Mocha Hotel Limited v Kwanza Estates Limited (Environment & Land Case E014 of 2022) [2025] KEELC 4303 (KLR) (4 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4303 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE E014 OF 2022

M SILA, J

JUNE 4, 2025

BETWEEN

MOCHA HOTEL LIMITED ..... PLAINTIFF

AND

KWANZA ESTATES LIMITED ..... DEFENDANT

JUDGMENT

(Defendant purchasing suit property through a public auction; plaintiff being in possession of part of the premises and claiming to be a protected tenant of the previous proprietor; defendant proceeding to demand payment of rent which was not forthcoming; defendant proceeding to seize the goods of the plaintiff in purported distress for rent and instructing an auctioneer to sell them; plaintiff suing for loss of business, goodwill and value of the goods; defendant lodging a counterclaim for rent arrears to cover the shortfall of the amount obtained from the auction sale; court's assessment is that the plaintiff was not a tenant of previous proprietor but a licencee; licence terminated when the property was sold at the auction; upon sale, and there not being any tenancy agreement, the plaintiff's status was one of trespasser and not tenant; defendant could thus not purport to levy distress; defendant's remedy was to give notice to the plaintiff to vacate and sue for vacant possession; purported seizure of the plaintiff's goods in distress of rent thus unlawful; plaintiff entitled to value of the goods but not entitled to loss of business or goodwill as she was in unlawful occupation; defendant not entitled to any rent arrears as there was no tenancy; defendant could have been entitled to mesne profits but no claim for mesne profits made; judgment entered for the plaintiff for estimated value of the goods and counterclaim dismissed)

A. Introduction And Pleadings

1. The land parcel Kisii Municipality/Block III/195 (the suit property) was owned by one Josphat Mwangi Moracha (Josphat). He charged this property to Housing Finance Company Limited (HFC or the bank), to secure some financial facilities offered by the bank to Jipa Oil Limited. The amount

secured was in excess of Kshs. 500 million. There was default in paying back this money and the bank advertised the suit property for sale by public auction. Through a public auction conducted on 20 April 2021, the bank sold the suit property to the defendant for a sum of Kshs. 600,000,000/=. Registration of the transfer of the suit property to the defendant was effected on 21 July 2021.

2. There appears to have been an earlier arrangement, prior to the auction, whereby the rents were being remitted directly to the defendant. With the sale of the suit property to the defendant, through a letter dated 30 June 2021, the bank wrote to the various occupants in the suit property, directing them to now be paying rent to the defendant and an account was provided. Among those addressed in the letter was the plaintiff. The occupants were advised that with effect from 1 July 2021, they were now to pay rent to the defendant through the provided account.

3. The plaintiff is a limited liability company whose owners and directors are Josphat Mwangi Moracha (the original owner of the suit property) and his brother, Henry Moracha. There is some controversy as to exactly what space the plaintiff was occupying within the suit property and what businesses the plaintiff was undertaking but I will get to this later. On 1 July 2021 when the premises was being handed over, there was push and pull, between the plaintiff and defendant which culminated in a report being made at the Kisii Police station and a meeting being held there. It was agreed that an inventory of the items of the plaintiff would be taken by a joint team of the plaintiff and defendant, with each party being represented by three persons. The inventory was duly taken and there is a signed inventory dated 8 July 2021. On the same day, i.e 8 July 2021, the defendant wrote to the plaintiff's director, demanding a monthly rent of Kshs. 6,406,030.40/= for the club area, the restaurant and hotel area, the gym, and some areas on the 4th, 5th and 6th floors. The plaintiff did not pay this money but neither did she move out of the premises. Instead, the plaintiff proceeded to file a suit before the Business Premises Rent Tribunal (BPRT), where she claimed to have a 4 year lease from 1 July 2018, with Josphat Mwangi Moracha as landlord, and paying a monthly rent of Kshs. 180,000/=. There were also other suits filed at the tribunal by other individuals claiming to have rented spaces from the former proprietor. Since no money was forthcoming, the defendant locked the premises that he deemed was occupied by the plaintiff and instructed M/s Hegeons Auctioneers (the auctioneer), to levy distress for rent. The letter of instruction, dated 12 August 2021, instructed the auctioneer to recover rent arrears of Kshs. 12, 812,060.80/= as at August 2021, which is clearly what the defendant regarded to be two months' rent for July and August 2021. Given that the premises was locked up, the goods were proclaimed in situ. The intention was to sell the goods on 20 September 2021 and an advertisement was put up for that purpose in the Standard Newspaper of 13 September 2021, but there was a stay order issued by the BPRT which delayed the auction. This order must have been vacated thus paving way for the sale of the goods. According to the auctioneer, the goods were sold on 18 October 2021 to Prospa Limited, who were the highest bidder at Kshs. 6,500,000/= . The plaintiff contests this, alleging that what happened is that the defendant converted her goods into her own use and converted the plaintiff's business into hers. This triggered the filing of this suit on 22 June 2022 vide a plaint.

