



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 460 of 1996

MICHAEL DANSON MAHUGU.....
PLAINTIFF

VERSUS

DILIP HARA KHCHAND(Managing Director,

Belion Teenage Centre Ltd).....1st
DEFENDANT

BELION TEENAGE CENTRE LTD.....2ND
DEFENDANT

JUDGMENT

The plaintiff was a tenant of the second defendant on business premises on Plot No. 22 Section 49 Block 9/77 along Kenyatta Avenue in Nakuru. By an agreement dated 15th February, 1995 between the plaintiff and the second defendant, it was agreed that in consideration of the defendants undertaking to reinstate and accommodate the plaintiff in one of the reasonable sized shops on the proposed new building which the second defendant was to put up, the plaintiff was to close down his business and vacate the premises which he did. The said agreement was negotiated for the second defendant by its managing director, the first defendant.

However, upon completion of the building in 1996, the plaintiff breached the said agreement and refused to accommodate the plaintiff in the new building. The plaintiff stated that the second defendant reopened the said building as a supermarket and failed to give any space therein to him to continue with his business of a photography studio. The plaintiff testified that he had moved into that particular building in 1972 before the second defendant bought it. In 1988 the second defendant had served upon the plaintiff a notice of termination of tenancy and the plaintiff went to court and successfully challenged the same.

When the plaintiff later agreed to move out, albeit temporarily, he was to be out thereof for a period of eight months after which he was to be taken back. The plaintiff stated that when he moved out of the said building, he was given a small room by his brother in another building and the second defendant's failure to honour its agreement with him adversely affected his business and therefore he claimed damages as well as specific performance of the said contract.

The agreement dated 15th February, 1995 between the plaintiff and the second defendant stated inter alia that upon completion of the reconstruction, the new premises were to be assessed for purposes of determining the reasonable rent which the tenant would be required to pay and towards that anticipated new rent, clause 5 of the agreement provided as follows:-

“The tenant wish (sic) to deposit with the landlord at the tune of Kshs.5,000/- per month during the pendency of the construction which will be credited towards the new rent, with effect from the date of occupation of the new premises. Hence the rent to be assessed.”

When the plaintiff’s advocates wrote to the second defendant on 13/4/96 to demand that the plaintiff be given a “reasonable sized shop” in the new building as per the said agreement, the defendant’s advocates responded on 22/4/96 and stated that the second defendant was not aware of any valid agreement between the parties and if the agreement existed, the conditions of the same were not complied with.

Regarding the issue of depositing Kshs.5,000/- per month on account of the proposed new rent, the plaintiff explained that he wrote three cheques and forwarded them to the second defendant but when he realised that they were not being banked, he stopped issuing them. He stated that he was ready to pay such new rent for the shop as would have been assessed.

At the close of the plaintiff’s case, none of the defendants testified or called any witness. From the evidence on record, it is clear that since 1988 the second defendant as the plaintiff’s landlord wanted the plaintiff to vacate the shop he was occupying in the suit premises and therefore the second defendant served the plaintiff with a notice under Section 4(2) of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301** requiring him to vacate the shop with effect from 1/10/88. The reason for the desired termination of tenancy was that the landlord intended to demolish and reconstruct the premises comprised in the tenancy and the landlord could not reasonably do so without obtaining possession of the said premises.

The second defendant alleged that the plaintiff did not file any reference to oppose the said notice and therefore filed **HCCC No. 308 of 1989** at the High Court, Nakuru seeking vacant possession of the said premises and mesne profits. The plaintiff filed his defence and denied ever having been served with the alleged notice. The suit was thereafter withdrawn by the second defendant and the tenancy continued until the parties entered into the agreement of 15th February, 1995. The plaintiff (tenant) was clearly not a limited liability company as was suggested in his cross-examination. All the documents on record show that the plaintiff was **MICHAEL DANSON MUHUGU T/A BERLION STUDIO**, a sole proprietor.

