



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MOMBASA**

**ELC CASE NO.36 OF 2016**

**JACOB KALIUNGA M'MWIRABUA.....PLAINTIFF**

**VS**

**WARDA SAID ABUD MSALAM.....1ST DEFENDANT**

**COUNTY GOVERNMENT OF MOMBASA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

**THE PLAINTIFF'S CASE**

1. The plaintiff commenced this suit by a plaint dated 16<sup>th</sup> March,2016 and amended on 8<sup>th</sup> May 2017.The plaintiff has pleaded that since 2000, he was a tenant enjoying a controlled tenancy in respect of one shop on L.R No. Mombasa/Block XVII/219, Mombasa Island, within the meaning of the Landlord and Tenant (Shops, Hotels and Catering establishments) Act Cap 301 Laws of Kenya from where he operates a shop named 'Junior Grocery'. The plaintiff avers that there was a tenancy termination dispute in Mombasa Business Premises Rent Tribunal Case Number 128 of 2015 JACOB KALIUNGA M'MWIRABUA v SAID ABOUT AWADH which was determined in the plaintiff's favour on 11<sup>th</sup> December,2015 by an order withdrawing the Landlord's notice with costs.

2. The plaintiff avers that on 14<sup>th</sup> March 2016 at 10.00 a.m, the defendants, using hired goons and the 2<sup>nd</sup> defendant's officials and 'askaris' in uniform, under the superintendent of M/S Halima J and Gilbert, maliciously, forcibly and wrongfully evicted the plaintiff from the suit property in spite of protestation from the tenant who had in his possession the order of the BPRT in the aforesaid case, dismissing the landlord's previous notice. The plaintiff contends that the eviction was malicious, callous and wrongful in that no notice as envisaged under section 4 of Cap 301 was served on the plaintiff after the withdrawal of the previous notice on 11.12.2015 with costs. The plaintiff avers that the 2<sup>nd</sup> defendant is not privy to the tenancy between the plaintiff and the landowners, nor has it initiated a process for condemnation and or demolition of the structure standing on plot Number Mombasa/Block XVII/219, Mombasa island, whereat it could afford the tenant a hearing before condemning him unheard.

3. The plaintiff has enumerated particulars of conspiracy and or collusive conduct on the part of the defendants and avers that pursuant to the acts complained of, he has suffered loss, damage and abrupt and wrongful termination of his tenancy. The plaintiff has given the particulars of loss and damage totaling Kshs. 2,530,280/= as follows:

- (i) Cost of repair and restoration of the business premises Kshs.138,600/=
- (ii) Stock loss Kshs 1,592,280/=
- (iii) Cash loss Kshs.276,000/=
- (iv) Breakages Kshs 113,600/=
- (v) Loss of business for 14 days Kshs. 409,800/= and which the plaintiff claims.

4. The plaintiff prays for judgement against the defendants jointly and severally for the following orders:

A. A mandatory injunction at the interim stage, to compel the 1<sup>st</sup> defendant to restore the outer shop door at its expense and re-admit and unconditionally put into possession the plaintiff with regard to the premises where he has since 2000 carried on 'Junior Grocery' shop business, on Mombasa/Block XVII/219, Mombasa Island;

B. Kshs. 2,530,000/=

C. A declaration do issue that the County Government of Mombasa is not privy to the tenancy in respect of one shop (otherwise known as 'Junior Grocery) between the plaintiff and the 1<sup>st</sup> defendant or any other land owners of Mombasa/Block XVII/219, Mombasa Island; and consequently, its involvement in the callous, malicious and forcible wrongful eviction of the plaintiff without following due process is illegal, null and void; and that the defendants are jointly and severally liable to the plaintiff in damages;

