



Kungu & another (Suing as the administrations of the Estate of Kungu Kagiri t/ a Monte Carlo Club) v English Press Properties Limited & 2 others (Environment & Land Case 110 of 2016) [2024] KEELC 556 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 556 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 110 OF 2016**

**AA OMOLLO, J
FEBRUARY 8, 2024**

BETWEEN

KAGIRI KUNGU AND GRACE NYAMBURA KUNGU (SUING AS THE ADMINISTRATIONS OF THE ESTATE OF KUNGU KAGIRI T/A MONTE CARLO CLUB) PLAINTIFF

AND

**ENGLISH PRESS PROPERTIES LIMITED 1ST DEFENDANT
WILSON M KARIUKI T/A WISKAM AUCTIONEERS 2ND DEFENDANT
WAKA MULTILINE LIMITED 3RD DEFENDANT**

JUDGMENT

1. The Plaintiff filed this suit vide a plaint dated 9th September 2015 in the Commercial and Admiralty Division against the Defendants seeking for the following prayers;
 - a. A mandatory injunction reinstating the Plaintiff to the suit premises and restraining the defendants by themselves, servants or agents or any of them or otherwise howsoever and preventing the Plaintiff, his employees, customers and or visitors from having access to the suit premises or in any way obstructing or interfering with the Plaintiff or quiet and peaceful occupation and enjoyment of the suit premises.
 - b. The Defendants be ordered to return all the Plaintiff's goods of trade carried from the suit premises on the 4th September 2015.
 - c. Mesne profits, aggravated, exemplary and punitive damages for business loss, disturbance and interruption.
 - d. Cost of this suit.



2. The Plaintiffs stated that they had been a tenant of the 1st Defendant since 1994 running a business, Monte Carlo Club, herein after referred to as “the suit premises”, under a lease which expired in 1999 converting the tenancy to a protected tenancy at a monthly rent of Kshs.60,000/= plus VAT Ksh.9,600. They contended that since the year 2015, the 1st Defendant tried to alter the terms of tenancy, illegally increase rent and or terminate the tenancy resulting to several references to the Business premises rent tribunal which are yet to be determined but issued prohibitory orders against the 1st Defendant.
3. The Plaintiffs averred on the 4th September 2015 the 1st Defendant through its agents and the 2nd Defendant accompanied with the police officers from central police station entered the suit premises and ordered everybody out, in execution of a court order issued vide Chief Magistrate’s court Misc. Application no.718 of 2015 for distress of rent amounting to Kshs.950,000/=
4. Further, that the Defendants denied them access to the premises and carried away their goods of trade, furniture, fittings, electronics and a music system belonging to Mr. Charles Estika Oyugi a musician on hire, demolished internal partitions and Kitchen, then locked the premises. The Plaintiffs contended that they had been running a reputable business since the year 1994 and if the Defendants are allowed to forcibly evict them, they will suffer substantial and irreparable harm, loss and damages.
5. The 1st and 2nd Defendants filed a joint defence dated 8th October 2015 and confirmed that the deceased Mr.Stephen Kung’u Kagiri T/a Monte Carlo Club was a lessee on its premises under a written lease, Upon expiry of the lease in 1999 the tenant stayed under a tenancy will. They however denied unlawfully evicting the Plaintiffs from the Suit Premises contending that they lawfully entered upon the same vide a valid Court Order to justifiably distrain for rent, found a stranger occupying the premises, ostensibly claiming to have sub-let the entire space from the Plaintiffs.
6. The Defendants also contended that the Plaintiffs do not have the locus standi and capacity to sue in the tenancy as the said tenancy being a controlled one terminated upon death of the deceased tenant.

