



Getembe Hospital Limited & another v Masaba Farmers Co-operative Union & 2 others (Environment & Land Case 821 & 1014 of 2016 (Consolidated)) [2025] KEELC 383 (KLR) (5 February 2025) (Judgment)

Neutral citation: [2025] KEELC 383 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 821 & 1014 OF 2016 (CONSOLIDATED)
M SILA, J
FEBRUARY 5, 2025**

BETWEEN

GETEMBE HOSPITAL LIMITED PLAINTIFF

AND

MASABA FARMERS CO-OPERATIVE UNION 1ST DEFENDANT

**CHARLES AYIENDA T/A C.M AYIENDA & COMPANY
ADVOCATES 2ND DEFENDANT**

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 1014 OF 2016**

BETWEEN

MASABA FARMERS CO-OPERATIVE UNION LIMITED PLAINTIFF

AND

GETEMBE HOSPITAL LIMITED DEFENDANT

JUDGMENT

1. There are two suits before me for determination. The first is that filed on 7 May 2012 by Getembe Hospital Limited against Masaba Farmers Cooperative Union Limited, and Charles Ayienda, an advocate of the High Court of Kenya trading in the name and style of M/s C.M Ayienda & Company Advocates. The suit was initially filed in the High Court at Kisii and registered as Kisii HCCC No. 154 of 2012. The second suit is that filed on 25 October 2012 by Masaba Farmers Cooperative Union Limited against Getembe Hospital Limited, again in the High Court at Kisii, and registered as Kisii



HCCC No. 362 of 2012. Upon establishment of the Environment and Land Court, both suits were transferred to the new court and respectively registered as Kisii ELCC No. 821 of 2016 and Kisii ELCC No. 1014 of 2016.

2. The plaint filed by Getembe Hospital Limited was amended a couple of times resting with the Re-Amended Plaint filed on 22 May 2023. In the plaint, it is pleaded that Getembe Hospital Limited was tenant of Masaba Farmers Cooperative Union Limited in the premises Kisii Municipality/Block II/17 (the suit premises) and that until 30 August 2010, it operated a vibrant medical facility, receiving both in-patient and out-patients, with a bed capacity of 83. It is also pleaded that the plaintiff was accredited with the National Hospital Insurance Fund (NHIF). It is contended that on 13 and 30 August 2010, the 1st defendant acting on instructions or advice from the 2nd defendant, and on the basis of an illegal court order, proceeded to evict the plaintiff from the suit premises and maliciously damaged, set ablaze and/or stole the plaintiff's fixtures, trade in stock and assets all valued at Kshs. 26, 827,450/=. It is pleaded that this was in disregard to a valid court order issued by the Chief Magistrates' Court Kisii in the suit Kisii CMCC Miscellaneous Civil Application No. 109 of 2009 and the eviction was thus in contempt of a court order. In the suit the plaintiff seeks the following orders :
 - a. General damages for trespass, lost business and incomes, malicious damage to property and compensation for the lost, destroyed, damaged or stolen hospital property, stock, chattels, fixtures, specialist and general assets and other goods as set out in a valuation report by Western Homes Limited.
 - b. Special damages of Kshs. 26, 827,450.00/=
 - c. Costs of the suit.
 - d. Interest at court rates.
3. The defendants filed a joint statement of defence. They admitted that the plaintiff was previously their tenant but denied any illegal eviction or being in disobedience of any court order. They also pleaded that the plaint does not particularize the goods allegedly destroyed or stolen, and that the particulars of special damages was also not pleaded. They pleaded that the eviction was lawfully carried out pursuant to court orders issued on 13 October 2009.
4. In the plaint filed by Masaba Farmers Cooperative Union Limited, the Cooperative pleaded that Getembe Hospital Limited was previously their tenant but the tenancy relationship was terminated, and vide orders issued in BPRT Cause No. 41 of 2007, the defendant was evicted from the premises on 13 August 2010. It was pleaded that on 26 August 2012, the defendant returned to the premises and installed watchmen and denied the plaintiff entry. In the plaint, she seeks the following orders :
 - i. Declaration that the plaintiff is the owner of the land parcel Kisii Municipality/Block II/17.
 - ii. General damages for trespass.
 - iii. Costs.
 - iv. Such further relief that the court may deem fit to grant.
5. Together with the plaint, the Cooperative filed an application for injunction to restrain Getembe Hospital Limited from the suit premises pending hearing and determination of the suit. The application was heard by Okong'o J who allowed it vide a ruling delivered on 17 May 2013. From the evidence that was presented the status of the premises is that it is now in the possession of Masaba Farmers Cooperative Union, though there is no tenant in it. It was said in the course of trial that the premises has been under renovation since Getembe Hospital Limited vacated it.



