



Woolworths Limited v Nakumatt Holdings Limited & 2 others (Commercial Case 39 of 2012) [2024] KEHC 3634 (KLR) (Commercial and Tax) (15 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 39 OF 2012
JWW MONG'ARE, J
APRIL 15, 2024**

BETWEEN

WOOLWORTHS LIMITED PLAINTIFF

AND

NAKUMATT HOLDINGS LIMITED 1ST DEFENDANT

THE KENYA POWER AND LIGHTING CO. LTD 2ND DEFENDANT

ATULKUMAR MAGANLAL SHAH 3RD DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 25th January 2012 and amended on 1st August 2013 seeking for judgment against the Defendants as follows: -
 - a. USD 3,085,600/= for loss of rent together with interest thereon at Court rates from 1st February 2009 until payment in full;
 - b. Kshs. 7,475,475/= for loss of the land rent and rates together with interest thereon at Court rates from 1st February 2009 until payment in full;
 - c. Kshs. 58,570,000/= for the value of the building together with interest thereon at Court rates from 1st February 2009 until payment in full;
 - d. Kshs. 4,030,532/= for cost of demolition and re-improvement of public areas together with interest thereon from 24th June 2009 until payment in full;
 - e. Kshs. 185,600/= for Quantity Surveyor fees together with interest thereon at Court rates from 18th March 2009 until payment in full;



- f. Kshs. 243,600/= for legal fees together with interest thereon at Court rates from 28th December 2009 until payment in full;
 - g. Kshs. 469,800/= for cost of carting away the debris together with interest thereon at Court rates from 13th August 2009 until payment in full;
 - h. General, aggravated and/or exemplary damages together with interest thereon from the date of judgment until payment in full;
 - i. The costs of this suit on an Advocate/Client basis together with interest thereon at Court rates from the date of filing suit until payment in full; and
 - j. Any other or further reliefs which this Honourable Court may deem fit and just to grant.
2. The 1st and 3rd Defendants filed their defence on 14th March 2012 which was later amended 25th November 2013 denying the averments contained in the Plaintiff's plaint. They specifically denied that the fire which destroyed Woolworths House was caused and/or contributed to by the 1st Defendant's negligence, and/or breach of contract and statutory duty. To the contrary, the said fire was caused and/or contributed by the 2nd Defendant's negligence and/or breach of contract and statutory duty. They averred that the Plaintiff was under an obligation under the lease agreement to insure the building from loss or damage by fire, storm, earthquake, lighting and tempest.
 3. The 2nd Defendant filed a statement of defence dated 30th March 2012 denying the averments contained in the Plaintiff's plaint. The 2nd Defendant specifically denies that the fire was and/or contributed by any negligence on its part, it averred that the said fire was wholly caused or materially contributed by the Plaintiff and the 1st Defendant's negligence.
 4. On 16th July 2014, the parties herein recorded a consent that the issue of liability shall be determined at the hearing of the main suit and it shall be several. This matter proceeded to hearing where the Plaintiff called two witnesses in support of its case, the 1st & 3rd Defendants called one witness, and the 2nd Defendant called two witnesses.

Plaintiff's Case

5. Mr. Chandrakant Jastbai Patel(PW 1) testified that the Plaintiff is the registered owner of all that property known as L.R. No. 209/12003 along Kenyatta Avenue/Kimathi Street, Nairobi, and the owner of the building known as Woolworths House (hereinafter referred to as the suit property) erected on the aforementioned parcel of land. He averred that the 1st Defendant leased the suit property for a period of 20 years from 12th June 1995 vide a lease dated 12th June 1995. Sometime in July 2007 the Plaintiff and the 1st Defendant agreed that the 1st Defendant shall pay rent for the suit property at USD. 35,000/= per month plus VAT until further notice.
6. PW 1 contended that pursuant to the provisions of clause 8 of the lease agreement dated 12th June 1995, the 3rd Defendant as surety undertook to make good to the Plaintiff on demand all losses, damages, costs and expenses which the Plaintiff may sustain through the 1st Defendant's default. He asserted that the 1st Defendant had installed a generator at the suit property to ensure continued electricity supply, on 28th January 2009 a fire broke out on the suit property and caused major irreparable damage to the building such that it had to be demolished. The said fire was caused by and/or contributed by the 1st & 2nd Defendant's negligence and/or breach of contract. He further stated that they had insured the suit property under a fire policy with Concord Insurance Company Limited.



