



J.M Kimani t/a Renco Car Identity v Parliamentary Service Commission (Environment & Land Case 258 of 2016) [2022] KEELC 2843 (KLR) (6 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2843 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 258 OF 2016**

JA MOGENI, J

JUNE 6, 2022

BETWEEN

J.M KIMANI T/A RENCO CAR IDENTITY PLAINTIFF

AND

PARLIAMENTARY SERVICE COMMISSION DEFENDANT

JUDGMENT

1. The plaintiff first approached the seat of justice by way of a plaint dated September 11, 2008 and subsequently amended on the June 18, 2010. The amended plaint was filed on the June 21, 2010 in which he has pleaded as follows. He was a tenant of the Defendant in premises known as L.R. No. 209/5412 I.R 13314 from April 1, 2007 which was a leased property for to last five (5) years three(3) months. The Plaintiff carried on therein a business for car park and other related vehicle services under the name Renco Car Identity which was duly registered. He was paying a monthly rent of Kshs. 40,000 per month revisable upwards every year.
2. The Plaintiff has further pleaded that he continued in quiet possession and enjoyment of the leased premises until May 2008 when the defendant gave him a statutory notice to terminate the lease. The plaintiff responded to the notice declining to vacate until such a time that the defendant was ready to engage in the works of construction that were stated in the aforesaid statutory notice and the plaintiff also filed a reference in the Business Rent Tribunal (BPRT). The defendant raised a preliminary objection against the Reference, the reference however collapsed.
3. He stated that on September 10, 2008 the defendant locked the plaintiff out of the suit premises by posting police officers at the suit premises denying the plaintiff and his customers access. The plaintiff filed for and was granted a temporary injunction restraining the defendant from interfering with his quiet possession. Further it is the plaintiff's case that he erected a perimeter fence and metal gate and refurbished the parking lots as per the City Council's engineers' specifications and requirement. That despite the renovations, the defendant continued to deny him access despite the fact that he continued



to receive rent even after expiry of the notice period that he given. He further stated in the court's ruling of December 18, 2019 by Justice Abida Ali in declining to issue injunctive orders observed that the plaintiff had already been out of the suit premises for a period of over one (1) year and the loss could be compensated by damages and not reinstatement. The plaintiff then amended his plaint and now seeks damages for loss of as his tenancy was disrupted abruptly and unlawfully and he states that he incurred a lot of losses. The plaintiff has particularized the loss and damage.

Particulars of loss and damage

- i. Loss of business income and goodwill from the date of interference with his business and or tenancy to the date of judgment
- ii. Psychological torture and embarrassment

Particulars of damages

- i. General damages
4. Finally, it is the Plaintiff's case, as pleaded, that as a result of the Defendants' illegal action, he has suffered irreparable loss and claims damages by way of compensation. He claims –
- i. general damages as particularized in paragraph thirteen (i) and (ii) which seek for;
 - a. compensation for loss of business income and goodwill from the date of interference with his business and or tenancy to date of judgment
 - b. psychological torture and embarrassment
 - ii. costs of the suit and interest.
5. The Defendant entered appearance and filed their defence dated November 5, 2008 and an amended defence and counter-claim dated July 5, 2010. While denying all the averments in the plaint, they pleaded, *inter alia*, that they gave the plaintiff a three month notice of termination of tenancy on May 29, 2008 issued by ordinary letter pursuant to clause 5 of the tenancy agreement dated April 1, 2007 and that the plaintiff's tenancy terminated on August 31, 2008; that they informed the plaintiff that they required the premises for purposes of constructing offices for Members of Parliament and staff of the National Assembly.
6. That the plaintiff was aware of this fact and should have reasonable anticipated that his tenancy would be lawfully terminated to enable the defendant carry out the construction; that the plaintiff was in breach of several conditions of the tenancy which allowed the defendant to exercise its right to terminate the tenancy and take back physical possession of the premises without any notice to the plaintiff, over and above the right to terminate the tenancy; that the plaintiff has was in huge rent arrears, has breached implied conditions for tenancy to comply with all laws and in particular the City Council of Nairobi By- Laws, the plaintiff breached clause 2(e) of the tenancy agreement and sublet the leased premises; three months-notice of termination took effect and the tenancy terminated on August 31, 2008 and therefore the defendant has re-entered the premises under its common law right of re-entry; further that the plaintiff was in breach of the agreement having failed to pay for rent for.
7. In a counterclaim the Defendants claimed -