Evidence

7. In support of their case, the Plaintiffs called PW1, Kagiri Kungu, the son of the Stephen Kungu Kagiri (deceased) and also one of the administrators of the deceased estate. He adopted his recorded witness statement dated 9/9/2015 as evidence in chief and produced bundle of documents dated 28/6/2018 and filed on 29/6/2018 as PExh1.
8. He testified that on 4/9/2015 at around 11.00 am, he was informed that the 2nd Defendant in the company of police officers were at the suit premises levying distress for alleged rent arrears whereby they chased all the workers away and arrested one who resisted. That in the evening when he was able to access the suit premises, he found that the 2nd Defendant had carried all their goods of trade despite not being served with a proclamation notice.
9. PW1 testified that their Advocate obtained a copy of the proclamation notice which had been issued on 31/8/2015 before any rent had accrued. That they had not been served with any court order or notified of any application filed. The witness testified that the proclamation listed seven (7) items but the Defendants carried all the items as particularized in the list on Page 44 to 47 of the bundle of documents. He stated that some of the goods were returned on 29/9/2015 but others were missing as per the inventory of missing goods at page 56 of the bundle of documents. Further that it costed them Kshs.12,000 to carry the said goods back to their premises and also paid the auctioneers Kshs.30,000.
10. The witness added that the Defendants demolished their partitions and shelves made on the suit premises as shown in the pictures produced and also clarified that they had not sublet the premises but had entered into an agreement dated 4th January 2015 King Lion Sounds Promotions to provide



entertainment. The Plaintiff averred that the sole purpose for the illegal distress for rent was to use unorthodox means to evict the tenant/Plaintiff from the suit premises.

11. The 1st and 2nd Defendants called one witness, DW1, Mr Dennis Nyabate Nyachio who stated that he is the property manager thus conversant with the facts of this case. He adopted his witness statement dated 1/12/2022 as evidence in chief and relied on the list of documents dated 18.8.2017. Mr Nyachio stated that the Plaintiffs were their tenant which tenancy was governed by the provisions of the Landlord and Tenants Act Cap 301. He continued that due to the said tenant's non-payment or irregular payment of rent, the 1st Defendant moved to enforce its right in law.
12. The witness averred the issue of rent arrears and distress for rent are matters that were framed for determination and in which evidence had been tendered before the Tribunal making it subjudice or res judicata BPRT Ref 423 of 2005 and 261 of 2006. It was his further evidence that the 1st Defendant was being exposed to queries of tax avoidance given the disparity in the declared value of the suit property which is way above the rent remittances. Accordingly, the Plaintiff cannot be said to occupy a position of equity that this court's conscience ought to countenance. DW asserted that the Plaintiffs are litigating in bad faith and are abusing the process of this court.
13. The witness stated that the family wrangles over the deceased estate resulted in the eviction of the 2nd family from the occupation, possession and management of the suit premises. That over time, the tenant stopped paying rent and the 1st Defendant justifiably retained the services of the 2nd Defendant to investigate the issue of abandonment of the premises by the Plaintiff. That the 1st Defendant levied for distress of rent that amounted to Kshs.950,000. He concluded by stating that the Plaintiff cannot seek restoration for premises they were not in possession and that the Plaintiffs have not suffered any form of damage.
14. During cross-exam, DW1 confirmed that when he was engaged by the 1st Defendant in the year 2006, the deceased was the one running the club (Monte Carlo). That after the expiry of the lease in 1999, the Plaintiff became a protected tenant. He was not aware if the matters pending before the Tribunal had been concluded. The witness admitted that although Mr Kungu died in 2015, he was aware the 1st Defendant received rent until August 2015 and which rents used to be paid by way of cheques. He could not explain the arrears of Kshs 950,000 demanded was for which period and stated that the proclamation notice was dated 31/8/2015 but the goods were carried away on 4/9/2015, 4 days apart instead of 14 days contained in the notification. Also, he confirmed that there was no eviction order.
15. In re-exam, DW stated that the premises are currently occupied so the Plaintiff cannot be restored and all the goods were returned so there is nothing to be returned. On the claim for loss of profits, DW said he did not know whether the Plaintiff was making any profits. He maintained that the 2nd Defendant evicted a stranger and that no case had been filed against the auctioneer with the Auctioneers Licensing Board. He prayed for the dismissal of the Plaintiffs suit.

