



**Mutisya & another (Both t/a St Philips Optical Supplies and Oddyssey Opticians Ltd) v Emerad Point Limited & 2 others (Environment & Land Case 538 of 2018) [2022] KEELC 15267 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15267 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 538 OF 2018  
MD MWANGI, J  
NOVEMBER 28, 2022**

**BETWEEN**

**PHILIP MUNYAO MUTISYA ..... 1<sup>ST</sup> PLAINTIFF  
MARY NZILANI ..... 2<sup>ND</sup> PLAINTIFF  
BOTH T/A ST PHILIPS OPTICAL SUPPLIES AND ODDYSSEY OPTICIANS  
LTD**

**AND**

**CHARLES NDUNGU ..... 1<sup>ST</sup> DEFENDANT  
EMERAD POINT LIMITED ..... 2<sup>ND</sup> DEFENDANT  
SORTMASTER INVESTMENT LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. The plaintiffs were at all material times tenants in the 1<sup>st</sup> defendant's premises on the parcel of land LR No 209/2303 also known as 'Lois Plaza' (formerly referred to as 'Mulji Jetha Mansion') in Nairobi (hereinafter referred to as 'the suit premises'. The 1<sup>st</sup> defendant acquired the suit premises sometimes in year 2017 from its previous owner consequently taking over the tenants who had leased various shops/spaces therein including the plaintiffs in this case.
2. The plaintiffs' complaint was that the 1<sup>st</sup> defendant through the 2<sup>nd</sup> & 3<sup>rd</sup> defendants had in violation of the terms and conditions of the lease unlawfully interfered with their quiet possession of the leased spaces and had made several attempts to forcefully evict them from the premises. The plaintiffs particularized the alleged breaches at paragraph 8 of their plaint which included disconnecting water supply to the basement space occupied by the plaintiffs, closing and removing washroom facilities



and failure to drain water that used to accumulate at the basement amongst the others tabulated thereunder.

3. The plaintiffs alleged relocating the equipment from the basement was a complex and expensive affair that required well trained technicians and engineers to undertake 'reverse engineering' for purposes of dismantling the parts for purposes of transporting them to the new location and then re-assembling the machine. The reassembling would also require special wiring, air pipes and air compressors. The total cost of such an exercise was estimated to be Kshs 1,650,000/=.
4. The plaintiffs who were still tenants of the 1<sup>st</sup> defendant at the time of filing suit prayed for judgment against the defendants jointly and severally for: -
  - a) A permanent injunction to restrain the defendants whether by themselves, their servants, agents and or employees from evicting the plaintiffs or in any other way interfering with the plaintiffs' quiet possession of space No 5, room No 20 (1<sup>st</sup> floor), room numbers 29 and 39 (2<sup>nd</sup> floor), shop No 36 (2<sup>nd</sup> floor), room No 51 (3<sup>rd</sup> floor) and shop No 45 (3<sup>rd</sup> floor) in parcel of land known as LR No 209/2303 Mulji Jetha mansion (Lois Plaza).
  - b) A permanent mandatory injunction for the defendants to provide water, security, sanitary, electricity and other services to the areas/space(s) occupied by the plaintiffs in parcel of land LR No 209/2303 Mulji Jetha mansion (Lois Plaza).
  - c) An order that the defendants do meet all the costs of relocating the plaintiffs from the basement space that the plaintiffs occupy of LR No 209/2303 Mulji Jetha mansion (Lois Plaza).
  - d) Special and general damages.
  - e) Costs of the suit.