The expressed intention of the parties at the time of entering into the said agreement was that the plaintiff was to vacate the shop so that the landlord could reconstruct the entire building and thereafter accommodate the tenant in one of the reasonably sized shops in the new building. However, the landlord’s true intention seems to have been to get rid of the plaintiff as a tenant. When the reconstruction work was finalised, there was no shop at all on the ground floor and the second defendant did not make any other offer to the plaintiff at all. The second defendant’s counsel submitted that reinstatement of the plaintiff back into the new building upon completion was not possible because the defendants changed their plans and converted the premises into a supermarket. That defence is not tenable in law. It is the second defendant who changed the building plans unilaterally and without any regard to the agreement that it had entered into with the plaintiff.

The second defendant made an alternative submission that the said agreement was not valid as it was never witnessed and neither did it contain any seal of the second defendant.

That is a lop-sided argument that is untenable in equity. The second defendant is estopped from challenging the validity of the agreement having used it to its benefit to get the plaintiff out of the suit premises so that it could reconstruct the building. The second defendant’s argument clearly shows that its overt intention was to deceive the plaintiff and remove him from premises where he had been for years. It is a contention which goes counter to the spirit of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act Cap 301 Laws of Kenya whose preamble states as follows:-

“An Act of parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.”

The second defendant further contended that if the said agreement was upheld by the court, then the court should find that the plaintiff breached the terms of the same as he never made the payments of Kshs.5,000/- per month over the period when the suit premises were under going reconstruction.

With respect that was not the position. There was no obligation cast upon the plaintiff to make the above payments which in any event could only have been on account of future rent for the premises which he expected to be allocated to him. Clause No. 5 of the agreement clearly showed that it was the plaintiff who wished to make the said deposits. Turning now to the reliefs sought by plaintiff, I declare that the second defendant's refusal to accommodate the plaintiff in its new building was a breach of the agreement dated 15/2/95.

The plaintiff further prayed for a mandatory injunction to issue to compel the defendants to accommodate him in a reasonable sized shop within the new building. In my view, that cannot be done without causing unnecessary hardship to the second defendant who has converted the entire ground floor space into a supermarket. Specific performance is an equitable remedy and the court has a discretion whether to grant it or not and where grant of the same will cause considerable hardship to a party the same may not be granted – see **HALSBURY'S LAWS OF ENGLAND** 4th Edition Volume 27, Paragraph 9. Chesoni J (as he then was) also held the same in **ONGECHA VS THE CITY COUNCIL OF NAIROBI** [1982] KLR 151.

The plaintiff further prayed for general damages for breach of the said agreement. There being no doubt that the second defendant breached the agreement between it and the plaintiff damages are payable. Unfortunately the plaintiff did not provide a good basis for assessing such damages. Save for his assertion that the premises he vacated were located along Kenyatta Avenue, the centre of business at Nakuru and that his business was adversely affected when he moved to the lesser prestigious location, he did tell the court what his income was before he moved out from the suit premises to the new location and what he was currently earning. What are general damages? In **STOMS VS BROKS AKTLE BOLAG VS HUTCHINSON** [1905] A. E. 51 it was held that:-

“General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of.”

“CHITTY ON CONTRACTS” 24 Edition Paragraph 1552 states as follows:-

“General damage is such damages as the law presumes to result from the infringement of a legal right or duty; damage must be proved but the claimant cannot quantify exactly any particular items in it.”

Counsel for the plaintiff urged this court to award Kshs.950,000/- as general damages for breach of contract but, with respect, that figure was totally unsupported by any evidence. However, since I have already determined that the second defendant's breach of the said contract had the effect of removing the plaintiff from the main business centre of Nakuru to a back street shop, doing the best I can I will award general damages in the sum of Kshs.300,000/-.

The plaintiff further claimed special damages for breach of the agreement and failure to honour the undertaking including loss of business. That claim is totally misplaced and nothing can be awarded thereunder. It is trite law that special damages must specifically be pleaded and proved strictly.

“CHITTY ON CONTRACTS” (Ibid) states that:-

“Special damages is that precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in his pleadings.”

I find that no special damages are awardable and I dismiss that claim. The same applies to the plaintiff's claim for exemplary damages.

In conclusion, I enter judgment against the second defendant on account of general damages for breach of

contract in the sum of Kshs.300,000/- plus costs and interest.

DATED, SIGNED & DELIVERED at Nakuru this 7th day of July, 2005.

D. MUSINGA

JUDGE

7/7/2005