4. In the plaint, the plaintiff contends that she was operating a hotel in the suit property and was a tenant of the then owner, Josphat Mwangi Moracha. She claims to have been a protected tenant. She pleaded that after the defendant purchased and took over the premises, the defendant closed her business. It is pleaded that having unlawfully closed the plaintiff's business, the defendant could not demand rent from the plaintiff. She pleaded that the defendant proceeded to take over and convert the plaintiff's business, furniture and fittings into her own use, and took over operating the same business that the plaintiff was operating using the plaintiff's facilities and goods. She pleaded that there had been taken an inventory of goods and that the goods taken over are valued at Kshs. 168,873,435/=. She claimed that as a result she has lost business and lost goodwill, which she particularized at Kshs. 2 million per month for 5 years, and goodwill at Kshs. 120 million. In the plaint, she sought the following orders :

a. Special damages of Kshs. 408,873,435/=.

b. Costs of the suit.

c. Interest on (a) and (b) above from the date of filing suit.

d. Such other orders as this court may deem just.

5. The defendant filed defence and counterclaim. She admitted instructing the auctioneer to levy distress. She pleaded that when the goods were sold, the plaintiff owed rent for the months of July, August, September and October 2021, in total Kshs. 25,624,121.60/=. She pleaded that through the auction conducted on 18 October 2021, the auctioneer realized a sum of Kshs. 6,500,000/= leaving a deficit of Kshs. 19,124,121.60/=. She otherwise denied taking over or converting the plaintiff's goods and business. She admitted that an inventory had been taken at the time of taking over the premises but denied that the goods therein were worth Kshs. 168,873,435/=. She also refuted the plaintiff's entitlement to Kshs. 2 million per month or goodwill of Kshs. 120 million. In the counterclaim she asked for the following orders :

a. The payment of Kshs. 19,124,121.60/= together with interest at 14% per annum from 18 October 2021 until payment in full.

b. Costs of the suit together with interest.

c. Any other relief this Honourable Court may deem fit to grant.

B. Evidence Of The Parties

6. The plaintiff called three witnesses. PW-1 was Henry Moracha, one of her directors. Part of his evidence in chief was that the company was tenant of Jipa Oil Limited, though he produced a lease agreement with Josphat Mwangi Moracha as landlord. He testified that he was informed by Josphat about the sale of the suit property but he did not move out of the building as he had the lease. He stated that he (and I would think he was referring to the company) was leasing a hotel, gym, nightclub and conference facilities. He did not enter into a new lease with the defendant. He averred that after the defendant was introduced, he proceeded to lock the premises. He contended that the defendant failed to acknowledge the terms of lease that were already in existence. He affirmed that they had a meeting at the office of the County Commander which culminated in them agreeing to get three people each to take inventory. He stated that he could not pay rent now that he had been locked out of the premises. He denied being in any rent arrears and asserted that he was up to date with his payments to the previous landlord. He testified that they did not enter into a lease agreement with the defendant and had not agreed on rent of Kshs. 6,406,030.40/= per month. He maintained the claim in the plaint elaborating that he had built up a brand, and was generally doing good business.

7. Cross-examined, he acknowledged that Josphat is his brother. They are together the directors of the plaintiff. They are also directors of Jipa Oil Limited alongside one Mr. Ongwacho. He was cross-examined at length on the financial statements he relied on, particularly amounts said to be due to Jipa Oil Limited which he could not explain. There was also indicated in the financial statement rent of Kshs. 7,416,000/= which he could not explain, since if rent was actually Kshs. 198,000/= as shown in the tenancy agreement that he produced between the plaintiff and Josphat Moracha, then the annual rent would be Kshs. 2,376,000/=. He elaborated that revenue streams were from three sources, i.e the restaurant, the club and the conference facility. He could see the financial statement showed that in 2018, the company made a loss of Kshs. 21,698,859/= ; there was also loss in the years 2019 and 2020 (Kshs. 11,717,077/=), but a profit of Kshs. 659,769/= for the year 2021. He nevertheless asserted

that the plaintiff is still entitled to the claim of Kshs. 2 million as loss of business per month. He was taken through the net book values in the financial statement which showed Kshs. 103,134,318/=. He nevertheless insisted that the value of goods was Kshs. 168,873,435/= relying on a valuation report done by M/s Milestone Land Access Limited, a firm of valuers, dated 20 April 2021. He did not have any receipt to show the cost of the goods when purchased.

8. He was questioned on the various cases filed at the BPRT. The same indicated that one Cyrus Nyakoe Ongaki had sued as owner of Club Eclipse (the Club). He claimed that he sublet the Club, located at the basement, to Cyrus but he did not have any written sublease. Another case, BPRT No. E005/2021 was filed by Mocha Hotel Limited showing the premises let as the upper ground, 4th, 5th and 6th floor without including the basement. There was also the case Kisii BPRT No. E006/2021 with the tenant as one Simion Nyamari Ongancho T/A Miles Lounge. He claimed that he is the one who put the fixtures for the lounge and he sublet to Simion. He similarly did not have this sublease. There was also the case Kisii BPRT No. E007/2021 with the tenant as Mary Nyaboke Mageto and Dennis M. Ombui T/A Planet Fitness Gym which gym was said to be on the 3rd floor. He also claimed to have sublet this area. He alleged not to have been aware of the auction. He insisted that the defendant's director, Mr. Asanyo, took over his business and everything in it and there was no auction sale. He was questioned where rent was being paid and he stated that rent was being paid into an account of Jipa Oil and not to Josphat.

