



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS**

Civil Case 829 of 2003

RAJABALI KASSAM T/A GIRAFFE SNACK BAR PLAINTIFF

VERSUS

TOTAL KENYA LTD DEFENDANT

J U D G M E N T

The Plaintiff filed this suit on the 15th November 1999. The Plaintiff sued the Defendant for special damages with interest, loss of profit, aggravated and general damages for disruption and loss of the Plaintiff's business. The facts of the Plaintiff's case are that on or about 1966, the Plaintiff was offered business premises being part of LR. NO. 209/6344, known then as Total Service Station, along Enterprise Road in Nairobi, to operate a canteen which he accepted. That on or about 1992, the Defendant took over the premises and immediately commenced acts intended to terminate the Plaintiff's tenancy, as a consequence of which the Plaintiff filed various Business Premises Rent Tribunal Causes, in some of which he objected to the termination of his tenancy.

The Defendant issued various notices to the Plaintiff. One notable Notice was the one dated 26th February 1997, in which the Defendant required the Plaintiff to vacate the suit premises. On receipt of the Notice the Plaintiff filed a reference to the Business Premises Rent Tribunal Cause No. 229 of 1997. It is the Plaintiff's case that the Defendant, on or about 21st December 1997 prior to the determination of the reference, invaded the suit premises and completely demolished them.

The Plaintiff claims special damages in the sum of Kshs 1,499,200/- for loss of furniture, fittings, stock, equipment, for improvements carried out on the premises including installation of water and electricity meters, severance pay to the Plaintiff's employees, and legal expenses in Business Premises Rent Tribunal. The Plaintiff also claims loss of business profit at Kshs 500, 000/- per year for a period of 10 years. The Plaintiff also claims aggravated damages for unlawful termination of the Plaintiff's tenancy and forceful repossession of the suit premises.

The Defendant has denied the Plaintiff's claim. On its part, it is the Defendant's case that it was all along the owner of the suit premises and that in successive leases beginning 1963, the latest one being the one dated 11th November 1983, the Defendant leased out the suit premises to Bruce Ltd., which occupied and carried out fuel station business on the said premises. It is the Defendant's case that on expiry of the lease between it and Bruce Ltd., it occupied and took over both the possession and management of the suit

premises on the 1st January 1992. The Defendant states that the plaintiff was a total stranger as the lease between the Defendant and Bruce Ltd did not permit sub-letting. The Defendant contends that it did not enter into any contract whatsoever or make any offers to the Plaintiff as alleged in the plaint. The Defendant admits issuing a Notice to the Plaintiff requiring him to vacate the suit premises, but denies that the Plaintiff objected to the Notice before filing the Reference in the Business Premises Rent Tribunal (herein after BPRT). The Defendant avers that the Reference was misdirected, misconceived and an abuse of the process of the BPRT.

It is only the Plaintiff who filed issues for determination and these are dated 29th October, 2002. The Court however decided to frame Issues when the parties failed to file Agreed Issues. The Issues framed by the court are dated 17th October 2007 and are as follows:-

- 1). whether the Plaintiff was a lawful tenant in the
Suit premises?**
- 2). whether the Business Premises Rent Tribunal issued an order barring the Defendant from terminating the Plaintiff's tenancy?**
- 3). whether the Defendant issued a notice dated 26th February 1997 to the Plaintiff to terminate his tenancy of the suit property?**
- 4). whether the Plaintiff filed a notice in the Business Premises Tribunal objecting to the notice of termination dated 26th February 1997?**
- 5). whether the Defendant unlawfully and illegally demolished the Plaintiff's business premises?**
- 6). whether the Plaintiff suffered loss as a result of the said demolition?**
- 7). whether the Plaintiff is entitled to damages for loss of profit?**
- 8). whether the Plaintiff is entitled to aggravated damages and general damages for loss of business?**

This case was heard partly in 2003 by Hon. Nyamu, J. as he then was. Upon his transfer, he directed that the case be started *de novo* before any other judge in the Division. Hon Okwengu, J. then took over the matter and between 17th October 2007 and 16th January 2008, heard the entire Plaintiff's case. On 17th November 2008 I took over this matter after Hon. Okwengu, J. was transferred from the station. It was agreed between the parties that I proceed on with the matter from where it was left off by my learned

sister, and therefore I commenced the defence case.

