



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Cause 2 of 2004

DR. ESTHER KANINI MUTAKHA1ST PLAINTIFF

LUCY WAMAITHA NDEGWA T/A LUSAM

HAIR DRESSING & BEAUTY PARLOUR 2ND PLAINTIFF

SUSAN MWIHAKI WANYOIKE T/A

VALENCIA FASHION DREAMS 3RD PLAINTIFF

JANE WAMBUI WANYOIKE T/A

VALENCIA FASHION DREAMS 4TH PLAINTIFF

VERSUS

MUTATI TRANSPORTERS LIMITED DEFENDANT

JUDGMENT

The 1st plaintiff, Dr. Esther Kanini Mutakha filed suit with three others seeking several reliefs from the court. The three other plaintiffs withdrew from the suit before the hearing of the case. The 1st plaintiff (*hereinafter referred to as the plaintiff*) was a tenant in the defendant's premises known as Gate house situate along Mburu Gichua road in Nakuru township. The plaintiff leased Room No. 7 at the first floor of the building. The plaintiff operated a dental clinic in the said premises. In her plaint, the plaintiff averred that she had been a tenant in the said premises from 1993 to the time she filed the present suit. The plaintiff complained that from about October 2003 to the time she filed suit, the defendant had, without any lawful excuse or justification harassed her with a view to frustrating the plaintiff's tenancy in the said premises. The plaintiff averred that the defendant had used unlawful means to frustrate the said tenancy in order to secure the plaintiff's eviction or vacation from the suit premises without giving any legal notice and without following the laid down legal procedure in terminating the tenancy. The plaintiff listed the acts that the defendant allegedly committed which rendered the said lease untenable.

The plaintiff sought protection from the court to prevent the defendant from breaching the terms of the lease or further from interfering with the plaintiff's lease over the suit premises. The plaintiff sought mandatory injunction to compel the defendant to remove building materials that were placed or stored along the corridor or near the entrance or the doors leading to the premises leased to the plaintiff. The plaintiff further prayed for an order of the court to compel the defendant to reopen the metal grill

door/access to the said leased premises which the defendant had allegedly closed. The plaintiff prayed for a permanent injunction to restrain the defendant by itself or its employees from undertaking any act that would frustrate the plaintiff's lease over the demised premises. The plaintiff further prayed for general and exemplary damages for nuisance and breach of contract and/or of statutory duty and on account of breach of terms of the tenancy. The plaintiff prayed for the costs of the suit to be awarded to her as against the defendant.

The defendant filed a defence. It denied that it had rendered the lease to the plaintiff untenable. It denied that it had unlawfully or otherwise threatened to terminate the lease of the plaintiff. The defendant averred that the plaintiff had agreed to vacate from the suit premises on her own volition. The defendant denied that it had placed any building materials along the corridor or had done anything to block access to the plaintiff's leased premises. The defendant averred that the plaintiff was a rent defaulter and had rushed to court to prevent the defendant from taking action to recover rent arrears. The defendant denied that it had blocked access into the premises leased by the plaintiff by erecting or closing the grill doors. The defendant was of the view that the plaintiff, by filing the present suit, was seeking to derail the renovation and construction work on the premises without any justifiable reason. The defendant averred that the plaintiff's suit was incompetent and should be struck out. The plaintiff prayed for the plaintiff's suit to be dismissed with costs.

At the hearing of the suit, the plaintiff adduced evidence as PW1. The defendant called one witness i.e. DW1 Daniel Kareithi. After the evaluating the evidence adduced by the parties to this suit, and after perusing the pleadings filed by the parties in support of their respective opposing positions, the facts of this case are more or less not in dispute. The defendant is the owner of the business premises known as Gate House situate within Nakuru Municipality. The defendant leased the premises to various tenants, including the plaintiff. The plaintiff leased the premise known as Room No.7 situate at the 1st floor of the building. From the evidence adduced, it was apparent that the defendant secured a new tenant i.e. Equity Bank Ltd. in 2003. The bank required more space than the defendant was able to avail at the time. The defendant sought to satisfy the space requirement of Equity bank by terminating some leases of its tenants. The leases which the defendant sought to terminate were in respect of premises on the 1st floor of the building. Among the tenants affected was the plaintiff. The plaintiff, and the other tenants, were protected tenants under the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act (Cap.301, Laws of Kenya). Although the defendant offered testimony which suggested that the defendant had notified the plaintiff of its intention to renovate the premises and therefore resulting in the said renovations temporarily disrupting the business of the plaintiff, what emerged from the evidence was that once the defendant realized that the plaintiff was unwilling to vacate the premises, the defendant put in motion steps to frustrate the plaintiff from peacefully occupying the premises.

The defendant undertook certain acts whose aim was to frustrate the tenancy of the plaintiff. According to the plaintiff, the defendant blocked access to her demised premises, deposited stones on the corridor and the entrance to the premises, disconnected water supply to her premises (which was essential to her dental practice), removed security grills from the entrance to her premises and thereby rendered the said premises insecure, demolished walls which partitioned the various offices that resulted in cracks developing in the premises which the plaintiff occupied, undertook renovation and re-fitting of the 1st floor of the building during working hours and thereby made it impossible for the plaintiff to do undertake her trade due to the noise and the dust that was generated when the construction workers undertook the said renovation.