9. PW-2 was Joel Ombati Nyamweya, a registered valuer. His evidence was that he was asked to do a valuation of the moveable assets of the plaintiff. He prepared a report which he produced as an exhibit. He gave the value of goods at Kshs. 168,873,435/=. Cross-examined, he testified that he was asked to do the report in March 2021 and he visited the premises between 1st and 4th April 2021. He stated that the directors wanted to revalue their property to see whether it had appreciated or depreciated. The inventory taken by the parties in July 2021 was put to him and he could see that the goods therein are itemised in the same sequence as itemized in his report. He could not comment on this coincidence. He denied that he followed this inventory and backdated his report. He did not have any document to back up the values of the items in his report.

10. PW-3 was Robert Mabeya (CPA). He is the accountant who prepared the financial report. The report spans the period 2018, 2019, 2020, and 6 months of 2021. He was cross-examined on the lease produced by the plaintiff which he could see shows the 4th , 5th and 6th floors. His report had some amount for turnover for the Club. He was examined on the dates in the financial statements. Some bore curious dates. He denied that he prepared all these statements on the same day, claiming a typographical error with the dates. He denied that he specifically prepared the financial statements for this case. He testified that the plaintiff came into operation in 2018 and sourced for funding from Jipa Oil. He was aware that Jipa Oil was unable to pay its loan to HFC but said that he cannot be in a position to explain why Jipa Oil decided to finance the plaintiff. He could see that the book value of goods in his report was Kshs. 168,873,435/=. He said that he adopted the value given by the valuer though this was in his report of 2018. He gave a goodwill figure of Kshs. 150 million which is the same figure as the business being sold as a going concern. He acknowledged that his report did not indicate any tax returns.

11. With the above evidence, the plaintiff closed her case.

12. DW – 1 was Peter Kinyua (CPA). He testified that he was instructed to study the audited report produced by PW-3 and he did a report of his own which he produced. His view was that the report of PW-3 does not reflect the actual performance of the company. Inter alia he testified that despite claiming a profit in the six months of 2021, no VAT returns were provided and no proof of generation of this revenue through Kenya Revenue Authority (KRA) returns. He added that there was no proof that the assets actually cost kshs. 168 million as claimed. It was put to him in cross-examination that

the demanded rent of Kshs. 6 million per month would be an acknowledgment that the business could return this amount but his explanation was that rent is charged based on a client's judgment.

13. DW- 2 was Hezron Getuma Onsongo, the proprietor of Hegeons Auctioneers. His evidence was that he was instructed to levy distress, that he did levy distress, and eventually sold the goods in situ. He did his own valuation estimates of the goods and did not ask for the services of a registered valuer. The highest bidder was Prospa Limited at Kshs. 6,500,000/= which was a bid higher than his own estimate of the value of the goods. The goods were sold as one lot.

14. DW – 3 was Geoffrey Makana Asanyo. He is a director of the defendant and engaged in the real estate business. He testified that after buying the suit property he came for handing over on 1 July 2021. He was with managers of HFC Limited and they took him round the premises. He wished to know the spaces for each tenant and how much they were paying. For the space occupied by the plaintiff, he was told that they do not remit any rent to HFC. He stated that Josphat informed him that they were in charge of the club, gym, restaurant and rooms. Later, they changed tune to claim that the spaces are run by different person and the defendant was sued before the BPRT by Cyrus Ongaki claiming Club Eclipse, Simon Ongwacho who claimed he was running Miles Lounge, Mary Nyaboke and Denis Ombui who claimed Planet Fitness Gym, and PW-1 claimed to be running a restaurant, rooms and conference halls. He testified that he demanded that the plaintiff pays rent for the spaces and the plaintiff asked for more time to decide, but he did not have time since he had borrowed money to buy the property, and the plaintiff was occupying significant spaces, i.e the restaurant downstairs, and the 4th and 5th floors. He wrote to Josphat and informed him that rent would be Kshs. 6,406,030.40/= per month. No payment was made and he instructed the auctioneer to levy distress which led to the items being sold. He asserted entitlement to what he considered the balance of unpaid rent which is the amount in the counterclaim. He denied taking over the business of the plaintiff and reiterated that the plaintiff is only in the real estate business and that the restaurant, gym and the lodging rooms are all let out to tenants. He acknowledged that they took an inventory of the items of the plaintiff and a list was drawn. He did not believe that the claim of Kshs. 168 million by the plaintiff is justified and wished to see invoices and receipts.