7. PW 1 averred that they appointed M/s Amazon Consultants Ltd as the Quantity Surveyor to prepare a Bill of Quantities and tender documents relating to the demolition which documents were filed by M/s Lee Funeral Services who demolished the remnants of the suit property and re-improved the public areas around the site which had been damaged by the fire at Kshs. 4,030,532/=. He further averred that they paid M/s Amazon Consultants Ltd Kshs. 185,600/= on 18th March 2009 for their services. He contended that on 13th August 2009 the Plaintiff paid M/s Kabi Investments Kshs. 469,800/= for carting away the debris from the site.
8. PW 1 testified that they also paid their Advocates Kshs. 243,600/= for the legal services rendered as a result of the fire. He further testified that in an unfortunate turn of events, Concord Insurance Company Limited refused to honour their fire policy and refused to compensate them for the damages caused by the fire. On 19th May 2005, N.W. Realite Ltd conducted a valuation on the suit property and thereafter issued a report indicating that the cost of reinstating the suit property as at the date of the report would be Kshs. 58,750,000/=. He asserted that the fire had the consequence of terminating the lease between the Plaintiff and the 1st Defendant on which was to run up to 31st May 2015 when the 1st Defendant stopped paying rent to the Plaintiff on 1st February 2009.
9. PW1 contended that the 1st Defendant was also under an obligation to pay land rent at Kshs. 415,465/= per year and rates at Kshs. 652,460/= per year to the Nairobi City Council in respect of the land, however as a result of the fire the 1st Defendant stopped paying the said rates thus the Plaintiff paid them for the years 2009, 2010, & 2011. PW 1 testified that in as much as Concord Insurance offered to settle the Plaintiff's claim in an ex gratia basis, it never settled the said claim.
10. On cross-examination, PW 1 averred that it received a renewal notice from its insurer dated 21st November 2008 which ought to have been paid within 30 days from the date of the notice. However, he confirmed that there was no evidence before Court demonstrating that the Plaintiff renewed its insurance and/or complied with the said renewal notice. He further averred that the insurance over the suit property covered the building and loss of rental income in case of a fire from February 2009 onwards, and confirmed that the cause of fire could not be established. In re-exam, he asserted that the Plaintiff was to pay the premiums 30 days after receipt of the debit note thus they were to pay premiums thirty days from 25th August 2008, but by the time the fire took place it had not received a debit note for the year 2009.
11. PW2, Mr. James Wangema Ruitha testified that he used to work for NW Realite Ltd as a valuer and he prepared a valuation report for the suit property in 2005 where he valued the property at Kshs. 58,750,000/=. He averred that his opinion on the value of the suit property was informed by its insurance value of Kshs. 58,750,000/=:, and the reinstatement cost of the structure in the event it was completely demolished. Upon cross-examination, he stated that he is not aware whether the suit property was insured as at the time of the report.

1st & 3rd Defendant's Case

12. MR. Atulkumar Shah (DW 1) testified that the loss of rent claimed by the Plaintiff from the 1st & 3rd Defendant is not justifiable since the building was not habitable during that time as a result of the fire. He averred that prior to the fire break out, there had been a power black out on 28th January 2009 at the suit premises which was reported to the 2nd Defendant. The 1st Defendant had installed an in-house diesel generator at the suit property to offer power in case of such power failures which was in use at the time there was a power blackout. He asserted that immediately power supply from the 2nd Defendant resumed, there was a massive explosion of the generator and thereafter power broke out destroying the suit property together with the 1st Defendant's merchandise.



