



REPUBLIC OF KENYA



Wamugi Stationers and Booksellers Limited v Wachira (Civil Case E006 of 2022) [2024] KEHC 5316 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE E006 OF 2022
FN MUCHEMI, J
MAY 16, 2024**

BETWEEN

WAMUGI STATIONERS AND BOOKSELLERS LIMITED PLAINTIFF

AND

KAMONJI KANG'ARU WACHIRA DEFENDANT

JUDGMENT

Brief Facts

1. By a plaint dated 1st April 2022, the plaintiff seeks for orders against the defendant for general damages for breach of lease terms; special damages of Kshs. 30,323,360/- and costs and interest of the suit.

The Plaintiff's Case

2. PW1, Priscilla Muiga in her witness statement dated 1st April 2022 testified that she had a business trading in the name and style of Wamugi Stationers and Booksellers Ltd situated on LR. No. Block III/2 Nyeri Municipality belonging to the defendant. Further, the witness stated that she entered into a lease agreement with the defendant through Rawa Estate and Managing Agents over the suit premises, for a term of 5 years and 3 months commencing on 1st July 2017 to 30th September 2022.
3. PW1 testified that she had a cordial relationship with the management agent until 30/3/2019 when the defendant who was the lessor asked her to vacate the premises with immediate effect. The witness stated that she rushed to court in Nyeri CM ELC Case No. 80 of 2019 where she obtained a court order directing the landlord and their agents to stop attempting to evict her and not to interfere with their peaceful use and occupation of the suit premises pending the hearing and determination of the said suit. PW1 stated that she served the defendant with the said order promptly.
4. The witness further stated that the defendant instituted a suit at the Business Rent Tribunal in Case No. 26 of 2019 and obtained an order to evict her thus disobeying the court order granted in her favour



- by the court. On 11/04/2019, the landlord evicted her without affording her a hearing at the tribunal or serving her with the said order and pleadings in the tribunal case. Additionally, she contends that she was unlawfully evicted from the suit premises 42 months before the lease expired.
5. PW1 stated that her stock of books, stationery machines were destroyed during the eviction leading to loss of business and property. She therefore seeks for damages in the sum of Kshs. 30,323,360/-.
 6. PW1 further stated that the defendant introduced her to the managing agent and that she used to pay rent to the defendant.
 7. On cross examination, the plaintiff stated that she was not aware that the defendant owns LR No. Nyeri Municipality Block III/11 (Block Three/Eleven) and not Block III/2 as per the lease agreement. The plaintiff further testified that she entered into the lease agreement and the same was signed by herself and Riziki Wambui of Rawa Estate and Managing Agents. The plaintiff admitted that she did not conduct any official search nor did she exhibit any authority or power of attorney given by the defendant to Riziki Wambui.
 8. The plaintiff further stated that CM ELC Case No. 40 of 2019 was dismissed for want of prosecution and that she never opposed the application for dismissal. She further testified that the eviction order from the tribunal was not valid, although she later admitted that she never inquired about its validity. The witness further said although the defendant filed an affidavit of service claiming to have served her with the order, she was not served with the said order. The witness further stated that she did not summon the process server for cross examination and neither did she appeal or review the orders of the tribunal.
 9. The plaintiff relied on the letter by Gachiri Kariuki & C. Advocates dated 23/4/2019 to show that there was a contract between her and the managing agent that bound the defendant.
 10. PW2, Simon Kimani Muui testified that he is a Certified Public Accountant trading in the name and style of MUY Auditors and that he received instructions from the plaintiff to assess the loss suffered as a result of the eviction. The witness stated that he took an account of the damaged assessed and the value of the assets at the time of the damage, profit of the business since the inception of the lease and the profit of the remainder of the period of the lease to find out whether there were unsettled claims by creditors.
 11. PW2 testified that he found that at the time of eviction, the stock was worth Kshs. 5,700,935/- with the stock in good condition valued at Kshs. 4,335,566/- stock that was damaged worth Kshs. 743,000.80/- and stock that was missing at Kshs. 612,298/-. The business operating assets were computers and their soft wares were valued at Kshs. 53,595/-. Furniture in the business was worth Kshs. 2,110,885 and one motor vehicle valued at Kshs. 640,188/-. The witness testified that save for the motor vehicle, the other properties were stolen during the eviction and the loss incurred was Kshs. 2,164,480/-.
 12. PW2 further testified that the business trade and other valuables (debts) owed by customers was at Kshs. 2,592,467/-. The customers did not make good the debts due to the closure of the business and that he assessed the goodwill of the business at Kshs. 6,562,202/- which was lost as the parties could not transit smoothly. The business was interrupted on 15/4/2019 three years before the expiry of the lease.
 13. The witness further testified that the profit made in the 2 years the business operated in the period ending on 31st March 2018 was Kshs. 4,370,812/-. He further assessed the profit for the following year ending on 31st March 2019 at Kshs. 4,816,271/-. The witness thus made a projection for the upcoming years with the year ending on 31st March 2020 at Kshs. 3,612,203/- and year ending on 31st March 2021, at Kshs. 5,052,896/-.