- i. That the plaintiff had a prior lease agreement with the defendant over the same property entered into on December 17, 2003. The rent payable under that agreement was Kesh 28,750/- per month. The lease was renewed on April 1, 2007 with a provision for a new monthly rent of Kesh 40,000/-
 - ii. As at the date of termination of the plaintiff's tenancy over the premises on August 31, 2008 the plaintiff owed the defendant rent in arrears in the sum of Kesh 536,000/-
 - iii. The defendant now claims the sum of Kesh 536,000/- plus costs and interest from the plaintiff being rent in arrears.
8. The defendants prayed for the dismissal of the plaintiff's suit and Judgment in their favour amounting to Kshs. 536,000 plus interest at court rates from August 31, 2008 being the date of the termination of the tenancy and the cost of the suit and counter-claim.
9. In a reply to defence and defence to counterclaim, the Plaintiff joined issue with the Defendants upon their statement of defence. He prayed for the dismissal of the defence and counterclaim with costs and for Judgment to be entered for the Plaintiff as prayed for in the amended Plaint.
10. At the hearing the plaintiff testified and he was the only witness. The defendants also called only one witness.
11. The Plaintiff – Joseph Maina Kimani (PW1) adopted his witness statement dated July 18, 2018 including the list of documents on the instant date which run from documents 1-24 as PW1Exh 1-24. He testified that he had sued Parliamentary Service Commission (PSC) because they had a 5 year 3 months lease agreement. He stated that they terminated the agreement by issuing a notice because they stated that they wanted to construct. He testified that he told PSC that the notice was too short and so he filed a reference at the tribunal BPRT Cause No. 506/08 and the tribunal ruled in his favour and he was paid costs but the defendant raised a preliminary objection.
12. Later he stated that the PSC posted three police officers at the premises so the plaintiff could not gain access to the suit premises. The plaintiff's contends that he never got an opportunity to move his property out of the suit premises. The plaintiff stated that he had a contract with Marshalls to provide vehicle services and he also supplied the National Assembly with vehicle accessories. He also testified that he had another client known as Save the Children. He stated that he had a motor boutique and he also sold snacks in the suit premises, he has a food bus.
13. He led evidence to the effect that City Council wrote to him where he was instructed to do a dustfill and ensure that there was not dust. That the letter from City Council on the dust was written to the clerk of the National Assembly it is dated June 1, 2008 and copied to him. He subsequently wrote to the clerk stating that he would do the dustfill and he did not receive any objection from the clerk and he contracted Kamirithu to do the work. He was given 15 hours and he complied and he notified the clerk that he had complied. He stated that the work cost him Kesh 150,000. That the clerk gave him the metal material and the floor and the plaintiff paid for the dust fill. He stated that it cost him Kesh 500,000 for the fencing of the premises.
14. In cross-examination he stated that he had rented the premises much earlier when it was under Kenya Finance Bank and while he was still their tenant they sold the suit premises to PSC. He stated that he asked the PSC to allow him to continue in the premises as a tenant and pay the rent as per the lease dated April 1, 2007 until the time they will be ready to construct. The agreement stated that the plaintiff had to pay Kesh 40,000 per month. He testified that the lease had an exclusion clause 2(c). He stated that