D. A permanent injunction do issue, to bar the 1<sup>st</sup> defendant by herself, or by her relations, beneficial owners, agents, servants, employees, workmen or hired goons, from wrongfully entering upon and evicting the plaintiff from one shop known as Junior Grocery on Mombasa/Block XVII/219 Mombasa Island; or otherwise dealing with the suit premises in any manner whatsoever, to the detriment of the plaintiff vis-à-vis the terms of the tenancy he enjoys in the suit premises, pending the hearing and determination of the application for injunction, and ultimately the main action;

E. Exemplary damages for trespass upon goods and for breach of the tenancy contract and for malicious and wrongful eviction and/or wrongful attempted termination of a controlled tenancy on Mombasa/Block XVII/219, Mombasa Island, in contravention of the law;

F. An order do issue, directed to the OCS, Central police station, Mombasa Island, requiring him/ her to supervise the restoration of the outer door and re admission and putting into possession of the plaintiff in respect of the demised premises 'Junior Grocery' on Mombasa/ Block XVII/219, Mombasa Island, so as to prevent a breach of the peace while restoring the status quo ante.

G. Cost of this suit are provided for.

5. At the hearing, the plaintiff testified as PW1. He stated that he suffered a damage of Kshs. 2.6 million due to the defendants' acts. He testified that he was not present when his property was destroyed since he was away in Meru, but that his colleague, Peter Karatho was present and called him about the incident. The plaintiff stated that he was the only one who was evicted from the suit premises.

6. During cross-examination by Mr. Yunis advocate for the 1<sup>st</sup> defendant, the plaintiff stated that he was paying rent to Abud Said and not to any agent. He confirmed that Abud Said was deceased and that the 1<sup>st</sup> defendant was the deceased's daughter. He further confirmed that the suit premises belonged to the deceased and not the 1<sup>st</sup> defendant.

7. The plaintiff reiterated that it was the agents of the 2<sup>nd</sup> defendant who removed things from the plaintiff's shop, adding that they did so under the supervision of the 1<sup>st</sup> defendant. He further confirmed that Aboud Said (deceased) had other children.

8. When cross-examined by Mr. Lumatete, learned counsel for the 2<sup>nd</sup> defendant, the plaintiff admitted that the house he had rented did not belong to the 2<sup>nd</sup> defendant. That he was paying rent to the owner of the premises, and had gotten license from the 2<sup>nd</sup> defendant. PW1 stated that he had sued the 2<sup>nd</sup> defendant because they invaded his premises without notice. He however confirmed that he was not present at the time, and was only informed by a colleague. He confirmed that he had no notice from the 2<sup>nd</sup> defendant and had no receipts because they were taken away.

9. PW2 was Peter Gitonga Karatho, an employee of the plaintiff at the grocery shop. He testified that on 14.3.2016, he was at Kongowea market when he received a call that employees of the 2<sup>nd</sup> defendant had invaded the plaintiff's grocery shop and ordered them to vacate. That he rushed there and found the eviction taking place. That he took photographs of what was taking place before reporting to the police. He produced the business permit, the police Abstract and the photographs among other documents as exhibits.

10. During cross examination, PW2 Stated that the premises belonged to Aboud Said, but the business belonged to the plaintiff. He stated that he was paying rent to an agent and did not have a receipt in the name of Aboud Said. He confirmed that he did not see the 1<sup>st</sup> defendant on the material day and did not know if she was present. He stated that he had collected cash amounting to Kshs.276,000/= from the sale of Miraa and the shop, though he did not have the receipts showing the sales. He testified that the police referred them to the Business Premises Rent Tribunal, adding that nobody was arrested for damaging their goods. He denied that there was a notice stating that the premises were in a deplorable state and could collapse.

11. PW2 further stated that he took photographs of the back of the askaris because he feared that he could be beaten if he took their faces. Although he stated that they were filing K.R.A returns, he could not remember the profit they made for the year, or the previous 3 months.

12. PW3 was William Kailikia, the proprietor of Wim Builders Ltd. He testified that he was instructed by the plaintiff to carry out some repair work valued at Kshs.138,600/=/. He produced the quotation, agreement, NCA certificate, invoice, certificate of incorporation and a receipt as exhibits. He was also cross examined by Mr. Yunis.