Submissions

16. The Plaintiffs filed submissions dated 10th August 2023 and the 1st and 2nd Defendants' submissions are dated 1st September 2023.

PARA 17.

The Plaintiffs submitted that the tenancy in subject between them and the 1st Defendant is a controlled tenancy as per Section 2 of the Landlord and Tenant (shops, hotels and catering establishment) Act. They submitted that the tenancy was between Kungu Kagiri (deceased) T/A Monte Carlo Club and the 1st defendant and that



the same was vested onto the plaintiffs by virtue of them being the administrators to his estate and that the grant confirms that Monte Carlo club was part of the estate of the deceased.

18. Consequently, they added that there is nothing in the Landlord and Tenant (shops, hotels and catering establishment) Act or under common law to suggest that the death of the tenant would terminate a controlled tenancy and in support cited the case of WALJEE-VS-ROSE (pg28) where it was held that there is nothing in the Act to suggest that death of the tenant would terminate a controlled tenancy and under common law: A tenancy does not determine by the death of the lessee but will vest in his legal personal representatives who are entitled to give or receive the proper notice to quit.
19. The Plaintiffs denied abandoning or subletting the premises as alleged by the 1st Defendant and submitted that they continued to pay rent throughout their occupation. They stated that cheque dated 2nd September 2015 for Kshs. 69,600/= being rent for the month of September 2015 was taken to the defendant's offices at Riverside as was the procedure but the secretary refused to receive the same indicating that she was under instructions not to receive the same.
20. They submitted that DW1 was contradictory in his testimony when he claimed that he used to visit the suit premises which were locked but confirmed that the proclamation was served at the bar counter meaning the place was open and business was ongoing.
21. The Plaintiffs submitted that the rent payments were made to the 1st Defendant by the tenant using one of his companies Kunste Limited cheques and upon delivery of the cheques, the landlord received the same using the stamp of one of their companies Sansora Group Limited and later on receipts were issued in the name of English press limited as was confirmed by DW1 during cross examination.
22. The Plaintiffs submitted that the landlord is by law required to keep a rent book containing the details of all payments, provide a copy to the tenant and that it is actually an offence not to keep or provide one, thus as the 1st defendant failed to produce evidence of such arrears, failed to keep and or produce rent books/records, he was not entitled to levy distress but a decoy meant and calculated to evict the tenant.
23. The Plaintiffs challenged that the eviction by the 1st defendant through the 2nd defendant as unlawful as there was no notice issued, there were pending cases in the Business premises rent tribunal being numbers 423 of 2005, 271 of 2006 and 316 of 2006 wherein interlocutory orders were in place and as confirmed by DW1 there was no application for order for eviction that was undertaken.
24. Further, the Plaintiffs submitted that they were evicted on 4th September 2015 and a letter of offer drawn the same day to the 3rd Defendant, commencing the same day, accepted on the same day, and rent plus deposit to the sum of Kshs. 1,193,130/= paid on the same day, indicating a premeditated scheme to evict the plaintiff and ensure there was no premises to be reinstated into. They cited the case of M/S Gusii Mwalimu Investment Co, Ltd v M/s Mwalimu Hotel Kisii Ltd Court of Appeal Civil Appeal No. 160 Of 1995 where the court held that to obtain possession by levying illegal distress is per se wrong.
25. The Plaintiffs seek a mandatory injunction to restore possession of the premises relying on the finding in the case of Intimate Beauty Care Ltd -Vs- Kundan Singh Construction Ltd HCCC No, 227 of 2001 Mombasa. They submitted that the court has the power to pass a decree for possession of the premises to the plaintiffs as per Order 21 rule 13 (1)(a) and that it does not matter whether the 1st defendant has further leased the premises to the 3rd defendant. Order 21 R.13 states thus:

