Manyuru t/a Nairobi Aviation College v Industrial & Commercial Development Corporation (Civil Suit 535 of 2011) [2024] KEHC 4613 (KLR) (Civ) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4613 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 535 OF 2011

CW MEOLI, J

MAY 6, 2024

BETWEEN

PETER MANYURU T/A NAIROBI AVIATION COLLEGE ..... PLAINTIFF

AND

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION ..... DEFENDANT

JUDGMENT

1. Peter Manyuru t/a Nairobi Aviation College (hereafter the Plaintiff) via a plaint filed on 07.12.2011 and amended on 14.06.2012 sued Industrial & Commercial Development Corporation (hereafter the Defendant) seeking inter alia general damages for pain, anguish and suffering arising from the illegal eviction of the Plaintiff, special damages in the sum of Kshs. 31,311,270/-, and refund of the deposit paid. It was averred that on various dates, namely, 29.04.2003 and 18.07.2005, the Plaintiff entered into a lease agreement with the Defendant, to occupy, the 10th & 11th floors and the 3rd, 4th & 5th floors, respectively, (hereafter suit premises), of the building known as Uchumi House erected on LR No. 209/7405 (hereafter suit property). For a period of seventy-two (72) months with effect from 15.03.2003 and 01.06.2005 respectively, and paying a specified monthly rent and service fee for each lease correspondingly.

2. It was averred further that in 2006 the Plaintiff was offered additional space on the 7th floor of the suit property for a specified monthly rent and service fee. And that all the lease agreements executed by the Plaintiff and the Defendant contained clauses providing for renewal of the leases for a further period of sixty-three (63) months.

3. That the Plaintiff had peaceful occupation of the suit premises, paying rent regularly as it fell due and operated a college with a burgeoning student population, hence the need for extra space every year. Consequently, the Plaintiff had expressed his desire to renew the leases. That on 18.03.2011, the

Plaintiff had successfully requested the Defendant in writing for extension, for a period of one (1) year. It was asserted that the landlord had thereafter repeatedly threatened the Plaintiff with eviction, prompting the Plaintiff to move to the Business Premises Rent Tribunal (BPRT) in Nairobi Cause No. 794 of 2011 on 11.11.2011, to obtain restraining orders, that were served upon the Defendant on 15.11.2011. That despite this, the Defendant had proceeded to maliciously evict the Plaintiff from the 3rd, 4th & 5th floors of the suit property, causing wanton damage and loss of property, in respect of which the Plaintiff claimed damages.

4. On 02.04.2015 the Defendant filed a statement of defence denying the key averments in the plaint. However, it was averred that the eviction carried out on or about the 06.12.2011 was pursuant to the order of the High Court in Civil Case No. 363 of 2011, issued on 26.08.2011.

5. During the trial, the Plaintiff testified as PW1. He identified himself as a Bishop, televangelist and director of the Nairobi Aviation College (hereafter the college) and thereafter adopted his witness statement dated 07.12.2011 as his evidence- in –chief. He produced his bundle of documents as PExh.1. It was his evidence that college was established as a sole proprietorship in the year 2000 and registered as a training institution in 2002, to provide commercial training for the aviation industry and to offer commercial courses. That since 2003 the college was housed on the suit property owned by the Defendant, and remained in occupation until 2011. He explained that initially the college occupied the 11th floor but due to expansion, took up more space on the 3rd, 4th, 5th, 6th & 7th floors and executed lease agreements in that regard.

6. It was his evidence further that some of the courses offered by the college required expensive and rare specialized machinery. And that although the leases had an automatic renewal clause, in February 2011, the college was aware that the leases in respect of the suit premises were coming to an end, hence had sought renewal. He stated that the Defendant was reluctant, but pursuant to negotiations it was agreed that due to the large student population, the college would have two (2) years to mobilize for relocation from the suit property. That the Defendant later resiled from this understanding, forcing him in November 2011 to move the BPRT to restrain the Defendant from evicting the college from the suit premises. However, the Defendant had proceeded to evict him on 06.12.2011, despite having paid rent for December 2011 and January 2012 and a two-month deposit. Prompting him to move to the High Court to seek redress.

7. He testified that the college lost financial and student records, and expensive equipment in the eviction. That he further lost business and property, and the students could not sit their respective examinations. He emphasized that he got 4 months' notice from the Defendant instead of 6 months' notice , contrary to Clause 6 of the lease, adding that no valuer was appointed as envisaged under the said Clause. In conclusion, he urged the Court to allow his claim.

