Bakari v Sawa (Environment and Land Appeal 13 of 2021)
[2022] KEELC 13709 (KLR) (11 October 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 13 OF 2021

M SILA, J

OCTOBER 11, 2022

BETWEEN

RIZIQ FUNDI BAKARI ..... APPELLANT

AND

KASSIM ALI SAWA ..... RESPONDENT

JUDGMENT

1. The appellant was a tenant of the respondent in premises located within the land parcel No 8844 (Original No 4826/2) MN having become tenant in the year 2006. He was running a hotel business on the premises. In the plaint, filed on October 23, 2009, and amended on June 18, 2012, he pleaded that the respondent presented himself as owner of the suit premises which led him to enter into the lease agreement. He pleaded that in the year 2008 he was confronted by a representative of Asmuhar Developers Limited, who informed him that the respondent was not the owner of the premises, and that it is them, Asmuhar, who own the land. The appellant pleaded that he confronted the respondent with this information, and the respondent threatened to evict him, which he duly did so on October 17, 2009. The appellant contended that his eviction was illegal and pleaded that the respondent forcefully took away his tools of trade and stock and destroyed the premises. He listed various items as having been destroyed or stolen, being a Sanyo refrigerator, an LG fridge, a double door fridge, fridge guard, power guard, Ariston gas and electric cooker, display, Aiwa Radio, Singer sewing machine, car battery N70, Zanussi weighing machine, Nokia phone make 3310, Safaricom line, Panasonic tv, Euromond aerial, two wooden beds, eight bales of flour, one shop grill, LG microwave, 7 T-doors with frames, 1 grill window, 9 windows, 1 row of steel metal, all totaling the sum of Kshs 404,930/=. He also pleaded that as a result of the eviction, his business was completely destroyed and that he lost income at the rate of Kshs 3,000/= per day. In the amended plaint he sought the following orders :-

    a. A declaration that the respondent's actions and/or conduct are illegal, null and void ab initio.

    b. Payment of special damages amounting to Kshs 404,930/=.

c. General damages for trespass and loss of business at the rate of Kshs 3,000/= per day for 12 months.

d. Costs of and/or incidental to this suit.

2. The respondent filed defence. He admitted that the appellant was his tenant but pleaded that he subsequently sought to deny his status as landlord contrary to the provisions of section 121 of the *Evidence Act*, Cap 80, Laws of Kenya. He admitted evicting the appellant but pleaded that he was justified to do so on account of the appellant becoming a tenant on sufferance capable of eviction without notice. He denied confiscating the appellant's tools of trade. He denied that the appellant was unlawfully evicted and denied the appellant's claim to damages.

3. At the hearing of the suit, the appellant testified that he was called by his staff and informed that the defendant had broken into his hotel accompanied by other people. He proceeded to the hotel and found the defendant. The defendant told him that he had a court order to break in, which order he told him was at Bamburi police station. When the appellant went to the police station, he was shown a proclamation issued by Kameta Enterprises dated July 4, 2009. The same showed rent arrears of 4 months but he denied being in any arrears of rent. He photographed the damage caused to the hotel which photographs he produced as exhibits. He produced receipts to support his claim for the lost items. He averred that in the process of eviction, force was used and his cashier was injured, of which he produced a P3 form. He was never allowed access back to the hotel. He claimed to be earning a net income of Kshs 3,000/= per day and produced a daily sales book of the year 2008. He asserted that he was illegally and forcefully evicted from his hotel without a court order. He was cross-examined on whether he used to pay rent and he stated that he did, and that he last paid rent sometime in the year 2009, though he could not remember when. He called his cashier and manager, one Abdilahi Omar Ahmeed as his witness. PW-2 did testify that the defendant came with a group of people and they carried away everything. He was also beaten in the process and he produced a P3 to support this. The place was demolished. He went back to the scene after two days and found people constructing.

4. The respondent testified that the appellant was his tenant operating a café. He stated that the appellant stopped paying rent in May- June 2009. He went to see him and the appellant told him that he would pay. Later, he wrote to him a letter informing him that he (respondent) was no longer his landlord. He (respondent) then decided to remove his (appellant's) items from the premises. Cross-examined, he stated that he had earlier sent Kamete (an auctioneer) when the appellant was in rent arrears but no goods were removed in distress. After evicting the appellant, he renovated the premises by partitioning it to have many stores. He admitted to not having a court order. He did not know what was in the premises nor did he list the items removed.

5. The respondent called one Said Mwaasa as his witness. He is among those who helped the respondent in evicting the appellant. He stated that when they went there, the appellant was not in. He told those that he found that they have come to remove the items in the café. He said that they removed about 4 sufurias, plates and spoons which they kept outside. He denied that anybody was injured. They later locked the premises. Cross-examined, he testified that they left the items at the roadside and he did not know where the items went. They did not record the inventory of the items removed. He acknowledged that he was the one who supervised their removal. He stated that the café is no longer there as the premises was partitioned.

