



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

Civil Case 455 of 1996

MULWA TUTUMA.....1ST PLAINTIFF

ALEXANDER MUNENE TUTUMA2ND PLAINTIFF

VERSUS

PETER N. MAINGADEFENDANT

JUDGMENT

Initially there were two (2) Plaintiffs in the suit filed in Court on 27th February 1996. They were joint owner of *plot No. 16 Gikomba Light Industries*. It is now *L.R. No. 209/13813*.

Originally this plot was owned by one *James Kariuki Gichoya* or *Ichoya*. By an agreement dated 26th May 2005 the said *Gichoya* or *Ichoya* sold this plot to the plaintiffs. This agreement was produced in this case as the plaintiffs' exhibit No. 1. The transfer of this plot from the *Gichoya* or *Ichoya* to the plaintiffs was notified to the Nairobi City Council by letter dated 2nd February 1995 (he must have meant June 1995) and another notice to the Commissioner of Lands by Nairobi City Council dated 7th November 1995. These notifications are marked as plaintiff exhibits 2 and 3.

In the meantime, *James Kariuki* (vendor) had rented the premises to the defendant. He too was notified of the transfer of the plot to the plaintiffs by plaintiffs' exhibit No. 4.

Though they wrote a letter to the defendant to vacate the suit plot so that the plaintiffs could develop it, he did not heed the notice – see plaintiffs' exhibit No. 5.

That even the Council wrote to the plaintiffs with copy to the Commissioner of Lands in plaintiffs' exhibit 6 for the latter to address all matters relating to this suit plot to the plaintiffs.

That later the 1st plaintiff transferred his share in the plaintiff to the 2nd plaintiff who alone testified in this case on 26th March 2007. This is confirmed by the issue of a grant on the suit property to the plaintiff (see exh. 7).

According to the plaintiff, when the defendant was a tenant of *Kariuki*, there was a rent dispute between the m at the Rent Restriction Tribunal which *Kariuki* won and he auctioned the defendant's property to recover such rent and this is how the premises became vacant and *Kariuki* offered to sell it to the plaintiffs.

That it was after the plaintiffs bought the premises and opened the door (gate) to it that defendant came

back and placed his logs for making carvings thereon.

That the plaintiffs did not want any violence and they started the process of taking the dispute to the Court.

That before instituting this suit the plaintiff has tried to tell the defendant that he had purchased this plot from the said **Kariuki** but the defendant would hear none of it.

That the plaintiff stayed in the premises for two years after the notices before he moved out after some directives were given by the Court that he moves out of the plot. This was in 1998.

It is during the 2nd Plaintiff's testimony in Court that he revealed that the 1st plaintiff had relinquished his share in the suit plot in his favour and that since then the defendant had moved out of the premises, and that though in the suit referred to in the first paragraph of this judgment the plaintiffs had sought a permanent injunction to restrain the defendant, his servants and/or agents from entering, interfering, alienating and/or remaining on the suit plot and for his eviction there-from, the 2nd plaintiff said during his testimony that he was no longer pursuing those orders as the defendant had moved out of the said plot; but he was only pursuing a claim for general damages and costs.

On the issue of damages, the plaintiff stated that he expected to complete construction within two years of purchasing the plot but since the defendant remained thereon for that period the materials had gone up and that this is why he had asked for these sort of damages.

The plaintiff stated that the defendant was not his tenant and he had not invited or allowed him to come to the plot.

He denied raiding the defendant's premises and demolishing the kiosks or carrying away goods from thereon.

He said it was when he opened the gate at the front of the plot that the defendant entered it bringing his logs there for making carvings. That the defendant then put up structures thereon covered with canvas to protect him from the sun and that this was not a construction.

In cross-examination the plaintiff said the defendant did not leave the plot on his own accord and that he left after a Court issued an order for him to vacate the same.

That the plaintiff did not forcefully evict the defendant from the suit plot, but he identified two letters by his advocate, dated 15th May 2000 and 16th July 2000 asking the defendant to vacate the suit plot but he could not remember whether by this time the said defendant was still on the plot.

That he sought compensation from the defendant for delayed construction. That he was not present when the defendant vacated the plot and that he only found it vacant.

In his testimony the defendant said that he was working at **Gikomba plot No. 16 Light Industries** where he made and sold carvings since 1978.