13. DW 1 contended that they reported the fire incidence to their insurers Kenindia Assurance Company Limited who instructed M/s Surveyors Limited to investigate the case of the fire outbreak. The outcome of the said investigation was that the said fire was as a result of errors made in the process of repairing a fault at transformer No. G1583411 situated at Nation Centre following complaint No. 1675312 by the 1st Defendant. He asserted that the generator installed was maintained and serviced regularly by Ryce East Africa Limited, in addition the 1st Defendant had obtained a fire safety clearance certificate from the City Council of Nairobi for the year 2008-2009 which shows that the 1st Defendant was running a safe business premises.
14. DW 1 testified that the 1st Defendant also had firefighting equipment at the suit property in compliance with the statutory requirement, and fire equipment service and maintenance contract with Electrocar Limited. He further testified that the 1st Defendant exercised due diligence in operation of its business to ensure safety and eliminate any fire accident at its premises. He averred that the Plaintiff was under an obligation under clause 5(4) of its lease agreement with the 1st Defendant to insure the suit property from loss or damage thus failure to do so was negligence on the Plaintiff's part.
15. In cross examination, DW 1 stated he is not sure whether the invoice at page 37 is for generator JS200 since it refers to a J200. He further stated that the 1st Defendant was selling LPG Gas cylinders which were stored on top of the ablution block, but he did not know where the gas cylinders were being stored at the time of the fire since there was a recommendation that they be removed. DW 1 confirmed that the 1st Defendant stored inflammable materials which were prohibited under clause 3(20) of the Lease agreement between the Plaintiff and the 1st Defendant. However, the quantities of the inflammable materials stocked were not in quantities that would amount to breach of the said clause. He also confirmed that clause 4(2) provides that the 1st Defendant was not to store inflammable materials or any engine or moving machinery.

2nd Defendant's Case

16. Mr. Ngei Ntabo(DW 2) averred that he worked for the 2nd Defendant as a technician. He testified that the 2nd Defendant did not cause the fire since if at all its installation was faulty, the fire would have consumed Nation Centre and the adjacent buildings which was not the case. In addition, no repairs were carried out on the said transformer. He asked this Court to take judicial notice of the fact the Nation Centre sub-station is still intact to-date.
17. Upon cross examination, he averred that he noticed a faulty busbar at the RMU at Nation center. The said busbar was one source of the power which connected the source of the power to the transformer. DW 2 rectified the problem and isolated one busbar and restored power using another source. He contended that none of the 2nd Defendant's equipment tripped as a result of the fire. To the contrary, he is the one who switched off the transformer as a precaution to prevent further spread of the fire. Thereafter, he disconnected the cable supplying power to the suit property and restored power to all the adjacent buildings. He confirmed that a power surge may cause a fire.
18. Mr. Charles Muhoro(DW 3) testified that he worked for the 2nd Defendant as a senior technician and he prepared an incident report after the fire. He stated that when he visited the site on 3rd February 2009, he noticed that the 2nd Defendant's cable had been pulled out of the meter box. He also noticed that the fire had burnt the meter and cable but the generator was intact though with slight burns on the top. In addition, if at all the 2nd Defendant was responsible for the fire, the fire would have started at the Nation Centre sub-station.



19. DW 3 averred that as soon as the fire broke out, there was a short-circuit and the fuse at the sub-station tripped and power was automatically disconnected. Thereafter, the transformer cut off power to the adjacent buildings. He asserted that an electrical fault could not have been the cause of the fire as the transformer that served the suit property was not affected. Further, the slight damage on the standby generator and the control panel was caused by heat from the fire emanating from the corridor.
20. In cross examination, DW 3 asserted that when he went to the scene three days after the fire, he noticed that the generator was intact with fuel inside. He stated that he saw no signs of an explosion at the generator. He confirmed that on the day of the fire, there was power outage at the suit property in the morning and that the fire broke out just after power had been restored to the suit property. DW 3 contended that the fault in the 2nd Defendant's installation was reported at the Nation center sub-station which supplied electricity to the suit property. In re-exam, he stated that the generator did not cause the fire, and the fire was not caused by an electrical fault.
21. At the close of the 2nd Defendant's case, the Court directed parties to file written submissions which were highlighted on 27th November 2022. I shall not reproduce the contents of the said submissions but will refer to them in my determination.

Analysis and Determination

22. I have considered and carefully analyzed the evidence above in line with the pleadings filed, together with the written submissions by Counsel for parties. In my view, the issues that arise for determination are: -
 - i. Whether the suit property was insured by the Plaintiff as at the time the fire broke out;
 - ii. Whether the fire that broke out on the suit property on 28th January 2009 was as a result of negligence and/or breach of contract and statutory duty by the Defendants; and
 - iii. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint dated 1st August 2013.

i. Whether the suit property was insured by the Plaintiff as at the time the fire broke out.