I have carefully considered the evidence adduced both by the Plaintiff and the Defendant in this case. I have also considered the filed and oral submissions by Counsels Mrs. Mbaabu for the Plaintiff and Mr. Marete for the Defendant.

There are various undisputed facts in this case as follows:-

§ It is not disputed that the Plaintiff carried out a snack bar business known as Giraffe Snack Bar, on the suit premises.

§ It is not disputed that the premises are owned by the Defendant.

§ It is also not disputed that the Plaintiff did not rent the suit premises from the Defendant.

§ It is not in dispute that the Defendant took over the occupation and possession of the suit premises on 21st December 1997, following a Notice to terminate the tenancy it issued to the Plaintiff, dated 26th February 1997.

§ There is no dispute that on receipt of the Notice to terminate the tenancy from the Defendant, the Plaintiff filed before the BPRT Case No. 229 of 1997. That matter was on 9th June 1998 stood over generally on the grounds the Defendant had demolished the suit premises.

§ It is not in dispute that the Defendant demolished the suit premises on the 21st December, 1997.

The court will determine each of the issues raised by the court in this matter seriatim.

The first issue is whether the Plaintiff was a lawful tenant in the suit premises. The Plaintiff contends that he was a lawful sub-tenant of the suit premises having sublet the suit premises from Bruce Ltd, the head tenant of the Defendant, between 1967 and 1992. The Plaintiff produced P.Exh. 1 to 5 as proof of his tenancy. P.Exh.1 to 4 are correspondences between him and Bruce Ltd and its successor Motor Mart Group Ltd, dated between 1971 to 1992, discussing the tenancy and rent payable. In addition P. Exh. 4 informed the Plaintiff to pay all future rent for the suit premises directly to the Defendant. That letter is dated 8th October, 1992. P.Exh.5 is a letter from the Plaintiff to the Defendant dated 3rd November 1992 formally applying to the Defendant to be allowed to “Continue Occupation” of the suit premises.

The Plaintiff contends that after he filed a complaint with BPRT No. 482 of 1992, the Tribunal ruled in his favour and found the Plaintiff a Controlled Tenant of the Defendant's. The Tribunal also ruled that in order for the Defendant to get the Plaintiff out of the premises, it had to serve the Plaintiff with a proper notice. The Plaintiff has produced the proceedings of the various references he filed with the BPRT. The Plaintiff has also produced in evidence the various Notices served upon him by the Defendant in a bid to terminate his tenancy. It is the Plaintiff's contention that all these Notices serve as proof that the Plaintiff was a lawful tenant of the Defendant. To crown it all, the Plaintiff urged the court to note that in its various notices, the Defendant referred to him as tenant and to itself as Landlord.

The Defendant on its part has opted not to submit on this issue despite leading evidence to the effect that the tenancy between the Defendant and Bruce Ltd specifically forbid any sub-letting of the suit premises and any construction of structures as was evidently done in order to accommodate the Plaintiff's restaurant.

The evidence adduced by the Plaintiff clearly shows that the Plaintiff had been a sub tenant of Bruce Ltd at the suit premises, for a period of 25 years before the Defendant took over the suit premises. Being a catering services establishment the applicable law is **The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** Cap 301 (hereinafter the Act). Section 2(1) of the Act, defines a

controlled tenancy as meaning-

“a tenancy of a shop, hotel or catering establishment –

a. Which has not been reduced into writing or

b. Which has been reduced into writing and which

i. is for a period not exceeding five years or

ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof or

iii. relates to premises of a class specified under subsection (2) of this section”

In this case there is clear evidence that the Plaintiff's tenancy was a sub-tenancy between him and the head tenant Bruce Ltd, and that there was no formal Lease nor was there a written agreement in force at any one time between Bruce Ltd, the head tenant and the Plaintiff. The Plaintiff's tenancy with Bruce Ltd was therefore a controlled tenancy within meaning of section 2(1) of the Act.