#### **Response by the Defendants.**

5. The defendants filed a joint statement of defence and counter-claim dated March 4, 2019 whereby they denied interfering with the plaintiffs' possession of the suit premises and or breach of the tenancy as alleged putting them to strict proof.
6. In their counterclaim, the defendants counter accused the plaintiffs of breaching the terms of the lease agreement and particularized the breaches at paragraph 23 of the statement of defence and counter claim. The defendants accused the plaintiffs of using verbally abusive and unwarranted remarks against the 2<sup>nd</sup> & 3<sup>rd</sup> defendants, erecting/installing metallic steel doors in the shops and offices leased to them without authority and consent of the defendants amongst the other violations.
7. The defendants therefore prayed for judgment against the plaintiffs as follows: -
  - a) The plaintiffs suit be dismissed with costs.
  - b) The plaintiffs, their servants, agents or workers be restrained from interfering with the defendants' duty and obligation of carrying out their obligations and duty in accordance with the lease and also in compliance with the requirements of the County Government of Nairobi Laws & Standards.



## Evidence Adduced

8. The case proceeded to full hearing. On behalf of the plaintiffs, only the 1<sup>st</sup> plaintiff testified.
9. The plaintiffs' witness, Philip Munyao Mutisya, the 1<sup>st</sup> plaintiff, stated that he was a businessman trading under various names as indicated on his plaint. He adopted his witness statement dated December 13, 2018, as his evidence in chief. He further produced the documents listed on the plaintiffs' list of documents of even date which were accordingly marked as exhibits.
10. PW1 explained that he had been a tenant in the suit premises since 2009 even before the 1<sup>st</sup> defendant acquired it. The 1<sup>st</sup> defendant took over the suit premises in 2017 and that was when everything took a dramatic twist according to PW1. New terms and conditions were introduced into the tenancy by the new landlord making it difficult for them to continue operating peacefully.
11. PW1 accused the defendants of being hostile and inconsiderate. He alleged that at one point in time there was a stage managed break-in into one of his offices intended to scare him and force him out of the premises allegedly by the 2<sup>nd</sup> & 3<sup>rd</sup> defendants.
12. PW1 stated that it was the reason why he decided to reinforce his doors to secure his stock and properties in the shops/offices. At the basement he had equipments worth of Kshs 30 million while in rooms number 45 & 51, he had stocks of lenses, frames and optical equipment worth Kshs 100 million. He had other properties in other rooms which he needed to secure. The defendants were apparently unhappy with his actions of reinforcing his doors. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants apparently removed the steel doors forcing him to lodge a complaint with the police which caused them to be charged with a criminal offence of malicious damage to property.
13. Seemingly, the major dispute was over the basement space where PW1 alleged to have done improvements in order to make it habitable. PW1 stated that the defendants well hellbent on forcing him out of the suit premises. They would flood the basement with water and at one time even attempted to poison him by throwing in some foul smelling chemical. At other times they would cut off power by manipulating the main switch board just to frustrate the plaintiffs to force them out.
14. Eventually, PW1 stated that they were forced to move out of the basement of the suit premises. He required special services to remove the 'generator-like machine' from the basement. He alleged that it required reverse engineering to dismantle it and then re-assemble it. It took him about 3 weeks costing him Kshs 1,650,000/-. He moved from the suit premises to an entirely different premises.
15. At the time of the hearing, PW1 confirmed that they had moved out of the suit premises remaining with only office number 29. They had already given a notice terminating the lease for the office number 29.
16. The plaintiff confirmed that he was consequently abandoning the prayers for injunctions and was only pursuing the prayers for special and general damages. He was specific that he was claiming for the 3 steel doors at the cost of Kshs 30,000/- each, the cost of renovating room number 20 on 1<sup>st</sup> floor at Kshs 450,000/- and the cost of relocating the machinery/equipments from the basement office at Kshs 1,650,000/-. He further clarified that he was also claiming damages for loss of customers and business and interference with their quiet possession as tenants which caused them fear and psychological torture.
17. In cross-examination, PW1 confirmed that the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant were not convicted for the charge of malicious damage to property in the criminal case number 2190/2018 where he was



the complainant. Further PW1 affirmed that he had not exhibited any documents to prove value of his stock or value of the machinery he was supposedly moving from the suit premises.

