



Sony Driving School Limited v Funan Construction Co Limited & another (Civil Case 56 of 2014) [2024] KEHC 14177 (KLR) (Civ) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 56 OF 2014

AN ONGERI, J

NOVEMBER 8, 2024

BETWEEN

SONY DRIVING SCHOOL LIMITED PLAINTIFF

AND

FUNAN CONSTRUCTION CO LIMITED 1ST DEFENDANT

DANIEL GACHERU NDIANGUI 2ND DEFENDANT

JUDGMENT

1. The plaintiff filed this suit vide plaint dated 11/3/2014 amended on 15/4/2024.
2. The plaintiff sued the two defendants, Funan Construction Co. Ltd and Daniel Gacheru Ndiangui seeking the following remedies;
 - i. A declaration that the forcible eviction of the plaintiff from the suit premises by the defendant was illegal and unlawful.
 - ii. General and pecuniary damages for wrongful termination of the plaintiff's tenancy and illegal eviction of the plaintiff from shop number B6, B7 and B8 within the premises known as Salvation Army Business Centre situated along Landhies/Racecourse Road.
 - iii. Punitive/vindictory/exemplary damages for wrongful termination of the plaintiff's tenancy and illegal eviction of the plaintiff from Shop number B6, B7 and B8 within the premises known as Salvation Army Business Centre situated along Landhies/Racecourse Road.
 - iv. An order for immediate release and restitution of the plaintiff's movable goods/chattels wrongly appropriated and/or illegally detained by the defendants.



- v. Compensation in the sum of kshs.1,300,000/= being the value of the plaintiff's movable goods/chattels wrongfully impounded/appropriated and/or illegally seized and/or detained by the defendants.
 - vi. Refund of the premium goodwill in the sum of kshs.4,400,000/= paid by the plaintiff to the defendants.
 - vii. Damages for any excessive, wrongful and/or illegal distress that the defendants may have purported to have exercised towards recovery of the disputed rent arrears.
 - viii. The costs of this suit.
 - ix. Any other relief that this honorable court may deem just and fit to grant.
3. The case proceeded exparte since the defendants did not enter appearance or file a defence.
 4. The plaintiff called one witness PW 1, James Gitonga Njenga who is a director of the plaintiff company.
 5. PW 1 adopted his witness statement dated 11/3/2024 as his evidence in chief.
 6. In the said statement PW1 stated that at all material times the 1st and 2nd defendants were the landlords of the plaintiff in respect to premises known as Salvation Army Business Centre Shop Number B6, B7 and B8 situated along Ladhies/Racecourse Road where the plaintiff had let out from the defendants three retail shops. It had been agreed by the parties that the plaintiff was to pay rent on a monthly basis.
 7. Prior to the plaintiff taking over possession and actual occupation of the premises in November 2012, the plaintiff dutifully performed all its contractual obligations including the payment of the agreed goodwill of Kshs. 4,400,000. It was further agreed that the plaintiff would immediately upon taking possession commence the re-partitioning works on the rented premises that would be necessary for the plaintiff's business and would only commence paying the agreed monthly rent immediately the defendants had installed connection of the required utilities and water supply.
 8. That this arrangement worked well until 28/5/2013 when the defendants proceeded to lock the plaintiff out of the rented premises.
 9. The defendants thereafter started issuing threats of eviction to the plaintiff and refused to remove the padlocks placed on the main grill door to the rented premises.
 10. That the closure of the shops prompted the plaintiff to institute proceeding before the Business Premises Rent Tribunal, Nairobi BPRT Case No. 372 of 2013 and on 31/5/2013 the tribunal issued a court order directing the defendants to re-open the suit premises and further restraining and prohibiting the defendants from terminating, removing, evicting and/or levying distress, attaching, harassing, locking, and/or in any manner whatsoever interfering with the plaintiff's quiet possession and enjoyment of the suit premises pending the hearing of the complaint.
 11. The defendants were served with the said orders on 31/5/2015 but decided not to comply with the orders and instead decided to terminate the plaintiff's tenancy. The defendants consequently continue to detain the plaintiff's chattels/movables which were inside the rented premises.
 12. That on 18/2/2014 M/S Wamahiu Kimeria & Company Advocates acting for the defendants wrote to the plaintiff demanding rent arrears in the sum of Kshs. 2,530,000 in respect of rent arrears for the period running from 1/1/2012 to 2/2/2014 overlooking the fact that the plaintiff had only been in possession of the subject premises from November 2012. The same letter purported to instruct M/S Sterling Auctioneers to proceed and levy distress yet the plaintiff was not in possession of the same.



13. The plaintiff filed written submission stating that the Defendants despite being promptly and properly served with the court order issued on the 31st May, 2013 by Hon. D. Mochache, Chairperson in Nairobi BPRT Case No.372 of 2013 *Sony Driving School Limited vs Funan Construction & Daniel Gacheru Ndiangu* directing them to re-open the subject suit premises and further restraining them from terminating the Plaintiff's tenancy, still refused to comply with the said order and decided to go ahead and irregularly and unlawfully terminate the Plaintiff's tenancy.
14. The Defendants further terminated the Plaintiff's tenancy without issuing any notice or proper notice at all to justify if they had valid reasons to terminate the Plaintiff's tenancy.
15. The plaintiff submitted that the fact that the defendants locked the plaintiff from accessing the subject premise amounted to constructive eviction. The defendants forceful re-entry to the premises without issuing the plaintiff with any eviction notice and putting in a new tenant without first obtaining a court order is in contravention of the plaintiff's enforceable legal right and equitable right of possession of the subject premise.
16. The plaintiff argued that where the tenant has not voluntarily surrendered the physical possession of the rented premises the landlord must obtain an eviction order, since the tenant has not ceased enjoying any constructive occupation or exercising dominion over the rented premises neither can it be said that a tenant forfeited its tenancy upon the lapse of the time specified even in the case of regular termination notice being issued.
17. The plaintiff argued that vide a letter dated 18/2/2014 the defendants' advocates purported to instruct M/S Sterling Auctioneers to proceed to levy distress for the disputed rent arrears.
18. Further, that the said distress did not comply with the express mandatory provisions of Section 5 of the *Distress for Rent Act* Cap 293 Laws of Kenya which stipulates that