23. PW 1 on cross examination testified that it received a renewal notice from its insurer dated 21st November 2008. He further averred that ordinarily, upon receipt of the renewal notice, the Plaintiff was expected to make payments of the requisite premiums within 30 days from the date of the notice. However, in re-exam he asserted that the Plaintiff was to pay the said premiums 30 days after receipt of the debit note but by the time the fire took place it had not received a debit note for the year 2009.
24. From the record, it is clear that there is no evidence that the Plaintiff took out an insurance cover over the suit property for the year 2009. The Plaintiff's witness alleged that the existing insurance cover with Concord Insurance was automatically renewed, but goes ahead to state that it was expected to pay the requisite premiums within 30 days after receipt of the debit note. This would mean that in the absence of payment of premiums, the renewal of the insurance will not take effect and consequently the suit property would not be insured.
25. The 1st & 3rd Defendants submitted that the Plaintiff did not bring forth a renewal certificate for 2009, thus they failed to renew the insurance cover on time, which would have cushioned them from the loss as a result of the fire outbreak. Section 107, 108, & 109 of the *Evidence Act* Cap 80 of the Laws of Kenya provide that he who asserts must prove. Accordingly, the Plaintiff had the burden of demonstrating



to this Court that as at the time of the fire, it had taken out an insurance cover over the suit property that was valid.

26. However, the Plaintiff did not only fail to produce any evidence for renewal of the said insurance, but also confirmed upon cross examination that there was no evidence before Court demonstrating that it renewed its insurance and/or complied with the renewal notice. In addition, the Plaintiff's witness averred that the said Concord insurance had offered to settle the Plaintiff's claim in an ex gratia basis and not under the terms of the policy. I opine that this averment gives credence to the fact that there existed no insurance cover over the suit property as at the time of the accident.
27. In the end, this Court finds that the suit property was not insured as at the time of the fire.

(ii) Whether the fire that broke out on the suit property on 28th January 2009 was as a result of negligence and/or breach of contract and statutory duty by the Defendants

28. The Plaintiff relied on the case of Donoghue v Stevenson [1932] UKHL 100 and submitted that the 1st Defendant being its tenant owed it a duty of care to ensure that the suit property was not damaged or destroyed. He further submitted that a fire is not a natural or spontaneous occurrence, its outbreak can only be deliberate or as a result of negligence. The Plaintiff referred to clause 3(20) and 4(2) of the lease agreement between it and the 1st Defendant dated 12th June 1995 and argued that the 1st Defendant was in breach of the said clauses since it did not deny having stored, kept or placed inflammable goods and materials in close proximity to the suit property.
29. The Plaintiff contends that since the 1st Defendant was not only in breach of the lease agreement dated 12th June 1995 but also in breach of several statutory rules by keeping both empty and filled gas cylinders, paint thinners, spirits, and a generator in the suit premises, it should be held responsible for the fire outbreak.
30. The 1st & 3rd Defendants relied on the case of Caparo Industries PLC v Dickman [1990] 1 ALL ER 568 and Chun Pui v Lee Chuen Tal [1988] RTR 298, as cited in Christine Kalama v Jane Wanja Njeru & Another [2021] eKLR and submitted that the 1st Defendant incorporated various safety mechanism while in occupation of the suit property. It further submitted that the Plaintiff did not challenge the Field Service Reports from Rycee Engineering in respect of the generator at Nakumatt which countered the Plaintiff's allegations that the 1st Defendant operated a faulty, defective, and unsafe generator hence the said evidence remains uncontroverted.
31. To buttress this argument, the 1st & 3rd Defendants cited the case of Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007, as cited in Grace Nzula Mutunga v Joyce Wanza Musila [2017] eKLR. They further submitted that PW 1 testified that his assertion on negligence on part of the 1st Defendant was based on belief and no concrete evidence to prove the same and asserted that the cause of fire could not be established.
32. The 2nd Defendant on the other hand cited the case of Anastassios Thomas v Occidental Insurance Company Limited [2017] eKLR and submitted that the Plaintiff failed to establish that there was a link between the electricity supply from the 2nd Defendant and the fire. In addition, PW 1 testified that the cause of the fire was unknown and no adjacent building was affected. In view of the foregoing, there is no evidence adduced that shows that the 2nd Defendant was negligent and is to be found liable for any loss and/or damage suffered by the Plaintiff.