18. PW1 asserted that he was not aware that the defendants had been served with an enforcement notice by the Nairobi City County Government requiring him to renovate the basement of the suit premises. However, he confirmed that the basement used to flood water and had no toilets.
19. The alleged cost incurred of Kshs 1,650,000/- was not supported by any documentary evidence. Though was the cost of renovating the room number 20; neither the steel doors. He had no invoices nor receipts to confirm the expenditure. To support his claim for loss of business, he too had not attached any records to show how his business was fairing.

### **Evidence Adduced On Behalf Of The Defendants**

20. The defendants called 2 witnesses. DW1 was the 2<sup>nd</sup> defendant who adopted his witness statement dated March 9, 2020 as his evidence in chief.
21. DW1 confirmed that he was a director of the 1<sup>st</sup> defendant company which owns the suit premises. He affirmed that the plaintiffs were his tenants but had since vacated all the spaces they had leased in the suit premises.
22. DW1 averred that the plaintiffs had installed steel doors without authority contrary to the tenancy agreement. He denied frustrating or interfering with the quiet possession of the plaintiffs while they were tenants in the suit premises.
23. It was DW1 evidence that the basement of the suit premises was only meant to be a store as it was not adequately ventilated. It lacked other essential facilities like toilets that would have made it habitable. The plaintiffs had put their workers under hazardous conditions. When officers of the Nairobi City County government discovered it, they issued the defendants an enforcement notice to renovate it. The renovation was ordered by the county government. In order to comply, the defendants offered the plaintiffs alternative spaces upstairs which they declined.
24. DW1 termed the plaintiffs' case against them as outrageous and without any basis. The plaintiffs moved out of the suit premise on their own volition. In fact, DW1 stated that they did not even notify them when they were moving out the machine from the basement.
25. DW1 under cross-examination stated that the plaintiffs had been draining sand into the sockpit from their activities at the basement causing blockage that led to the foul smell the plaintiffs complained of. They were the cause of the smell. After the plaintiffs vacated the basement, he engaged a contractor to clean up the sockpit. He denied that he forced the plaintiffs out of the suit premises.
26. DW2 was a manager of the 3<sup>rd</sup> defendant. He adopted his witness statement dated March 9, 2020 as his evidence in chief. He confirmed that the 3<sup>rd</sup> defendant was the property manager in charge of the suit premises.
27. DW2 stated that after they were served with the enforcement notice by the Nairobi city county government, they duly notified the plaintiffs. He asserted that they did not force the plaintiffs out of the suit premises. The plaintiffs had moved out on their own volition.
28. Under cross-examination, DW2 stated that he was not aware of the time when the plaintiffs vacated the basement as they did not inform them. There had been 3 tenants at the basement. Two tenants accepted the alternative spaces offered by the defendants to allow the renovations be carried out. It was only the plaintiffs who had refused to move to the alternative spaces offered.



## Court's Directions

29. Upon the close of the hearing of the case, the court directed parties to file written submissions. Both sides complied. The court has had the opportunity to read the submissions.

## Issues for Determination

30. By the time of the hearing of the case, the circumstances had changed substantially. The plaintiffs had already vacated the suit premises. PW1 in his testimony confirmed that the plaintiffs were no longer pursuing the orders of permanent and mandatory injunctions. They would only pursue prayers (c) in their plaint i.e special and general damages.
31. Considering the evidence adduced, the pleadings on record and the submissions filed by the parties, the court is of the view that the issues for determination in this matter are:
- a. Whether the plaintiffs have proved their claims for special damages.
  - b. Whether the plaintiffs are entitled to the relief of general damages.
  - c. Whether the defendants are entitled to the prayer sought in their counter-claim.
  - d. Who should bear the costs of the suit and the counter-claim.