“ Any person having rent in arrears and due upon a demise, lease or contract after the ending or determination of the demise, lease or contract, may distrain for the arrears after the ending or determination in the same manner as he might have done if the demise, lease or contract had not been ended or determined: Provided that distress under this section shall be made within the space of six months after the determination of the demise, lease or contract and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due” .
19. The plaintiff submitted that at the time of the illegal termination of the Plaintiff's tenancy, the Plaintiff had paid to the Defendants a premium goodwill in the sum of Kshs.4,400,000. The plaintiff argued that they are therefore entitled to the refund of the good will for the loss of opportunity suffered through a premature and illegal; termination of its tenancy.
20. The plaintiff argued that they have discharged the burden of proof as provided by Section 3 (2), Section 107 and Section 109 of the *Evidence Act* and in the circumstances the prayers sought should be granted as prayed.
21. The plaintiff's case is not controverted since the defendant did not adduce any evidence.
22. I find that the plaintiff has proved his case to the required standard in civil cases that is on a balance of probabilities.
23. The issues for determination is as follows;
 - i. Whether plaintiff has proved its case to the required standard.



- ii. Whether the plaintiff is entitled to the orders sought against the defendants.
24. On the issue as to whether the plaintiff has proved its case, I find that the plaintiff has established that the eviction was unlawful.
 25. The plaintiff's evidence which is not controverted is that it dutifully performed all its contractual obligations including the payment of the agreed goodwill of Kshs. 4,400,000.
 26. Further, that this arrangement worked well until 28/5/2013 when the defendants proceeded to lock the plaintiff out of the rented premises.
 27. The plaintiff further stated that the defendants thereafter started issuing threats of eviction to the plaintiff and refused to remove the padlocks placed on the main grill door to the rented premises.
 28. That the closure of the shops prompted the plaintiff to institute proceeding before the Business Premises Rent Tribunal, Nairobi BPRT Case No. 372 of 2013 and on 31/5/2013 the tribunal issued a court order directing the defendants to re-open the suit premises and further restraining and prohibiting the defendants from terminating, removing, evicting and/or levying distress, attaching, harassing, locking, and/or in any manner whatsoever interfering with the plaintiff's quiet possession and enjoyment of the suit premises pending the hearing of the complaint.
 29. The defendants were served with the said orders on 31/5/2015 but decided not to comply with the orders and instead decided to terminate the plaintiff's tenancy. The defendants consequently continue to detain the plaintiff's chattels/movables which were inside the rented premises.
 30. That on 18/2/2014 M/S Wamahu Kimeria & Company Advocates acting for the defendants wrote to the plaintiff demanding rent arrears in the sum of Kshs. 2,530,000 in respect of rent arrears for the period running from 1/1/2012 to 2/2/2014 overlooking the fact that the plaintiff had only been in possession of the subject premises from November 2012.
 31. Further, that the same letter purported to instruct M/S Sterling Auctioneers to proceed and levy distress yet the plaintiff was not in possession of the same.
 32. I find no reason not to rely on the plaintiff's evidence since this case proceeded *ex parte*.
 33. In the circumstances, I find that the plaintiff has proved its case to the required standard in Civil cases.
 34. On the issue as to whether the plaintiff is entitled to the orders sought against the defendants, I find that the plaintiff is entitled to Compensation in the sum of kshs.1,300,000/= being the value of the plaintiff's movable goods/chattels wrongfully impounded/appropriated and/or illegally seized and/or detained by the defendants.
 35. The plaintiff is also entitled to a refund of the premium goodwill in the sum of kshs.4,400,000/=which was paid by the plaintiff to the defendants.
 36. On the issue as to whether the plaintiff is entitled general damages for breach of contract. I find that no general damages are payable for breach of contract.
 37. In the case of Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR, the Court held that :-

“... as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *Dharamshi v Karsan* [1974] EA 41, the Court of Appeal held that general damages are not



allowable in addition to quantified damages with Mustafa JA expressing the view that such an award would amount to duplication”

38. It follows that no punitive/vindictory/exemplary damages for wrongful termination of the plaintiff’s tenancy and illegal eviction of the plaintiff from Shop number B6, B7 and B8 within the premises known as Salvation Army Business Centre situated along Landhies/Racecourse Road are payable in the circumstances.
39. The claim for damages for excessive, wrongful and illegal distress is also not payable.
40. On the prayer for restitution of the goods attached, there is no evidence that the same are still available. The said orders are not granted since courts do not act in vain.
41. However, the defendant to compensate the plaintiff Ksh.1,300,000 being the value of the said goods.
42. The plaintiff is also entitled to a refund of the premium goodwill in the sum of Kshs.4,400,000/=which was paid by the plaintiff to the defendants.
43. Judgment be and is hereby entered in favour of the plaintiff against the defendant in the sum of Ksh.5,700,000 plus costs of this suit and interest at court rates from the date the plaint was amended (15/4/2024) until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