8. Under cross-examination, he confirmed being the manager of the college and that on 06.12.2011 he was not at the premises when eviction was undertaken. Admitting further that the lease agreement in question was to lapse on 01.09.2011, hence his written requests to the Defendant on 18.03.2011 and 29.06.2011 seeking renewal of the leases. He further confirmed that, in response and in respect of negotiations, the Defendant had declined his request, and fearing eviction, he instructed counsel to seek injunctive orders against the Defendant before the BPRT and this Court. Admitting that his counsel before the High Court recorded a consent with the Defendant, he disputed that he had authorized counsel to record the consent.

9. Referring to PExh.1, he testified that he did not prepare the bill of quantities or invoices in respect of the estimated costs of the project or renovations in 2005. He stated that when the college took possession of the premises, he did not take an inventory but maintained that equipment at the suit premises were

thrown out on the night preceding the eviction, and evidence destroyed by the goons who carried out the eviction. He further asserted that at all material times the parties herein were negotiating the re-leasing of the premises. Finally, he confirmed reporting the incident at Central Police Station and that no arrest or charges were laid against any persons in that regard.

10. During re-examination, he reiterated that the consent order in the High Court suit was recorded without his authority and reiterated that upon execution of the new leases he renovated the college to make it suitable for the students. He further affirmed that the BPRT restrained the Defendant from evicting the college.

11. On behalf of the Defendant, Paul Aloo Okwiri testified as DW1. He identified himself as an employee of the Defendant, previously serving as the Property Manager and currently, the Assistant Manager Administration. He stated that the Defendant as of July 2021 transitioned to become the Kenya Development Corporation (KDC). Adopting his witness statement dated 28.07.2023 as his evidence -in -chief, he produced the bundle of documents appearing in the Defendant's list of documents as Exh.1 - 11. The gist of his evidence was that the Plaintiff was a tenant under a lease since 15.03.2003 and was allocated more space in September 2005 under a new lease for 72 months, to accommodate the growing college population of about 2000 students.

12. He testified that the lease was to expire in September 2011 and the Defendant wrote to the Plaintiff on 07.02.2011 indicating non-renewal. That the Defendant had declined the Plaintiff's appeal on the renewal of the lease and in March 2011, May 2011 and August 2011 did reminders to the Plaintiff in that regard. However, the Plaintiff opted to file HCCC 363 of 2011 and obtained orders, but eventually the suit was resolved by consent to the effect that the Plaintiff was to vacate the premises by 01.12.2011 or be evicted.

13. He confirmed that the Plaintiff did not vacate as agreed and on 06.12.2011 the Defendant instructed auctioneers who evicted the Plaintiff. That on the said date, the Plaintiff and his team, alongside his workers and students, began removing his goods from the suit premises. He asserted that on eviction, the Defendant did not give or take an inventory of any goods left behind and he was not aware of any loss or damage in respect of the Plaintiff's items. It was further his evidence that the Plaintiff paid a deposit of Kshs. 2,000,000/-. However, Clause 1(w) of the lease provided that any deposit was to be applied towards restoration of the premises and balance refunded to the tenant. He concluded by stating that on account of the foregoing, the Defendant utilized the deposit to restore the premises and actually spent more than Kshs. 6,000,000/.

14. During cross-examination he confirmed that the Plaintiff occupied the 3rd to 7th floor of the suit property and had sought an extension which request was declined by the Defendant. He further confirmed negotiations in connection with renewal of the lease in 2011 and several letters to the Plaintiff reminding him to prepare to vacate and remove his goods from the suit premises. That an auctioneer was consequently instructed upon expiry of the lease because the Plaintiff did not vacate as agreed in HCCC 363 of 2011. He reiterated that when auctioneers arrived at the suit property, the Plaintiff mobilized staff and students to remove equipment from the suit premises.

15. On being referred to the order obtained by the Plaintiff in BPRT Cause No. 794 of 2011, he confirmed that the order restrained the Defendant from evicting the Plaintiff; that the order came to his attention much later despite having been received on 15.11.2011 by the Defendant's Corporation Secretary; and that nevertheless, the order in HCCC 363 of 2011 allowed the Defendant to evict the Plaintiff. He categorically stated that despite Clause 6 of the lease providing for renewal, renewal of lease was not automatic, and further no request had been made for a refund of the deposit. Finally, he testified that

no inventory was taken during the eviction and confirmed he did not tender evidence before Court regarding the Defendant's alleged expenses of Shs. 6,000,000/- in respect of restoration of the premises.