“(1). Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree -



(a) for the possession of the property”

26. The Plaintiffs claimed damages under various head; for loss of business, disturbance/ interruptions, and mesne profits. They submitted that the 1st defendant after unlawfully evicting them from the suit premises, gained wrongful possession of the same and received profits in form of rent from leasing the same to the 3rd defendant.
27. Further, they submitted that the 1st and 2nd Defendants carried away documents in the cabinets and shelves which were never returned hence the Plaintiffs are not able to compute the profits as they had no documents to refer to but the same can be computed from the difference between what they used to pay to the landlord Kshs. 69,600 against what the 1st Defendant was receiving from the 3rd defendant, Kshs. 248,290/= after the illegal eviction ie. Kshs.248,290 - Kshs. 69,600 = Kshs. 178,690/= per month from the date of eviction 4th September 2015 to the date of judgment and/or compensation in full.
28. The Plaintiffs submitted that the Defendants trespassed the suit premises and as such caused the Plaintiffs actual damage, thus entitled to receive such amount as will compensate them for their loss. They also submitted that the conduct of the defendant was deliberate and calculated to secure them higher rent profits by leasing it to the 3rd defendant at the expense of the plaintiff losing business hence this case qualifies for compensation of exemplary damages as the court may deem fit to grant.
29. The Defendants submitted that the Plaintiffs have neither established their case nor proved the threshold for granting a mandatory injunction. Further, they submitted that the subject in dispute is a tenancy relationship that is always open to termination at any stage thus issuing a mandatory injunction would invariably infringe the 1st Defendant's constitutional rights as a property owner.
30. The Defendants submitted that going by definition of mesne profits alone, 'the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord', the relief sought must fail ab initio since the Plaintiffs do not have the locus, having been the tenant and not the landlord.
31. Further, that it is trite law that mesne profits and damages for loss of business must be particularized and proved with the requisite specificity and the Plaintiffs have failed to provide an iota of any evidence to indicate how much profit and/or loss the Plaintiffs were making/ incurring. In support they cited the court of Appeal decision in the case of Peter Mwangi Mbuthia & Another v Samow Edin Osman [2014] eKLR which held thus;

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established”

Analysis and determination:

32. After I have read the pleadings filed by the Plaintiffs and 1st and 2nd Defendants, considered the evidence tendered and submission filed, I frame the following issues for determination.
 - a. Whether the Plaintiffs have locus standi
 - b. Whether the eviction of the Plaintiffs was unlawful
 - c. Whether Plaintiff should be issued with the reliefs sought
 - a. Whether the Plaintiffs have locus standi?



33. In the case of *Law Society of Kenya v Commissioner of Lands & others*, Nakuru High Court Civil Case No 464 of 2000, as relied by court in *Edward v Mwakidudu & 3 others (Environment & Land Case 25 of 2021) [2023] KEELC 6 (KLR) (10 January 2023) (Ruling)*, it was held that: -

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of *Alfred Njau and others v City Council of Nairobi [1982] KAR 229*, the Court also held that;-

“the term locus standi means a right to appear in Court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings”.

34. The 1st and 2nd Defendants challenged the Plaintiffs’ locus on the basis that the tenancy was with Kungu Kagiri who is deceased thus it cannot be passed to his estate. The premises was being used for business and the business as a going concern formed part of the assets of the deceased estate. The answer to whether death of a tenant terminates a tenancy relationship is found in section 4(1) of *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* which provides that-

“Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated and no term or condition in or right or service enjoyed by the tenant of any such tenancy shall be altered otherwise than in accordance with the following provisions of this Act.”

b) Whether the eviction of the Plaintiffs was unlawful?