13. PW4 was SILAS OKWIRY, an accountant working with Sica Consultancy services who were instructed by the plaintiff to prepare a report regarding the incident that occurred on 14.3. 2016.He stated that he carried out an investigative report and came up with his findings which he produced as an exhibit. He was also cross-examined and re-examined.

#### **THE 1<sup>ST</sup> DEFENDANT'S CASE**

14. The 1<sup>st</sup> defendant filed a defence on 29<sup>th</sup> May, 2017 and an Amended defence filed on 19<sup>th</sup> September, 2017. The 1<sup>st</sup> defendant denied the Plaintiff's claim and specifically denied carrying out the acts complained of by the Plaintiff. The 1<sup>st</sup> Defendant further denied that the

Plaintiff suffered any or any substantial loss or damage as alleged or at all and averred that the Plaintiff is not deserving of the prayers sought in the amended plaint. It is the 1<sup>st</sup> defendant's contention that the Plaintiff's suit against her is misconceived, fatally defective and amounts to a gross abuse of the court process.

15. The 1<sup>st</sup> Defendant testified as DW1 and adopted her witness statement dated 23<sup>rd</sup> March, 2018 and filed on 26<sup>th</sup> March, 2018 as her evidence-in-chief. Her evidence is that she is one of the heirs to the estate of the late Said Abud Awadh who was the proprietor of the property known as Mombasa/Block XVII/219 which comprises of two rental shops. That the suit property belongs to the estate and is managed by her brothers who are the legal representatives of the estate of the deceased.

16. The 1<sup>st</sup> defendant stated that she was aware that the Plaintiff herein had repeatedly defaulted in payment of rent. She however denied evicting the plaintiff from the suit property, adding that she was not present at the premises on 14<sup>th</sup> March, 2016 when the Plaintiff was allegedly evicted. The 1<sup>st</sup> defendant further testified that she never instructed the 2<sup>nd</sup> Defendant to evict the Plaintiff, though she knew that the 2<sup>nd</sup> Defendant had issued notices for repair and/or renovation of the premises since they were in a dilapidated state.

17. The 1<sup>st</sup> Defendant stated that on or about 28<sup>th</sup> October, 2015, officers from the Department of Land, Planning & Housing, County Government of Mombasa, visited the suit premises and conducted a routine inspection of the building and the 1<sup>st</sup> defendant was subsequently served with a Form PPA 7 requiring her to carry out repairs on the subject property belonging to the estate. That on 3<sup>rd</sup> November, 2015, the Plaintiff was served with an enforcement notice requiring the Plaintiff and all other occupants to vacate from the suit premises. That the Plaintiff and all other occupants of the premises were reminded of the notice by the Estate, but the Plaintiff ignored the said statutory notice. That the 2<sup>nd</sup> Defendant in exercise of its statutory obligation took action to enforce its notices to protect the public and the Plaintiff from peril and obvious danger. The 1<sup>st</sup> Defendant further contends that the eviction of the Plaintiff from the suit premises was carried out by the 2<sup>nd</sup> Defendant in accordance with the law and that the Plaintiff never challenged the notices in any court. The 1<sup>st</sup> Defendant added that the Plaintiff defied the eviction order and returned to the premises within two days, and is therefore in illegal occupation of the suit premises contrary to the notice by the 2<sup>nd</sup> Defendant thereby endangering his own life and those of innocent members of the public who frequent the premises oblivious of the risk posed by the dilapidated structure that may collapse any time. It is the 1<sup>st</sup> defendant's evidence that the Plaintiff's suit is brought contrary to the law and is aimed at sanitising the Plaintiff's forceful occupation of the suit property thereby preventing the estate from carrying out overdue repairs. The 1<sup>st</sup> Defendant's evidence is that the Plaintiff runs a ration shop with no capacity to stock the kind of goods that he alleges to have been lost or destroyed or make the kind of profits that he claims to have lost. That the Plaintiff is using this suit for purposes of unjust enrichment. The 1<sup>st</sup> Defendant also states that she knew that the Plaintiff has sub-let the premises contrary to the Tenancy Agreement and the goods allegedly lost do not belong to the Plaintiff.