16. In re-examination, he reiterated that the decision regarding non- renewal of the lease was communicated to the Plaintiff and that the orders in HCCC 363 of 2011 entitled the Defendant to carry out the eviction in default. Moreover, the BPRT's order was obtained after the consent order in in HCCC 363 of 2011 which allowed for receipt of rent for a specified period, hence the rent payments made by the Plaintiff.

17. In compliance with directions given after the trial, the parties filed written submissions. Counsel for the Plaintiff condensed his submissions around two issues. Addressing the question whether the eviction of the Plaintiff was in accordance with the law and executed lease, he cited Clause 1(w) and Clause 6 of the lease dated 18.07.2005. He contended that despite negotiations on renewal of the lease between the parties, the Defendant was bound by the terms of the lease and hence ought to have invoked the latter clause in the event that it was unwilling to grant the Plaintiff a renewal of the lease. Failure to do so was cited as the first act of breach of the lease on the part of the Defendant.

18. In respect of the former Clause, it was argued that the Plaintiff was never granted an opportunity to remove its property from the suit premises, as confirmed by the Defendant's witness, this failure constituting the second act of breach on the part of the Defendant. Secondly, with respect to the legality of the eviction, counsel relied on Section 152G of the *Land Act*, the decisions in Solome Naliaka Wabwile v Alfred Okumu Musinaka [2022] eKLR, Quick Lubes E.A Ltd v Kenya Railways Corporation [2012] eKLR, Jacob Kaliunga M'mwirabua v Warda Said Abud Msalam & Another [2021] eKLR and Julius L. Marten v Caleb Arap Rotich [2021] eKLR.

19. To support the submission that the Defendant could not hide behind the consent order to evict the Plaintiff, as neither valid eviction notices had been served upon the Plaintiff, nor the Plaintiff accorded an opportunity to remove its property. Counsel here emphasizing that the Defendant maliciously and unlawfully carried out the evictions while students were undertaking their examinations. In summation, counsel asserted that the eviction undertaken by the Defendant was not only illegal but also unlawful.

20. Concerning general damages sought for pain, anguish and suffering on account of the illegal eviction, counsel called to aid the Court of Appeal decisions in Southern Engineering Company Ltd v Mutia [1985] eKLR and Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR. In arguing that the Plaintiff has established legal entitlement to an award of general damages arising from the Defendant's illegal eviction. On the claim for special damages, it summarily submitted that the same were specifically pleaded and proved to the tune of 31,311,270/-. The Defendant having failed to controvert the Plaintiff's evidence in support of the claim for loss and damage occasioned by the illegal eviction. The decisions in John Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR, South C Fruit Shop Limited v Housing Finance Company of Kenya Limited [2013] eKLR, Francis Muringu Mureu t/a Jem Corner Bar v Karuga [2004] eKLR and Francis Githuku Kabue v Kimani Chege & Another [2009] eKLR were relied on in the foregoing regard.

21. Further, it was contended that the Defendant's witness had admitted that it was still holding the Plaintiff's deposit and that the recital clause of the Lease entitled the Plaintiff to a refund of deposit upon expiration of the lease. Thus, the Court ought to order such refund. In conclusion, placing reliance on Kuloba, J. (Rtd), Judicial Hints on Civil Procedure, 2nd Ed., 2011 and the decision in Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR, counsel urged the Court to allow the Plaintiff's suit with costs.

22. On the part of the Defendant, counsel, after restating the evidence asserted that the consent record in Nai. HC No. 363 of 2011 determined the issues between the parties with finality and overrode the subsequent proceedings brought by the Plaintiff in the BPRT. That the landlord / tenant relationship between the parties ended upon the Plaintiff communicating handing over partial possession of the Defendant's premises on 16.09.2011. Citing the decisions in Kanji K. Patel & 2 Others Steelmakers Limited [2021] eKLR, KCB Ltd vs Popatlal Madhavji & Another [2019] eKLR and National Oil Corporation of Kenya vs Robert Obegi Ongera & Another [2014] eKLR, counsel referred to the correspondence on renewal of the lease to submit that the Plaintiff's claim for unlawful eviction is without basis.