Section 5(1) of the Act stipulates:-

“Where a landlord is himself a tenant, the termination of the landlord's tenancy shall not of itself terminate a controlled sub-tenancy, but for the purposes of this Act the person entitled to the interest in reversion expectant on the termination of the landlord's tenancy shall be deemed to be the landlord of the controlled sub-tenancy upon the terms and conditions thereof and subject to the provisions of this Act.”

The effect of this section in my view is to create a tenancy between a landlord owner of the premises and a subtenant of the head tenant whose tenancy is being terminated. The section provides that the termination of the tenancy between such a landlord and such head tenant does not of itself terminate a controlled sub-tenancy, but has the effect of transforming such sub-tenancy into a tenancy between the subtenant and the landlord owner of the property. In the instant case the effect of this section means that the moment the tenancy between the landlord and Bruce Limited was terminated, the Plaintiff's sub-tenancy with Bruce limited reverted to a tenancy between the Plaintiff and the Defendant. The Plaintiff was in the circumstances of the case, and by operation of the law, a lawful tenant of the Defendant, and a controlled tenant at that.

The second issue is **whether Business Premises Rent Tribunal issued an order barring the Defendant from terminating the Plaintiff's tenancy.** The Plaintiff's a submission on this point is that the BPRT issued such an order. The Plaintiff relies on P. Exh. 7, which are the proceedings and the order made in BPRT No. 482 of 1992.

I have looked at the proceedings. The order made by the Chairman of the Business Rent Tribunal at the close of the proceedings of BPRT No. 482 of 1992 is part of the proceedings of that case as produced by the Plaintiff. The order provides as follows:-

“AND UPON RULING, IT IS ORDERED AS FOLLOWS:-

- 1. *The applicant had been a subtenant of the premises.***
- 2. *The applicant became a tenant of the premises after Total Kenya moved out of the premises.***
- 3. *The applicant was in a controlled tenancy terminable in accordance with the provisions of Cap 301.***
- 4. *The respondent to pay the applicants costs of Kshs. 5,000/-***
- 5. *Given under my hand and Seal of this tribunal court this 20th May, 1994.”***

The order of the Tribunal speaks for itself. Order No. 3 clearly stated that the Plaintiff’s tenancy was terminable in accordance with the provisions of the Act. In conclusion on this second issue, there was no order from the BPRT barring the Defendant from terminating the Plaintiff’s tenancy. The order made by the Tribunal gave directions that the Plaintiff’s tenancy could only be terminated in accordance with the Act.

The third issue is **whether the defendant issued a Notice dated 26th February 1997 to terminate the tenancy**. The Plaintiff submission is that the said Notice was issued and that he produced it in court as P. Exh.No. 12. The Plaintiff’s submission is that in any event the Notice was admitted under paragraph 9 of the defence. There is no contention on this issue since both the Plaintiff and Defendant admit that the Defendant issued the Notice in issue to the Plaintiff. The Notice is P.Exh.12. It is on the prescribed Standard Form under the Act. It clearly gives the Plaintiff Notice of termination of tenancy with effect from 1st May 1997. The Notice gave the Plaintiff the reasons for the termination and also required him to notify the defendant in writing within one month of the receipt of the Notice, whether or not he agrees to comply with the said Notice. I find and hold that the defendant issued a Notice to the Plaintiff terminating the Plaintiff’s tenancy over the suit premises and that the Notice complied with the requisite requirements of the Act.

The fourth issue is **whether the Plaintiff filed a notice in the Business Premises Tribunal objecting to the notice of termination dated 26th February 1997**. The fourth issue is related to the fifth issue and the two should therefore be considered together. The fifth issue is **whether the Defendant unlawfully and illegally demolished the Plaintiff’s business premises**.