14. PW2 further testified that on 31st March 2022, profit was at Kshs. 5,558,185/- and projected the sum at Kshs. 4,168,638.38/- for the period ending 30/9/2022 which is the last day of the lease thus making the total profit at Kshs. 18,391,922/-. The witness assessed the total loss at Kshs. 30,323,360/-.
15. On cross examination, PW2 said that he did not belong to KASNEB and neither did he avail his professional or search certificate but said that he stamped the report. The witness further said that he relied on bank statements and records maintained by the business for his factual findings. Further that he was not present during the eviction and neither did he witness the value of the assets salvaged which were worth Kshs. 773,000/-. The witness admitted that he did not attach any documentation to show the value of the computers or the furniture.
16. PW2 testified that he assessed receivables and debt to the sum of Kshs. 2.9 million as the amount not recovered as the debtors could not trace the business personnel to pay the money they owed. He further testified that he obtained the said information from PW1. On re-examination the witness stated that the failure to attach supporting documents did not invalidate his report.

The Defendant's Case

17. The defendant relied on his witness statement dated 11th November 2022. He testified that he is not the proprietor of LR. No. Nyeri Municipality Block III/2 and neither did he enter into any lease agreement with the plaintiff. He further stated that he has never donated any power of attorney to Rawa Estate Agents that would enable them to deal with his property. Reference number Nyeri Municipality Block III/11 (Block Three/Eleven). According to the defendant, Rawa Estate Agents were not registered with the Estate Agents Registration Board under the provisions of the *Estate Agents Act* as he found out after the cause of action arose..
18. DW1 testified that the proprietor of LR. No. Nyeri Municipality Block III/11 (Block Three/Eleven) devolved to him from his deceased father. He further testified that upon getting the property, he sought to commence the process of formalizing the issues of management of the property with the said Rawa Estate and Managing Agents. The witness stated that the said estate managing agents have been most uncooperative and general withheld crucial information, including the details of tenancy agreement arrangements that existed before and during the period he took ownership of the property. The witness further stated that he was totally unaware of the formal tenancy agreement between Rawa Estate Agents and the plaintiff. He further stated that he was not a party to the lease neither was he consulted on its drafting or execution.
19. DW1 testified that on 11/4/2019, pursuant to the orders of the Business Premises Rent Tribunal Nyeri, the plaintiff was evicted from the premises LR. Nyeri Municipality Block III/11 after being served with the pleadings after the case was filed. Upon conclusion, eviction notice was served on 16th January 2016. The witness said that the plaintiff did not enter appearance in the matter after being served. The plaintiff never made an application to set aside the orders or lodge an appeal against them. Thus, the defendant argued that the eviction process was legal and valid given by a court of competent jurisdiction and enforced by the OCS Central Police station Nyeri and the county Commander of police, Nyeri County. The witness further argued that in the event the plaintiff felt aggrieved by the manner in which the police conducted the eviction, she ought to take relevant action against the County Commander of Police and OCS Nyeri Central Police Station
20. On cross examination, the witness stated that he did not produce an official search of his property Block III/11. DW1 stated that the letter dated 25/7/2019 from Gachiri & Co. Advocates to Rawa Agencies was written to the agencies by his advocates concerning rent collected from his property. He further stated that he did not give Rawa Estate Agents authority to manage the property on his behalf. It was



