



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1610 OF 1997

KIMANI NJUGUNA.....PLAINTIFF

-VERSUS-

PENINA WARURA MWANGI.....1ST DEFENDANT

KIRIIYU MERCHANTS AUCTIONEERS.....2ND DEFENDANT

JUDGEMENT

The original plaint in this suit was dated and filed on 30th June, 1997. It was later amended and re-filed on 10th November, 1997.

The plaintiff pleaded that he is a protected tenant of the 1st defendant under the Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act (Cap.301), occupying plot No. 28 at Kibichoi Market, where he pays a rent of Kshs.500/= per month. On 26th June, 1997 the 2nd defendant, acting as agent of the 1st defendant and accompanied by six persons, entered the suit shop and removed and disposed of his shop stock including —

- (i) four shelves containing cooking fat, shoe polish, margarine, ball-point pens, tea leaves, cocoa, exercise books;
- (ii) three bags of sugar, ten bales of maize flour; ten bales of wheat flour; two bags of rice; crates of soda;
- (iii) Embassy, Sweet Menthol, Sportsman, Champion, Rooster, and Super Match cigarettes;
- (iv) three tables;
- (v) two gas cylinders and a gas cooker;
- (vi) two beds, beddings and clothes - cabinet;
- (vii) four cartons of Panga soap; one carton of Rexona soap; one carton of Lifebuoy soap; one carton of Lux soap; two cartons of Cussons soap;
- (viii) cash — in the sum of Kshs.10,000/=.

Thereafter, the 2nd defendant accompanied by the said six people, locked up the two doors of the shop

using planks of timber; and they prevented the plaintiff from re-entering the shop.

The plaintiff avers that the disposal of his goods, and the closure of his shop, had not been sanctioned by the Business Premises Rent Tribunal established under the Landlord and Tenant (Hotels, Shops and Catering Establishments) Act (Cap.301). He states that the losses he suffered as a consequence, included the damage to his steel doors, the value of which stood at Kshs.5000/=.

The plaintiff also avers that he was forced to pay to the 2nd defendant Kshs.10,000/= for alleged transport and labour.

The plaintiff pleads that the eviction was effected without any notice, and it took place notwithstanding that there was a Tribunal case between him and the landlord, pending. The eviction, moreover, was not effected in execution of a Court order.

The plaintiff prays for —

- (a) an order that the 1st and 2nd defendants, their agents or employees, be prevented by injunction from interfering with his tenancy on shop No. 28, Kibichoi Market;
- (b) special damages in the sum of Kenya Shs.273,215/=;
- (c) damages for trespass;
- (d) refund of Kshs.20,000/= with interest, by the 2nd defendant.
- (e) Costs.

When this case came up before me for hearing on 25th July, 2005 learned counsel, **Mr. Muchiri Kinuthia**, appeared for the plaintiff, while the defendant was unrepresented. **Mr. Kinuthia** stated that the plaintiff was claiming Kshs.293,215/= as well as a refund of Kshs.20,000/=. The plaintiff was also praying for general damages and for costs.

The plaintiff, **Kimani Njuguna**, was sworn and gave his evidence as follows. He knew **Penina Warura Mwangi** who was his landlady on Plot 28, Kibichoi Market. It was a wholesale shop, and he was paying in rent Kshs.500 per month. On 26th June, 1997 at 10.00 a.m. the landlady visited the suit shop with auctioneers, and demanded that the plaintiff vacate the shop. They seized the plaintiff's goods and threw them out, leaving nothing at all in the shop. Most of these effects, stock and merchandise were destroyed, and some were taken and appropriated by people walking along the streets. The landlady and her auctioneer also took the sum of Kshs.10,000/= which she found in the suit shop.

The plaintiff showed (plaintiff's exhibit No.2) that her landlady had, on 13th February, 1997 served him with notice to vacate the suit shop. But he resisted, and filed Business Premises Rent Tribunal Case No. 36 of 1997 (plaintiff's exhibit No.3). This case had not yet been heard and determined when the defendants seized and destroyed his goods.