In regard to fourth issue and fifth issues the Plaintiff contends that upon receipt of the Notice dated 26th February 1997 he filed BPRT No. 229 of 1997. The Defendant case was that upon receipt of the Notice in question the Plaintiff ought to have notified Defendant in writing whether or not he would comply with said Notice of termination and that that requirement ought to have been met before the Plaintiff filed any reference to the BPRT. Mr. Marete for the Defendant argued that under section 4 (5) of the Act, upon being served with the Notice, the Plaintiff ought to have served upon the Defendant a Notice on non-compliance before filing any reference to the Tribunal. Mr. Marete urged that had the plaintiff served the Notice of non-compliance before moving to the BPRT, the reference could automatically have stayed the Notice of termination. Mr. Marete urged that since the Notice of non-compliance was never served upon the Defendant before the filing of the reference, filing the reference as the Plaintiff did could not stay the Notice of termination. Counsel urged that in the circumstances, the Defendant was right to take over the suit premises as it did on the 21st December 1997, even before the Tribunal determined reference. Mr. Marete urged the Court to find that section 4(5) as read with section 6(1) and the proviso there under supports its argument that in order for the Reference to serve as a stay of the Defendant’s Notice the

Plaintiff must have served the Defendant with a Notice of non compliance. Mr. Marete urged the court to find that the Defendant lawfully took possession of the suit premises. Mr. Marete urged that under a common law remedy which the Defendant invoked, it kept all the property it found in the suit premises for the Plaintiff. Counsel relied on the case on **SADHU & ANOTHER V. VADGAMA GARAGE AND ANOTHER(1975) EA 3 at page 36 where Chanan Singh J.** discussing the issue of notice under the Act held:

“If the notice is of proper length, then the tenant can either accept the notice which means that the increased rent and the altered terms or conditions will come into effect on the date named, or the tenant can refuse to comply with the notice and “refer the matter” to the tribunal “whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the tribunal....”

The Defendant also relies on the case of **MUHOTA KIMOTHO VS KENYA COMMERCIAL BANK HCCC 76 OF 1997 (UNREPORTED)**, for the proposition that where a party without any explanation fails to call as a witness a person who it is reasonably expected to call, the Court is entitled to draw an inference that if such a witness was called, their evidence could have been unfavourable to the party who failed to call them. With due respect to the Defendant’s counsel the cited case has no application to the instant case. The Plaintiff explained why he was unable to call his Auditors and it was because one died and the other sold off his business and stopped trading due to old age.

Mrs. Mbaabu for the Plaintiff, in response to the Defendant’s submissions contended as follows:-

It was Mrs. Mbaabu’s submission that the moment the Plaintiff filed the Reference to the Tribunal on receipt on the Notice of termination, the filing of the Reference effectively stayed the Notice until the Reference was determined. Counsel urged the court to find that under section 6(1) of the Act, once the Plaintiff filed the Reference, the Defendant ought to have waited until it was determined. Counsel contended that the Notice of termination did not entitle the Defendant to move into the suit premises without else after the Notice period was over. Mrs. Mbaabu contended that even if the Plaintiff did not file any reference, the Defendant could not have evicted the Plaintiff without an order of eviction and vacant possession issued by the court. For this proposition Counsel relied on the case cited by Mr. Marete of **SADHU & ANOTHER**, supra.

I have carefully considered the rival arguments of both counsels. I do not wish to belabor the point. It is correct that on receipt of Notice of termination of the tenancy the Plaintiff ought to have indicated in writing to the Defendant whether or not he was accepting the Notice. Under section 6(1) of the Act, and under the prescribed form under the Act which the Defendant used to draft the Notice, the Plaintiff had another option to file a Reference to the BPRT as he did. Having opted to file the Reference without notifying the Defendant of his option as provided under section 4(5) of the Act meant that the Defendant’s notice could become effective on the due date, unless the Plaintiff obtained an injunctive order from the court. Having so stated, I must hasten to add that I agree with Mrs. Mbaabu’s submission that the Defendant could not have taken possession of the suit premises without a specific order from the court allowing him vacant possession and or eviction. Mr. Marete’s submission that the Defendant acted within its power and under the common law is both misleading and inapplicable in the circumstances. In conclusion on these two issues I find and hold that the Reference filed by the Plaintiff to the BPRT objecting to the Notice of termination dated 26th February, 1997 did not render the Defendant’s Notice of termination of no effect as provided under section 6(1) of the Act. I find and hold that the Defendant could not have taken over the suit premises and demolished the suit premises and therefore effectively evicting the Plaintiff, without an order from a court of law. The Defendant’s action to take over and demolish the suit premises was therefore both unlawful and illegal.