23. Responding to the Plaintiff's submission on special damages, counsel argued that having opted to cart away his property with the support of his students before the Defendant carried out the eviction, the Plaintiff took responsibility for it. It was further submitted that the Plaintiff failed to prove to the required standard the alleged losses and that the Defendant was liable therefor. Moreover, he failed to prove the special damages which were not particularized as required. The decisions in China Wu Yi Limited & Another v Irene Leah Musau [2022] eKLR and Kenya Women Microfinance Ltd v Martha Wangari Kamau [2021] eKLR were relied on in that regard. On refund of the deposit, it was submitted that the same was applied to restore the suit premises in line with Clause 3 of the lease agreement, and that the Plaintiff had not sought a statement of the accounts in that connection. In conclusion, the Court was urged to dismiss the suit with costs.

24. The court has considered the respective parties' pleadings, evidence as well as submissions filed in the matter. The fundamental question for determination is whether the Plaintiff has established his case on a balance of probabilities and if so, whether he is entitled to the reliefs sought in his amended plaint.

25. In Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

26. Further, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> "[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

27. The dispute herein revolves around the two (2) lease agreements, and more particularly the one dated 18.07.2005. It is not disputed that the Plaintiff and Defendant had initially entered into an agreement dated 29.04.2003 for the former's lease of the 11th floor in the suit property; that subsequently, on 18.07.2005 the Plaintiff and Defendant agreed on a lease in respect of 3rd, 4th and 5th floor of the suit property; and that on or about the 06.12.2011 the Plaintiff was evicted from the 3rd, 4th and 5th floor, hence this suit .

28. The Plaintiff asserted that the renewal of the lease was automatic under the lease documents. His key grievance is that despite paying rent regularly, and the grant of his request for extension of the lease by the Defendant for one (1) year, the Defendant had proceeded to maliciously evict the Plaintiff from the 3rd, 4th & 5th floors of the suit property. All in violation of a lawful order of the Court and occasioning the Plaintiff loss and damage. The defence case on the other hand is hinged on the fact that renewal of the lease was not automatic and having declined to renew the Plaintiff's lease, the Defendant was entitled to evict the Plaintiff, as done on or about the 06.12.2011, pursuant to the order of the High Court in Civil Case No. 363 of 2011 issued on 26.08.2011. These are the matters in contention here and calling for determination.

29. The lease agreement dated 18.07.2005 was the instrument that set out the respective parties' rights and obligations. Thus, the role of the Court is as stated in National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR; -

> " A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties."

30. For the purposes of this dispute, the pertinent clauses invoked by the Plaintiff in the lease agreement in question (PExh.1) provided as follows; -

s) .....

t) .....

u) .....

v) .....

w) At the expiration or sooner determination of the said term to yield upon the said premises to the Lessor with the fixtures and fittings thereto (other than the Lessee's fixtures and fittings which shall unless otherwise agreed in writing remain the Lessee's property and which the Lessee shall be entitled to remove prior to the determination or expiration of the said term making good to the satisfaction of the Lessor any damage occasioned by installing or removing the same) in such good and tenantable repair and condition and with all locks and keys and fastenings complete.

x) .....

2. .....

3. .....

4. .....

5. .....

6. The Lessor will on the written request of the Lessee made six months before the expiration of the said term and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants of the part of the Lessee hereinbefore contained at the expense of the Lessee grant the Lessee a lease of the premises for the further term of Sixty Three (63) months from the expiration of present term at such rent as the parties may mutually agree and containing the like covenants and provisions as are herein contained with the exception of the present covenant for renewal PROVIDED ALWAYS that if the parties hereto shall be unable to agree within three months the dispute shall be referred to a valuer to be mutually appointed by the parties in the absence of agreement on such appointment with a further period of one month as shall be appointed by the Chairman for the time being of the institutions of the Surveyors of Kenya and such valuer shall be deemed to acting as an expert and not as an arbitrator and his decision shall be final and binding on the parties hereto and the costs and other charged of the valuer shall be met and paid in equal proportions by the Lessor and Lessee." (sic)

31. Under Clause 2 of the Lease Agreement, it was expressly stated that the Plaintiff was to lease the suit premises "for a term of Seventy Two (72) months from 1st day of September Two Thousand and Five (hereinafter called "the term")". Thus, for all intents and purposes the lease in respect of the suit premises in question was to lapse on 01.09.2011. The Plaintiff's case was that renewal of the Lease was automatic. However, in the Courts' reading and interpretation of Clause 6 of the lease document, the lease could be renewed for a further term of Sixty-Three (63) months from the expiration, on condition that the Defendant received a written request from the Plaintiff, at least Six (6) months before 01.09.2011, and there being at the time of such request no existing breach or non-observance any of the covenants on the part of Plaintiff in respect of the lease. This means that the Defendant ought to have first received a request for renewal of the lease dated 18.07.2005 on or before 01.03.2011.