15. Cross-examined, he could not tell whether he found the hotel running or not. He stated that he inquired from HFC whether the plaintiff had a lease and he was informed that they had none. He did not himself enter into any tenancy agreement with the plaintiff. The amount that he demanded as rent, i.e about Kshs. 6.4 million per month, was not one that had been agreed with the defendant. He affirmed that at no time was the plaintiff his tenant. He testified that he was claiming the money demanded because the plaintiff occupied the space. He did not consider them his tenants. He knew what mesne profits means but asserted that what he was claiming was unpaid rent not mesne profits. He averred that he locked the premises after taking the inventory which was about 8 July 2021. He had the keys and the auctioneer did not break into the premises to access the goods. He stated that he informed the plaintiff to pay for one month, i.e July, before they can take away their goods. He stated that for the other existing tenants he asked them to pay the current rent that they were paying, but since no figures were given for the occupation of the plaintiff, he came up with what he thought would be the rent payable. He did not write to the plaintiff to give vacant possession, his claim being that they were hostile and they went to the tribunal for remedy. He was ambivalent on what relationship the plaintiff had with the defendant. On one hand he testified that he did not consider them tenants, but he also stated that so long as they occupied the space, he took them to be tenants, and he could thus levy distress. A valuation of HFC was put to him which valued the annual rent for the hotel section to be Kshs. 18,434,200/= (just above Kshs. 1.5 million per month) but he stated that this was HFC's valuation and not his. He testified that he calculated their rent according to the square feet they

occupied. He averred that the occupation of the plaintiff ended on 18 October 2021 when her good were sold.

16. With the above evidence the defendant closed her case. I invited counsel to file submissions, and I have taken note of the submissions filed by Mr. Mogeni, learned counsel for the plaintiff, and Mr. Konosi, learned counsel for the defendant. I take the following view of the matter.

C. Analysis And Disposition

17. In a nutshell the plaintiff contends that the defendant unlawfully took over her goods which were in the suit premises on the pretext that the defendant was claiming rent due. The defendant has a counterclaim for unpaid rent.

18. The following are the issues for determination :

    i. What was the status of the plaintiff at the time the premises was sold ? Was she a tenant ?

    ii. What was the status of the plaintiff after the premises was sold ? Did she become a tenant ?

    iii. Was the defendant right in locking up the premises and effectively evicting the plaintiff ?

    iv. Was the defendant right in demanding rent and levying distress ?

    v. Is the plaintiff entitled to damages and if so to what extent ?

    vi. Is the defendant entitled to rent arrears as sought in the counterclaim ?

    vii. Who bears the costs ?

What was the status of the plaintiff at the time the premises was sold ? Was she a tenant ?

19. The plaintiff made some assertion that she was a tenant of the previous landlord paying a monthly rent of Kshs. 180,000/=. The defendant's position was that the plaintiff was not a tenant at all. Mr. Asanyo in his evidence testified that when he went to the premises for handover, HFC informed him that the plaintiff does not pay rent for the premises that she occupied. I am persuaded to believe the defendant that there was actually no tenancy that the plaintiff enjoyed with the previous owner of the premises. The previous owner of the premises was of course one of the directors of the plaintiff. He was also a director of Jipa Oil which is the entity that borrowed money from the bank. During his evidence, PW-1 at some point insinuated that the plaintiff was a tenant of Jipa Oil. But there was no tenancy with Jipa Oil that was displayed. What was displayed was a purported tenancy agreement with Josphat dated 1 July 2018. That agreement has it that what is leased is the upper ground, 4th, 5th and 6th floor. Now save for that lease agreement no other document was produced to prove tenancy. There was not a single rent receipt produced, and not a single document showing proof of payment of rent. No cheques, no bank statement, no money transfer, nothing. The lease was disputed and it was incumbent upon the plaintiff to prove it. Merely producing the document purporting to be a lease agreement in the circumstances of this case was not good enough. There is evidence that HFC was to receive rent pursuant to a deed of assignment executed on 12 February 2016, but no proof of any payment of a single shilling to the account of HFC was displayed. I have already said that there is no proof of any payment to Josphat Moracha or even to Jipa Oil as rent. Even when I look at the purported agreement produced, it is not complete for it does not bear the date of signature of the tenant. As far as I can see, this is a fictitious lease.

20. The fictitious nature of the purported lease of the plaintiff is uncovered by the fact that multiple parties proceeded to the tribunal to try and allege that they are lessees of the former owner of the suit premises

and that they are protected tenants. Despite PW-1 in this suit claiming to have had a lease for the club, the gym, and restaurant, there were leases produced by different persons at the tribunal also claiming leasehold interest for these spaces. I would think that even these are fictitious leases by acolytes of the plaintiff, and at the time they were unleashed, this was with the sole aim of stalling the taking over of the premises by the defendant. You will in fact see that when the two parties herein went to do an inventory, they took inventory even for these other spaces i.e the gym, the club and the restaurant. If other people had leases, I do not see how the plaintiff could have taken the defendant to these spaces for purposes of taking inventory. Even the rent payments in the financial report does not add up. If rent was Kshs. 180,000/= (or even Kshs.198,000/=) per month, the annual rent would be Kshs. 2,160,000/= or thereabout not the Kshs. 7,416,000/= noted in the financial statement which would be a calculation of rent at Kshs. 618,000/= per month.