The last three issues, the sixth, seventh and eighth, are all related and will be considered together. The issues are **whether the Plaintiff suffered loss as a result of the said demolition; whether the Plaintiff is entitled to damages for loss of profit; whether the Plaintiff is entitled to aggravated damages and general damages for loss of business.**

In paragraph 10 of the plaint the plaintiff sets out the particulars of the loss he claims to have suffered in the following terms:

“PARTICULARS OF LOSS

(a) Furniture, fittings, stock, equipment and

Other movables

Shs. 567,200

(b) Improvements carried out to the premises

Including installation of water and electricity

Meters Shs.450,000

(c) Severance pay to the plaintiff’s employees

Shs.353, 000

(d) Legal expenses in Business premises rent

Tribunal Shs.1, 000,000

TOTAL Shs.1,490,200”

S

In paragraph 11of the plaint the plaintiff claims loss of profit at the rate of Kshs. 500,000/- per year for a period of 10 years.

In support of his claim the Plaintiff called 2 witnesses. The first witness was the Plaintiff himself while the other witness was Jaina Gohil, an auditor. The Plaintiff in his testimony stated that he lost most of his documents and receipts which he could have relied upon in this case, at the time of the demolition of the suit premises. The Plaintiff was however able to produce some receipts which he said he had in his possession before the demolition.

I will consider the special damages claimed for furniture, fittings, stock, equipment and other movables, together with the one for improvements and installations of water and electricity meters. In support of the claim for furniture, fittings, stock, equipment and other movables, the Plaintiff produced several receipts. Plaintiff testified that he carried out restaurant business on the suit premises and that he had one refrigerator, one cooker, two electric cookers and a microwave oven. He produced P.Exh. 22, receipts in support of the equipment and crockery. According to his testimony, the crockery included 3 to 4 dozens spoons and cups, 6 dozens plates, 4 jerry cans of edible oil of 20 litres each, coins and silvers of 5000/-, 10 steel tables and 30 steel chairs. The restaurant had a grill door and a grill fence which he said he had erected. The Plaintiff produced receipts for material bought for fixing the grill improvements as P. Exh. 19. He also produced receipts in support of the purchase of steel and for labour as P.Exh. 20, and for paint as P.Exh. 21. He also produced payment vouchers for payment in respect of labour as P.Exhs. 23 and 24.

Mrs. Mbaabu for the Plaintiff submitted that the Plaintiff’s evidence was that he lost everything as a result of the demolition of the suit premises. Counsel urged that the Defendant had removed the Plaintiff’s goods from the suit premises but could not account for them between 21st December,1997 when the demolition took place and 30th June, 1998 when the documents from NOTCO show the goods were received at their premises. Counsel submitted that DW1 who testified on behalf of the Defendant could

not explain what the Defendant took over at the suit premises on the 21st December, 1997.

Mr. Marete for the Defendant contended that the Plaintiff did not prove its claim. Mr. Marete has urged the court to find that the Plaintiff did not prove that he suffered any loss after the demolition of the suit premises. In the alternative and without prejudice Mr. Marete urged the court to find that the Plaintiff did not specifically plead nor prove his claim for special damages. For that proposition Mr. Marete relied on the case of KARANJA MUCHIRI V. PROTCAL & ALLAN EAST AFRICAL LIMITED HCCC (BUSIA) NO. 48 OF 2004. In the cited case Hon Msagha J. held:

“The plaintiff’s claim is for special damages which, in addition to the same requiring to be specifically pleaded, must be proved.

It is not enough for a party to plead figures then in evidence place them before the court and say this is my claim. Evidence is required to persuade the court why it should believe that party and disbelieve the other. The plaintiff has come out as an inconsistent litigant without any or adequate evidence to persuade this court to find in his favour.”

I agree with the holding of my learned brother.