32. From PW1's evidence and material before the Court, it appears that the earliest communication in respect of renewal of the lease was in February 2011, when DW1 informed the Plaintiff that the lease was set to expire on 01.09.2011. PW1 asserted through oral testimony that upon the realization of imminent expiration, he requested renewal of the lease. However, the letter seeking renewal was not produced by the Plaintiff. Nevertheless, it appears from the correspondence contained in PExh.1, particularly resting with the letter from the Defendant dated 17.03.2011, that the Plaintiff was seeking renewal of the lease for a period of two (2) years.

33. In the letter above, the Defendant addressed the Plaintiff in part as follows;-

> " Your letter dated 3rd March, 2011 and your various presentations on this matter refer.
>
> In the presentations under reference, you have requested that the lease for Nairobi Aviation College Uchumi House be renewed for a further two years. At the onset it is noted that your request is rather late considering that you had been given ample time on the termination of the said lease and hence the notice to terminate the same.
>
> Additionally, we believe that you do appreciate the student population has outgrown the facilities available at Uchumi House. This is why you have started the development of a more spacious facility out of the City Centre which will also provide a conducive learning environment.
>
> There is need, therefore, to emphasize that the decision not to renew the lease for the Aviation College was informed by the following facts:

> The high population of students in your college has caused a strain on the shared services. .....The facilities were not designed to serve the large student population. Of particular concern is the potential danger caused by the small fire exit-stair case. It will be very difficult to evacuate students and other stakeholders in the unfortunate event of a fire break out in the building.We also draw your attention to the recent two occasions when the students went on the rampage threatening the peaceful existence of other tenants. There are no mechanisms in place to contain such an eventuality.

The foregoing notwithstanding, we are willing to give you some time to enable you finalize construction of your new facility. The one-year renewal period is based on the construction program presented to us. The extension of the lease is subject to the following terms and conditions, among others:

I. You surrender Floors 6th and 7th immediately as at end of August

II. The rent will be adjusted to market rate for the remaining space i.e. 3rd, 4th and 5th.

III. Provision of acceptable undertaking that you will vacate the premises on or before 1st September 2012." (sic)

34. The Plaintiff responded to the above letter through his own dated 18.03.2011 wherein he implored the Defendant for a two (2) years extension of lease. By their response letter dated 25.05.2011, the Defendant informed the Plaintiff that upon consideration of all the circumstances surrounding the issue of renewal of the lease, and having sought legal advice, it was unable to offer an extension on the lease beyond the current term and required the Plaintiff to vacate on or before 31.08.2011. This was followed by several successive letters from the Defendant reminding the Plaintiff of the expiry of the lease.

35. From a review of the totality of the correspondences, it appears firstly, that the Plaintiff did not lodge his written request for renewal of the lease as required on or before the 01.03.2011 (an issue raised in the Defendant's letter dated 17.03.2011 quoted above) . Whereas the renewal of the lease was pegged on two conditionalities, namely, a written request for renewal of the Lease by the lessee six (6) months before its expiration and secondly, there being no breach or non-observance of any of the covenants on the part of the lessee at the time of request. Secondly, the Defendant seems to have resiled from its earlier grant of extension of one year, by eventually declining the Plaintiff's renewal request altogether, on grounds of purported breach on the part of the Plaintiff.

36. Clause 1(m) of the Lease agreement provided in part that the Plaintiff was "not to do or permit or suffer to be done upon or within the premises anything which in the opinion of the Lessor (which opinion shall be final and conclusive) may be or become a nuisance or annoyance to or in any way interfere with the quiet user of the other portion of the building or adjoining or neighboring premises." (sic).