6. For ease of reference, I will henceforth refer to Getembe Hospital Limited as the plaintiff and Masaba Farmers Cooperative Union and Charles Ayienda as the 1st and 2nd defendants in the two consolidated suits.
7. Hearing commenced before me on 14 November 2023 with the plaintiff calling Joseph Maore Ogeka as her first witness. He testified that he is a director of the plaintiff and elaborated that the plaintiff was incorporated as a company in 1992. He testified that the plaintiff was tenant of the 1st defendant in the suit premises from 1982 and they had a lease. In 2007, the 1st defendant wrote to the plaintiff terminating the lease and the plaintiff filed a reference before the Business Premises Tribunal (BPRT), being BPRT Case No. 41 of 2007. The tribunal ruled that the tenancy be terminated. They filed an appeal in the High Court at Kisii being Kisii Civil Appeal No. 25 of 2009, while the 1st defendant filed Miscellaneous Civil Application No. 106 of 2009 in the Chief Magistrates' Court at Kisii for adoption of the decision of the BPRT. According to him a consent was entered that they can stay in the premises until the appeal is heard by the High Court, but the 1st defendant proceeded to get an order of eviction in the suit Kisii Miscellaneous Civil Application No. 106 of 2009. The 2nd defendant acted as counsel for the 1st defendant. He testified that Moco Auctioneers effected the eviction order and evicted them allegedly with the use of hooligans. He was however not present during the eviction. He stated that their equipment and documentation were burnt during the eviction. He added that the facility had 85 beds and they had in-patients. They engaged Western Homes Limited, a valuation company, to value their loss and the valuer prepared a report dated 7 September 2010 quantifying their loss at Kshs. 26, 827,450/=. He testified that they filed the suit Kisii High Court Miscellaneous Application No. 167 of 2010 to have the defendants cited for contempt for evicting them from the premises despite a court order and that the defendants were found guilty and fined Kshs. 100,000/= or be jailed for 30 days. According to him, the High Court found that the eviction was unlawful but could not make an award for damages within the miscellaneous suit. He stated that the court advised them to file a separate suit for damages hence this suit. He denied that after they were evicted, they went back to the premises as claimed by the 1st defendant in her suit, and contended that the 1st defendant filed her suit to cover the damage that they had done. He produced various documents as exhibits which I will elaborate later in my analysis among them being a contract between Getembe Nursing Home and NHIF dated 21 December 2018.
8. Cross-examined, he agreed that the contract produced was not between Getembe Hospital Limited and NHIF but between Getembe Nursing Home and NHIF and that in the year 2018 they had already been removed from the premises. He nevertheless claimed that Getembe Nursing Home and Getembe Hospital Limited is one and the same thing. He was also referred to the plaintiff's licence No. 006424 to operate a private medical institution, issued in 2009, and he could see that it showed "no in-patient." He could not elaborate why it shows "no in-patient" and insisted that they were operating an in-patient and out-patient facility. He could not tell whether they had a licence for the year 2010 and admitted exhibiting none. He testified that they were evicted on 13 August 2010 which he contended was in breach of a consent that they should stay in the premises pending hearing of the appeal. He admitted not producing receipts in proof of their claim of loss but stated that he did not have them as they were burnt. He stated that they reported to the police and got a police abstract. What he produced was for a report made on 5 September 2011 though he stated that he made the report to the police on 14 August 2011. The abstract also shows the premises Kisii Block II/301 which was a different premises.
9. Re-examined, he testified that the appeal they filed is yet to be concluded. On Getembe Hospital, Getembe Hospital Maternity Home, and Getembe Nursing Home, he explained that Getembe Hospital Limited had four directors (though I think he meant four shareholders) whereas Getembe Hospital Maternity Home and Getembe Nursing home is solely owned by one Dr. Ragira. He claimed