18. The 1<sup>st</sup> Defendant produced the documents filed on 26<sup>th</sup> March, 2018 as D.exhibits 1-3. The documents are Form PPA 7 Notice dated 28<sup>th</sup> October, 2015; Notice dated 3<sup>rd</sup> November, 2015 and Form PPA 7 dated 29<sup>th</sup> January, 2016. The 1<sup>st</sup> Defendant was also cross-examined by Mr. Kimani the advocate for the Plaintiff, and Ms. Ambetsa the advocate for the 2<sup>nd</sup> Defendant.

## **2<sup>ND</sup> DEFENDANT'S CASE**

19. The 2<sup>nd</sup> Defendant filed a defence dated 10<sup>th</sup> May, 2016 in which it denied the Plaintiff's claim in toto. The 2<sup>nd</sup> Defendant states that none of its servants and/or agents were involved in any eviction on 14<sup>th</sup> March, 2016 and further states that it is not privy to the tenancy agreement, if any ever existed, as between the Plaintiff and the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant avers that the reliefs sought by the Plaintiff cannot issue against the 2<sup>nd</sup> defendant. During the hearing, the 2<sup>nd</sup> Defendant opted not to call any witness.

## **SUBMISSIONS**

20. Upon the close of the case, the parties through their respective advocates requested for time to file their written submissions. The Plaintiff filed submissions on 2<sup>nd</sup> August, 2021 while the 2<sup>nd</sup> defendant filed on 5<sup>th</sup> October, 2021.

## **ANALYSIS AND DETERMINATION**

21. The court has carefully considered the evidence on record, the submissions made and the applicable laws. From the pleadings and the evidence adduced, the issues that call for determination in my view are:

- i. Whether the attempted eviction of the Plaintiff was lawful or not.
- ii. Whether the Plaintiff is entitled to the orders sought.

## **WHETHER THE ATTEMPTED EVICTION OF THE PLAINTIFF WAS LAWFUL OR NOT**

22. In this case, it is not in dispute that the Plaintiff was a tenant in the premises on plot LR. NO. MOMBASA/BLOCK XVII/219.

23. The Plaintiff's evidence was that on 14<sup>th</sup> March, 2016 the Defendants maliciously, forcibly and wrongfully evicted him from his shop in the suit premises. It was the Plaintiff's evidence that there was a tenancy termination dispute in Mombasa BPRT case No. 128 of 2015 which was determined in the Plaintiff's favour on 11.12.2015. The Plaintiff's case is that the attempted eviction on 14<sup>th</sup> March, 2016 was carried out notwithstanding the outcome of the BRT case and without following due process by the defendants.

24. The 1<sup>st</sup> defendant admitted that she knew the Plaintiff as a tenant of the suit premises. The evidence of the 1<sup>st</sup> defendant was that the suit property belonged to the estate of her deceased father and that the property was being managed by her brothers who are the legal representatives of the estate of the deceased. Although the 1<sup>st</sup> Defendant denied evicting the Plaintiff or being involved in the attempted eviction of the Plaintiff, it was the evidence of the 1<sup>st</sup> Defendant that the Plaintiff was repeatedly in default of payment of rent. The 1<sup>st</sup> Defendant further confirmed that officers from the 2<sup>nd</sup> Defendant visited the suit premises and conducted a routine inspection of the building on 28<sup>th</sup> October, 2015 and subsequently served the 1<sup>st</sup> Defendant with a Form PPA 7 requiring her to carry out repairs on the suit premises since it was in a dilapidated state. It was the evidence of the 1<sup>st</sup> Defendant that on 3<sup>rd</sup> November, 2015, the Plaintiff was served with an enforcement notice requiring the Plaintiff and other occupants of the suit premises to vacate. The 1<sup>st</sup> Defendant accused the Plaintiff of ignoring the said statutory notice and stated that the 2<sup>nd</sup> Defendant in exercise of its statutory obligation took action to enforce its notices to protect the Plaintiff and the public from peril and danger. The 1<sup>st</sup> defendant's evidence was that the eviction of the Plaintiff was carried out by the 2<sup>nd</sup> Defendant in accordance with the law.

