



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1321 of 1999

FRANCIS GITHUKU KABUE..... PLAINTIFF

VERSUS

KIMANI CHEGE..... 1ST DEFENDANT

DANIEL MACHARIA CHEGE 2ND DEFENDANT

JUDGMENT

On the 29th of May, 2001 the Plaintiff filed a Further Amended Plaint dated 4th December, 2000 against the 1st & 2nd Defendant, where he claimed against the two jointly & severally for general & special damages arising from an illegal eviction from **L.R. No. 36/11/160**, 2nd Avenue Eastliegh, Nairobi, where he ran music shop.

The Defendants both denied liability and filed their defences on the 13th of June, 2001 and 26th April, 2007 respectively. The Defendants alleged breach of contract for non-payment of rent and abandonment of the said shop by the Plaintiff. They also denied the particulars of loss & damaged alleged by the Plaintiff.

The defence counsel filed her submissions on the 20th of July, 2009 in line with the court order of 24th of June, 2009. The Plaintiff's counsel belatedly filed her submissions on the 23rd of July, 2009. In arriving at the Judgment I have considered the pleadings, evidence placed before the court, the submissions by learned counsel and the authorities cited.

At the commencement of the trial the issues agreed upon were as follows:-

- (i) Was the Plaintiff in the premises by the 27th May, 1999 when he was evicted?
- (ii) Did the Plaintiff suffer any loss and damage due to the dispossession?
- (iii) If so, what is the quantum of damages thereof?
- (iv) Who shall bear the costs of the suit?

It is not disputed that the Plaintiff and 1st Defendant entered into a lease for a period of 5 years 1 month with effect from 1st November, 1996 and the tenancy was to run up to the 30th of November, 2001. In the first two months of the tenancy the Plaintiff paid **Kshs.4, 000/=** as rent thereafter the rent payable was

Kshs.5, 000/=. The Plaintiff registered his business “Star One Ten Electronics & Music Shop” on the 13th of June, 2001, and gave the place where he carried on his business as being plot **No. L. R. 36/11/160 2nd Avenue, 5th street Eastliegh Nairobi**. **It is not disputed either that upon taking possession the Plaintiff not only paid good will of Kshs.90,000/=** to the 1st Defendant and another not a party to the suit but also improved the shop. It was stated in evidence that the 2nd Defendant took over the premises as a Landlord on or around May, 1999.

The Plaintiff gave evidence and called one witness. The Plaintiff’s case is that upon taking over the premises, the 2nd Defendant on or about the 27th May, 1999 evicted him from the suit premises without a lawful court order and in his absence. The 2nd Defendant and/or his agents took away the Plaintiff’s goods and destroyed all the fitting and fixtures including the Mezzanine floor and the steel doors he had fitted at the premises. Among the items they carried were stock, movables and documents. That the 2nd defendant was bound by the lease entered into between the Plaintiff and the 1st Defendant. The Plaintiff’s witness **Mr. Francis Njihia**, corroborated the evidence adduced by the Plaintiff. He further stated that he accompanied the Plaintiff to report the breaking in and taking away of the Plaintiff’s the goods at Pangani Police Station , where the Plaintiff was issued with a Police Abstract form.

The defendants on their part called 4 witnesses. The defendants’ case was that the 2nd Defendant upon taking possession of the premises, required to do renovation including repairing a bust sewer, leaking roof and hanging electrical wires. **DW2** the wife of **DWI** stated that she informed all the tenants including the Plaintiffs’ girl (I believe meaning a worker) at the shop of the intended repair works and the need to give room for the repairs to be done. That although the Plaintiff removed most of his stock to another shops, he did not give access but instead closed the said shop and disappeared. **DW2** informed the court that she involved the area Chief, who assisted in breaking into the Plaintiff’s shop and removing the stock therein. She was further assisted by the 2nd Defendant’s agents. The area Chief was called as defence witness **DW3** and he confirmed his involvement. The defence also pleaded dissertation on the part of the Plaintiff and unpaid rent.

The first issue for consideration by the court is whether or not the Plaintiff was in occupation as at the 27th May, 1999 when the 2nd defendant took possession of the premises and had his goods removed from the said premises.

The Plaintiff’s lease was to run up to the 30th of November, 2001 a fact not disputed by both sides. It is also clear from the evidence on record that the Plaintiff did not give up possession. He may have locked the premises as stated in evidence by the defence witnesses, but did this give the defendants the authority to break in and take possession? I think not. The Plaintiff may have been in arrears of rent, however did this allow the Defendants to re-possess or remove his goods from the premises? I think not either. Indeed, the court was not given any details of arrears as alleged. The Plaintiff on his part denied owing any rent. He stated that the Defendants refused to take rent from him around the period of eviction. It is undisputed that the rent payable by the Plaintiff before his eviction was **Kshs.5, 000/=** However it is notable that upon completion of the renovations the shop was rented to a third party at **Kshs.25, 000/=**