21. In short, I am not persuaded that the plaintiff enjoyed any landlord/tenant status with the former proprietor of the suit property. My hypothesis is that since the proprietor was also a shareholder and director of the plaintiff, he allowed the plaintiff a licence to use the property with no arrangement for payment of rent. In street parlance we would call this a 'kienyeji' agreement (a local informal arrangement) given that he was owner of the premises and also part owner of the plaintiff. I think he was running the hotel in a manner that you could not differentiate the company running the hotel from the owner of the premises. That is the only reasonable deduction that can be made given that there is no proof of payment of rent by the plaintiff directly to Josphat Moracha, the former proprietor of the premises.

22. I would equate the plaintiff to a licencee in the premises. Megarry & Wade, The Law of Real Property, 8th Edition, page 1437 defines licence as follows :

> "A licence is a mere permission which makes it lawful for the licensee to do what would otherwise be a trespass...A licence in connection with land while entitling the licencee to use the land for the purposes authorised by the licence does not create an estate in land. A licencee cannot therefore bind a successor in title of the licensor as a matter of property law... Where the requirements for a tenancy are not satisfied, the interest can be no more than a licence, and if a person crosses my land and has no easement, they will be either a licencee or a trespasser. If A owns a lodging house and sells it, B, the purchaser, can recover possession from the lodgers, who are in law mere licencees, notwithstanding their agreements, unless in the circumstances, B's conduct is sufficiently unconscionable to warrant the intervention of equity. In the usual case, the lodger's only remedy is to sue A for damages."

23. The plaintiff was enjoying possession without paying rent and with the permission of the owner of the suit property. The owner could change the occupation of the plaintiff at a whim and the plaintiff would not complain. All these elements point to a licence and not a tenancy. My holding is that at the time the premises was sold, the plaintiff was a licensee of the previous proprietor of the suit premises and not a tenant. That being the case, the plaintiff cannot claim to have been a protected tenant under the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap 301, Laws of Kenya.

24. We could have entered into the debate and an analysis of what happens to a protected tenant when premises changes hands, but it is not necessary in the circumstances of this case, for the simple reason that the plaintiff was not a tenant, let alone a protected tenant, but was a mere licencee.

25. From my assessment of the evidence, the space that the plaintiff occupied comprised the restaurant, the hotel (i.e the lodging rooms), the club and the gym. I say so because this is the area that the parties covered when doing the joint inventory. This was the area occupied by the plaintiff as licencee.

What was the status of the plaintiff after the premises was sold ? Did she become a tenant ?

26. We have seen above that at the time the premises was sold, the plaintiff was a licencee. The rights of the licencee terminated with the sale of the property. Without the new owner continuing the licence, any occupation of the premises by the plaintiff would have needed to be one of tenant, or else the status of the plaintiff would be that of a trespasser. In Clerk & Lindsell on Torts, 17th Edition, page 868, paragraph 17-56, it is elaborated that :

> " At common law a revocable licence was revoked where the licensor conveyed the land to another, so that the licensee became a trespasser if he remained on the land or entered on it after the conveyance. This was so at common law even if the licensor's purchaser bought with express notice."
>
> Further at Page 864 paragraph 17-47,it is explained that :
>
> "A licencee who remains on land after his licence expires or is properly revoked is a trespasser."

27. In John Gitonga Kihara & 4 others vs Kasigau Ranching (D.A) Limited [1995] KECA 85 (KLR), the defendants had been granted a licence which had expired and there was no evidence of any renewal of such licence. In dealing with an application for injunction the court was emphatic that upon the plaintiff withholding his consent the defendants were clearly trespassers. The Court of Appeal stated as follows :

> " The law is, we believe, quite properly laid down in the passage in Salmond On Torts 17th Edn., at p.74;
>
> "Under a bare licence no interest in property passes: the licensee is simply not a transpasser (sic). A licence of this kind may be either gratuitous or contained in a contract for valuable consideration: in either case at Common law it was revocable at the will of the licensor and was therefore no justification for any act done in exercise of it after revocation. This was laid down in Wood V. Leadbitter and emphatically reaffirmed by the Court of Appeal in Thompson V. Park .....If, however, the licensee insists, notwithstanding the revocation of his licence (even though it is thus premature and wrongful), in entering or remaining on the land or in otherwise exercising his licence, he becomes at common law trespasser or other wrongdoer..... A licensor has at common law the power to revoke the licence at any time, but he has no right to revoke it before the expiration of the term."