37. Evidently therefore, from the lease agreement and related correspondence herein, renewal of the lease was not automatic, as asserted by the Plaintiff, but was pegged on certain conditionalities. It appears that eventually, the Defendant declined to renew the lease and or resiled from its earlier communicated one-year extension, premised on Clause 1(m). Therefore, the court finds that the renewal was not automatic, and the Defendant potentially could, and did reject renewal of the lease in line with the provisions of the lease document and take back vacant possession of the suit premises.

38. In that regard, it was the Plaintiff's case that in November 2011 following purportedly failed negotiations on renewal, he approached the BPRT and obtained orders to restrain the Defendant. However, the latter proceeded to evict him on 06.12.2011, despite having received rent for December 2011 and January 2012 and a two-month deposit. Prompting the Plaintiff to move to the High Court

to seek redress. The Defendant countered this position by stating that despite the Plaintiff opting to file HCCC 363 of 2011 and obtaining orders, the suit was resolved by way of a consent order that the Plaintiff vacates by 01.12.2011 or be evicted. In response to the forestated, the Plaintiff asserted that the counsel who was instructed in HCCC 363 of 2011 recorded the consent without his authority.

39. The sequence of the litigation relating to this dispute is important. The present suit, accompanied by an application under certificate urgency, was initially instituted on 07.12.2011 as HCCC 552 of 2011 in the Commercial and Admiralty Division of the High Court at Nairobi. On 08.12.2011, Musinga, J. (as he then was) ordered the transfer of the cause to the Civil Division where it was redesignated as HCCC 535 of 2011 and placed before Mwera, J. (as he then was), who issued interlocutory prohibitory orders in favour of the Plaintiff on 09.12.2011. See PExh.1. Obviously, by the date of the institution of the suit and order by Mwera J, (as he then was) the eviction had already occurred.

40. Moreover, from DExh.1, DExh.2 and DExh.3 it appears that the Plaintiff had much earlier instituted a separate suit in the High Court, namely, HCCC 363 of 2011 in respect of the same dispute. In that suit, before Warsame, J (as he then was) on 26.08.2011, a consent order (DExh.4) was recorded. The order stated as follows; -

> " 1. That the Plaintiff to vacate and hand over the whole premises (all the floors) within the next three months from the 1st September 2011.
>
> 2. That the Plaintiff or his students must vacate the premises of the Defendant on or before 1/12/2011
>
> 3. That the Plaintiff pay the rents applicable correctly for that period.
>
> 4. That in the event that the Plaintiff fails to hand over or vacate the whole premises by 30/11/2011, the Defendant be at liberty to evict them.
>
> 5 ....." (sic)

41. It is on the premise of the above order, according to DW1 that the Defendant carried out the eviction of the Plaintiff on 06.12.2011, after he failed to vacate the suit premises. PW1 made the case to the effect that in November 2011 he had obtained orders in the BPRT in Case No. 794 of 2011 to restrain the Defendant from evicting him and later on 09.12.2011 in this suit (formerly HCCC 552 of 2011), and that the respective orders were served upon the Defendant. Revisiting this Court's earlier finding on the renewal of lease, it is evident that the Defendant had early in 2011 expressed its intention not to renew the lease upon its expiry on 01.09.2011. Hence subsequent entreaties for renewal by the Plaintiff, which were unsuccessful. Secondly, in a subsequent suit filed at the Plaintiff's own instigation, namely, HCCC 363 of 2011, a consent order was recorded before Warsame, J. (as he then was) on 26.08.2011 essentially formalizing the expiry of the lease by consent.

42. The thrust of the said consent order was to the effect that both PW1 and his students ought to surrender vacant possession of the suit premises on or before 01.12.2011, in default of which the Defendant was at liberty to evict them from the premises. And thirdly, it is evident that the interlocutory orders in respect of the suit premises obtained in BPRT in Case No. 794 of 2011 and HCCC No. 535 of 2011 were obtained after the consent in HCCC 363 of 2011 had been recorded and adopted as an order of the Court.

43. This conduct on the part of the Plaintiff smacks of abuse of the process of the court, on the part of the Plaintiff. The litigation before the BPRT and the High Court was in relation to the same dispute and parties. Having recorded the consent before Warsame J, (as he then was) the Plaintiff

subsequently approached BPRT and the High Court via separate suits/causes. The orders issued in the latter litigation could not supersede the subsisting consent order recorded before Warsame J. (as he then was). By subsequent litigation, the Plaintiff was attempting to nullify the effects of the consent earlier recorded before Warsame J (as he then was) and to restore the status quo ante. However, it was too late. Hence the Plaintiff's reliance on orders issued in proceedings subsequent to the consent order cannot aid his case for unlawful eviction.