6. Both counsel filed final submissions and judgment was delivered on July 15, 2016. The honourable trial magistrate isolated five issues for determination being :-

a. Was the plaintiff in default of payment of rent.

b. Was there a court order for eviction.

c. Did the defendant demolish and carry away goods of the plaintiff.

d. To what damages, if any is the plaintiff entitled to.

e. What are the appropriate orders on costs.

7. On the first issue, he held that there were no proper records on rent and finding that there were rent arrears 'would be engaging in guesswork.' He found that in any event the respondent did not file any counterclaim for rent arrears. On the second issue, he found that there was no court order for any eviction and held that the eviction was therefore unlawful. On the third issue, he was not convinced that there was any demolition of the premises. On whether the appellant was entitled to damages, he held that there was no evidence that the appellant suffered any damages. He held that the appellant only pleaded but never assisted the court by stating the exact extent of damage suffered. On the claim that he used to earn Kshs 3,000/= per day, he held that this should have been pleaded as a special damage claim. He thus disallowed the said claim. He added that the appellant did not say why he only sought damages for one year only and that no records of income were shown to the court. He thus proceeded to dismiss the case of the appellant but ordered each party to bear his own costs.

8. Aggrieved, the appellant has now preferred this appeal on the following grounds :-

1. That the learned trial magistrate erred in law and fact in finding that the appellant had not proved that the demised premises were demolished when the evidence on record by both Parties was that the premises were demolished in the course of an unlawful eviction.

2. That the learned trial magistrate erred in law and fact by holding that there was no evidence that the appellant suffered any damage as a result of the unlawful eviction when there was overwhelming evidence on record to the contrary.

3. That the learned trial magistrate erred in holding that the appellant had not pleaded special damages in his claim when the record showed that the appellant had pleaded and particularized the special damages and also strictly proved the same.

4. That the learned trial magistrate erred in law and fact by holding that the appellant did not produce any records of income when the appellant had produced his records during trial.

5. That the learned trial magistrate erred in law and fact by misapprehending the law on proof of special damages.

6. That the learned trial magistrate erred in law and fact by failing to appreciate the plaintiff's evidence on record thereby arriving at a wrong decision.

7. That the learned trial magistrate erred in law and fact by holding that the plaintiff had failed to prove his case on a balance of probabilities.

8. That the learned trial magistrate erred in law and fact in failing to allow the appellant's claim for damages for unlawful eviction.

9. That the learned trial magistrate erred in law and fact in dismissing the appellant's claim for damages.

9. The appellant thus seeks that the judgment of the trial magistrate be set aside and the appeal be allowed with costs. He also wishes to have his claim for damages for unlawful eviction allowed as pleaded.

10. Counsel filed written submissions to argue the appeal and I have taken note of the submissions of Mr Mutubia, learned counsel for the appellant, and Mr Mwakisha, learned counsel for the respondent.

11. I will start by recapitulating the claim before the trial magistrate. From the prayers, it will be seen that firstly, the appellant sought a declaration that the respondent's actions were illegal; secondly, he sought special damages of Kshs 404,930/=; thirdly, he sought general damages for trespass and loss of business at Kshs 3,000/= per day for 12 months; and finally costs. There had been a prayer in the original plaint for a permanent injunction against the respondent to restrain him from evicting the appellant, but this was removed when the plaint was amended, as the premises had already changed character and taken over by other persons. There was no dispute before the trial court for rent or any rent arrears. There could have been an issue regarding rent if the acts that took place were acts that were aimed at recovery or rent, such as the act of levying distress for rent. However, the respondent himself did affirm that what took place was not an action in levy of distress but an eviction of the appellant, the reason given in the pleadings being that the appellant failed to recognize the respondent as landlord. The entire case thus revolves around the question whether the eviction of the appellant from the premises was unlawful. On this, the trial court did actually find that the eviction was unlawful inter alia because there was no court order allowing the respondent to evict the appellant. There is no cross-appeal by the respondent challenging this finding.

12. In his submissions, Mr Mwakisha, learned counsel for the respondent, did dwell considerably on the issue of the legality of the eviction and did argue that by dint of section 121 of the *Evidence Act*, the respondent had a right to evict the appellant. As I have said there is no cross appeal against the finding that the eviction was unlawful. If the respondent wished to challenge the finding of the trial court then he needed to cross appeal against this finding. But let us assume that I am wrong on this. Does section 121 really protect the respondent ? I am not persuaded. We need first to understand the context of section 121 of the *Evidence Act*, Chapter 80, Laws of Kenya. Section 121 is within part II of the Act which is titled 'estoppel.' Estoppel is a rule of evidence where a party is barred from challenging the existence of a state of affairs. Indeed section 120 of the *Evidence Act* does pronounce itself on the concept of estoppel by providing as follows :-

> 120. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

It will thus be seen from the above that estoppel is nothing more than a rule of evidence.