That he had rented this plot from **Kariuki** but did not know when **Kariuki** sold this plot to the plaintiffs as he was not informed about such a transaction.

But he acknowledged receiving the plaintiffs' exhibits Numbers 4 and 5 and said that this was the first time he learned that **Kariuki** had sold the plot to the plaintiffs.

According to his evidence, he did not discuss this matter with **Kariuki** or try to know who had bought the plot.

That he had put up structures or kiosks on the plot for displaying his carvings but that these were demolished by **Kariuki** in 1991.

Then he built thereon three others which were then demolished on the night of 9th/10th October 2000 by the plaintiff and a group of people.

That it was his son, now dead who called him to come and see what was going on at the plot and when he arrived there he found the one who was initially the first plaintiff in company of about forty (40) people and Chief's askaris who were demolishing his kiosks, removing and throwing his carvings outside.

He testified that he tried to stop these people from doing that but it was all in vain. That amongst all these people he only recognized the initial first plaintiff and the Chief's askaris.

The defendant showed the Court a number of photographs including those of kiosks and carvings which were destroyed and/or thrown outside.

The defendant accompanied these people to the District Officer's office Pumwani but does not say what happened there.

He gave estimate of his property which was damaged during the demolition and the total amount came to **Kshs.955,000/=**.

The defendant testified that he used to export carvings to Italy, England and other countries or that sometimes; European customers bought the carvings and asked the defendant to send these to them. He produced one invoice he used to send some carvings to Italy worth **Kshs.1,200,735/=** (Def. Exh. 4(a) to (d)).

That his business was of high value and that the defendant lost a lot when his kiosks were demolished and some property destroyed and others carried away on a lorry.

The defendant said that there was no Court order to evict him and that he was a lawful tenant on the suit plot but that later the Court ordered him to move out of it.

The defendant denied refusing to allow the plaintiff entry on to the plot after he knew the latter had purchased the same and denied that his structures were temporary. He made an application to a counter claim to specifically plead a sum of **Kshs.955,000/=**.

The defendant prayed for general damages for unlawful eviction and special damages of **Kshs.955,000/=**, plus interest and costs of the suit.

In cross-examination, he agreed he was not a tenant of the plaintiffs but that of **James Kariuki**. That he did not know the plot had been sold to the plaintiffs except during the demolition.

However, he agreed that he received plaintiff's exhibits 4 and 5 which are copy of letters **Kariuki** and plaintiffs wrote to him and/or to the plaintiffs about the sale of this plot to the latter; but that by this time there was a claim he was pursuing against **Kariuki** hence he could not vacate the premises. That all the same he never recognized the plaintiffs and that up to the year 2000 he knew the plot belonged to **Kariuki**.

That during the demolition **Kariuki** was not at the scene.

He stated that during 1993 he had a case with **Kariuki** at the rent tribunal and that an order was made for him to vacate the suit premise which he did but that later there was a Court order authorizing him to come back to the same premises.

In re-examination, he said though he saw the exhibits 4 and 5, he did not believe them because he still had

a claim against **Kariuki**.

Counsel for the parties made submissions on this case on 26th September 2007 with counsel for the defendant terming the plaintiff's evidence dishonest, untrue and contradictory.

As to the plaintiff's claim for damages for delayed construction, counsel for the defendant said there were no pleadings or evidence to support this claim. He added that the nature of this claim was not clearly brought out in the pleadings hence the Court cannot grant general damages in a vacuum.

That the plaintiff had not proved his case against the defendant on a balance of probabilities and urged the Court to dismiss the suit with costs.

On the counterclaim the counsel for the defendant stated that defendant's exhibit 1 to 3 showed there was forceful eviction and that the property was damaged. This was also confirmed by the ruling of **Judge Kasanga Mulwa** on this matter which, according to counsel, resolved the issue of liability.

He proposed a sum of **Kshs.500,000/=** as general damages.

Counsel referred to the quantification of special damages as pleaded in the plaint and the evidence adduced and stated that the defendant was engaged in vary gainful business due to the amounts disclosed in the receipts. Therefore, he had satisfied the principle that special damages must not only be specifically pleaded but also strictly proved.

Counsel urged the Court to award the defendant the special damages prayed for in the plaint or in the alternative exercise its discretion to award an amount which could be reasonable in the circumstances of this case.

Counsel for the plaintiff submitted that his client's pleadings and the evidence were consistent.