35. There was no evidence adduced confirming service of the termination of the tenancy in accordance with the law served on the either the administrator of the estate of the Kungu Kagiri-deceased or left in the suit premises. If the 1st Defendant argues that the tenancy did not pass to the deceased estate, why did they distress for rent? The levying of the distress was an acknowledgement by the 1st Defendant that the tenancy still subsisted. Consequently, the Plaintiffs as the administrators of the estate of Kungu Kagiri-deceased had locus to bring this suit.
36. The Plaintiffs contended that the 1st Defendant evicted them without issuing any notice, without a court order and that even the proclamation notice that they had, was not been served. Further, they aver that the court order obtained by the 2nd Defendant was for the distress of rent only although the Plaintiffs proved that they were diligently paying the agreed rent. The 1st Defendant has not submitted on the lawfulness or otherwise of the eviction exercise but from their witness account, they were evicting a stranger who was found in the suit premises. However, the 1st Defendant have not provided any legal basis for evicting even the so-called stranger.
37. Section 4(2) of Cap 301 provides the procedure by which a controlled tenancy can be lawfully terminated thus;

“(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.”

38. In the case of *Jacob Kaliunga M’wirabua v Warda Said Abud Msalam & another [2021] eKLR* the court cited with authority the case of *Caudonia Supermarket Ltd v Kenya National Examination Counsel [2000] 2 EA 351*, where the Court of Appeal held that in order to terminate a controlled



tenancy, the Landlord had to comply with section 4 of Cap 301. From the evidence tendered, and being guided by the provisions of the law, it is my opinion and I so hold that the attempted eviction of the Plaintiff from the suit premises was illegal and unlawful. This finding is premised on the fact that the evidence adduced confirm no rent was owed at the time of proclaiming the Plaintiff's goods and there was no court order giving the 1st Defendant authority to take back the premises/eviction.

c) Whether Plaintiff should be issued with the reliefs sought

39. The Plaintiffs brought a cause of action against the Defendants for wrongful eviction from the suit premises whose tenancy is controlled under Cap 301. It is the Plaintiffs' case that as a result of their unlawful eviction, they suffered loss of business, disturbance, and interruptions, damages including mesne profits and also return or payment of the value of items that were missing.

40. In support of their case, the Plaintiff cited inter alia *Gusii Mwalimu Investment Ltd v Mwalimu Hotel Kisii Limited* Civil Appeal No. 160 of 1995, the Court of Appeal observed as follows:

“I have no hesitation, whatsoever, in holding that the Landlord did all it could to obtain possession unlawfully and the learned Judge was entirely right in making the orders he made. 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 for possession.”

41. The next issue is determining whether or not the Plaintiffs is entitled to compensation as a result of the unlawful acts of the 1st and 2nd Defendants. In the case of *Caledonia Supermarket Ltd v Kenya National Examination Council* [2017] eKLR it was held that “This court is persuaded that it is not necessary that all claims in a suit must be proved vide documentary evidence. Where a court has justifiable reason to believe a witness, documentary evidence would cement such belief, but is not necessary for the same.

42. The Plaintiff in submitting that they are entitled to damages referred this court to several cases inter alia, *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko* which held that;

“We appreciate the expectation of Mr. Inamdar that accounts books, income tax returns or audited accounts would have put the claim beyond doubt if it was pleaded as special damages or even as general damages. But there is dicta in decided cases that one does not lose his remedy in damages merely because quantification is difficult...”

43. There is no doubt that at the time of taking over possession by the 1st Defendant, the Plaintiff had its equipment in the suit premises some of which were carted away by the 2nd Defendant. The Plaintiff produced a copy of the proclamation issued by the 2nd Defendant (found at pages 44-45 of the Plaintiff's bundle) which proclamation listed the goods carted away. The Plaintiff also provided a list at pages 55 -56 of the bundle listing the goods that were returned to them. The Plaintiff demonstrated that they were up to date with the rents by producing copies of cheques used to pay the monthly rents. Beside the date appearing on the cheques, there were handwritten notes on the copies stating the month for which the rent was being paid.