his own brother who was managing the said property for him as he was living in Canada then. DW1 further testified that Rawa Estate Agents remitted rent to him but not the whole amount. He added that he did not reject the said rent nor did he stop them from collecting rent at the time.

21. DW1 further stated that he obtained an order from the tribunal dated 10/4/2019 seeking eviction of the plaintiff as he became aware that she was a tenant but without a lease. The witness further testified that the order in CM ELC Case No. 80 of 2019 was never served upon him and in any event it was not a valid order as it referred to the wrong plot number. He further testified that he was not served with the order in ELC Case No. 40 of 2019.

Plaintiff's Submissions

22. The plaintiff submitted that the defendant has not expressly refuted evicting her from the said premises, he has only made mere denials of the unceremonial manner in which the plaintiff was evicted.
23. The plaintiff further submitted that it is not in dispute that she was a tenant at the suit premise, running the business of the bookshop known as Wamugi Stationers and Booksellers Limited pursuant to a lease agreement between herself and Rawa Estate and Managing Agents as a representative of the defendant. The plaintiff further argued that although the defendant attempted to discredit the locus of Rawa Estate and Managing Agents, he confirmed that he had given them express instructions to execute the said agreement.
24. The plaintiff submits that she never fell into any rent arrears or breached any of the stipulated terms of engagement of the said lease to justify any untimely eviction. Moreover, she stated that the defendant did not expressly deny forcefully evicting her from the said premises on 11/4/2019.
25. The plaintiff further argued that although the defendant had an issue with how Rawa Estate and Managing Agents were undertaking their duties as far as the business premises were concerned, that did not nullify the tenancy agreement and its stipulations.
26. The plaintiff submits that the defendant is being mischievous as he claims to have been issued with the ex parte orders of eviction on 10th April 2019 and proceeded to evict her the following morning on 11th April 2019. Essentially, the suit was heard and judgment entered on 10/4/2019 and orders were extracted on the same date. The said orders were then executed hurriedly the following morning and thus the defendant's allegations that she was served with the BPRT Case No. 26 of 2019 but never bothered to enter appearance or contest the case in any manner are falsehoods designed to hoodwink the court. The plaintiff further submits that the defendant's mischievousness is further exhibited by the letter dated 5th April 2019 whereby the defendant asked the executive officer of the tribunal as to whether she had responded to the Notice of Termination of tenancy. The rent inspector responded on the same date and thus the defendant cannot argue that he had served the plaintiff with the pleadings in sufficient time to grant her time to respond adequately.
27. The plaintiff argued that the term of the lease was for a period of 5 years and 3 months and therefore outside the purview of the BPRT tribunal as she was not a controlled tenant within the meaning of Section 2(1) of the BPRT Act. Therefore, the order issued by the tribunal in Nyeri BPRT No. 26 of 2019 dated 10th April 2019 was void ab initio. To support this contentions, the plaintiff relied on the case of Grosvenor vs Rogan Kampar cited with approval in Nairobi ELC Case No. 568 of 2008.
28. The plaintiff further argued that the defendant could not purport to shift blame to the OCS Nyeri Police station for her loss and damage to her property because the order from BPRT was specifically directed at the OCS. The defendant was solely liable as he is the party who sought the eviction orders. As such, the plaintiff contended that she established her claim to the standard required by law.