- that the 2010 licence to operate a hospital was burnt with the hospital. He had no profit and loss statement.
10. PW-2 was Fred Juma Aduda who described himself as a valuer. He stated that he holds a Bachelor of Arts Degree in Land Economics from the University of Nairobi (1979) and a Diploma in Valuation and Estate Management from the Institute of Surveyors of Kenya (ISK) though he did not produce evidence of any of the qualifications. He operates under the name of Western Homes Limited. He testified that he prepared a valuation report for the plaintiff dated 7 September 2010. He testified that he visited the site in the last week of August 2010 and found the premises in bad shape and vandalised. His task was to try and determine what was there before and the value of the items prior to the incident. He made some corrections in the report when he testified so that the value of loss was quantified at Kshs. 25, 218,550/= and not Kshs. 26,827,450/= as pleaded.
 11. Cross-examined, he testified that he generated the report on 7 September 2010. He did not have a licence to demonstrate that he was licenced to practice during this period. His report bore a note that “this report follows a similar one submitted earlier dated 2nd June 2010 which details losses incurred earlier when this same premises were broken into by unauthorised third parties.” He could not tell who had broken into the premises on 2 June 2010. He testified that to prepare his report he relied on records supplied to him by the hospital. He claimed that he was told that the records had been burnt. He sat down with the officer in charge of administration and he asked him to give him an inventory. The administrator came up with a list of items but had no receipt or any written document. He relied on his word of mouth on what was there. His job was to list down what he was told existed and then he gives a value for the item. He believed what he was told by the administrator. He testified that he then took the details of the item and went to the market to find its quotation. He did not have the quotations in his report as he stated that it is based on sampling. In his report he recorded ‘damaged beyond repair’ meaning that there was a physical record; ‘destroyed’ meaning that it cannot be used again; and ‘lost’, meaning that the item was not there at all.
 12. Re-examined, he mentioned that the plaintiff had come to him earlier in May 2010 and he prepared some reports as they were discussing a sale of the business as a going concern. They came back to him later and informed him that the facility had been vandalised. He stated that he had thus previously seen the items he was assessing. He elaborated that the building was not burnt and that the premises was intact. He saw furniture that had been physically damaged and there was burning of papers outside the building.
 13. With the above evidence, the plaintiff closed her case.
 14. DW-1 was Elijah Mururi Otieno, the Chairman of the 1st defendant. He became Chairman in 2019. He testified that the plaintiff was their tenant in the suit premises and they had a tenancy agreement entered into in 1992. He testified that problems started in 2007 due to non-payment of rent and a suit was filed before the BPRT. The BPRT allowed them to terminate the tenancy. The plaintiff then filed an appeal which is yet to be heard. They subsequently evicted the plaintiff on 13 August 2010 after getting an order of eviction in Kisii CMCC Miscellaneous Application No. 106 of 2009. He stated that they took possession and commenced renovation works but the plaintiff returned to the premises and posted watchmen. He stated that on 26 August 2012, their workers went to the premises and were assaulted, injured and chased away thus their suit.
 15. Cross-examined, he was not very clear on the date of eviction and stated that he was not present at that time. He was referred to various orders issued, his view being that there was nothing to stay the eviction and denied being in contempt. He was not aware if the auctioneer wrote any report to court regarding the eviction. He asserted that the plaintiff was only operating an out-patient facility.