44. The 1st and 2nd Defendants argue that the Plaintiffs have not presented calculations of the profits they were making in their business. In answering why they did not present documents to prove their loss of business profits, the Plaintiff's witness said that all the documents were kept in the suit premises



and that the documents got destroyed during the unlawful eviction. Further, there was no dispute that the Plaintiff had carried business on the suit premises for quite a while (from 1994 to Sept 2015). A reasonable person can then draw a conclusion that the business must have been making profits to have continued for this long period of time and paying its rent. Therefore, my opinion and I so hold that the court should not dismiss the claim under loss of profits merely on the lack of documentary evidence proving monetary loss.

45. One of the equitable doctrines state that equity will suffer no wrong without a remedy which means that equity aims to provide a remedy for every legal wrong/injury. Therefore, this court is allowed in equity to award an estimate amount commensurate to the damage for loss of business and the wrongful termination of the tenancy can be awarded.
46. Thirdly, the Plaintiff urged to be awarded mean profits and in determining the compensation by way of mense profits, the court is guided by precedent. However, 1st and 2nd Defendants contended that the Plaintiff is not entitled to mesne profits because they are not the landlord. In the case of Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR, had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits:-

“In Bramwell vs. Bramwell, Justice Goddard stated that “... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.” Similarly, in an Australian case, Williams & Bradley v Tobiasen it was stated that these words: “Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant’s possession, or right to possession, which has been interfered with.

A more useful description of mesne profits can be found in Halsburys Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner’s lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant’s interest in the land has come to an end.

Halsbury’s 4th ed. Above suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.

The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne



profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law.

47. In consideration of the above detailed discussion on who is entitled to mesne profits and when they are entitled to it, it is my view that that the same cannot be granted to Plaintiffs as they were not the owners of the suit premises. It is also my holding that were this court to award the Plaintiff for mesne profits as well as under the heading of loss of business, it would amount to double compensation. For these two reasons, I hold that the Plaintiff is not entitled to any compensation under this heading.
48. The Plaintiff asked the court to calculate what is payable to them as mesne profits by taking the difference between the amount of rent they were paying (Kshs.69,600) and what the 3rd Defendant is currently paying (248,290). They urged to be paid that difference of Kshs.178,690 per month until judgement and or compensation in full. For general damages for trespass, Kshs. 23,835,840 (8 years x 12 months x Kshs.248,290)
49. The Plaintiffs' submission that they be awarded general damages for a period of 8 years must be on the presumption that their lease was never going to be terminated even by themselves. Theirs was a month to month tenancy which then would be terminated by serving one-month notice. Section 57(4) of the Land Act 2012 provides that:
- “a periodic tenancy may be terminated by either party giving notice to the other, the length of which shall not be less than the period of the tenancy and shall expire on one of the days which rent is payable”
50. There was no basis why their compensation was pegged on a period of eight (8) years. the case of *Consolata Anyango Auma v South Nyanza Sugar Company Ltd* [2015] eKLR where the court stated that,
- “As a general principle, the purpose of damages of breach of contract is subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach contained of had not occurred. This is the principle encapsulated in the Latin phrase restitution in integrum.”
51. In my view, in the absence of books of accounts to guide the court in assessing loss of business, I hold that payment of one years' rent at the rate of what the Plaintiff was paying would amount to sufficient compensation for damages for loss of profits. I base my finding on the presumption that if the Plaintiff was served with one month notice, they would still settle down in the new business premises and make profits. Their eviction from the suit premises cannot be inferred to mean that the business could not be undertaken elsewhere and so the compensation is to mitigate the loss in an interim period. For the unlawful acts of distressing while there was no rent in arrears and using the distress to evict the Plaintiff, punitive damages of Kshs.500,000 would be commensurate.