Defendant's Submissions

29. The defendant submitted that the lease agreement dated 1st July 2017 is invalid and could not transfer any estate interest as between the parties. The defendant stated that he is a stranger to the lease as he did not sign it. Furthermore, the lease was signed by one Riziki Wambui t/a Rawa Estate Managing Agents however the plaintiff never called her as a witness and neither did she produce any authority that the said Riziki Wambui had to execute the lease as his agent. Thus, the defendant relied on Section 3(3) of the Law of Contract Act and the case of Daudi Ledama Morintat vs Mary Christine Kiarie & 2 Others [2017] eKLR and submitted that the contract failed for lack of meeting of minds.
30. The defendant further relied on Section 48(1) of the Land Registration Act and submitted that no power of attorney had been produced by the plaintiff to show that the said Riziki Wambui had the authority to enter into the lease agreement on his behalf.
31. The defendant submitted that the lease had no connection as it referred to LR. No. Nyeri Municipality Block III/2 (Block Three/Two) whereas his property is Block Three/Eleven. He further added that the order in Nyeri BPRT No. 26 of 2019 gave the proper description of the property and further he made enquires at Nyeri land office which revealed that the property Nyeri Municipality Block III/2 was registered to Nyathirima Holdings but had since been surrendered to the government.
32. The defendant relied on the case of Kenya Women Finance Trust vs Isca Adhiambo Okayo [2014] eKLR and argued that he who alleges must prove and thus the onus was upon the plaintiff to show that the lease was valid which she failed to do.
33. Relying on the case of Marie Stopes (K) Limited vs Cecilia Kihara [2020] eKLR, the defendant argued that the lease was unregistered and therefore it cannot bind him notwithstanding the fact that he was not a party to it. As such, the defendant submitted that the purported lease could not afford any protection on the plaintiff and neither could any of its terms be employed to command liability upon him.
34. The defendant submitted that he was not aware of the orders issued in Nyeri CM ELC Case No. 80 of 2019 on 1st & 4th April 2019. In any event, the defendant stated that the orders do not relate to the suit property which renders the proceedings fatally defective. To support his contentions, the defendant relied on the case of Bartholomew Muyale vs Shem Nyambasi Mulefu & Another (1985) eKLR.
35. The defendant further relied on Order 40 Rule 4(3) of the Civil Procedure Rules and the case of Esther Kakonyo Wanjohi vs Julian Wambui Gakuru [2018] eKLR and submitted that he was never served with the said orders and neither did the plaintiff produce evidence of service.
36. The defendant submitted that the orders dated 10th April 2019 in Nyeri BPRT Case No. 26 of 2019 were valid as they have not been impugned. Further the defendant contended that the lease was fundamentally flawed that it cannot pass the basic threshold required by the law, rendering the tenancy a month by month tenancy. Further, the defendant denied issuing the lease, arguing that he had generally been kept in the dark by his siblings and by extension the said Riziki Wambui seeing that he lived abroad. Therefore he needed to put his affairs in order.
37. The defendant stated that the plaintiff was served by himself and the through the tribunal as early as 16th January 2019 therefore she had sufficient notice. The defendant further relied on the case of African Highland Produce Limited vs John Kisorio [2001] eKLR and argued that the plaintiff failed to mitigate her losses if she believed the eviction notice was wrong. Furthermore, the defendant relied on the case of Republic vs Cabinet Secretary Ministry of Education & Another ex parte Thadayo Obanda



[2018] eKLR and stated that the plaintiff never applied for review or appealed against the orders and thus she had to abide by the court orders.