In response to the allegations made by the plaintiff, it was the defendant's case that it had duly given notice to the defendant of the renovation it intended to undertake in the premises. According to the defendant's witness, the plaintiff was notified as early as October 2003 that the defendant intended to undertake renovation on the premises which would of necessity result in the temporary disruption of the plaintiff's business by interfering with access to the premises leased to the plaintiff. The defendant denied taking any action that was deliberately calculated to annoy or vex the plaintiff. The defendant further denied that it had deliberately disconnected water supply to the plaintiff's premises. It was the defendant's case that water shortage was a normal occurrence at the building as the water supply to the building by the local water company was unreliable. The plaintiff produced correspondence in her bid to

establish the frustration that she experienced during the period in question.

It is not disputed that the plaintiff vacated the suit premises on 7th February 2006 after severally engaging in legal tussles with the defendant in court. I have read the proceedings of this court. It was evident that the plaintiff was severally forced to seek the intervention of the court in order to secure her rights as a tenant. For instance, it took the court's intervention for the water supply to the plaintiff's dental clinic, which had been disconnected by the defendant, to be restored. It further took the intervention of the court for the construction material which had been placed on the corridor leading to the premises leased to the plaintiff to be removed. A grill which had been installed to secure the premises of the plaintiff was restored after the defendant was ordered to do so by the court. From the evidence adduced, it was clear that upon the defendant securing a tenant i.e. Equity bank, which it thought to be a worthwhile tenant than the plaintiff, the defendant went out of its way to do the bidding of the said valuable tenant by acceding to its every wish, including availing space required by the said tenant by frustrating the controlled tenants in the said premises to the extent that they reluctantly vacated from the premises. The plaintiff sought to soldier on.

Having carefully evaluated the facts of this case, including the documentary evidence produced in evidence, it was clear that the defendant took action which can only be interpreted to mean that the defendant was constructively seeking the eviction of the plaintiff by frustrating the tenancy of the plaintiff and thus secure the unlawful eviction of the plaintiff from the suit premises. As stated earlier in this judgment, the plaintiff who was a protected tenant under the Landlord and Tenant (*Shops, Hotels and Catering Establishments*) Act. Under section 4 (1) of the said Act, a lease of a controlled tenant shall not be terminated or the conditions in, or right or service enjoyed by the said tenant be altered otherwise than in accordance with the provisions of the Act. Under section 4(2) of the Act, a landlord who wishes to terminate a controlled tenancy or to alter to the detriment of the tenant any term or condition in, right or service enjoyed by the tenant under such tenancy shall give notice in that behalf to the tenant in the prescribed form. The notice envisaged under the said Act is the notice stipulated under section 4(4) of the Act which provides that such notice shall be issued, and shall only take effect not less than 2 months after the receipt thereof by the receiving party. The Act also provides the manner which a dispute arising in the event that the receiving party objects to the notice is to be resolved.

In the present case, it was clear that the defendant altered the conditions in, the right or service enjoyed by the plaintiff, to the plaintiff's detriment without issuing notice in the manner prescribed by the law. The defendant therefore acted in breach of the law that safeguards the interest of the plaintiff as a protected tenant. By disconnecting water to the premises leased to the plaintiff, by depositing building materials on the corridor leading to the premises leased to the plaintiff, and by removing the grills that secured the plaintiff's premises, the defendant was constructively seeking to obtain the termination of the plaintiff's tenancy, and indeed eventually succeeded in doing so, without resorting to the termination procedure provided under the law. In her plaint, the plaintiff sought three prayers, two of which were sought on assumption that she would remain in the premises as a tenant. In view of her testimony that she has already vacated from the suit premises, after she could no longer withstand harassment by the defendant, I hold that prayer (a) and (b) of the plaintiff's suit cannot in the circumstances be allowed. This court cannot grant mandatory injunction or permanent injunction to maintain a *status quo* on the ground that does not exist. Prayer (a) and (b) of the suit is therefore disallowed but with no order as to costs.

The plaintiff sought to be granted general and exemplary damages for nuisance and for breach of contract and/or statutory duty imposed on the defendant by the Landlord and Tenant (*Shops, Hotels and Catering Establishments*) Act in relation to its conduct towards its tenant. It was clear from the foregoing that the court is of the view that the defendant breached the tenancy agreement by constructively seeking to secure the eviction of the plaintiff from the demised premises. This was in breach of the statutory duty placed on the defendant not to frustrate or interfere with the tenancy of the plaintiff, as a protected tenant. In Michael Danson Mahugu vs. Dilip Harakhchand & Anor [2005] eKLR, Musinga, J awarded general damages to a tenant whose terms of the tenancy had been abridged by the landlord. Similarly, in Kimakia Co-operative Society vs. Green Hotel [1988] KLR 1 the Court of Appeal held that general damages may be awarded where it is established that a landlord had altered the terms of the lease of a tenant protected

under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. It is therefore evident from the above decisions, that this court has jurisdiction to award general damages where it is established that a landlord has acted in breach of the statutory protection accorded to a tenant under the said Act.

I have considered the submission made by the plaintiff on the general damages she proposes the court to award her. The defendant made submission urging the court not to make any award of damages as, in its view, no general damages can be awarded in the case of breach of contract where the plaintiff has not quantified it. Having held that the plaintiff is entitled to be paid general damages, and having taken into consideration the hardship the plaintiff experienced in the period that the defendant deliberately altered the terms of her tenancy to her detriment, and taking into consideration the fact that the plaintiff lost business in the period that the defendant made it virtually impossible for the patients wishing to obtain the services of the plaintiff to access the plaintiff's dental clinic, and doing the best that I can in the circumstances, I assess the general damages to be paid to the plaintiff by the defendant at Kshs.800,000/=. The plaintiff shall be paid the costs of the suit. Interest on the general damages awarded shall be paid from the date of the delivery of this judgment.

It is so ordered.

DATED at NAKURU this 22ND day of MAY 2009.

L. KIMARU

JUDGE