28. In our instance there was no permission from the defendant allowing the plaintiff to continue in possession subject to her being tenant. The plaintiff could have elevated her status from trespasser to tenant, if the parties had agreed on terms of rent with the defendant, but there was no agreement. In fact, there appears to have been every intention by the plaintiff to pass herself off as a protected tenant, which status she did not hold, so that she could continue remaining in the premises without entering into a formal agreement with the defendant. The plaintiff did file a suit before the Business Premises Rent Tribunal, but it seems that nothing came out of it for I was not shown any order, and as far as I can see, that suit was only intended to buy time for the plaintiff. I say so because as I have said above, I am not persuaded that there was any tenancy agreement, and other than buying time, the plaintiff had no business before the tribunal.

29. There may have been some bitterness in the dawning of the reality that the premises is no longer of the plaintiff, but that bitterness ought not to have clouded reason. What was reasonable was for the

plaintiff to acknowledge that there is a new owner, and if she wished to continue doing business, then she needs to negotiate a lease. There was no need to misdirect any anger to the defendant, who was merely a purchaser purchasing a commodity that had been lawfully placed for sale in the market. At this juncture the plaintiff needed to appreciate that the premises has changed hands and there is a new sheriff in town and this new sheriff was the defendant. It ought to have dawned on her that she only had two options; either to agree terms for a lease of the premises or give vacant possession. Without a lease, her status remained that of a trespasser, which is exactly what she became, and was, from the time that the previous proprietor lost the property at the fall of the hammer.

30. There was an argument raised by Mr. Mogeni that the rights of the defendant only came to be after the defendant came to be registered as proprietor on 21 July 2021. I do not agree. The rights of the previous proprietor got extinguished when the property was sold in the auction of 20 April 2021. From that day, the previous proprietor's interest in the land became extinguished and the plaintiff became a trespasser in the suit property.

Was the defendant right in locking up the premises and effectively evicting the plaintiff ?

31. What transpired after the defendant took over the premises on 30 June/1 July 2021, is that the defendant demanded payment of rent in advance for that month, and proceeded to lock up the premises until this amount demanded was paid. The defendant first wrote a letter dated 2 July 2021, addressed to M/s Ombui Ratemo & Company Advocates, who were at that time acting for the plaintiff. In that letter it is inter alia expressed that "your client should express his intention of renting the above areas to our client by 4th July 2021." I have not seen any written response to this letter. The next letter is that dated 8 July 2021 addressed to Josphat Mwangi Moracha. It inter alia states as follows : "you are aware that your interest in the property was extinguished at the fall of the hammer during the auction and the subsequent payment of the full purchase price within the prescribed time. Our client requires that you pay rent for the month of July 2021 in the sum of Kshs. 6,406,030.40/=...".

32. The defendant was certainly right in seeking to have the plaintiff update her status from that of trespasser to tenant. However, there was non-compliance with the demand to improve status to tenant, and pay the amount demanded. Now that the plaintiff never signalled intention to be a tenant the defendant ought to have considered the plaintiff as a trespasser. The defendant could not unilaterally impose upon the plaintiff the status of tenant. That imposition would in fact be against the will of the plaintiff who does not appear to have had any intention of being a tenant of the defendant. Tenancy is a contract between the landowner and a person who is willing to occupy the premises at a consideration and ready to be considered a tenant. Just like in any other contract, you need consensus ad idem. There needs to be a meeting of minds that one party is willing to be landlord and the other party is willing to be tenant. Without that consensus you cannot have a contract and you cannot therefore speak of a tenancy.

33. A landowner cannot unilaterally impose the status of a tenant upon an individual who is not willing to take up a tenancy. There was mention of this by the Supreme Court in the case of Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology (Petition E001 of 2024) [2024] KESC 74 (KLR) (6 December 2024) (Judgment) (a case that the defendant should be very familiar with since she was a party) where the court stated as follows :

> " We find persuasive value in the Court of Appeal's finding in the case of Kasturi Limited vs. Nyeri Wholesalers Limited [2014] eKLR where it very aptly held that: "A tenant cannot impose or force him/herself/itself on a landlord." The converse is equally true that a landlord

cannot impose or force themselves on a tenant. This delicate balance is the cornerstone of harmonious co-existence and mutual respect in the rental world."

34. So, now that the defendant had demanded some money as rent and the plaintiff was not obliging, was it right for the defendant to have proceeded to lock the premises which was certainly a constructive eviction ? I am not persuaded. Having the knowledge that the plaintiff was not willing to be tenant, and was not willing to vacate, what the defendant needed to do was to give the plaintiff the notice outlined in Section 152E of the *Land Act*, 2012, which is drawn as follows :

152E. Eviction Notice to unlawful occupiers of private land.

(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.

(2) The notice under subsection (1) shall—

(a) be in writing and in a national and official language;

(b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;

(c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

(d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

35. From the foregoing, it will be seen that the law requires a 3 month notice to be issued to any person who is in illegal occupation of land, and that would also apply for occupation of a building. The law does not contemplate a scenario where jungle law is applied and a person is simply evicted without any notice being issued to him. If the defendant thought that there are special circumstances so that it would not be possible to issue such notice, he ought to have gone to court for appropriate orders of vacant possession, not take the law into his hands. If he thought that the plaintiff could not be able to pay him the amount of money due for 3 months, he could as well have applied for an attachment before judgment to secure payment of money that he was losing by not renting out the premises.