- he wrote the letter dated May 5, 2008 and I had not paid rent for the whole of 2007, he issued a cheque of Kesh 200,000. He testified that he suffered trauma when his business closed down.
15. In re-examination he stated that he paid parliament Kesh 80,000 this was made on September 8, 2008 and on the same day he paid Kesh 200,000 for cheque number 036793 drawn in favour of National Assembly. That he never received any complaint from the National Assembly about the breach.
 16. He maintained that he has never made full recovery bearing in mind that this matter has also taken time to be concluded. Finally, he prayed for damages as sought in the amended plaint.
 17. That was the totality of the evidence presented by the Plaintiff. Written submissions were filed on November 29, 2021 by the plaintiff while the defendant filed their submissions on February 3, 2022.
 18. DW1 – Sheriffsam Mwendwa testified on September 29, 2021. He stated that he is an advocate of the High Court of Kenya employed by PSC as a deputy director in charge of litigation and compliance. It was his testimony that PSC owns the suit property and that the land was initially leased to the plaintiff on December 14, 2003 as per the lease agreement on page 11-12 of the defendant’s list of documents and the plaintiff was then paying rent of Kes 28,750 subsequently the lease was renewed on April 1, 2007 which enhanced the rent to Kesh 40,000. His evidence was that, the plaintiff did not pay rent on time and during the audit the auditor wrote a letter date October 19, 2010 where the plaintiff was said to owe Kesh 536,000. Apart from failure to pay rent he testified that the plaintiff started selling food, opened a car wash and also erected a permanent around April/may 2008. The defendant therefore gave notice of termination. Initially PSC gave him notice see page 18 of the defendant’s bundle and it was withdrawn by PSC but issued with another one on May 29, 2008 issuing a three months notice. He testified that PSC had filed a counter-claim of Kesh 536,000 plus interest from August 31, 2008 when tenancy ended.
 19. In cross-examination he testified that PSC was an administrative arm of parliament and is therefore a statutory body and not a government and therefore the tenancy was a controlled tenancy since PSC was not a government. He testified that where the tenancy is controlled the tribunal has original jurisdiction under Landlord & Tenant Act cap 301. Further he testified that the Notice of Termination of Tenancy did not capture the reason for breach as selling food but the first notice was withdrawn. The second notice was a letter written by the clerk of National Assembly. He also stated that if it is established that the PSC was to supply metal bars for the fence, then the Commission will pay.
 20. In re-examination he stated that tenancy is not a controlled tenancy because according to him PSC is a part of government. Further that the notice issued according to section 4 of cap 301 was withdrawn and the notice issued pursuant to the letter dated May 29, 2008 is the one that is subsisting. Further the letter dated May 29, 2008 was in accordance with clause 5 for termination of tenancy That the tenant did not remove his belongings. He testified that the Reference filed at the Tribunal was filed by the plaintiff seeking the Tribunal’s intervention to investigate the Notice but since PSC withdrew the Notice there was no Notice to investigate. He stated that the suit premises are always guarded. He testified that the plaintiff who was the tenant fixed the suit premises with the authority of the PSC but that he is not entitled to any money since the suit property was a car park. When he was shown the photos of the fence he stated that he could not confirm if that was the fence constructed by the plaintiff. The defendant produced the letter dated October 19, 2010 and the report of the Auditor General of the Financial Year 2008/2009 and then closed his case.
 21. Subsequently, the defendant filed written submissions dated February 3, 2022 through the firm of Mwinyi Mohammed Advocate. Counsel framed the following as the two issues falling for determination in the suit: (i) whether the defendant’s eviction from the two shops in the suit property was lawful; and (ii) whether the defendant was entitled to the prayers sought in the counter-claim.



Issues, Analyses and Determination

22. The dispute being here as pleaded and on the evidence led, I have isolated the following issues as falling for determination by the court.
1. Whether or not there was a controlled tenancy between the parties under the provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*;
 2. Whether the Defendant issued a notice of termination under cap 301.
 3. Whether the Defendant was justified in locking out the Plaintiff from the suit premises
 4. Whether the Plaintiff is entitled to the reliefs sought.
 5. Whether the counterclaim is awardable.

Whether there was a tenancy relationship between the parties.

23. On the issue of controlled tenancy, this Court in ruling delivered on the May 22, 2009 pronounced itself on the issue that the defendant is not a government department. If it were then they would have been precluded from controlled tenancy and the circumstances that led to that conclusion have not changed. Therefore, it remains unchanged that the plaintiff herein was a controlled tenant.

Whether the Defendant issued a notice of termination under cap 301.

