surprise that on 24th September, 2001 the plaintiff was auctioned. He never saw the notice asking him to be aware that an auction would take place. He never saw a proclamation, nor did he believe he was in arrears and took no action. When he went to the premises in Kericho the chief advised him to protect his goods. The police declined to intervene stating it was a civil matter and personal to him.
9. It is therefore without a doubt that the plaintiff being aggrieved (he was an unprotected tenant) that he filed this present suit for damages.
10. The tenant sued two of the landlord and the auctioneer. He attempted to sue the advocate but this application was brought late.
11. The trail commenced before Koome J, when she heard six witnesses between the April, 2006 and the year 2007.
12. The file was brought to this court when parties had continued with the plaintiffs' case, that was duly closed and the defence hearing.

III: Trial

13. According to the plaintiff, he claims that he had properly paid his rent and was never in arrears. He claims several damages for unlawful auction. He claims special damages for the loss of his goods totaling kshs. 1,147,965 that was sold. He prayed for the return of his receipts, cash receipt and other books.
14. In their defence the landlord, defendant no. 2 only gave evidence, they stated that the plaintiff moved out the premises without their permission. When the tenancy was finalized he declined to make payments. The tenant though, had indeed made payments and produced receipts before Koome J. he also produced documents to support the said special damages through witnesses.
15. That parties herein never filed agreed issues to determine what was in dispute.
16. I would hold that the issue herein is "whether the said plaintiff was unlawfully evicted". "*Whether in effect by such eviction he is entitled to general damages*". "*Did he pay all his rent?*"
17. The defendant 1 and 2 ought to have a rent book to pursue the plaintiff had not paid. They did not produce this rent book or records to court.
18. I would accordingly hold that the plaintiff has established that he is entitled to general damages as proved. That the landlord ought to have been diligent to ensure that the plaintiff owned them rent and are liable herein at 100%.
19. The auctioneer stated he followed the law on instructions given to him. I would accordingly agree that he was following instructions as given by the agent and/or servants to the landlord 1 and 2. I accordingly find that they are not liable. In essence you do not normally sue the matter an agent at the same time. The 4th defendant is a government officer.

20. I do not find the auctioneers liable herein nor do I find the 4th defendant liable. The 4th defendant is a government officer and was to be sued through the Attorney General. I dismiss his case.

I enter judgment against the defendant 1 and 2 in favor of the plaintiff on general damages.

21. None of the parties addressed me on quantum I would nonetheless compute general damages for unlawful eviction at Kshs. 500,000/=.

22. As to special damages I note the amount of Kshs. 11 million or so that was incurred as losses. I would find that the plaintiff has proved his case and established that he was and or incurred losses to his business. The law requires I give normal damages and I do so at Kshs. 2 million as being reasonable from the date of filling suit.

23. I order that all ledgers, receipts and books of business be returned to the plaintiffs by the landlords.

23. In summary

23.1. Unlawful eviction liability 100% against 1 and 2 defendants jointly and severally.

23.2. The 3rd defendant being an agent no liability be against

Them. The 4th defendant being a government officer,

No case against him.

23.3. Quotum

i). General damages for unlawful eviction Kshs. 500,000/=

ii). Special damages nominal damages kshs. 2,000,000/= million.

iii). I order all ledgers, receipts and books of business to be returned to the plaintiff by the defendant 1&2.

23.4. Total Kshs. 2.5 million

25. That there be interest on general damages from the date of this judgement. Interest on special damages from the date of filling suit being 21st January, 2003.

26. I award costs to the plaintiffs, to be paid by 1 and 2 defendants. The costs for the 3rd defendant to be borne by the 1 and 2 defendants. There will be no costs awarded to the 4th defendant.

Dated this 4th day of February, 2009 at **Kericho**

M.A. ANG'AWA

JUDGE.

G.M. MAENGWE Advocate from M/S. G.M. Maengwe & Co. Advocates instructed to hold brief for M/S. Morara Ngisa for the plaintiff-present

S.K.OBOSO Advocate instructed by M/S. Oboso & Co. Advocates for the 1st and 2nd defendants-present

M.Sila Munyao advocate instructed by M/S. Sila Munyao & Co. Advocates for the 3rd Defendant-present

M/s. Orayo & Co. Advocates for the 4th Defendant-absent