16. DW – 2 was Charles Mogire Ayienda, the 2nd defendant. He testified that he acted for the 1st defendant in the suits over their landlord/tenant dispute. He stated that the BPRT allowed the termination of tenancy; that being aggrieved the plaintiff filed an appeal in the High Court at Kisii, and an application for stay pending appeal which was dismissed on 14 July 2009. The plaintiff (as tenant) then filed an application dated 12 October 2009 for review and stay of the ruling of 14 July 2009. On the other hand the landlord filed Kisii CMCC Misc. Application No. 106 of 2009 for adoption of the tribunal award. According to him there was an order of eviction issued by court which was properly executed. He admitted being found by the court to be in contempt but insisted that they were not in contempt. I will elaborate more on the orders issued in my analysis.
17. With the above evidence the defendants closed their case. I invited counsel to file written submissions and I have taken note of the submissions filed.
18. It is common ground that the plaintiff and 1st defendant had a landlord/tenant relationship. Around about the year 2007, the 1st defendant wished to terminate the tenancy and the matter went before the BPRT as BPRT Cause No. 41 of 2007 with the plaintiff as the applicant/tenant. The matter was heard culminating in a judgment delivered on 10 February 2009. The notice by the landlord was allowed and the tenancy was terminated. The tribunal ordered the plaintiff to vacate the premises on 1 April 2009. Aggrieved, the plaintiff filed an appeal to the High Court at Kisii being Kisii HCCA No. 25 of 2009 and sought stay pending appeal. I have not seen the ruling, but it is common ground that this application was dismissed on 14 July 2009 by Muchelule J (as he then was). Thereafter an application for review was filed on 12 October 2009 and interim orders of stay were given. The interim orders were extended until 2 December 2009, but were not extended any further on that day. It is not clear what happened to this application for review. As this was going on, the 1st defendant filed Kisii Miscellaneous Civil Application No. 106 of 2009 before the Chief Magistrates' Court, Kisii, being an application dated 23 September 2009, seeking adoption of the award of the tribunal, and issuance of eviction orders to be executed by Moco Auctioneers. I have seen an order issued on 12 August 2010 by Hon. G.T Kimutai (SRM) allowing the application and issuing orders of eviction. There is of course a major contention as to whether or not these orders were validly issued or were irregularly issued. The controversy arises because of proceedings of 19 October 2009 before Hon. Thuku, R.M where a consent was entered as follows :

“By consent the application dated 12.10.2009 be stayed pending the hearing and determination of Civil Appeal No. 25 of 2009 in the High Court. This is pursuant to orders granted for stay in that matter.”
19. Of course, as at 19 October 2009, there was pending the application for review and interim orders had been granted. The interim orders lapsed on 2 December 2009 when they were not extended. I would think that in the mind of the defendants, the consent before Hon. Thuku was pursuant to the fact that there were interim orders issued by the High Court at the time of the consent, i.e 19 October 2009, and given that the interim orders lapsed, then there was nothing to stop them from proceeding with seeking orders of eviction. That is indeed the argument that was presented before me by the defendants in asserting that the eviction was regular.
20. We need to bear in mind that the question of the legality or otherwise of the eviction was the subject matter in the suit Kisii High Court Miscellaneous Civil Application No. 167 of 2010 where the plaintiff (as applicant) sued the defendants and Kennedy Mokua T/A Moco Auctioneers, respectively as 1st, 2nd and 3rd respondents, through an application dated 1 September 2010. The plaintiff wanted the respondents punished for contempt of orders issued on 19 October 2009 by Muchelule J in Kisii