24. In the evidence led, there was no doubt that no termination nor distress for rent notice was ever issued to terminate the tenancy. In *Caledonia Supermarket Ltd vs Kenya National Examinations Council* [2000] 2EA 351, the Court of Appeal held that in order to terminate a controlled tenancy, the landlord had to comply with section 4 of the *Landlord and Tenant (Shops, Hotels & Catering Establishments) Act*. The court also considered that even if the tenant had lost its status as a protected tenant, the landlord (the council) was still obliged to give notice to the appellant. The court expressed itself as follows:

But even assuming for the sake of argument only that the appellant had lost its status of a protected tenant...then even in that situation the council was obliged by law to issue a proper notice of termination in accordance with section 106 of the Law of property Act of 1882.” (repealed)

25. Having found that the Plaintiff was a controlled tenant, the Defendant was obligated to comply with the prerequisites set out in Sections 4(1), (2), (4) & (5) of the Act if they desired to terminate the tenancy. Those provisions provide:
4. Termination of and alteration of terms and conditions in, controlled tenancy.
 - (1) 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 conditions or right or service enjoyed by the tenant of any such tenancy shall be altered, other than in accordance with the following provisions of this Act.
 - (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 on the prescribed form.



.....”

- (4). No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party as shall be specified therein.....
- (5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice; whether or not he agrees to comply with the notice.”

26. I do find that a controlled tenancy can only be terminated by issuing the notice prescribed under the Act as mandated by Section 4. See the holdings of the court in *Tiwi Beach Hotel Limited v Juliane Ulrike Stamm* [1991] KLR 658; *Munaver N. Alibhai t/a Diani Boutique v South Coast Fitness & Sports Centre Limited* [1995] eKLR (Civil Appeal 203 of 1994).
27. From the Defendant list of documents, and the evidence by DW1, it is apparent that the Plaintiff has never been issued with a notice of termination. The letter dated May 29, 2008 was not a notice as envisaged under Section 4 of the Act because it did not disclose the reason for the termination and it was not issued in the prescribed form as provided for under section 4. The letter was not even signed by the defendant. Consequently, I find that the Defendant failed to give the requisite notice to the Plaintiff of its intention to terminate the lease and take over the suit premises.

Whether the Defendant was justified in locking out the Plaintiff from the suit premises

28. A tenancy vests upon the tenant a property right which like all possessions ought not to be deprived arbitrarily. In *Gusii Mwalimu Investment Co Ltd vs Muabimu Hotel Kisii Ltd*, [1996] eKLR the Court of Appeal while addressing the right of a landlord to re-entry had this to say: -

To obtain possession by carrying out illegal distress is per se wrong. ...if what the landlord did in the case is allowed to happen we will reach a situation where the landlord will simply walk into the diminished 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 a trite law that unless a tenant consents or agrees to give possessions, the landlord has to obtain all orders from a competent court or statutory tribunal (as appreciate) to obtain an order for possession”.

29. Similarly, In the Case of *Ripples Limited vs Kamau Mucuba* Nairobi HCCC 4522 of 1992, it was held that;

The landlord should only take one course against the defaulting tenant i.e either to distrain for rent or institute an action for forfeiture of the lease/tenancy and repossession. Here the defendant/response took both reliefs to his benefit. It cannot be. The law does not permit it and this court cannot allow it.”

30. In the absence of a court order, I find that the Defendant acted in total disregard of the Law when it unlawfully locked out the Plaintiff from the suit premise thereby depriving the plaintiff of his possession. Since the proprietors of the suit premises did not obtain a court order for possession, the Plaintiff's eviction from the suit premises was illegal, unlawful and thus tortious.