33. The Plaintiff's case is founded on the tort of negligence and breach of contract and/or statutory duty. In the case of *Caparo Industries PLC v Dickman* [1990] 1 ALL ER 568 the Court made the following observation with regards to the tort of negligence: -

“What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the Defendant has been careless falls upon the claimant throughout the case.”

34. I opine that in as much as the 1st Defendant was in breach of Clauses 3(20) and 4(2) of the lease agreement between it and the 1st Defendant dated 12th June 1995, no evidence has been adduced to the effect that the LPG cylinders, paint thinners, spirit and/or generator that it kept in the suit property were the cause of the fire outbreak. To the contrary, DW2 & DW 3 who visited the site on the day of the fire and three days after the fire, confirmed that when they got to the site, the generator was intact with diesel inside save for slight burns on top of it. They further confirmed that the fire outbreak was not caused by the 1st Defendant's generator.
35. The 1st & 3rd Defendant witness testified that the said fire was as a result of errors made in the process of repairing a fault at transformer No. G1583411 situated at Nation Centre following complaint No. 1675312 by the 1st Defendant regarding power supply disruption. It is evident from the evidence adduced before this Court that there was power outage at the suit property in the morning and that the fire broke out just after power had been restored to the suit property. The 2nd Defendant averred that the fire outbreak was not caused by negligence on its part and or the power disruptions on the day of the fire since the transformer that supplied electricity to the suit property was not damaged and its intact to date.
36. In addition, all the other adjacent buildings that were also supplied with electricity by the said transformer were not affected. DW 3 testified that as soon as the fire broke out, there was a short-circuit and the fuse at the sub-station tripped and power was automatically disconnected, thereafter the transformer cut off power to the adjacent buildings. Notably, instead of corroborating the evidence of DW 3, DW 2 who testified that DW 3 was his boss thus he is the one who reported the incident to him averred that none of the 2nd Defendant's equipment tripped as a result of the fire. To the contrary, he is the one who switched off the transformer as a precaution to prevent further spread of the fire, then he disconnected the cable supplying power to the suit property and restored power to all the adjacent buildings.
37. The contradiction between the evidence of DW 2 and that of DW 3 leaves nothing to be desired. One thing is constant, the fire at the suit property broke out immediately after power was reconnected. DW 2 stated that the transformer at Nation center had a faulty busbar which he isolated and restored power using another source. There is no evidence that has been adduced even by the 2nd Defendant's witnesses with respect to the fact that the fire outbreak was as a result of an act and/or omission on the part of the 1st & 3rd Defendants. It is noteworthy that the 2nd Defendant's witnesses who visited the site on the day of the fire outbreak and three days later noted that the fire burnt the cable and the meter box. I find



it questionable that DW 3 was able to explain what burnt the top of the generator but did not offer any explanation as to what burnt the meter box and the cable that supplied electricity to the suit property.

38. The events prior to the fire outbreak are as follows, there was power outage on the morning of the fire which was reported to the 2nd Defendant. A team of technicians led by DW 2 were sent to identify and rectify the problem. They went to the transformer at Nation center which was supplying electricity to the suit property, DW 2 noticed a faulty busbar at the RMU at Nation center, he rectified the problem and isolated the busbar and restored power using another source. Subsequently, there was a fire outbreak at the suit property that caused him to switch off the transformer thus cutting electricity supply to the adjacent buildings.
39. In view of the foregoing and the testimony rendered before this Court and in the absence of any other evidence to the contrary, I am persuaded that there is prima facie evidence before this Court to suggest that the 2nd Defendant is solely to blame for the fire outbreak at the suit property,

ii. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint dated 1st August 2013.

