



**Fruits of Africa Restaurant Limited t/a Fruits of Africa Restaurant & 2 others v Varoo Investments Limited (Civil Suit 193 of 2020) [2022] KEELC 3399 (KLR) (6 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3399 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 193 OF 2020**

**M SILA, J**

**JULY 6, 2022**

**BETWEEN**

**FRUITS OF AFRICA RESTAURANT LIMITED T/A FRUITS OF AFRICA RESTAURANT ..... 1<sup>ST</sup> PLAINTIFF**  
**JOSHUA OPEE MBOYA ..... 2<sup>ND</sup> PLAINTIFF**  
**ANN WAHU ICHANGAI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**VAROO INVESTMENTS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. This suit was commenced through a plaint filed on October 20, 2020. The 1<sup>st</sup> plaintiff is a limited liability company whereas the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are its shareholders and directors. In the plaint, it is averred that the 1<sup>st</sup> plaintiff was a tenant of the defendant at the defendant's premises identified as "The Planet Gupta Complex" in the land parcel MN/3413, Mahesh Doshi Road within Nyali. The demised premises comprised of a shop No 30 and an annex upon which the plaintiffs operated a fast food and restaurant business popularly known as "The Fruits of Africa Restaurant." The term of the lease was five years and 3 months from 1st November 2016. The rent payable was Kshs 120,000/= for the shop and Kshs 100,000/= for the annex. It is averred that the plaintiff dutifully paid rent and was not in any rent arrears. It is claimed that the defendant however raised fictitious claims of rent arrears and on July 23, 2018, levied illegal distress by locking out the plaintiffs. It is averred that the distress was levied without any statutory notice demanding payment; was done without the presence of a court bailiff or auctioneer; and was done without the sanction of the court. It is averred that this led to a constructive eviction of the plaintiffs. It is pleaded that the defendant put in a different tenant now occupying the suit property and utilizing the plaintiff's fixtures, fittings, furniture and equipment. As a result, it is averred that the 1<sup>st</sup> plaintiff suffered loss, and also the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs suffered mental anguish and their health was otherwise severely impacted. It is said that they respectively incurred medical expenses



of Kshs 150,000/= and Kshs 250,000/= and will also incur future medical expenses. It is pleaded that the plaintiffs had to lay off their 14 staff which led to staff release costs. The plaint discloses that there have been previous suits being Mombasa BPRT Case No 1 of 2018, Joshua Mboya v Rupa Gupta; Mombasa Judicial Review Case No 8 of 2018; and Mombasa Chief Magistrate's Case No 368 of 2018, Varoo Investment v Joshua Mboya T/A Fruits of Africa.

2. In this suit, the plaintiffs seek the following orders :-

- (a) Monetary compensation in respect of the 1<sup>st</sup> plaintiff for :-
  - (i) Stock items – Kshs 154,100/=.
  - (ii) Actual items and expenses incidental to installation of fixtures, fittings, furniture, equipment and inventory on the demised premises – Kshs 2,088,500/= and Kshs 5,000,000/= incidental expenses.
  - (iii) Staff release cost – Kshs 580,000/=.
  - (iv) Suppliers – Kshs 360,000/=.
  - (v) Lost income from use of the suit property with effect from July 2018 until termination of the lease in February 2022 at the rate of Kshs 350,000/= (average) per month – Kshs 15,400,000/=.
- (b) Nominal damages in respect of the 1<sup>st</sup> plaintiff on account of :-
  - (i) Illegal/unlawful eviction – Kshs 5,000,000/=.
  - (ii) Irreparable injury/damages to the plaintiff's business model – Kshs 5,000,000/=.
- (c) General damages for lost business/income (1<sup>st</sup> plaintiff).
- (d) Special damages : Kshs 150,000/= to the 2<sup>nd</sup> plaintiff and Kshs 250,000/= to the 3<sup>rd</sup> plaintiff.
- (e) Cost of expected future medical expenses – Kshs 684,000/= to the 2<sup>nd</sup> plaintiff and Kshs 3,500,000/= to the 3<sup>rd</sup> plaintiff.
- (f) General damages for irreversible health damage (2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs).
- (g) Mesne profits derived from the defendant's use of the plaintiff's fixtures, fittings, furniture, equipment, inventory and stock items calculated at the rate of Kshs 350,000/= per month with effect from July 23, 2018 until hand over of the said items and/or full payment of their nominal value in lieu thereof.
- (h) Interest on (a), (b), (c), (d), and (e) above at the current commercial rate with effect from July 23, 2018 until payment in full.
- (i) Costs of this suit.
- (j) Any other/further relief the honourable court may deem fit and just to award in the circumstances.

3. Despite being served with summons, the defendant did not enter appearance and also did not appear during the hearing of the suit. The matter thus proceeded ex-parte with the only evidence being that provided by the plaintiffs.