Whether the Plaintiff is entitled to the reliefs sought

31. This court having found that the locking up of the Plaintiff's premises was unlawful, tortious and amounted to constructive eviction, it finds and holds that a breach of the law ought to attract reprieve to the violated. In *Mattarella Limited v Michael Bell & another* [2018] eKLR the Court awarded the Plaintiff damages in the sum of Kshs.2,000,000/= and held as follows:

While the defendants were not specifically levying distress for rent, what they sought to do and actually did was to take possession by use of the law of the jungle. That must be, as has always been, frowned upon by the courts. Not only frowned upon but equally remedied by award of damages so that everybody seeking to live within the territory of Kenya, a county whose citizens have chosen to be led by the rule of law, gets to know, if one be otherwise under some illusion, that arbitrariness and or just impunity is not a virtue but a vice. Vice cannot be countenanced but must be curtailed and discouraged. I am saying all the foregoing because I have come to the conclusion that a violation of a right, due process and the law invite a reprieve or remedy to the violated.”

32. I am satisfied that the plaintiff is entitled to claim general damages and I hereby award him Kshs. 2,000,000/= as damages of unlawful eviction.

Whether the Plaintiff is entitled to the reliefs sought – “Loss of business”

33. While it would be the natural consequence that the plaintiff lost business due to what I have found to have been unlawful and wrongful locking up of his premises, such a loss when made quantifiable at the date of filing suit is in the nature of special damages. It ought to have been specifically pleaded and strictly proved. In this matter, the Plaintiff did not plead with particularity any figures either in the body of the plaint or in his prayers as to disclosed a claim for special damages. Considering that the Plaintiff's claim was based on alleged loss of business earnings, it follows that a claim for loss of sales arising out of a breach of such a contract are in the nature of special damages which must not only be specifically pleaded but must also be strictly proved as well. Without having been specifically pleaded or proved, the Plaintiff's claim for loss of business fails. See *National Social Security Fund Board of Trustees vs Sifa International Limited* (2016) eKLR, *Macharia & Waiguru vs Muranga Municipal Council & another* (2014) eKLR and *Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nandwa*, KSM CACA 179 of 1995 (ur). In the latter case the Court was emphatic that:

... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”

Whether the counterclaim is awardable.

34. Rent is the consideration a tenant pays to the landlord for the enjoyment of the premises let. Rent is that due when the enjoyment persists. When possession is taken away the right to receive rent cannot be retained. That is what section 77, *Land Act* provides. It says:-

Unlawful eviction

A lessee who is evicted from the whole or a part of the leased land or buildings, contrary to the express or implied terms and conditions of a lease, shall be immediately relieved of all obligation to pay any rent or other monies due under the lease or perform any of the



covenants and conditions on the part of the lessee expressed or implied in the lease in respect of the land or buildings or part thereof from which the lessee has been so evicted”.

35. Having found that the Plaintiff was a controlled tenant who was constructively evicted it follows that the landlord cannot be entitled to rent for the duration the plaintiff was deprived of possession. The defendant's counter-claim being based on rent entitlement cannot in fairness include rent for the period of unlawful dispossession. It must exclude the period of the dispossession from September 10, 2008. The plaintiff is therefore relieved from the obligation for the payment of all the sums claimed as rent.
36. It is not disputed that the plaintiff was in possession and occupation of the premises for the period for the uninterrupted period between April 1, 2007 to September 10, 2008 when he was locked out of the suit premises. For that period the plaintiff cannot escape the obligation to pay. I however note that the plaintiff submitted in evidence copies of cheques written in favor of the defendant and he challenged the defendant's claim that he owes any rent at all. Now in the event that the plaintiff owes any rent, then as I have already said it should only cover the period of tenancy from April 1, 2007 to September 10, 2008 when he was locked out. The defendant is at liberty to apply to court for the exact figure to be paid.
37. In the end I do enter judgment for the plaintiff for general damages for wrongful eviction while the defendant gets judgment for the unpaid rent. Judgment is accordingly entered as follows: -
 - a. For the plaintiff, Kshs. 2,000,000/= being general damages for unlawful and wrongful eviction with interest thereon at court rates from the date of this judgment till payment in full.
 - b. For the defendant, the amount of the unpaid rent only as outstanding arrears of rent with interest thereon at court rates from the date of the counter-claim till payment in full.
 - c. I consider both parties have equally succeeded for which reason I make an order that each party shall bear its own costs.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF JUNE 2022

MOGENI J.

JUDGE

In the presence of

..... for the Plaintiff

..... for the Defendant

Vincent Owuor Court Assistant