25. In this case, the 2<sup>nd</sup> Defendant opted not to adduce any evidence in support of its case.

26. In the instant case, there is no denial that the Plaintiff is a tenant in the suit premises. It is also not in dispute that the Tenant/Landlord relationship in existence was a controlled tenancy. Evidence has been adduced to show that there was a tenancy termination dispute in Mombasa BPRT Case No. 128 of 2015 between the Plaintiff and the Landlord. The dispute before the Tribunal was determined in favour of the Plaintiff herein on 11.12.2015 by an order withdrawing the Landlord's notice with costs. There was no evidence adduced to show that the Plaintiff was served with a fresh notice as envisaged under section 4 of the Landlord and Tenant (shops, Hotels and Catering Establishments) Act Cap 301 before the attempted eviction on 14.3.2016.

27. In this case, the 2<sup>nd</sup> Defendant opted not to call any witness or offer any evidence while 1<sup>st</sup> Defendant on her part blamed her brothers for the attempted eviction. The 1<sup>st</sup> Defendant also justified the attempted eviction by 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant's evidence was that there were structural defects in the suit premises that required the tenants therein, including the Plaintiff, to vacate to allow repairs to be undertaken on the premises. In her evidence, the 1<sup>st</sup> Defendant stated that she was aware that the 2<sup>nd</sup> Defendant had issued notices for repair and/r renovation of the suit premises since they were in a dilapidated state, and that she was served with a Form PPA 7 requiring the 1<sup>st</sup> Defendant to carry out repairs on the subject premises. The 1<sup>st</sup> Defendant added that the Plaintiff was served with an enforcement notice requiring him and all occupants to vacate from the suit premises.

28. The court has perused the said Form PPA 7 that was produced as an exhibit. I note that the same required the 1<sup>st</sup> Defendant to give notice to the tenants to vacate from the premises. There was however, no evidence indicating that the Plaintiff herein was served with notice as required. The notice that was produced by the 1<sup>st</sup> Defendant as an exhibit was directed to one Mr. Kuria Kaburu who is not a party to this suit and who is certainly not the Plaintiff herein. The 1<sup>st</sup> Defendant and/or the Landlord of the premises was under an obligation to issue the Plaintiff with notice before evicting him. It is evident that the attempt to evict the Plaintiff from the suit premises was not proper, and therefore unlawful.

29. In *Gusii Mwalimu Investment LTD -Vs- Mwalimu Hotel Kisii Limited* Civil Appeal No. 160 of 1995, the Court of Appeal observed as follows:

***“I have no hesitation, whatsoever, in holding that the Landlord did all it could to obtain possession unlawfully and the learned Judge was entirely right in making the orders he made. If what the Landlord did in this case is allowed to happen, we will reach a situation when the Landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra judicially. A court of law cannot allow such state of affairs, whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession, the Landlord has to obtain an order of a competent court or a statutory Tribunal for possession.*”**

30. In the absence of a court order, I find that the Defendants acted in total disregard of the law when they unlawfully attempted to evict the Plaintiff from the suit premises.