38. The defendant submitted that the order was clear on the mode of eviction and provided for the proper officers to enforce compliance of the said orders. The order was put into effect in its full tone and tenure by the proper state agencies who were carrying out their statutory duty. The defendant relied on the case of *South Shore International Ltd vs Talewa Road Contractors & Another* [2013] eKLR and submitted that the role of the police was to maintain law and order and preserve peace during functions that are firmly bottomed in maintenance of law and order. The defendant argued that if there was any break up of law and order, the plaintiff ought to bring the said police officers to account for the damage to her property. Moreover, the defendant stated that the plaintiff testified that she made no report to the police for stealing or damaging her property to enable investigations to be carried out. Therefore the plaintiff failed to mitigate her losses and she was indolent in her conduct.
39. On the allegations that the tribunal did not have jurisdiction due to the fact that the tenancy was not a controlled tenancy, the defendant argued that the plaintiff did not argue that point at the tribunal despite being afforded an opportunity to do so. Furthermore, since the plaintiff claimed that the lease was valid, then she had become a periodic tenant and the agreement was subject to the jurisdiction of the tribunal.
40. The defendant submitted that the expert report dated 6th June 2020 was made over one (1) year after the eviction and that no effort was made to involve him in preparing the report. As such, the said report cannot bind him. The defendant further relied on the case of *Kings Group of Schools Limited & Another vs Kenya Women Microfinance Bank Limited* [2018] eKLR and raised the objectivity of the said report arguing that its objectivity was cast in serious doubt. Furthermore, the defendant stated that expert evidence is opinion evidence and it must be objective, independent and unbiased. To support this contentions, the defendant relied on the case of *Christopher Ndaru Kagina vs Esther Mbandi Kagina & Another* [2016] eKLR. The defendant submitted that the report listed several sources of information at paragraph 6 but did not annex any of the said sources to provide the substratum of acts to the court and to provide sufficient details for the court to make an objective determination. Furthermore the expert made inventories worth Kshs. 5.7 million including damaged stock without providing any particulars. He referred to computer and software plus furniture and fixtures amounting to Kshs. 2.1million but did not produce any details and documents. At paragraph 7(1)(e) the expert attributed trade and other receivables valued at Kshs. 2.5 million and attributed the loss to rumours which led to customers not bothering to pay their debts. Further in part e, the figures do not add up and the expert owned up to several arithmetic and typographical errors.
41. The defendant further submitted that the expert did not provide his qualifications so as to satisfy the court of his professional ability to make such a report and to bolster the credibility of his work further hurting the credibility of the report to support his contentions, the defendant relied on the case of *Kagina vs Kagina & 2 Others Civil Appeal No. 21 of 2017* [2021] KECA 242 (KLR) (3 December 2021). Thus the defendant submitted that the report is an afterthought, a hurriedly fashioned patchwork put into pleadings to fit into the scheme of things and ought to be disregarded. The defendant argued that he had no reasonable chance of providing his own expert report as the only raw data was uniquely in the possession of the plaintiff. Moreover, the defendant submitted that the prayers for general damages ought to be dismissed as the expert report is not credible. As for special damages, the defendant submitted that special damages must be pleaded and proved and no particulars of special damages were pleaded and none were proved.



Issues for determination

42. The main issues for determination are:-
- a. Whether the plaintiff proved her claim against the defendant on a balance of probabilities;
 - b. What is the quantum of damages entitled to the plaintiff?

The Law

Whether the plaintiff proved her claim against the defendant on a balance of probabilities

43. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

(108) the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

44. The burden of proof was discussed in the case of *Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua* [2015] eKLR where the court held as follows:-

As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account as provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant...The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.....In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/- the debt being claimed herein.

45. Similarly in the *Halsbury's Laws of England*, 4th edition, Volume 17 at paras 13 and 14:-

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he had failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.



As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

46. It is therefore, clear that the burden of proof in this case lies on the plaintiff on the balance of probability.

Whether the suit property in question was identified and whether it was fatal to the plaintiff's case.