44. PW1 has asserted here that the consent order was recorded by erstwhile counsel without his express authorization or instruction, and therefore non-binding. There is no evidence that he challenged the impugned consent order by seeking to set it aside. Besides, it is trite that an instructed counsel has implied general authority to compromise a suit. As stated by Hancox JA (as he then was) in the celebrated case of Flora Wasike v Destimo Wamboko (1982-88) 1 KAR 266: -

> " It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in JM Mwakio v Kenya Commercial Bank Ltd. Civil Appeals 28 of 1982 and 69 of 1983. In Purcell v F. C. Trigell Ltd [1970] 2 ACCER671, Winn LJ said at 676:
>
> "It seems to me that, if a consent order is to be set aside on grounds which justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside of rectification of this order looked at as a contract..."

45. The learned Judge continued to state that: -

> " It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in Hirani v Kassam [1952] 19 EACA 131 at 134 as follows:
>
> "The mode of paying the debt, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Setton on Judgments and Orders (7th Edn) Vol. 1 p. 124 as follows: -
>
> "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ..., or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."
>
> See also:- Brook Bond Liebig (T) Ltd v Mallya (1975) EA 266.

46. The latter passage was also followed by the High Court in Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1980] eKLR where the court stated that: -

> " ....Both counsel relied, for different purposes, upon the decision of the former Court of Appeal for East African in Brook Bond Liebig (T) Ltd v Mallya [1975] EA 266, where, in declining to set aside a consent judgment, the court cited with approval a passage from volume 1 of the 7th Edition of Seton on Judgments and Orders page 124 to the effect that, prima facie any order made in the presence and with the consent of counsel is binding on all

parties to the proceedings and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement.

The 7th Edition of Seton was published in the year 1912, that is, more than sixty-five years ago. It does not take into account the decision of McCardie J in Welsh v Roe (1918), 87 LJ KB 520, where the earlier authorities were carefully considered and it was held that after the commencement of an action, the solicitor for a party has an implied general authority to compromise and settle the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the notice of the other side. This decision is accepted as authoritative by the editors of the Supreme Court Practice (1979), vol 2 para 2013, where it is stated that a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction."

47. Both the courts in the Brook Bond Liebig (supra) and the above case refused to set aside the disputed consent orders. On an appeal in respect of the Kenya Commercial Bank Ltd case, the Court of Appeal held that the advocate had both the implied and ostensible general authority to bind the appellant client "in effecting the compromise". The appellate Court affirmed the judgment of the High Court and dismissed the appeal. In a more recent decision in Intercountries Importers and Exporters Limited vs. Teleposta Pension Scheme Registered Trustees & 5 others [2019] eKLR, the Court of Appeal pronounced itself as follows: -

> " Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside..."

48. The consent before Warsame J (as he then was) was binding upon the parties. Thus, the Defendant was entitled to evict the Plaintiff from the suit property in the event of his default in vacating the suit premises, pursuant to the consent order in HCCC 363 of 2011. The interlocutory orders obtained in BPRT in Case No. 794 of 2011 and HCCC No. 535 of 2011 were to no avail, in the circumstances.

49. Was the eviction lawfully carried out? From the pleadings and material presented at the trial, the eviction was carried out in 2011, prior to the enactment of the *Land Act* and the *Land Registration Act*. Recent amendments to the *Land Act* in 2016, particularly to Section 152 therein, thus set out the procedure relating to evictions. Pre-2012 and by extension 2016, eviction procedures and conditions were set out by the Court issuing the order of eviction. Consequently, the Plaintiff's invocation of Section 152G of the *Land Act*, has no effect.

50. The lease agreement that is the subject of the dispute equally did not provide for the procedure relating to the removal of a recalcitrant lessee, in any event. Moreover, the only eyewitness account of the eviction process was by DW1, who said that the Plaintiff had prior to the eviction on 6.12.2011 carted away his goods from the premises. While the Plaintiff asserted that goons removed the goods on the night prior to 6.12.2011 during which some goods were lost and others damaged, an assertion disputed by DW1. PW1 however said that he was not present on that date, and it is not clear how he obtained information regarding the actual eviction. The production of the police abstract which is essentially a record of the Plaintiff's own report to the police cannot not aid his case, in the circumstances.