31. In the case of *Caudonia Supermarket Ltd –Vs- Kenya National Examination Counsel (2000) 2 EA 351*, the Court of Appeal also held that in order to terminate a controlled tenancy, the Landlord had to comply with section 4 of Cap 301. The Court further held that even if the tenant had lost its status as a protected tenant, the Landlord was still obliged to give notice. From the evidence on record, and being guided by the above authorities and the law, it is my finding that the attempted eviction of the Plaintiff from the suit premises was illegal and unlawful.

#### **WHETHER THE PLAINTIFF IS ENTITLED TO THE ORDERS SOUGHT?**

32. The cause of action herein is one of wrongful eviction by the Defendants from the demised premises whose tenancy the Plaintiff contends is controlled under Cap 301. It is the Plaintiff's case that the Defendants failed to follow due process in attempting to evict him, and that in the process, he suffered loss and damage.

The action by the Defendants happened soon after withdrawal of a notice of termination that was issued under the law in BPRT Case No. 128 of 2015.

Among the prayers sought by the Plaintiff are cost of repair and restoration of the premises, loss of stock and cash, breakages and loss of business for 14 days, all amounting to Kshs.2,530,280/=. I find that the damages claimed by the Plaintiff under this heading are quantifiable as the Plaintiff has clearly pleaded in the Amended plaint. In my view, the clam is one of special damages which must not only be

specifically pleaded but must also be proved with a degree of certainty and particularity.

33. In the case of **Richard Okuku Oloo –Vs- South Nyanza Sugar Co. LTD [2013] eKLR**, the Court of Appeal observed thus:

***“We agree with the learned Judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must depend on the circumstances and the nature of the act complained of.***

***In the Jivanji Case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited –v- Murunga & Others Nairobi CA No. 192 of 1992 (ur) appears in the Jivanji Case:***

***“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council –vs- Nakaye (1972) EA 446, Ouma –v- Nairobi City Council 1976 (KLR) 297 and the latest decision of this court on this point which appears to be Eldama Ravine Distributors Limited and another –v- Chebon Civil Appeal Number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said this in his judgment:***

***“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma –v- Nairobi City Council [1976]KR 304 after stressing the need for a Plaintiff in order to succeed on a claim for specified damages, Chesoni J quoted in support the following passage from Bowen LJ’s Judgment at 532 – 533 Ratcliffe v Evans (1892) QB 524, an English leading case of pleading and proff of damage,***

***“The character of the acts themselves which produce the damage, and the circumstances under which those 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.”***

34. In the instant case, it cannot be disputed that the Plaintiff has pleaded the damage allegedly suffered as required by law. The only issue that arises is whether the Plaintiff has strictly proved the same as required. From the pleadings, the sum claimed, in my opinion, is in the nature of special damage that needed to be strictly proved.

35. The first limb of the special damage claimed by the Plaintiff is the cost of repair and restoration of the business premises. The Plaintiff has claimed a sum of Kshs.138,600/= and has produced as exhibits an Agreement for repair work dated 21<sup>st</sup> March, 2016, an invoice from Wim Builders dated 25<sup>th</sup> March, 2016 and a petty cash voucher dated 25<sup>th</sup> March, 2016. The invoice produced indicates the cost of materials as Kshs.97,467/= and labour cost of Kshs.41,135/=. There was no indication of what the said materials were and the Plaintiff has not produced any evidence in the form of receipts to show how the figure of Kshs.97,467/= was arrived at. The court, in my view, cannot simply accept the global figure given without any proof of what those materials were and their individual costs. For those reasons, I am of the view that this claim has not been strictly proved and must therefore fail.

36. The second and third limbs are claims for stock loss of Kshs.1,592,280/= and cash loss of Kshs.276,000/= respectively. These figures are found in the special audit report that was produced as an exhibit. It is however, not clear how these figures were arrived at. For example, there were no supporting documents produced such as stock card or cash book or receipts. In my view, it was necessary for the Plaintiff to show the court the primary documents that led the auditor to arrive at the global figure indicated in the audit report and now claimed. This court cannot take the summary of stock given and the alleged cash lost as shown in the special audit report as the gospel truth in the absence of any supporting documents. In the absence of any primary documents that were kept by the Plaintiff if any, and which were used to generate the special audit report, this court finds that the Plaintiff has not strictly proved these special damages claims. The requirement of the law is that special damages must not only be specifically pleaded, but must also be strictly proved. Therefore, the court cannot merely rely on guesswork.