36. The question of a landowner taking possession by force has been subject of jurisprudence. One of the leading cases is the Court of Appeal decision in Gusii Mwalimu Investment Co. Ltd & 2 others v Mwalimu Hotel Kisii Ltd [1996] KECA 118 (KLR). In this case the appellant owned premises that had been demised to the respondent. An issue regarding that tenancy arose leading to the appellant removing the respondent from the suit premises. The respondent filed suit and sought an order of injunction and reinstatement to the premises which was granted. The appellant appealed. Shah J.A, had this to say on the conduct of the appellant :

"If what the landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession."

37. In the case of Moi Education Centre Co. Ltd v William Musembi & 16 others [2017] eKLR the appellant proceeded to evict the respondents from land in which they were squatting. A finding was made by the High Court that the eviction, inter alia without a court order was illegal. This was upheld by the Court of Appeal, where it was stated as follows :

> " 56.... In the circumstances of the present case, where the evictees or some of them appear to have been on the property well before the allotment of the property to the appellant, it would have been necessary, to seek a court order prior to carrying out the eviction. Thankfully there is now in place and in force a statutory legal framework through the Land Laws (Amendment) Act, 2016, providing for the manner and procedure that should be followed in evicting persons in unlawful occupation of private, community or public land."
>
> The Land Laws (Amendment) Act, 2016, alluded to above, among other sections included Section 152E of the *Land Act*, which I have already mentioned.

38. In Kenya International Fisheries Development and Fish Supplies Agency Ltd v Agricultural Development Corporation & 2 others [2016] eKLR Murithi J also added his voice on the same issue commenting that :

> " 21. ... I daresay that there is no authority to forcibly evict any person in possession of immovable property whether by a colour of right or a trespasser."

39. In our case, no notice was given by the defendant to the plaintiff under Section 152E. Neither did the defendant proceed to court to have the plaintiff give vacant possession if he thought that special circumstances exist to warrant a waiver of Section 152E of the *Land Act*. Given that the plaintiff had failed to abide by the directive to pay the demanded rent, this is the path that the defendant ought to have taken. As stated in the case of Gusii Mwalimu Investment (supra) we cannot encourage a state of anarchy where a land owner takes the law into his hands at the detriment of an occupant.

40. Therefore, my holding on this issue is that the defendant ought not to have applied jungle law and proceeded to simply lock out the plaintiff from the premises and seize her goods in the manner that she did. This now brings me to the next point.

Was the defendant right in demanding rent and levying distress ?

41. The simple answer is no. The defendant had no right to demand rent nor levy distress for reason that there was no landlord/tenancy relationship. You demand rent from a tenant, not a trespasser, and I have already held that the status of the plaintiff was that of a trespasser, not a tenant.

42. The point was debated in Gusii Mwalimu Investment (supra) where Shah J.A commented as follows :

> " The landlord's argument is that the tenant was a trespasser as from 1st October, 1994 and that a trespasser is not entitled to protection of a court of equity. If the tenant was a trespasser as from 1st October, 1994 the landlord could not have levied lawful distress, after 31st day of March, 1995."

43. The same was also the basis for the decision in Citi Gate Developers Limited vs John Miriung'u Karuki (2007) eKLR, where it was observed that :

> " Instead of filing a suit upon the sale of the suit premises and seeking this courts orders for vacant possession the plaintiff unlawfully distress for rent and instructs an auctioneer to so

distress (sic). This indeed is irregular. The plaintiff allege the defendant is a trespasser (sic). What one levy's is "mense profits" not rent (sic). The plaintiff and auctioneer used the police to attempt to break in and levy distress. The Ripples case of appeal is very clear that in civil matter police officers are not to levy distress but court bailiffs. That the task of the police is only to supervise that there is no breach of the peace committed."

44. The only right that the defendant had was to invite the plaintiff to enter into a tenancy contract. If that was rebuffed then she had the obligation to issue the requisite notice or seek a court order. There would be no right to rent for reason that there is no tenancy. And there not being any tenancy and no right to demand rent, then it follows that there would be no right to distrain any goods for non-payment of rent. She could not unilaterally fix a figure as rent, demand its payment, and purport to levy distress without there being a tenancy.

45. The defendant's right was for mesne profits not rent. It is mesne profits that is claimed against a trespasser, not rent. The mesne profit in our instance could constitute the loss that the defendant suffered for the occupation of the premises by the plaintiff.

46. If the plaintiff was the defendant's tenant the defendant could levy distress without first coming to court. But we have already seen that this right was not available and what the defendant was entitled to was mesne profits. To obtain an order for mesne profits the defendant needed to file suit in court and hope to have a decree granting him an order for mesne profits. She did not have an order for mesne profits and she did not therefore have a right to seize the goods of the defendant in purported execution of a right to levy distress. The instruction to the auctioneer was thus illegal. The attachment of the goods and sale on the instructions of the defendant was unlawful. I cannot fault the auctioneer, for he was acting on instructions of the defendant. He was acting for a disclosed principal and thus the act of the auctioneer must be visited upon the defendant.