He stated that the continued occupation of the suit plot by the defendant after being notified by the previous owner about the sale of the same to the plaintiff made him unable to utilize it as he wanted and this is why he sought general damages and proposed a sum of **Kshs.500,000/=** on this head of damages.

On the counterclaim, the plaintiff counsel submitted that the defendant did not prove special damages as required by law; because of non-production of receipts of purchase of the items alleged to have been destroyed. He urged the Court to dismiss this claim.

On the claim for general damages he said the defendant was not entitled to these because he did not establish the existence of Landlord-tenant relationship between him and the plaintiff hence there was none that the plaintiff breached.

Counsel stated that it was wrong for the defence counsel to state that the issue of liability had been settled by **Judge Mulwa's** ruling on an application for injunction.

He urged the Court to allow the plaintiff's case with costs and to dismiss that of the defendant also with costs.

Before the 2nd plaintiff started testifying in this case, his counsel informed the Court he was no longer pursuing prayers (a) and (b) of the plaint; because the defendant had already vacated the suit premises.

Prayer (a) was for a permanent injunction against the defendant while prayer (b) was for his eviction from the suit premises. Thus the Court is not required to make any findings in respect to these prayers and that the only prayer that the plaintiff is seeking from this Court is for general damages and costs of the suit.

In this regard, the plaintiff testified that after the proprietor of the plot, **Mr. Kariuki** – had sold it to him, it was agreed between the two that the defendant be notified of this change. That this is when **Kariuki**

wrote to the defendant the letter dated 11th December 1996 (Plaintiff's exhibit 4) followed by the plaintiff's own letter dated 13th December 1996 (Exh. 5) but that the defendant remained on the plot and this is why the plaintiff resorted to this Court action.

But I note that while these letters between the defendant and **Kariuki** and the plaintiff were written in December 1996 this suit was filed in Court on 27th February 1996. These differences in the dates are not explained.

That the defendant stayed on the premises for two (2) years after he was given the notices and he eventually left them in the year 1998.

The plaintiff said he had anticipated to complete his development on the plot within two years of purchasing the same but he could not because of the building materials which had gone up. He prayed for damages for the delayed construction.

But even though the defendant left the premises in the year 1998 the plaintiff did not say whether he started the development, when and/or if he had completed it. He did not say which business he intended or was doing on the plot or if he had been prevented from developing the plot because of the materials which had gone up. What the prices of the materials were before or after and when he started the construction, if at all.

In fact he has not given this Court the basis upon which to measure the general damages he alleges he suffered.

Moreover, the plaintiff did not tell the Court how much money he had set aside for the development of the plot and whether he had used it to start the development and the stage it had reached, and/or stalled because of the price hike of the materials. All this information in form of evidence was required to guide the Court to measure the general damages to be awarded to him. He chose not to avail it.

In his counsel's submissions he stated simply that:

“There was no denial by the defendant that the continued occupation of the suit land after being notified by the previous owner of the sale made the plaintiff unable to utilize the land as he wanted to hence reasons for general damages and the plaintiff is entitled to the same and the Court should assess them at Kshs.500,000/=”

Surely this is not the basis at all for assessing damages without giving the basis or a sufficient one for assessing the same as explained herein – before.

As regards the defendant's case, I need to start with his claim that he was forcefully evicted from the suit plot at midnight of 9th and 10th October 2000.

The plaintiff says in fact when he came to occupy the suit property, the defendant had already been evicted by the previous Landlord, Mr. **Kariuki**, through a Court order. That as soon as he opened the gate to take possession of the plot the defendant came back there bringing in his logs for making his carving business.

In cross-examination, the plaintiff testified that as the defendant reoccupied the premises accompanied by some young men and women, he shouted words to the effect that “*Hatutakubali*”.

That since he did not want violence he gave in and allowed the defendant to reoccupy the plot. This piece of evidence looks abit odd. A person who had bought a plot and is taking over possession cannot so easily yield it to a third party who has not been in possession without taking any action to resist this intrusion! Not even a report to the area Chief, District Officer or even police?

While in examination in chief the plaintiff said they had known the defendant as they used to supply him with glue for his carvings business, but during cross-examining, he said he did not know the defendant had an interest in the plot until he opened the gate; yet the defendant testified that he had been dealing in this business at the plot since 1978.