37. The other limb claimed by the Plaintiff is breakages at Kshs.113,600/=. From the evidence on record, and in particular the photographs that were produced as exhibits, it is apparent that in the course of the attempted eviction of the Plaintiff, the Plaintiff’s goods were strewn outside the shop. No doubt, some of the goods must have been damaged. I am therefore prepared to award the Plaintiff the sum of Kshs.133,600/= claimed. This is based on the evidence on record and the manner the attempted eviction was undertaken.

38. The Plaintiff has also claimed a sum of Kshs.409,800/= for loss of business for 14 days. I note that in the report that was prepared and produced by PW4 as P.Exhibit 12, the days the business was said to have remained closed was given as 12 days. It is not clear then why the Plaintiff is making a claim for the same for 14 days and not 12 days. This is not only contradictory, but it is also clear from the report that the figures were based on guesswork. There were no accounts produced by the Plaintiff to support his daily average income. In my opinion, the report ought to have been based on concrete facts such as bank statements and not based on assumptions and generalities. I am therefore unable to award the said special damage claim which is based on sheer guesswork. I find that the Plaintiff has failed to prove this limb of the claim to the required standard and the same must fail.

39. Besides the claim for special damages as outlined above, the Plaintiff also claims general and exemplary damages for trespass upon his goods and for wrongful eviction or attempted eviction. The Plaintiff has invited the court to award him a sum of Kshs.10,000,000/= as general damages.

40. In this case, the Plaintiff has proved, and the court has found that the attempt to evict the Plaintiff from the demised premises was

unlawful. No doubt, the Plaintiff is entitled to general damages for the illegal action undertaken by the defendants. However, the sum of Kshs.10,000,000/= asked by the Plaintiff is in my view on the higher side. In any case, the Plaintiff could not have suffered much damage having returned into the premises in less than fourteen (14) days. The damage or loss suffered in my view was very minimal. Having taken into consideration the circumstances of this case, the court awards the Plaintiff a nominal figure for general damages in the sum of Kshs.500,000/= with interest at court rates from the date of Judgment until payment in full.

41. The Plaintiff is also entitled to an order of permanent injunction restraining the defendants from wrongfully entering upon and evicting the Plaintiff from the demised premises without following due process and subject to the plaintiff complying with the terms and conditions of the tenancy in place.

42. Final orders:

Judgment is entered for the Plaintiff against the Defendants jointly and severally in the following terms:-

- a) Kshs.113,600/= for breakages.
- b) Kshs.500,000/= being general damages.
- c) Permanent injunction directed at the defendants, their servants and or agents restraining them from wrongfully entering upon and evicting the Plaintiff from the shop known as 'Junior Grocery' on Mombasa/Block XVII/219, Mombasa Island, without following due process, and subject to the Plaintiff complying with the terms and conditions of the demised premises.
- d) The defendants shall meet the costs of the suit.

43. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 3RD DAY OF DECEMBER, 2021 IN THE PRESENCE OF:**

CA: Ndegwa

M/s. Kimani h/b for S. M. Kimani for Plaintiff

N/A for 1<sup>st</sup> Defendant

Kazungu for 2<sup>nd</sup> Defendant

**C. K. YANO,**

**JUDGE.**

**Court**

Judgment delivered virtually in the presence of Ms. Kimani for the Plaintiff and Mr. Kazungu for the 2<sup>nd</sup> Defendant and in the absence of the 1<sup>st</sup> Defendant.

**C. K. YANO – JUDGE**

**3.12.2021**