Is the plaintiff entitled to damages and if so to what extent ?

47. I have already held that there was no right to levy distress. I have also held that the attachment and sale of the goods of the plaintiff was unlawful and that the defendant is liable for the said acts. The plaintiff is therefore entitled to damages.

48. In the plaint, the plaintiff has presented several heads of damages but my position is that the plaintiff's entitlement is only to damages for loss of goods. I am not persuaded to grant any damages for loss of business for reason that the plaintiff was a trespasser and thus in unlawful occupation. She is entitled to loss incurred for the goods seized because the person seizing the goods had no right to do so. Being in unlawful occupation the plaintiff cannot ask for damages for loss of business or loss of goodwill. Her claim for loss of business and loss of goodwill is therefore dismissed. But even if she was entitled to loss of business and goodwill, I wouldn't have granted it, for the simple reason that the plaintiff came with a financial report that is impossible to believe. That report is also not backed up by any supporting evidence such as tax returns. Anyone can put any figure and claim loss of business, thus the need to back that up with tangible proof which did not happen in our case.

49. So what is the value of the goods that the plaintiff is entitled to for the unlawful eviction ?

50. The plaintiff needed to help the court so that the court can help him. She should have come with a solid and honest report, but she chose to come to court with a valuation report that is difficult to believe. It will be recalled that the items that the plaintiff had in the premises were itemized in the inventory that the parties took on 8 July 2021, and all the plaintiff needed to do was to give costing for those items, item by item. It will however be clear to any person with a tinge of intelligence that this valuation report was cooked. It is cooked because I do not see how a report purportedly done in April 2021, can word

for coma, follow the same sequence and same notation as the joint inventory which was done later in July 2021. The backdating of that report and the giving of evidence, asserting that the inspection is true, which I consider to be false, obliterates any credibility that the said report has. If the valuer could backdate his report and assert that he actually visited the premises in April 2021 for the exercise, which I hold to be false, what then should I believe in his report ? Credibility is key to any court of law.

51. Given the above I am afraid that I am unable to grant the plaintiff the alleged value of Kshs. 168 million.

52. Neither am I persuaded to give the value in the financial statement given by PW-2. I have already found that the said statement is also one that is to be disregarded. It is also very curious that it gives the very same value of Kshs. 168 million as from the year 2018. That, surely, is just too much of a coincidence.

53. Given that I have ruled out the valuation report and the financial statements, the plaintiff needed to prove the loss with actual invoices and receipts, or accurate and verified financial reports, which could have been lifted from submitted annual returns and tax records, but she brought neither.

54. It is however inescapable that she had the goods in the premises which were illegally sold and that she lost the value of these goods. The goods had some value but I have already dismissed reliance on the valuation or financial report. The best I can do is to give an estimate of the value of goods lost pursuant to the unlawful distress for rent. The auctioneer testified that the goods fetched Kshs. 6,500,000/=. This was an auction and I will make the assumption that the sale of goods in an auction would be at a bargain, otherwise any purchaser would simply proceed to the open market and negotiate a purchase. The general practice for land sales is to have reserve prices at 75% of the value of the land. I would think that given the uniqueness of land a reserve of 75% is attainable. I would however think that for goods the reserve must be much less since you can buy an item that is 100% similar in the open market. In my discretion, I will assume a discount of 60% for the goods. In essence I will make an assumption that the goods were sold at 60% of their value. Thus, if Kshs. 6,500,000/= is 60%, the value of the goods sold is estimated at Kshs. 10,833,333.33/= which I round off to Kshs. 11,000,000/=. This Kshs. 11,000,000/= is what I will award the plaintiff for loss of goods, fixtures and such other items that were in the spaces that she occupied. I would have readily awarded general damages for unlawful distress but no claim for general damages was put forth. I therefore make no other award in favour of the plaintiff. The said sum of Kshs. 11,000,000/= to attract interest at court rates from the date of this judgment.

Is the defendant entitled to rent arrears as sought in the counterclaim ?

55. No, the defendant is not entitled to rent arrears. I have already held that there was no entitlement to rent. That being the case, automatically, the claim for unpaid rent by the defendant fails. There is no need of saying more.

Who bears the costs.

56. We would probably not be here if the defendant had given adequate notice in accordance with the law and/or sued for vacant possession as she was required to do. The seizure and sale of the goods in alleged distress for rent was also unlawful. For those reasons, the plaintiff shall have the costs of the main suit and of the counterclaim with interest at court rates.

57. Judgment accordingly.

DATED AND DELIVERED THIS 4TH DAY OF JUNE 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Purity Makori h/b for Mr. Kelvin Mogeni for the plaintiff

Mr. Konosi for the defendant

Court Assistant – Michael Oyuko.