4. PW-1 was the Joshua Opee Mboya, the 2<sup>nd</sup> plaintiff. He had a witness statement which he adopted as his evidence in chief. In it, he stated inter alia that they never had quiet possession of the demised



premises as the defendant constantly harassed and interfered with the 1<sup>st</sup> plaintiff's daily operations. He stated that within four months of taking possession, the demised property was truncated into half by state agencies, with the defendant's knowledge and without notice to the plaintiffs, and that the defendant never compensated the 1<sup>st</sup> plaintiff for the lost area nor did she review the rental payments. He stated that the 1<sup>st</sup> plaintiff religiously met the rent terms and was never in rent arrears and that at no time did the defendant issue notice for any outstanding rent or bills. He stated that no rent was owing as at 23 July 2018 when the defendant took over the premises. He quantified the fixtures and fittings at Kshs 237,000/=; furniture and equipment at Kshs 1,663,500/=; inventory at Kshs 188,000/= and stock items at Kshs 154,100/=. He added that the distress was undertaken without any notice or presence of a court bailiff or auctioneer. He stated that the 1<sup>st</sup> plaintiff lost income at the average rate of Kshs 350,000/= per month. Their personal health also suffered and they incurred the expenses stated in the plaint. He himself suffered high blood pressure and was admitted in hospital. He produced various documents as exhibits. He stated that immediately they were thrown out of the premises, somebody else took it over. He does not know what happened to their items that were in the premises. Arising from the closure, he paid off his staff but some are yet to be paid and he has Kshs 580,000/= owing to them. He testified that in a good month they would make a net profit of Kshs 1,200,000/=, and Kshs 600,000/= in a bad month, from the business. He elaborated that the business had a sitting capacity of 150 persons and operated for 24 hours. Sometimes a band would play to entertain guests. He stated that he used about Kshs 2,000,000/= to set up the premises. They filed a case at the tribunal (Business Premises Rent Tribunal) and the landlord was ordered to open up the premises which he did and they continued doing business. On the judicial review matter, he testified that it was filed by the defendant but it was not related to rent. He however did not have more details on it.

5. PW-2 was Anne Wahu Ichangai, the 3<sup>rd</sup> plaintiff. She also had a statement which she adopted as her evidence in chief. Her statement is more or less a replica of that of the 2<sup>nd</sup> plaintiff. In court, she testified that she suffered health complications which necessitated her undergoing surgery. The surgery was to remove a growth in her intestine which she stated resulted from hypertension that arose after they were evicted from the premises. She however did not have the treatment notes. She stated that they had a case at the Tribunal and that after a lot of negotiations the defendant opened the premises. She testified that the landlord had very erratic demands for rent such as making a call and making a demand of Kshs 100,000/= to be paid immediately. On the judicial review case, she stated that the landlord never followed it up and she does not know the status.
6. With the above evidence, the plaintiffs closed their case.
7. Mr Ngonze, learned counsel for the plaintiffs made written submissions which I have considered. Mr Ngonze annexed 7 authorities to his submissions. I only wish he had spelt out the point that he wished considered for each case. As it is, I have 7 cases and I do not know what it is that they elaborate to this court. I will say no more on them.
8. On the case itself, the pleadings and the evidence of the plaintiff are uncontroverted as the defendant opted not to participate in the case despite being duly served. I have considered the nature of the plaintiffs' case and the prayers sought. I have also considered the documents produced as exhibits. I have seen a lease document dated 1 November 2016 whereby the shop No 30 was leased to the plaintiffs for a consideration of Kshs 120,000/= per month. I have also seen several correspondences exchanged between the parties. Some of the correspondences from the defendant certainly use language that is completely uncouth to say the least and I have no doubt in my mind that the occupation of the plaintiffs of the suit premises was turbulent. It appears as if in January 2018 or thereabouts, the defendant locked the demised premises which prompted the plaintiffs to file a suit at the Business Premises Rent Tribunal in Mombasa, being Mombasa BPRT Case No 1 of 2018. I have seen that the tribunal issued an order



on January 5, 2018 directing the defendant to open up the premises. I think the premises was opened but the defendant filed Judicial Review Miscellaneous Application No 3 of 2018 to quash the order of January 5, 2018. It is not clear to me what happened to that suit and the plaintiffs themselves stated that they also have no idea. I have also seen that the defendant filed a Miscellaneous Application No 368 of 2018 dated September 18, 2018 at the Chief Magistrate's Court at Mombasa seeking orders to break into the premises and remove the goods therein. The plaintiffs have displayed an order dated November 30, 2018 dismissing the said application. It however does appear that even while that application was going on, the defendant had already locked out the plaintiffs from the suit premises, and from the uncontroverted evidence of the plaintiffs, had already leased out the premises to another person. The properties of the plaintiffs therein were either stored elsewhere and/or were leased together with the suit premises to the new tenant. I have no evidence that they were released to the plaintiffs.