47. The defendant argues that the misdescription of the property was fatal to the plaintiff's case. According to the plaintiff the suit premises she leased was Plot No. Block III/2 Nyeri Municipality whereas the defendant claims that his property is Nyeri Municipality Block III/11 (Block Three/Eleven). From plaintiff, property is described as Plot No. Block III/2 Nyeri Municipality. The order of the Business Premises Rent Tribunal, Case No. 26/2019 reads vacant possession of suit premises Kangaru Corner House Kamoji Kangaru Wachira Wing- Nyeri Municipality Block III/II. Although the defendant contends that the property is different it is not in dispute that the plaintiff's bookshop was on the suit premises belonging to the defendant. The landlord's notice to terminate or alter the terms of tenancy is addressed to the plaintiff who is said to be on the premises known as Kangaru Corner House Kamoji Kangaru Wachira Wing. The defendant wrote to the Executive Officer of the Tribunal dated 5th April 2019 inquiring whether the plaintiff had responded to the termination notice. He cited the property in his letter as Nyeri Municipality Block III/11 which was the correct description. The correspondence between the defendant and his advocates and the tribunal leave no doubt that the parties are referring to the same property. The description of the building, by the parties in their documents, the name of the premises as Kangaru Wachira Wing and the business name of the plaintiff Wamugi Stationers and Booksellers are sufficient proof that the parties referred to the same property.

Whether there existed a valid lease agreement between the parties herein.

48. It is the plaintiff's case that she entered into a lease agreement with the defendant through Rawa Estate and Managing Agents through agreement dated 1st July 2017. The defendant states that he was not a party to the lease, neither did he give Rawa Estate and Managing Agents any authority to act on his behalf or execute the lease.
49. Upon perusal of the lease dated 1st July 2017 and noted that the parties are Rawa Estate and Managing Agents on behalf of the lessor and Wamugi Stationers and Booksellers as the lessee. The lease is executed by one Riziki Wambui, the managing agent for Rawa Estate and Managing Agents on behalf of the lessor. Notably, the lease does not expressly name who the lessor was. Although the lease does not provide expressly the name of the defendant, the letter dated 23/4/2019, a letter by the defendant's advocates Gachiri Kariuki & Co. Advocates was addressed to Riziki Wambui t/a Rawa Estate and Managing Agents terminating her services effectively from 30th April 2019. Furthermore, the defendant in his testimony stated that although he did not instruct Rawa Estate and Managing Agents to execute the lease on his behalf, his brothers were the ones who were managing his affairs because he was living in Canada at the material time. In that scenario, the defendant's brothers were the defendant's authorised agents. On cross examination, the defendant admitted that he had instructed Rawa Estate and Managing Agents to collect rent but that the managing agent lacked accountability. It is quite clear from the defendant's evidence that he had instructed the firm of Rawa Estate and Managing Agents to collect rent from his premises. In another letter by the defendant addressed to the plaintiff he referred to the plaintiff as his tenant in L.R. Nyeri Municipality Block/III/11. The eviction orders in tribunal case obtained by the defendant against the plaintiff refers to the property in question as L.R. Nyeri Municipality Block III/11. I reach a conclusion that Rawa agencies was a legal player in the tenancy agreement and that she represented the defendant through his authorised agents.



Was the Lease Valid?

50. The defendant further contends that the fact that the lease agreement was for a period exceeding one year, it ought to have been registered. The Court of Appeal in the case of Civil Appeal No. 45 of 1984 *W J Blakeman Ltd vs Associated Hotel Management Services Ltd* (1985) KLR 156, Nyarangi JA stated in this regard:-

In *Souza Figueiredo & Co. Ltd vs Moorings Hotel Co. Ltd* [1960] 926, by an agreement the respondent let premises to the appellant for a term exceeding three years under the sub-lease, registration of the agreement was refused, the appellant took possession of the premises and it was later contended that the unregistered agreement was ineffectual to create any estate or interest and the contract to pay rent was unenforceable. It was held that whereas the agreement could not operate as a lease it could operate as an agreement inter parties which if followed by possession and payment of rent creates a tenancy from month to month.