It is very clear that a court order is mandatory in the process of evicting and repossessing premises. The Court of Appeal stated as much in the case of **M/S GUSII MWALIMU INVESTMENT CO LTD & 2 OTHERS vs. MWALIMU HOTEL KISII LTD C.A. No.160 of 1995**. Shah J.A. in his Judgment had this to say where a Landlord obtained possession through guise of distressing for rent without obtaining a court order:-

“I have no hesitation whatsoever in holding that the Landlord did all it could to obtain the possession unlawfully and learned Judge was entirely right in making the orders he made. If what the Landlord did in this case is allowed to happen it will reach a situation when the Landlord will simply walk into the demised premises exercising his right of re-entry and obtain possession extra-judicially. A court of law cannot allow such state of affairs whereby the Law of the Jungle takes over. It is trite law that unless the tenant consent or agrees to give up possession the Landlord has to obtain an order of a competent court or

a Statutory Tribunal (as appropriate) to obtain order for possession.”

The above authority is very clear on the need to obtain a court order in order to obtain possession. In my view, the area Chief had no authority whatsoever to issue orders of re-possession or breaking in, he clearly acted outside his jurisdiction as a Law enforcement agent. He had no authority in the absence of a valid court order to oversee the breaking into, carrying away of the Plaintiff’s stock and re-possession of the premises. The 2nd Defendant applied Jungle Law; he took the Law into his own hands. It is obvious to me that the 2nd Defendant’s idea of renovation was so as to increase rent and put in a tenant who could afford the exorbitant amount, no wonder in a month or 2 after breaking in and taking possession, he had a new tenant paying 3 times the rent the Plaintiff paid. Guided by, M/S Gusii Mwalimu Investment Co. Ltd & 2 others vs. **Mwalimu Hotel Kisii Ltd** (*supra*), I do not hesitate to state that the action of the 1st Defendant, which is prevalent amongst Landlords especially within the general area where the shop subject matter is situated, must be discouraged by all mean. The Law protects both the weak and the mighty, tenants ought not to be left in the hands of greedy Landlords whose aims is to maximize on rent irrespective of existing contractual obligations or the Laws of the Land. Even if, as it was claimed, that the Plaintiff owed rent, there is a legal process to be followed in levying distress. Having stated as above and in the absence of a court order, I find that the 2nd Defendant acted in total disregard of the Law and together with his agents unlawfully evicted the Plaintiff from the suit premises. They also unlawfully removed his merchandize to an unknown place. The Plaintiff has sought for general damages for the said unlawful eviction. I am persuaded that he deserves to be compensated. In this regard and guided by the case of Francis Muringu Mureu (T/A Jem Corner Bar) vs. John Muranguri Karuga Civil Suit No.119 of 1998 (NAKURU), where the court awarded **Kshs.300, 000/=** for general and punitive damages. I award the Plaintiff the sum of **Kshs.400, 000/=** as general damages.

The Plaintiff has pleaded for special damages. He gave details of the e same as loss of goodwill of **Kshs.90, 000/=** , the sum of **Kshs.120,000/=** worth of electronic goods and Kshs, 10,000/= for compact cassettes. In evidence the Plaintiff produced a bundle of receipts for electronics worth the sum of **Kshs.119, 500/=** and **Kshs.10, 000/=** for compact cassettes. The defence disputed the amount; however none of the people who removed the stock from the shop were called as defence witness in support of the denial. I am of the view that the plaintiff has adequately proved this claim and will award him **Kshs.119, 500/=** being the special damages proved by way of receipts and refund of the goodwill of Kshs 90,000/-

In regard to the claim for loss of business, the Plaintiffs claimed that he made **Kshs.1, 000/=** a day from the said shop and claimed the total loss at **Kshs.767, 000/=**. In his evidence he stated that his books of account were taken away by the Defendants when they evicted him, hence he had no documents in support of this claim. I am not convinced that the Plaintiff had no other means to prove this claim if indeed the same is genuine. His bank statements or previous books of account from his auditors would have assisted. Better still, comparables from shops carry on similar business within the general locality of the subject matter would have been used to persuade the court. The Plaintiff in my view failed to place before the court evidence that would enable the court arrive at a decision under this claim. In the absence of evidence in support of the said claim, I dismiss this prayer.

From the evidence on record there is a third party in occupation of the shop subject matter since 1999. I am in the circumstances unable to grant an order for the Defendants to put the Plaintiff back into possession.

The upshot of my Judgment is that:-

- (a) I grant damages of **Kshs.400, 000/=** to the Plaintiff for unlawful eviction.
- (b) I grant special damages of **Kshs.209, 500/=** to the stock and refund of goodwill.
- (c) I decline to make any award for loss of business.
- (d) I also decline to give an order reinstating the plaintiff into possession.

(e) I award costs and interest from the date of filing suit to the Plaintiff.

Dated and delivered at Nairobi this 21st day of October, 2009.

ALI – ARONI

JUDGE