## Analysis and Determination.

### A. Whether the plaintiffs have proved their claims for special damages.

32. In his testimony, PW1 stated that he was claiming the cost of the 3 metallic doors at Kshs 30,000/- each, the cost of renovating room number 20 at Kshs 450,000/- and the cost of relocating machinery from the basement office being Kshs 1,650,000/-
33. The law on special damages is clear and well settled. A claim for special damages must not only be specifically pleaded but must also be specifically proved.
34. In their pleadings, the plaintiffs did not specifically plead the special damages claimed. Nowhere in the plaint did the plaintiffs plead the cost of the 3 doors; neither the alleged cost of Kshs 450,000/ for renovating room number 20.
35. The figure of Kshs 1,650,000/- was mentioned in paragraph 9 of the plaint not as an expenditure incurred but as an estimated cost of relocating the equipment from the basement in the suit premises on the ground that it would require reverse engineering. After moving the equipments, the plaintiffs did not amend their plaint to plead the figure as actual expenses incurred.
36. The Court of Appeal in *Capital Fish Limited v Kenya Power Lighting Company Limited* (2016) eKLR, re-affirmed the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved. The court was categorical that it is not enough for a party to throw an 'abstract figure' to the court with a mere statement that....'this is the loss the appellant suffered.....please award it to the appellant.' Credible documentary evidence must be adduced to prove the pleaded special damages.
37. The plaintiffs did not provide actual proof of the alleged expenditure which form the basis of their claims for special damages. On the basis of failure to specifically plead and to strictly prove the same, the plaintiffs' claim for special damages must fail.



## **B. Whether the plaintiffs are entitled to the relief of general damages.**

38. In an attempt to elaborate the basis of the claim for general damages, PW1 alleged that he was claiming for loss of customers, loss of business and damages for fear and psychological torture caused by the defendants' 'persistent' interference with their quiet possession.
39. As I had pointed out earlier on in this judgment, the plaintiffs had in their pleadings made a number of allegations against the defendants at paragraph 8 of their plaint which they tabulated under the subheading, 'particulars of breach'. These were the acts that supposedly constituted the interferences with plaintiffs' quiet possession.
40. PW1 had alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had stage managed a break-in into one of his shops. He further accused them of removing his steel doors as a result whereof he made a complaint to the police causing them to be charged with a criminal offence of malicious damage to property. They were however acquitted for lack of evidence. In this case too, the plaintiffs have not offered any material evidence to support the allegations.
41. Again, the plaintiffs made scathing allegations of the defendants' interference with their occupation of the basement office. The defendants explained that they had been served with an enforcement notice by the Nairobi city county government to renovate the basement. They had offered the plaintiffs alternative space to relocate to and allow them to carry out the renovation but the plaintiff's declined the offer.
42. The allegation of attempted poisoning, stage managed power black-outs and deliberate flooding of the basement by the defendants were not proved. They can only be treated as such, mere allegations.
43. The burden of proof was upon the plaintiffs to prove their case.
44. Section 107 of the *Evidence Act* (cap 80 Laws of Kenya) succinctly states that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
45. Section 108 of *Evidence Act* (cap 80 Laws of Kenya) further states that:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
46. None of the allegations leveled against the defendants by the plaintiffs, in my opinion, was proved.
47. In summary, the courts finding is that the plaintiffs did not prove the alleged interferences with their quiet possession to justify an award of general damages. The claim by the plaintiffs for general damages therefore fails for want of proof.

## **C. Whether the defendants are entitled to the prayers sought in their counter-claim.**

48. The defendants in their counter-claim sought a restraining order against the plaintiffs to bar them from interfering with their responsibilities as landlords.
49. As noted earlier on, the plaintiffs have since vacated the suit premises. The defendants counter-claim is therefore overtaken by events. Consequently, the claim is disallowed.



**D. Who bears the costs of the suit and the counter –claim.**

50. From the foregoing, it is clear that the plaintiffs case fails; the defendants counter –claim too collapses.

The appropriate order in the circumstances in regard to costs is for each party to bears his own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER 2022**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

**Ms. Masaki for the Plaintiffs.**

**Mr. Mwaura for the Defendants.**

**Court Assistant – Hilda/Yvette.**

**M.D. MWANGI**

**JUDGE**