51. The Court of Appeal in Civil Appeal No. 265 of 2010 *Chon Jeuk Suk Kim and Kim Jong Kyu vs E.J Austin and Others* [2013] eKLR held that an agreement of a lease or unregistered lease where the statute requires registration, though not conferring any legal or equitable estate was nevertheless enforceable as contract between the parties for the period stated in the document and the non-registration does not preclude the use of the document to describe the terms of the contract between the parties. The court stated: -

The decision in *Souza Figueiredo & Co. Ltd* was followed in *Clarke vs Sodhoni* [1963] EA 107 where the Court further held that the proviso of Section 40 for the Kenya Registration of Titles Ordinance that no lease for a period exceeding one year shall be valid unless registered does not exclude the use of unregistered lease to show the terms of the contract between the parties.

The case of *GosVenor vs Rogan- Kamper* [1974]-446 concerned the enforcement for a lease contrary to Section 40 of Kenya Registration of Titles Act and it was held that such a lease is valid between the parties although it gives no protection to the rights of third parties and the respondent held under the same terms as if a lease had been granted. In *Bachelor's Bakery Ltd vs Westland Securities Ltd* [1982] KLR 366 which concerned the enforcement of unregistered lease agreement it was held that such an agreement valid between the parties even in the absence of registration.

Those decisions show that an agreement of a lease or unregistered lease where the statute requires registration, though not conferring any legal or equitable estate is nevertheless enforceable as contract between the parties for the period stated in the document and the non-registration does not preclude the use of the document to show the terms of contract between the parties. Although those decisions relate to the construction of the provisions of the Registration of Tiles Ordinance Act they apply with equal force to the legal effect of an agreement for a lease of unregistered lease of a period of over two years under the Registered *Land Act* as Section 47 thereof is similar to the provision under consideration in those decisions.

52. On perusal of the agreement dated 1st July 2017, the terms stipulate that the lease was for a fixed term of 5 years and three months. It is therefore my considered view that the agreement dated 1st July 2017 was not a valid lease owing to its non-registration. However, it is trite law that such a lease is still enforceable as a contract between the parties in a periodic tenancy to which it converts for lack of registration. As such, the intention of the parties in the contract, the substance of the agreement and the conduct of the parties must be considered in determining the terms of operation. On perusal of the agreement dated 1st July 2017, the parties are Riziki Wambui on behalf of the lessor and Wamugi Stationers and Booksellers



Limited. Although the defendant did not sign the said agreement personally, there is evidence to show that Rawa Estate and Managing Agents were executing the lease on his behalf.

53. I have carefully perused the evidence of the parties and noted that the plaintiff did not adduce any evidence of breach of any clause of the agreement. She blamed the defendant for evicting her unlawfully. However, the orders from the tribunal exonerate the defendant from any such blame in that he had valid orders of eviction against the plaintiff. I do not find any evidence of breach of the agreement on part of the defendant in relation to the eviction.

Is the Plaintiff entitled to damages?

54. The plaintiff blamed the defendant for causing damage to his machines, furniture, stock and for loss of business and good will. She called PW2 one Simon Kimani Muui, a certified public Accountant as he described himself although he did not produce his testimonials in court. Being an expert, the court in dealing with his evidence will be guided by case law. This evidence was challenged by the defendant in that the report of the loss and damage was made about one year after the eviction and that the defendant was not involved. It is imperative to note that the role of an expert is to assist the court with objective and impartial opinion, which duty overrides the expert's obligation to the instructing party.