51. The court's considered finding is that the Plaintiff was lawfully evicted as a consequence firstly, of a lawful refusal by the Defendant to renew the lease and, pursuant to his default in respect of the consent

order. He cannot benefit from an award of general damages for pain, anguish and suffering caused to the college during eviction (as pleaded), which category of damages appear novel, in any event. Nor special damages in the sum of Kshs. 31,311,270/-, which were not proved, in any event.

52. The Court of Appeal in David Bageine vs. Martin Bundi [1997] eKLR stated: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:
>
> "... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177 thus;
>
> "Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages, 'They have to prove it."

53. Further Chesoni, J (as he then was) stated in the case of Ouma v Nairobi City Council (1976) KLR 304:-

> " Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damages, Ratcliffe v Evans (1892) 2 QB 524 where Bowen L J said at pages 532, 533; -
>
> The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry." (Emphasis added)

See also; - Hahn -v- Singh [1985] KLR 716

54. It was the Plaintiff's evidence that due to the violent manner of eviction the college lost financial and student records, and equipment of high value. While PW1 admittedly did not witness the eviction or call an eyewitness, he relied on a bill of quantities dated 27.05.2005, invoices and or receipts in PExh.1. The Plaintiff readily admitted that he did not prepare the bill of quantities or invoices in respect of the estimated costs of the project or renovations in 2005 but did not call the makers. The Plaintiff's material in support of the claim lacked particularity concerning the loss or damages incurred by the Plaintiff in the eviction. Besides, a bill of quantities is merely an estimated cost of materials required in a project and not an actual representation of the costs of materials actually incurred in such project.

55. Concerning the receipts and invoices tendered, even assuming the asserted purchase of various items and equipment towards establishment the Plaintiff's college to be true, no inventory, assessment and or valuation report by an expert, itemizing the cost of installation of the Plaintiff's equipment and or damage thereto, during the eviction were produced. The police abstract (PExh.1) and cluster of

invoices and receipts were a poor substitute for cogent proof, first, of the prior existence/ownership of related items, and second, quantification of loss or damage thereto during eviction. The claim for special damages must fail.

56. Finally, regarding refund of the deposit, this was not expressly provided for in the lease agreement. However, DW1 did confirm in his evidence that the Plaintiff had paid a deposit of Kshs. 2,000,000/- allegedly utilized by the Defendant in the restoration of the premises after eviction of the Plaintiff. In the court's reading of Clause 1(j) & Clause 1(w) as read with Clause 3(i) of the lease, expenses required for such restoration of premises upon expiry of the lease were to be first certified by the lessor's architect, before demand was made to the lessee. Here, the Defendant does not appear to have followed this procedure before allegedly spending over Kshs. 6,000,000/- on restoration of the suit premises. No evidence in support of this expenditure was tendered by the Defendant.

57. Evidently therefore, despite the contentious parting of ways, the Defendant's unilateral utilization of the deposit appears unjustified, and the Plaintiff would be entitled to refund of the deposit, save for the fact that it does seem conceivable and plausible that, the Defendant may well have expended substantial funds toward restoring the suit premises previously used by the Plaintiff for over eight years, as what on all accounts was a fairly populated college.

58. Be that as it may, under Section 107 of the *Evidence Act*, the burden of proof, lay with the Plaintiff and in the court's considered view, his evidence did not support the facts pleaded concerning his key complaints and claim to damages. He therefore failed as the party with the burden of proof. See Wareham t/a A.F. Wareham (supra). The Plaintiff's claim for general and special damages must fail.

59. However, concerning the claim for the refund of the deposit, given the passage of time, it may not be feasible at this stage to require the Defendant to comply with Clause 1(j), of the lease agreement. In lieu thereof, the court will direct that the Defendant shall, within 120 days of this judgment, furnish the Plaintiff with a full statement of accounts in respect of the deposit sums applied to the restoration of the suit premises upon the eviction of the Plaintiff, and pay the balance of the deposit, if any, to the Plaintiff. Except for the foregoing regard, the Plaintiff's suit has failed and is hereby dismissed. On costs, the order that commends itself is that each party shall bear its own costs. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6TH DAY OF MAY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Akelo h/b for Mr. Otieno

For the Defendant: Ms. Kariuki h/b for Mr. Odongo

C/A: Erick