- HCCA No. 25 of 2009 and demanded that they purge the contempt by restoring the premises to the standard that it was before the eviction and demolition, and returning the properties of the plaintiff back to the premises. It also sought compensation for properties damaged or lost during the eviction.
21. That application was heard by Musinga J (as he then was) and he delivered ruling on 9 December 2011. The long and short of that ruling is that the good judge found that there was contempt of the order issued by Hon. Thuku R.M on 19 October 2009. He held both the 1st and 2nd defendants in contempt but absolved the 3rd respondent (Moco Auctioneers) from blame. He further held that it was the 2nd defendant who bore the lion's share of the blame because the 1st and 3rd respondents acted on his advice. He fined the 2nd defendant Kshs. 100,000/= and in default to serve 30 days imprisonment. Regarding the 1st defendant, he found that it was not specified which particular officer of the 1st defendant should be punished for contempt and on that basis did not mete out any punishment against the 1st defendant. On the prayer for restoration of the premises and damages, the judge was of opinion that he could not make such orders within a miscellaneous application, and that it was advisable to file a specific suit for compensation.
 22. Within this suit, it has been argued that there was no violation of any order and that the eviction order was issued regularly. Indeed, I was taken through the various applications and orders to press this point.
 23. My view, is that the question whether there was violation of a court order and whether the eviction orders were properly issued and executed was already determined by Musinga J in the ruling of 9 December 2011. I regret that owing to the res judicata rule, I cannot now delve into the merits or demerits of that decision. Neither can I sit on appeal against that decision. If the defendants thought that the ruling was wrong, they ought to have challenged it on appeal, or sought for its review. They did neither. I cannot revisit the same for the reasons that I have given.
 24. Pursuant to that ruling the defendants were held to have been in contempt for irregularly obtaining an eviction order and executing it. In other words, the issue of liability was already determined in that ruling, and I do not have the jurisdiction to overturn it. The only question that remained and was not determined, was the loss suffered and damages payable, and that is the subject matter of the suit now before me. That is the task that I now embark on.
 25. In the re-amended plaint, the plaintiff asked for general damages for trespass, lost business and incomes, malicious damage to property, and compensation for the lost, destroyed, damaged or stolen hospital property, stock, chattels, fixtures, specialist and general assets, and other goods as set out in a valuation report by Western Homes Limited. In addition, the plaintiff asked for special damages in the sum of Kshs. 26, 827, 450/= which was said to be in accordance with the valuation report.
 26. Given that it was already determined that the eviction was illegal, the plaintiff would be entitled to general damages for trespass at the very least. Damages for lost business is not really a general damage but falls in the category of special damages that must be pleaded and proved. Nothing was pleaded as to the amount of loss suffered for lost business and there was no profit and loss statement that was ever presented. There was presented some NHIF contract documents but they do not help the plaintiff. First, as I have said, there was no pleading of what the business loss is. Secondly, the NHIF documents presented are dated 22 December 2010 and 21 December 2018. I have nothing for the year 2012 when the eviction occurred. The long and short of it is that this limb is neither pleaded nor proved and is dismissed. The other general damages sought are for malicious damage to property and compensation for lost items. General damages for trespass and illegal entry suffices but other items regarding compensation are again special damages that need specific pleading and proof.