On the claim for furniture, fittings, stock and equipment, it is Mr. Marete’s submission that the Plaintiff failed to produce any receipts in support of his claim for Kshs 567,200/-. Counsel urged the court to note that the books of account produced for the years 1996 to 1997 do not show value of items claimed under this need to be equal to the sum claimed. Mr. Marete has urged the court to find that the Plaintiff made no attempt to mitigate his losses on the basis that he declined to collect his goods despite being notified to do so by the Defendant.

In regard to the claim for improvements carried out on the suit premises including installation of water and electricity meters, it was Mr. Marete’s submission that the claim was disproved by DW2 on grounds that the books of account sought to be relied upon only reflected a value of Kshs 49,949/50, as opposed to the sum claimed of Kshs 450,000.

I have considered all the documents produced by the Plaintiff in support of his claim for furniture, fittings, stock, equipment and cost of improvements. The Plaintiff has shown that the Defendant unlawfully carted took over the suit premises and away carted away his goods. The documents produced by the Defendant shows clearly that the defendant could not account for the Plaintiff’s goods between December 1997 when it demolished the premises and June 1998 when it handed them over to Messrs NOTCO. The fact the Defendant took over the premises without a court order allowing it to do so and in the process destroyed the Plaintiff’s property including his documents cannot be used by the Defendant against the Plaintiff. The fact of the matter is that the Defendant acknowledges that the Plaintiff carried out catering services and a restaurant business at the suit premises. I have considered that it is common sense that the Plaintiff needed capital equipment, loose change and crockery among others for that kind of business.

Mrs. Mbaabu invited the court to find that the Defendant used the Notice as an excuse to take over the premises from the Plaintiff. That could as well be true. However the Defendant had a right to take over the premises so long as it did so using the proper machinery. Unfortunately, it did not do so. In addition this being a special damages case the Plaintiff has to specifically prove what he has claimed.

For the Plaintiff’s claim for furniture et cetera and improvements no evidence at all was adduced in support of the water and electricity meters. Having taken into account the receipts and vouchers produced and the Statements of Accounts I will allow what has been proved at Kshs 196,411.85. In addition to that sum I will allow Kshs.5000/- for coins and silvers. **The amount adds up to Kshs. 201,411.85 which I**

hereby allow for the claim of furniture, fittings etcetera and for the claim of improvements.

The Plaintiff claims refund for severance pay to the plaintiff employees in the sum of Kshs 353,000/-. In support of this claim the Plaintiff produced several documents all marked P.Exh. 17 which are discharge certificates showing how much each employee was paid. These certificates are for payments of Kshs. (120,000/- + 35,000/- + 40,000/- + 50,000/- + 42,000/- + 66,500/-) and they total the sum claimed of Kshs. 353,000/-.

In regard to the claim for severance pay to the Plaintiff's employees, Mr. Marete urged the court to rule that the Plaintiff was obliged in law to pay his employees their rightful dues and therefore he ought not to pass on that burden upon the Defendant. Mr. Marete urged that since payment of severance pay was a statutory obligation they cannot be regarded as the creation of the Defendant even in the face of the termination of the tenancy between the Plaintiff and the Defendant.

In regard to this claim I find that the Defendant unlawfully and illegally evicted the Plaintiff from the suit premises causing the Plaintiff to incur a premature expense. Had the Defendant waited to either remove the Plaintiff by force of Law or for the Plaintiff to move willingly, the Defendant could not have been condemned to meet this cost. Have been impatient, it has to meet the consequences of its actions.

For the claim for severance pay, I will allow the entire sum claimed and also proved of Kshs. 353,000/-.

The Plaintiff claims refund for legal expenses in the BPRT incurred in relation to this case. In support of this claim the Plaintiff produced copies of proceedings before the BPRT which are the references he filed before the tribunal regarding this matter. The References and orders are contained in the proceedings adduced in evidence as:

BPRT No 482 of 1992 Pexh 6,7, and 8

BPRT No 374 of 1995 Pexh 10, and 12

BPRT No 229 of 1997 Pexh 13 and 16

In regard to the claim for refund of legal expenses for BPRT, Mr. Marete urged that this claim was simply not proved since the Plaintiff failed to produce in court certificate of costs from the Tribunal. Mr. Marete urged the court to disallow this claim.