9. The case of the plaintiffs is that they were not in rent arrears at all and that the defendant piled upon them fictitious rental demands and that their request for accounts were rebuffed. There may be substance in this assertion, as I have seen a letter dated December 27, 2017 from the defendant to the plaintiffs, wherein the defendant demands rent of Kshs 341,432/= with the following remarks :-

“N/B This a/c should be cleared out immediately. Do not come and waste our time in asking for details. Thank you for being our client.”

I think anybody demanding to be paid needs to justify why they need to be paid and cannot be heard to mention that asking for details is a “waste of our time.” The defendant has not come to court to make any assertion that the plaintiffs were in any rent arrears at the time that the defendant chose to lock out the plaintiffs from the suit premises on July 23, 2018. I am persuaded from the evidence provided that the defendant had absolutely no justification to lock the plaintiff out of the premises. It appears to me from the evidence tendered that the defendant was acting as if she is above the law and could do anything that she wished. I am sorry to tell the defendant that this country has laws that apply to everyone and they must be followed. Locking out a tenant from premises without justification and sending them letters with words such as “stupid” should have no place in a civilised society such as ours. I am thus persuaded that the plaintiffs deserve to be compensated by the defendants which is the subject that I now turn to.

10. The plaintiffs have presented a claim for various heads of damages. Prayer (a) of the plaint seeks compensation for stock items of Kshs 154,100/=; fixtures, fittings, furnitures, equipment and inventory of Kshs 2,088,500/= and incidental expenses of Kshs 5,000,000/=; staff release costs of Kshs 580,000/=; Kshs 360,000/= for suppliers; and loss of income of Kshs 350,000/= per month till the end of the lease thus Kshs 15,400,000/= in total. The problem with the plaintiffs is that they simply threw the documents at the court and took no time to explain them in detail. I will therefore do the best that I can after sifting through the pile.
11. I have seen two inventories of items totalling Kshs 1,663,500/= and Kshs 188,000/=, which include TVs, cookers, and fridges. There is also stock of Kshs 154, 100/=. I have no problem with awarding these amounts as the inventory of items and stock lost by the actions of the defendant. The total is Kshs 2,005,600/=. There is also an amount of Kshs 237,000/= as fixtures which appears to me to be reasonable and I award it.
12. I am not persuaded to award the incidental expenses of Kshs 5,000,000/=, staff release costs of Kshs 580,000/= and the Kshs 360,000/= for suppliers. On these, I have seen no sufficient proof through receipts or vouchers. There is a claim of Kshs 350,000/= as lost income. I am not also persuaded to award this. If the plaintiffs wished to have this award, they ought to have presented full accounts prepared by an accountant alongside the annual tax returns showing what they paid as income and/or



corporate tax. I am not persuaded that sufficient proof of net income and/or profit has been presented to enable this court make the award. Thus under prayer (a) I will only award the sum of Kshs 2,005,600/= + 237,000/= thus Kshs2,242,500/= in total.

13. Prayer (b) is for nominal damages for unlawful eviction and damages for injury to the plaintiffs' business model. I do not know why the plaintiffs used the term "nominal", but whatever the case, I think they have made out a case that the defendant unlawfully evicted them from the suit premises. Taking all circumstances into account, I will award general damages for unlawful eviction in the sum of Kshs 1,000,000/=. That is all I will award under prayer (b).
14. Prayer (c) is general damages for lost business/income. Lost income should be a special damage that is specifically pleaded and proven. I have already mentioned that I do not have sufficient proof of the profits that the plaintiffs would get, and on general damages I have already awarded them as above. I am not thus persuaded to make an award under prayer (c).
15. I can combine prayers (d), (e) and (f) for they all relate to what is said to have been damage to the health of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs. Prayer (d) is for special damages to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs for medical expenses, prayer (e) is a claim for future medical expenses, and prayer (f) is general damages for irreversible damage to health. If the tenancy was between the defendant and the 1<sup>st</sup> plaintiff, then it is the 1<sup>st</sup> plaintiff to claim damages under the contract and not the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs. In that event, damage to the health of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs would be remote. Even assuming I am wrong on this, to prove injury to health would have needed a medical expert to come and explain the health conditions suffered by the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, so that there is nexus between the medical expenses incurred and the actions of the defendant. The plaintiffs will have to live with the award for general damages made under prayer (c) and no more.
16. Prayer (g) is for mesne profits of Kshs 350,000/= and I have already dealt with this when addressing prayer (a). I need not say any more on that. I decline to award it.
17. Prayer (h) is for interest. I award interest on prayer (a) from the date of filing suit and on prayer (c) from the date of this judgment at court rates till settlement in full.
18. Prayer (i) is for costs. Costs will be to the plaintiffs against the defendant.
19. Prayer (j) is for any other order and I see nothing else to award.
20. I therefore enter judgment for the plaintiffs as above.
21. Judgment accordingly.

DATED AND DELIVERED THIS 6 DAY OF JULY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