40. The Plaintiff referred to the case of John Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR and submitted that it has specifically pleaded and particularized the special damages sought at paragraph 13 of the amended plaint and proved them. The Plaintiff is seeking special damages, general, aggravated and/or exemplary damages. It is trite law that special damages must be specifically pleaded and strictly proved. To this end, I am bound by the Court of Appeal decision in the case of Maritim & Another v Anjere (1990-1994) EA 312, 316, where it was held that: -

“In this regard, we can only refer to this court’s decision in Sande v Kenya Cooperative Creameries Limited Civil Appeal No. 154 of 1992 (UR) where as we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”

41. The Plaintiff at paragraph 13 of its amended plaint has pleaded the particulars of special damages sought. It claimed loss of rent payable by the 1st Defendant from February 2009 until expiry of the lease on 31st May 2015 at the rate of USD 40,600/= per month. Upon perusal of the lease agreement dated 12th June 1995 between the Plaintiff and the 1st Defendant, it is evident that it was to run for a period of twenty years. The Plaintiff produced a letter addressed to the 1st Defendant dated 10th July 2007 indicating that effective 1st July 2007, rent for the suit property shall be USD 35,000/= per month in support of this claim. It also produced invoices issued to the 1st Defendant in the year 2008 which shows that the 1st Defendant was paying rent of USD 35,000/= plus VAT @ 16% of USD 5,600 making a total of USD 40,600/=.
42. The fire that burnt down the suit property broke out on 28th January 2009, this means that the 1st Defendant still had 76 months to the expiry of its lease. Therefore, I find that the Plaintiff is entitled to the rent for the said period which is equivalent to USD 3,085,600/= since it is what it would have received from the 1st Defendant had the suit property not been burnt down by the fire that broke out on 28th January 2009.
43. The Plaintiff is also claiming land rent on the land whereupon the suit property was erected for the remainder of the lease period amounting to Kshs. 2,908,255/=, which would have otherwise been paid



- by the 1st Defendant were it not for the fire incidence. The Plaintiff averred that the 1st Defendant was also responsible of paying for land rent by way of additional rent. This is provided for under clause 3(2) (a) of the lease agreement dated 12th June 1995. The annual land rent payable was Kshs. 415,465/= as can be seen under clause (A) of the said lease agreement and the land rent paying slip for the year 2009, 2010 & 2011 annexed to the Plaintiff's bundle of documents at page 86, 89, & 92 respectively. From the foregoing, this Court finds that the Plaintiff has satisfactorily proved the claim for Kshs. 2,908,255/= in land rent for the period 2009 to 2015.
44. The Plaintiff is claiming Kshs. 4,567,220/= being Nairobi City Council land rates for the remainder of the lease period, payable by the 1st Defendant under the lease at Kshs. 652,460/= per year. Clause 3(2) (a) of the lease agreement dated 12th June 1995 also provided that the 1st Defendant was responsible for paying land rates for the land whereupon the suit property was erected. In support of this claim, the Plaintiff produced a receipt for payment of property rates for the said land for the year 2009, 2010, & 2011 annexed to the Plaintiff's bundle of documents at page 96, 98, & 100 respectively, and a demand for payment of land rates for the year 2010 from the Nairobi City Council annexed to the Plaintiff's bundle of documents at page 99. Accordingly, this Court finds that the Plaintiff is entitled to the said Kshs. 4,567,220/=.
45. In the amended plaint, the Plaintiff has claimed Kshs. 58,570,000/= being the value of the suit property. The Plaintiff relied on the valuation report by NW Realite Ltd dated 19th May 2005 which gave the insurance value of the suit property at Kshs. 58,570,000/=. It is noteworthy that the Defendants have not controverted the evidence produced by the Plaintiff with respect to the value of the suit property. In addition, they have not produced any other valuation report giving different values than the one given by PW 2 in support of the Plaintiff's case. No evidence has been adduced with respect to the fact that the Plaintiff has since been compensated the value of the suit property by an insurance company and/or that the suit property has since been sold. For this reason, I am persuaded that on a balance of probabilities, the Plaintiff is entitled to Kshs. 58,570,000/= being the value of the suit property.
46. The Plaintiff has claimed cost of demolition of remnants of the building and re-improvement of public areas being Kshs. 4,030,532/=. In support of this claim, the Plaintiff produced a Bill of Quantities prepared by Amazon Consultants Limited indicating that the cost of demolition of remnants of the suit property will be Kshs. 3,065,816/=:, and a specimen awarding the contract for the aforesaid demolition to M/s Lee Funeral Services Limited at a cost of Kshs. 3,065,816/= annexed to the Plaintiff's bundle of documents at page 41 & 53 respectively. The Plaintiff also produced a letter dated 27th May 2009 at page 66 of its bundle of documents from Safety Surveyors Limited enclosing the final and last payment for demolition works which indicated that the Plaintiff was required to pay M/s Lee Funeral Services Limited an additional Kshs. 964,716/= cost for re-improvement of the public areas. For this reason, I find that the Plaintiff is entitled to the claim for Kshs. 4,030,532/= being costs of demolition of remnants of the building and re-improvement of public areas.
47. The Plaintiff made a claim for Kshs. 185,600/= being professional fees paid for quantity surveyor services in connection with demolition. In support of this claim, the Plaintiff produced a letter dated 9th March 2009 addressed to it by Safety Surveyors Limited at page 55 of its bundle of documents indicating that the initial surveyor's fees was Kshs. 185,600/=. Thus, the Plaintiff is entitled to the said claim. The claim for Kshs. 243,600/= for legal fees paid for consultation in connection with the fire and its aftermath was supported by a fee note issued to the Plaintiff by Desai, Sarvia & Pallan Advocates found at page 71 of the Plaintiff's bundle of documents. The claim for carting away the debris from the site of Kshs. 469,800/= on the other hand was supported by an invoice issued to the Plaintiff by Kabi Investments General Merchants found at page 70 of the Plaintiff's bundle of documents.