Section 121 provides for estoppel of tenant or licencee. It provides as follows :-

> 121. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property, and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a right to such possession at the time when the licence was given.

13. From the above, it will be noted that a tenant or licencee, is barred from denying that the landlord or licensor had no title. But as I said earlier, this is a rule of evidence. Thus, in an instance where a landlord

sues a tenant for rent, the tenant is estopped from now arguing that the landlord has no title, so that the question whether the landlord had title or not does not become an issue for trial. One cannot use section 121 to argue that because the tenant is challenging the title of the landlord then the tenant has become a tenant at sufferance. Mr Mwakisha in his submissions relied on the *Ugandan case of Tumushabe & Another vs Anglo-African Ltd and Another (199) 2EA 319* to support the contention that where a tenant refuses to acknowledge the title of the landlord then he becomes a trespasser and the owner has the right to remove him. First the decision in that case, being from another jurisdiction, does not bind this court. Secondly, that decision is distinguishable from what happened in this case. In the said case, the tenant failed to pay rent. He was given notice but still failed to pay and the court held that he could be removed. In our case, no notice was ever given by the respondent to the appellant. It would also appear that the nature of the tenancy between the appellant and the respondent was a controlled tenancy within the meaning of the *Landlord & Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya and if the appellant wished to terminate the tenancy, then he needed to issue the requisite notice to tenant under section 4 (2) of the Act, before proceeding to evict him.

14. The finding that the eviction was unlawful was therefore correct.

15. What I find odd, is that despite finding that the eviction of the appellant was unlawful, the trial magistrate was not moved to make any award in general damages for unlawful eviction. In fact no award whatsoever was made even in respect of the other heads of damages. The reasoning of the trial magistrate appears to be based on two grounds. First, that there was no proof that the premises was demolished, and secondly, that there was no proof in respect of any loss suffered. With respect, this finding was erroneous. On the question whether there was a demolition of the premises, this was not even denied by the respondent. The respondent himself did affirm that after removing the appellant from the premises, he proceeded to alter the premises to have multiple shops in place of the hotel. The space that was let to the appellant was thus altered. Whether you wish to refer to it as a demolition or a renovation does not matter. What is important is that the character of the premises was altered in such a way that it could not be used as a hotel and in my opinion whatever the respondent did to the premises was similar to a demolition of the hotel.

16. The trial magistrate, again with respect, erred in failing to find that the appellant had not proved loss. The amended plaint, at paragraph 8A did list with precision the items that the appellant claimed to have lost when he was forcefully evicted. It cannot therefore be argued that there was no pleading relating to the items lost. Was there proof ? certainly, without any shred of doubt. The evidence adduced was that the respondent came with a group of people and removed all items that were in the appellant's hotel. These items were never taken for any safe keeping but were thrown in the streets without a care as to what would happen to them. DW-2 who was engaged by the respondent to do the supervision did state in his evidence under cross-examination that they left the items at the road side. PW-2 stated that the items were carried away and/or stolen. Clearly therefore, as a result of the forceful eviction of the appellant, the appellant lost goods. The loss of the goods was a direct consequence of the illegal act of eviction and the respondent is therefore liable to make good their loss. As I have mentioned above, the particulars of the goods lost were clearly itemized by the appellant, and I have no reason to doubt that these items were in the hotel. The evidence that only four sufurias, and some plates and spoons were removed must be taken with a pinch of salt. Do you need a group of people to remove four sufurias and some plates and spoons ? In any event, the respondent never took any inventory of the goods that he removed. What the appellant listed as having been lost are items that you would expect in a hotel. They inter alia comprised of fridges, a radio, and TV. I am persuaded to find that the plaintiff lost the items that he listed in the plaint. To prove the value of what he lost, the appellant adduced receipts of these goods as exhibits. It cannot therefore be argued that the appellant failed to plead and prove the items lost. I am persuaded that adequate proof was provided, through receipts, to support the claim

that the value of the goods lost was Kshs 403,000/=. This amount was not only pleaded but it was proved as well. The trial magistrate erred in not making an award for this sum.