The Plaintiff did not produce any receipts in support of this claim. Had the Plaintiff adduced evidence to show how much it cost to file a suit in the BPRT, I could have allowed the amounts so demonstrated, given his evidence that his documents were destroyed during the demolition. The Plaintiff has however not adduced any such evidence and in the circumstances the court has no idea how much to award under this claim.

The Plaintiff claims loss of profits for a period of 10 years from the date of demolition of the suit premises at the rate of Kshs 500,000/- per year.

The Plaintiff demonstrated that his restaurant used to earn profits in his evidence. The Plaintiff produced VAT records for 1995 to 1997 P.exh 25. These records show that the Plaintiff paid a total of Kshs 386,760.04/-for the period as VAT. The Plaintiff produced P.exh 26 as proof that between 1996 and 1997 he paid Income Tax to the tune of Kshs 65,216/-.

The Plaintiff also produced Books of Accounts he personally maintained for his business for the period 1994 to 1997, as P.exh 27, 28, 29 and 30. These records show all the business sales, rent paid, levies, purchases, wages, expenses, VAT, electricity and water bills, security guard, fuel expenses licenses and crockery paid for, bought or kept by the Plaintiff for the business.

The Plaintiff in cross-examination by the Defendant admitted that as per the records the profits earned in 1996 was Kshs 238,061/-, for 1997 Kshs 68,942/- and for 1995 Kshs 269,790/-. On the other hand, PW2 Ms Gohil, who produced the Audited Accounts for the Plaintiffs business for the period 1995 to 1997 stated that for 1995 and 1996 the business made good profits but that in 1997, the profits dwindled to Kshs. 67,000/-. The witness also admitted that the profits did not at any time during the period under review reach a margin of Kshs 500,000/-.

In regard to the claim for loss of profits and damages, Mr. Marete submitted that the statements of accounts produced by the Plaintiff did not support his claim. Mr. Marete urged the court to consider that in the evidence of PW2, she admitted that the Statements of Annual profits did not reach the Kshs 500,000/- margin. Mr. Marete has urged the court to take into account the evidence of PW2 who confirmed that the books relied upon by the Plaintiff did not show a profit of Kshs 500,000/- but rather that the profits were as follows:-

In 1997 Kshs. 68,942/-

In 1996 Kshs 108,625/-

In 1995 Kshs 215,046/-.

For the same period according to the Plaintiff he made the following profits:

In 1997 Kshs 68,942/-

In 1996 Ksh 238,061/-

In 1995 Kshs 269,709/

Counsel also urged the court to find that the claim for a multiplier of 10 years was rather presuming for a controlled tenant.

The Defendants evidence, in regard to the Plaintiff's accounts and profits earned during the three last years of his business, are at a glaring disparity from the Plaintiff's own evidence. There was disadvantage on both sides. The Defendant's witness, DW2 gave evidence of what he surmised from the records he was given. The Plaintiff's Accounts were prepared by a witness who could not be called as a witness due to efflux ion of time. I did note however that the Plaintiff had prepared his Accounts as part of his records and not for this case as did the Defendant. The Plaintiff's account is more reliable. In addition to this the VAT and Income Tax records for the period are enough proof that the Plaintiff's business was making profit. The year when the profits were low, 1997, has been explained as having been caused by politics being an election year. It is a matter the Courts can take judicial notice of, which I do.

For the claim for loss of business I will allow the average profit made of 238,061/- (for 1996 according to the Plaintiff). I will take into account that an average tenancy had a duration period of 5 years. I will therefore use a multiplier of 5 years. **For loss of profits the amount allowed comes to Kshs. 1,190,305/-**

In paragraph 12 of the plaint, the Plaintiff claims aggravated damages for the Defendants act of demolishing the suit premises while a case was pending before the BPTR. Mrs. Mbaabu for the Plaintiff relied on the case of **QUARDOBA ENTERPRISES V. NAIROBI CITY COUNCIL HCCC (NRB) No. 1268 of 1999** and urged the court to award users 15 million under this need as reasonable tallying into account the character, conduct, motive and circumstances of the parties and the matter in which the tort complained of in this case was committed. In the Quardoba Enterprises case Supra, Mitey J, awarded Kshs 10 million in 2001 as exemplary damages for demolition by the Defendant of premises built by the Plaintiff.