27. In his submissions, Mr. Momanyi, learned counsel for the plaintiff asked for general damages in the sum of Kshs. 20,000,000/=. He did not offer any authority to justify such an amount. I appreciate that the eviction was declared illegal but I was never informed of what kind of size of premises was let out, nor the rent payable, which would have assisted me in appreciating the nature of the premises for purposes of assessment of general damages. In my opinion, taking into consideration all circumstances, I will award Kshs. 1,000,000/= as general damages for illegal eviction jointly and/or severally against the 1st and 2nd defendants.
28. Let me now turn to the special damages. The pleading was for Kshs. 26, 827,450/= based on the valuation report that was produced by PW-2. In his submissions, Mr. Mulisa for the defendants urged that the valuation report was devoid of any records and/or receipts. He further pointed out that there appears to have been an earlier valuation done on 2 June 2010. He submitted further that some of the items listed in the valuation report would imply an inpatient facility whereas the licence presented by the plaintiff only authorized her to offer out-patient services. I agree.
29. In his evidence, PW-2 stated that he compiled the list of items said to be lost or destroyed based on what he was told by word of mouth. He relied on no record at all. I would imagine that the plaintiff, being a limited liability company, prepared annual profit and loss accounts and an annual balance sheet. The balance sheet would have shown what assets the plaintiff had over the years. No such document was presented. Neither was any record of inventory from the plaintiff herself availed, to show what sort of equipment the plaintiff had. Moreover, some of the items listed in the valuation report such as X-Ray Machine of Kshs. 700,000/= , incubator binder of Kshs. 990,000/= , photometer of Kshs. 720,000/= anaesthetic machine of Kshs. 1,400,000/= , digital thermometer of Kshs. 1,600,000/=, electrical and solar panel heaters of Kshs. 8,000,000/= and such other significantly expensive items must have been supplied from somewhere and you would expect them to have been covered under some sort of warranty or service/repair contract. Even assuming that the records were burnt, the plaintiff could have obtained evidence from the persons who supplied these items to her, or the person who serviced the machines, for purposes of demonstrating that indeed the items were present in the premises. The plaintiff could also have obtained records from any accrediting body such as the Ministry of Health or the Medical Practitioners and Dentist Board. The facility must have been inspected to be authorised to operate and during inspection inventory must be taken to assess the capacity of the facility. No such document was presented.
30. Apart from the foregoing, some of the items listed are consumables that you would expect in an in-patient facility such as patient uniforms, food and mattresses. I have no licence for any in-patient facility exhibited, but only one for out-patient. What was exhibited for a Maternity Home was Getembe Hospital's licence issued for the year 2018 which is after the fact and it doesn't help the plaintiff. Assuming that the plaintiff actually operated an in-patient facility this would be illegal for want of a licence to operate such a facility, and if I make an award on these items, it would mean that I am rewarding the plaintiff for operating an illegal in-patient hospital. I am afraid that without any tangible proof that the items listed in the valuation report were actually present in the facility and they were of the amounts quoted in the report, I am unable to make any award in respect of special damages. It is not good enough for the valuer to say that "I was told these things were in the hospital and I believed it." That cannot pass as proof. In any case, if indeed the valuer had visited the premises on 2 June 2010 when the premises was intact and prepared a report why didn't he produce that report as demonstration of the items that he actually saw on that day ? Moreover, if he visited the premises and saw damaged items, why didn't he take photographs of the same to demonstrate that they are present and damaged ? The plaintiff had the burden of specifically pleading and proving, which I regret to say,



she hopelessly failed in doing so. I am sorry to tell the plaintiff that without proof I cannot make an award for special damages. The claim for special damages is therefore dismissed.

31. What about the case by the 1st defendant? The 1st defendant wants a declaration that she owns the suit property. I wonder why she seeks such declaration within the context of this litigation as there is no dispute over the ownership of the suit property. The other prayer sought is a permanent injunction to restrain the plaintiff from entering into the suit premises. I am alive to the fact that the parties had a dispute over possession of the premises which is subject to Kisii High Court Civil Appeal No. 25 of 2009. It was said that the said appeal is still pending. Given that position, I cannot make any orders of a permanent nature as the appellate court may decide otherwise. The other claim is for general damages for trespass. I am unable to grant such damages given that it was already found that the eviction of the plaintiff was illegal. In essence the suit by Masaba Farmers Cooperative Union Limited is dismissed. For the avoidance of doubt, I have not made any order that the plaintiff i.e Getembe Hospital Limited should regain possession of the premises. Indeed, Getembe Hospital Limited never asked for any such prayer within the suits herein. That, as I have stated, is subject to what will be decided in Kisii High Court Civil Appeal No. 25 of 2009. Suffice to state that at the moment, it is the tribunal decision which terminated the tenancy that prevails, until otherwise determined on appeal.
32. The last issue would be costs. Getembe Hospital Limited will have the costs of her case jointly and/or severally against the 1st and 2nd defendants. The suit by Masaba Farmers Cooperative Union is dismissed without any orders as to costs.
33. Judgment accordingly.

DATED AND DELIVERED THIS 5TH DAY OF FEBRUARY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Momanyi for the plaintiff

Mr. Mulisa for the defendants

Court Assistant – Michael Oyuko