55. The defendant relied on the case of the Court of Appeal of Mutonyi vs Republic (1982) KLR 203 at page 210 where it held: -

Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like. Section 48 of the *Evidence Act* (Cap 80) provides that where inter alia, the Court has to form an opinion upon a point of "science, art or as to identity or genuineness of handwriting or finger or other impressions" opinions on that point are admissible if made by persons "specialist skilled" in such matters. In Cross on Evidence 5th edition at page 446, the following passage from the judgment of President Cooper in *Davie vs Edinburgh magistrates* (1933) SC 34, 40 as scenting the functions of expert witnesses: Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence. So an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

- a. Establish by evidence that he is specially skilled in his science or art.
- b. Instruct the court in the criteria of his science or art, so that the Court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
- c. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.

56. The witness testified that his objective was to assess the value of all the physical non-current assets damaged and lost during the eviction, the closing inventories for sale lost from the business, intangible assets that the business had established, profit foregone for the remaining of the lease period, to ascertain the amount of business debts lost as a result of abrupt closure of business and to find out if there were unsettled rent claims from the business. PW2 listed the sources of information as bank statements, purchase invoices, sales receipts, fixed assets register and records, summary reports from the directors and historical financial statements.



57. From the plaintiff's report, the value of the stock that was damaged was worth Kshs. 612,289/-, the assets were destroyed and stolen during the eviction was valued at Kshs. 2,164,480/-, the loss suffered under the business's trade and other receivables was valued at Kshs. 2,592,467/-. The good will of the business at the time of eviction was valued at Kshs. 6,562,202/- and the projections in business for the remaining months on the lease was assessed at Kshs. 18,391,922/-. Therefore the witness summed up the total loss to a tune of Kshs. 30,323,360/-.
58. Having considered the plaintiff's expert report, I am of the view that the same does not disclose the basis of how each of loss was assessed. Although the expert witness listed the documents he relied on, none of the documents were annexed to the report to give the court a chance to interrogate the loss. For items such as assets that were destroyed or stolen during the eviction, the plaintiff did not produce items such as receipts, ledgers or books of accounts to show its income and the value of the damaged articles and assets as well as loss of business.
59. It is on record that the expert witness relied on information given to him by the plaintiff yet the basis for that information has not been given anywhere in the plaintiff's evidence. There was no nexus in the evidence of PW2 and the plaintiff. In my view; the plaintiff had a duty to lay the basis of the claim of special damages and then leave the rest to the expert to explain how he assessed the loss. The credibility of the expert evidence was put in question in that he avoided disclosing the date he visited the place where the items were kept one year after the eviction. He kept saying "sometime in 2019." The failure to involve the defendant was very serious omission on part of the plaintiff. Had the plaintiff involved him, the defendant would have mitigated his responsibility on the loss, if any.
60. The eviction was done in the presence of the officer in charge of Nyeri Police Station and the Nyeri Police County Commander. It is trite law that the duty of the police in such an exercise is restricted to keeping law and order. The officer had no responsibility of taking stock of the plaintiff's property that was being removed from the premises. PW1 did not tell the court whether she was present at the shop at the time eviction was being carried out. If PW2 was present, she would have prevented and mitigated her loss, if any. It was not explained why the expert was called to assess the loss one year after the eviction.
61. It is imperative to note that the eviction was lawful since the defendant had obtained an order of the tribunal. As such, the plaintiff is not entitled to general damages or to the loss of business claim.
62. It is my considered view that the expert evidence was not credible in that it was biased, exaggerated and not founded on documentary evidence. It was done one year after eviction which period may have exposed the plaintiff's property to further damage, assuming that the properties were damaged on the material day. The role of an expert witness is to assist the court with objective and impartial opinion, which duty overrides the expert's obligation to the instructing party.
63. As for special damages, the law requires that the same be pleaded and strictly proven. The plaintiff failed to discharge this burden of proof.
64. Consequently, I find that the plaintiff has not proved her case against the defendant and it is hereby dismissed with costs.
65. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY AT THIKA, DATED AND SIGNED THIS 16TH DAY OF MAY 2024.

F. MUCHEMI



JUDGE