17. The other claim of the appellant was for loss of income, where the applicant sought to be compensated with the sum of Kshs 3,000/= per day for one year. The trial court was of the opinion that this was not proved and also questioned why the appellant only claimed it for one year. On the issue of proof, I think the appellant made a case for this award. He may not have produced very elaborate records of his income statement, but I think, whatever he produced, was sufficient to make an award. He did avail an exercise book where he stated he was recording his income. I can see for example that on January 26, 2008, he recorded his income at Kshs 3150 and his expenses at Kshs 2755 thus a net of Kshs 395/=. On January 29, 2008, he had a net income of Kshs 680/= . Of course business fluctuates, but I am prepared to give Kshs 600/= as net income per day. I do not see what problem there is in claiming compensation for one year or why the trial magistrate made it an issue. If the appellant thought it fit to make the claim for one year, that was his prerogative. Does it mean that the mind of the trial court would have been persuaded to make the award if he had made the claim for 5 years, or 10 years or 6 months ? If such claim was to be made, it would be pegged to a duration of time that the court would think reasonable, and if proved, it would not be denied because the appellant only pleaded it for one year.

18. On my part, I would peg it to the notice period for termination of the tenancy. If the tenancy was properly terminated, this would be the duration of time to allow the tenant make alternative arrangements for other premises. In the case at hand, the notice period must be the duration pegged by Cap 301 which at section 4 (4) provides as follows :-

> (4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:
>
> Provided that—
>
> (i) Where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;
>
> (ii) Where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;
>
> (iii) The parties to the tenancy may agree in writing to any lesser period of notice.

19. I have looked at the agreement that the parties had and I have not seen anywhere where it provides for notice by the landlord to tenant. I will therefore peg the award to the two months given in section 4 (4) above. Thus, for loss of income, I make an award of Kshs 600/= (income per day) X 30 (days for one month) X 2 (that is two months period) which totals to Kshs 36,000/=.

20. I had mentioned that I saw no reason why no award was made for general damages given that the trial court already held that the eviction was unlawful. General damages are in the discretion of the court after taking into account all factors. In the case of *Francis Maringu Mureu t/a Jem Corner Bar vs Joha Muranguri Karuga (2004) eKLR*, Musinga J (as he then was) made an award of Kshs 100,000/= as general damages for an unlawful eviction. On my part, I am ready to make an award of Kshs 250,000/= as general damages for the unlawful eviction and I do make that award.

21. I am also persuaded that this is a fit case for making an award in exemplary damages. The principles for the award of general damages under common law were succinctly put by Devlin LJ in the case of *Rookes vs Banard (1964) AC 1129*. In the said case, Devlin LJ, elaborated as follows on the instances when the same may be awarded :-

> The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category,—I say this with particular reference to the facts of this case,—to oppressive action by private corporations or individuals. Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object,— perhaps some property which he covets,—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay. To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute.
>
> (emphasis mine).

22. It will be observed that exemplary damages are awardable in the following three instances.

    (i) Where there is oppressive, arbitrary or unconstitutional action by the servants of the government;

    (ii) Where the defendant's conduct is calculated so that he can make profit for himself which may well exceed the compensation due to the plaintiff; and

    (iii) Where the same is expressly authorised by statute.

23. The respondent removed the appellant from the demised premises in a most cruel and inhumane manner. He threw his goods out onto the streets. There is evidence that the appellant's workers were roughed up and injured. No notice was given to the appellant. This sort of anarchy and impunity cannot be condoned in a civilized society. Such conduct must be condemned in the strongest terms possible and such condemnation, can, to a small extent, be expressed by an award of exemplary damages. In our case, I am further persuaded that the intention of the respondent was to remove the appellant from the premises so that he can make more money from it. He indeed proceeded to renovate the premises by creating more rooms which he let out to multiple tenants. He charged these tenants Kshs 6,000/= per month from the documents that he provided. In his affidavit in reply to the application for injunction that the appellant had filed, the respondent did depose that he has put up four shops. His income therefore jumped from the sum of Kshs 10,000/= , that the appellant used to pay, to Kshs 24,000/= , an increment of Kshs 14,000/=.The respondent must be taught the lesson that a tort does not pay. I will obliterate this extra income for 5 years thus Kshs 14,000/= X 12 X 5 = Kshs 840,000/=. I will make an award of Kshs 840,000/= as exemplary damages to the appellant.

24. I thus set aside the judgment of the trial court and substitute it with an award to the appellant as follows :-

    Kshs 403,000/= for lost goods;

    Kshs 36,000/= for lost income;

    Kshs 250,000/= for general damages;

Kshs 840,000/= for exemplary damages;

TOTAL – Kshs 1, 529,000/=.

25. This sum of Kshs 1,529,000/= to accumulate interest at court rates from the time that the suit was filed to the time that the amount will be paid in full.

26. The final issue is costs. I award the appellant the costs of the suit before the magistrate's court and also the costs of this appeal.

Judgment accordingly.

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

Delivered in the Presence of :-

Ms. Shisia h/b for Mr. Mutubia for the appellant.

Mr. Mwakisha for the respondent.

Court Assistant – Wilson Rabong'o.