52. Following my discussion in the above paragraphs, the last issue for my consideration is whether the Plaintiff should be granted an order of mandatory injunction whose effect is to re-instate them back to the suit premises. From the evidence, the Plaintiff was evicted on 4th September 2015 and filed this suit on 9th September 2015. Although the Plaintiff's witness admitted return of goods carted away the 2nd Defendant, it was not clear from the record whether they were also re-instated into the suit premises.
53. It is also argued for the 1st Defendant that a mandatory injunction should not be granted because the premises have already been leased to the 3rd Defendant and that issuance of the same will be an infringement of their right to property. The proceedings taken on 14th September 2015 before F. Ochieng (J), there was an application brought by the 3rd Defendant who stated that it was in occupation from 4th Sept 2015 and was seeking orders restraining the Plaintiff from evicting him. The judge made orders inter alia;
- “until 17th sept 2015, the plaintiff is restrained by way of an injunction issued from evicting the applicant, or from interfering with the applicant's quite possession of the 3,547 sq feet which the applicant is in possession of at Reata House, Accra road, Nairobi”
54. These orders were extended until the file was transferred to the Environment and Land Court. On 18th May 2017, the parties appearing before Gitumbi J agreed to again extend the interim orders. I have perused the file and only noted the interim orders issued were those of 14th Sept 2015 so that when the parties finally agreed to have the status quo maintained and the suit to proceed to the main hearing, the Plaintiff had not returned to the suit premises. In his oral evidence, Mr Kagiri Kungu in cross-examination stated that he did not know who was in the suit premises at the moment thus confirming they were not in possession.
55. It is with this background in mind that I am making my determination whether or not to grant the order of the mandatory injunction sought. In the cases of M/S Gusii Mwalimu Investment Co, Ltd -Vs- M/s Mwalimu Hotel Kisii Ltd and LOCABALL INTERNATIONAL FINANCE LTD. VS. AGRO EXPORT AND OTHERS supra, are distinguishable from the instant case because in those cases, the orders of mandatory injunction were granted at an interlocutory stage. It is my holding that it is too late to grant the order for mandatory injunction in this case because a 3rd party took over possession and the Plaintiffs did not diligently pursue their reinstatement in due time.
56. The claim for return of the goods belonging to the Plaintiff was already overtaken by events as their goods were returned. For the remainder of their items (pool table, two white balls, 3 TV decoders, 8 crates of beer and assorted spirits), no receipts were presented to ascertain ownership. The Plaintiff's witness said he was not in the premises when the 2nd Defendant took away the proclaimed goods and they did not call evidence of their workers to come corroborate that indeed these goods were in the suit premises and they were taken away on 4th September 2015.
57. For the goods not returned but which did not belong to the Plaintiff, in the list provided it is stated they belonged to KingLion Sounds. The suit as filed was on behalf of the estate of the deceased and the plaintiff produced a contract signed between monte carlo club and King Lion sounds (found at pages 60-61 of the trial bundle). The Plaintiff did not avail proof of authority to claim the said missing items for and on behalf of KingLion Sounds or Charles Estika Oyugi. No receipts were presented to confirm ownership or that the items were taken the 1st and 2nd Defendants. Lastly, the claim for these goods or their value fall under the category of special damages which must be strictly proved. I find the same has not been proved.



58. In light of the foregoing analysis, the Plaintiff's claim partially succeeds under the headings of compensation for general damages for loss of business. The Plaintiff is also entitled to punitive damages for unlawful eviction. Consequently, I enter judgement for the Plaintiff as against the 1st Defendant as follows;

- i. General damages of Kshs.720,000
- ii. Punitive/exemplary damages Kshs.500,000
- iii. Cost of the suit to the Plaintiff
- iv. Interest on (a) and (b) at court rates from the date of this judgement

Judgement Dated, Signed and Delivered at Nairobi this 8th day of February 2024.

A. OMOLLO

JUDGE