48. It is noteworthy that the Defendants have not tendered any evidence that contravenes the above claims and/or disputed the aforementioned amounts. Therefore, I find that the Plaintiff is entitled to the special damages sought.

49. The Plaintiff also made a claim for general, aggravated and/or exemplary damages. The Court in the case of *Obonyo & Another v Municipal Council of Kisumu* [1971] EA 91 in considering instances where exemplary damages would be applicable referred to the English decision of *Rookes v Barnard and Others* [1964] AC 1129 where it was stated that: -

“it will be convenient to begin summarizing very briefly the effect of *Rookes v Barnard*. In the first place, it was held that exemplary damages for tort may only be awarded in two classes, of case (apart from any case where it is authorized by statute, these are first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government (emphasis in original) and secondly where the Defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff. As regards the actual award, the Plaintiff must have suffered as a result of the punishable behavior, the punishment imposed must not exceed what would likely have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the Defendant’s conduct is to be taken into account.”

50. Based on the foregoing passage, I opine that the Plaintiff’s claim for aggravated and/or exemplary damages is not merited.

51. In the end, this Court finds that the Plaintiff’s claim against the 1st & 3rd Defendants is not merited, but its claim against the 2nd Defendant is successful. Section 27 of the [Civil Procedure Act](#) provides that costs follow the event, therefore the Plaintiff is awarded costs of the suit as against the 2nd Defendant, whereas the 1st & 3rd Defendants are awarded costs of the suit as against the Plaintiff.

52. In the premise, I make the following orders: -

- i. The suit against the 1st & 3rd Defendants is hereby dismissed with costs; and
- ii. I hereby enter judgment for the Plaintiff against the 2nd Defendant in the following terms: -
 - a. USD 3,085,600/= loss of rent;
 - b. Kshs. 7,475,475/= loss of land rent and rates;
 - c. Kshs. 58,570,000/= value of the building;
 - d. Kshs. 4,030,532/= cost of demolition and re-improvement of public areas;
 - e. Kshs. 185,600/= Quantity Surveyor fees;
 - f. Kshs. 243,600/= legal fees;
 - g. Kshs. 469,800/= cost of carting away the debris;
 - h. Costs of the suit; and
 - i. Interest on all the above at Court rates from the date of this judgment until payment in full.

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF APRIL, 2024.

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J.W.W. MONG'ARE

JUDGE

In the presence of

Mr. Sarvia for the Plaintiff.

Mr. Saka holding brief for Omwanza for the 1st and 3rd Defendants.

Ms. Wanjiku holding brief for Ms. Jan Mohammed for the 2nd Defendant.

Amos - Court Assistant