The plaintiff averred that he had paid the sum of Kshs.4000/= to the 1st defendant in December, 1996 and that was all the rent payment due for the period running from April to December, 1996. He had a receipt to demonstrate that the said payment was made (plaintiff's exhibit No.4 dated 4th December, 1996).

The plaintiff's prayer was that, since he was evicted during the pendency of a Tribunal case, she should be required to pay compensation for the lost goods, to pay general damages, and to pay costs.

Learned counsel, **Mr. Kinuthia**, noted that the total sum claimed by the plaintiff was Kshs.293,215/=. He remarked the fact that neither the defendant nor his counsel had appeared in Court to present any defence to the suit, and consequently the matter had been heard in their absence. The defence advocates, M/s.

Njenga Njau & Co. Advocates had been served on 27th June, 2005 with the hearing notice, but they did not attend Court. A return of service had been duly filed in Court on 25th July, 2005.

Learned counsel submitted that the plaintiff had been a protected tenant under the Landlord and Tenant (Hotels, Shops and Catering Establishments) Act (Cap.301). When the plaintiff was served with notice to terminate the tenancy on 13th February, 1997 he had proceeded, by virtue of s.4 of the Act, to file a Tribunal reference, No. 36/97 in the Business Premises Rent Tribunal where the matter is still pending.

Section 6(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.301) thus provides:

“A receiving party who wishes to oppose a tenancy notice and who has notified the opposite party under section 4(2) of this Act that he does not wish to comply with the tenancy notice made before the date on which such notice is to take effect may refer the matter to a tribunal whereupon such notice shall be of no effect until and subject to the determination of the reference by the Tribunal.”

By virtue of the foregoing provision, the plaintiff’s tenancy could not have been terminated by the 1st defendant, until the determination of the reference by the Tribunal. And therefore, the eviction of the plaintiff from his shop on 26th June, 1997 was unlawful and amounted to a trespass upon his shop — and he is, it was submitted, entitled to damages. Learned counsel relied, for this proposition on an earlier decision, ***Ripples Ltd. v. Kamau Mucuha***, Civil Case No. 4522 of 1992.

Learned counsel submitted that the plaintiff as tenant was not in arrears in rent payment; and what was claimed by the defendant as arrears was in error, and was unlawful. The landlady could not, under the law, both distrain for rent and exercise repossession; and in any case if she had elected repossession then she would have instituted an action before the Tribunal for forfeiture of the lease. She never went to the tribunal but instead, took the law into her hands.

Learned counsel urged that the Court give judgement for the plaintiff as prayed.

The evidence shows that the plaintiff had no rents in arrears, and therefore he was lawfully in occupation of his shop. What the landlady did, therefore, was a subversion of a status quo of legality, and it was illegal and stood to be condemned by this Court. The position is aggravated by the reckless and objectionable conduct of the landlady in destroying the tenant’s goods and stocks, by casting these out into the streets to be taken away by members of the public. Such annoying conduct is to be condemned by this Court.

It is unsurprising that the defendants elected not to come to Court and attempt to defend their acts which caused so much injury and damage to the plaintiff.

I hereby give judgement in favour of the plaintiff, and decree as follows:

1. The defendants jointly and severally shall pay special damages to the plaintiff in the sum of Kshs.273,215/=.
2. The defendants jointly and severally shall refund to the plaintiff the sum of Kshs.10,000/= bearing interest at Court rate with effect from 26th June, 1997.
3. The 2nd defendant shall refund to the plaintiff the sum of Kshs.10,000/= bearing interest at Court rate from the date when the auctioneer took that money.
4. The defendants shall jointly and severally pay to the plaintiff, in general damages for trespass to premises and to goods, the sum of Kshs.70,000/= bearing interest at Court rate from the date hereof until payment in full.

5. The defendants shall jointly and severally pay to the plaintiff exemplary damages in the sum of Kshs.50,000/=, bearing interest at Court rate from the date hereof

6. The defendants jointly and severally shall pay the plaintiff's costs in this suit, and the same shall bear interest at Court rate from the date of filing suit.

DATED and DELIVERED at Nairobi this 11th day of November, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Plaintiff: Mr. Kinuthia, instructed by M/s. Muicigi Kinuthia & Co. Advocates

Defendants absent and unrepresented