In response to the claim for aggravated damages Mr, Marete urged the court to consider the fact that the Defendant did not mitigate his losses for reason he failed to take any measures to mitigate his losses by;

- (a) Failing to issue a notice of non compliance with the Defendants notice of termination of the tenancy.
- (b) Moving to the BPRT only one week to the effect date of the notice of termination.
- (c) Failing to cut away his goods from the suit premises.
- (d) Declining to collect items carted away by the Plaintiff despite a written request to do so by the Plaintiff.

In answer to the Quardoba case Mr. Marete submitted that the instant case is distinguishable from the cited case for several reasons.

Mr. Marete urged that the business in the cited case was licensed by the Defendant and that therefore the Defendant had consented to the operations of the Plaintiffs at the suit premises. In contrast, Mr. Marete urged that the Plaintiff in the instant case was a controlled tenant where tenancy had for long been refuted by the Defendant. Mr. Marete also drew further contrast between the two cases and noted that while in the cited case the Plaintiff was given an untenable 48 hours notice to vacate the suit premises, the Plaintiff in the instant case has an eight month notice. Further Mr. Marete submitted that in the cited case the High Court had issued an order barring the Defendant from taking over the premises while in the instant case, no such order existed.

Mr. Marete made submissions in the alternative and without prejudice to his submissions above; Mr. Marete urged the court to award nominal damages if it is minded to award any damages at all. Counsel relied on **HALSBURYS LAW OF ENGLAND VOL 12 PARAGRAPH 1129** where it is provided:

“The first principles: restitution in intergrum. The general rule is that of restitution in intergrum: so far as money can do it, the injured person should be put in the same position as he would have been in if he had not sustained the wrong, namely if the tort had not been committed or the contract had been performed. This principle, whilst general, is subject to the more particular principles, and the corresponding limitations of remoteness, which are referred to in the succeeding paragraphs.”

Mr. Marete urged that only nominal damages were awardable based on the profits made by the business as proved by the documents placed before the court.

I have considered the submissions by both counsel on the claim for aggravated damages. I have also considered the cited case. I agree that the cited case can be distinguished from the instant case in that in the cited case there was a specific court order injunctioning the Defendant from evicting the Plaintiff. The Defendant in this case carried out an eviction at the guise of taking over possession of the suit premises. I noted that it did so without a court order allowing it to take possession of the suit property. I also considered that the Defendant waited until a long weekend just before Christmas of that year to take over the premises at a time it was sure it would take the Plaintiff time to discover what it had done. I also considered that the Defendant took away the Plaintiff’s working equipment furniture fittings and documents and kept them for six months without disclosing their whereabouts. As a result of that action and omission the Plaintiff has been deprived of documents with which to support his claim for equipment, furniture, etcetera. I also noted that there was a reference pending before the PPRT, which was still pending and which was compromised by the Defendant’s action so I am satisfied that the Plaintiff is entitled to aggravated damages as a result of the Defendant’s unlawful and illegal eviction carried out in a highhanded and vicious manner.

For the Plaintiff claim for aggravated damages I consider that a sum of Kshs. 3,000,000/- is sufficient under this head.

I enter judgment for the Plaintiff against the Defendant as follows:

1) For the claim of furniture, fittings, stock, equipment and improvements Kshs. 201,411.85/-

2) For the claim for severance pay Kshs. 353,000/-.

3) For loss of profits Kshs. 1,190,305/-

4) For aggravated damages Kshs. 3,000,000/-

5) I also grant interest on 1 above at court rates from 21st December, 1997 until payment in full.

6) The Plaintiff also gets costs for this suit.

Dated at Nairobi, this 13th day of November, 2009.

LESIT, J.

JUDGE

Read signed and delivered in the presence of

.....for the Plaintiff

.....for the Defendant

.....Court clerk

KHAMINWA, J.

JUDGE