I do not believe the plaintiffs' evidence that the defendant had vacated the suit premises voluntarily by the time the former came to take over the same. If this is what had happened I am quite sure the plaintiff would have resisted the attempt by the defendant to re-enter the same; and the application in **High Court Civil Case No. 3307 of 1994**, which learned **Judge Kasanga Mulwa** in his ruling dated 13th March 2001 directed should be consolidated with this case, should not have come into being.

That ruling in fact acknowledged that the defendant was forcefully evicted by the plaintiff herein using the order dated 5th October 1993 which had been granted to the previous owner of the plot, **Mr. Kariuki**.

In fact counsel who argued the case for the plaintiffs in **HCCC No. 3307 of 1994** acknowledged, according to **Judge Mulwa's** ruling, that they, the said plaintiffs, had no Court order to effect the eviction of the defendant from the suit plot.

In fact this is one reason why the plaintiffs filed this suit on 27th February 1996 to ask for one amongst the prayers that the defendant be evicted from the suit premises (see prayer (b) of the Plaintiff), which they carried out, albeit illegally, on the night of 9th/10th October 2000.

This is why the Chief's askaris feature in the eviction on the night in question but that neither party saw it fit to call any of them to come and testify in the case or at least produce any document authorizing this eviction.

Nor did the defendant see it appropriate to issue third party notice against the government through the Honourable the Attorney-General, if these Government officers were out on an official assignment on the night of 9th/10th October 2000.

For this unlawful action by the plaintiffs, against the defendant the plaintiffs' are liable to the defendant in general damages which I assess in the sum of **Kshs.200,000/=**.

As regards special damages, paragraph 3(A) of the counter claim states as follows:

“3A The defendant states that on the night of 9th October 2000 the plaintiffs' raided the defendant's suit premises demolished all the kiosks and structures erected thereon and carried away the plaintiffs (I think he meant the defendant's) materials equipment and stock in trade all valued at Kshs.955,000/= which the defendant claims from the plaintiffs.”

And in the counter claim it is stated

“3B The defendant repeats the foregoing and states that as a result of the plaintiffs' unlawful demolition of his premises and carrying away his goods, the defendant lost property worth Kshs955,000/=, suffered loss of business and embarrassment and claims compensation.

The principle followed in a claim of special damages is that these must be specifically pleaded and strictly proved.

When then in this case the defendant says in paragraph 3A of the amended defence that the defendant raided his premises on the night of 9th and 10th October 2000 and demolished all the kiosks and structures erected thereon and carried away the plaintiff's (**he means defendant's**) materials, equipment and stock in trade all valued at **Ksh.955,000/=** did he comply with the above principle?

In my view what the principle of specific pleading means is that the property lost should be itemized with

the estimate prices placed thereon.

Then there is the principle of strict proof which requires documentary evidence of the value placed on the items or property lost.

This is not what happened in respect of paragraphs 3(A) and 3(B) of the amended defence and counterclaim.

In fact when the defendant was testifying he placed prices on the items he said was destroyed or carried away during the demolition, thus:-

1. **Power Saw worth** **Kshs.25,000/=**
2. **Bend Saw** **Kshs.35,000/=**
3. **Leather Machine** **Kshs.20,000/=**
4. **Curios for export** **Kshs.325,000/=**
5. **Stock in Kiosk** **Kshs.235,000/=**
6. **Materials for wood carvings** **Kshs.150,000/=**
7. **3 Kiosks** **Kshs.114,000/=**

- Total** **Kshs.955,000/=**

When I add these figures the total comes to **Kshs.894,000/=** and not **Kshs.955,000/=**.

In any event, there was no evidence to confirm the price tags placed on these items. The invoices he produced to show that he used these to send some carvings to customers in Italy did not help him in this regard.

Given the evidence adduced herein which I recorded and my assessment of it and all the circumstances surrounding the case, I have concluded that the plaintiff did not prove his case against the defendant on a balance of probabilities and that I dismiss it with costs.

As regards the defendant's case, I find he suffered an unlawful eviction at the hands of the plaintiff and **award him Kshs.200,000/= in general damages**, with interest thereon from the date of this judgment plus costs thereof.

However, I am not satisfied his claim for special damages of **Kshs.955,000/=** was proved on the standard required by law and **I hereby dismiss it with costs.**

These shall be the orders of this Court.

Delivered, signed and dated at Nairobi this 30th day of October 2007.

D. K. S. AGANYANYA

JUDGE