**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 267 OF 2005**

**MICHAEL WAIHENYA……..…….....…….PLAINTIFF**

**VERSUS**

**BAOBAB BEACH RESORT MOMBASA LTD t/a**

**BAOBAB BEACH RESORT…….DEFENDANT**

**J U D G M E N T**

1. By a Lease Agreement dated the 12.01.2002, the plaintiff became the tenant of the defendant upon those premises situate at Diani, Kwale, and described as Plot No.90 or just Baobab Beach Resort. The term of the demise was agreed to be five year and six month. Although executed by the parties, the lease appears not to have been registered. The agreed monthly rent was Kshs.20,000.00 and a term for termination was incorporated in the lease to the effect that either party would be at liberty to terminate the lease by serving upon the other a Notice of three month. The user of the demised premises was disclosed as *hair dressing, massage and parlor services.*

2. Sometimes on the 22.9.2004, the defendant notified the plaintiff, among other tenants, that that the hotel was due for closure to enable renovations be undertaken for the period between 11.04.2005 and 1.07.2005. On the 23.03 2005, the defendant once again wrote to the plaintiff and reminded him to give a confirmation that he was acceptable to the proposal for closure for the purposes of refurbishment and beseeched him to give the confirmation by the 303.2013. By his letter dated the 26.03.2005, the plaintiff confirmed his acceptance of the proposal and voluntarily vacated on the understanding that he could retake possession upon the refurbishment works being completed. The complaint is that having so vacated, he was denied the option to come back on the allegations that the defendants intended to run own hairdressing, massage and parlor services in a modern way. That is the short history culminating in filling of this suit through the paint dated 9.12.2005.

3. The plaint asserts that the plaintiff invested heavily on the tenancy which resulted in his business being rated among the top service sections of the hotel and generating a monthly income of Kshs. 200,000.00 The plaintiffs claim is that having been convinced to leave and pave way for renovation, and the renovation having been completed, he was never reinstated as agreed for which reason the plaintiff takes the view that he was unlawfully evicted and the defendant therefore committed a breach of contract. The breach was pleaded to be inferable from termination of the tenancy before time effluxed and without issuing a termination notice as mandated under the contract and under cap 301.

4. On the basis of the pleaded breach, the plaintiff added that he had suffered loss and damage calculated at kshs 200,000 per month from April 2005 to the date of reinstatement. In the alternative it was prayed that he be granted an order for reinstatement to the premises, damages for breach of contract, costs and interests.

5. The suit was resisted by the defendant on the basis of the statement of defence dated13.01 2020 and filed the next day. The filling of that defence came that late because the matter proceeded on the mistaken position that a defence had been filed when indeed none was in the court file. It was at the point of preparing a judgment that a defence could not be trace a development which necessitated that parties address the court on the way forward. When parties attended court and perused the court file it was confirmed by them that the defence was not only missing from the court file but neither of them had a copy in their office files. It was also discovered that that two lists and bundles of documents filed by the plaintiff and the one filed by the defendant were also missing from the court file. It was the agreed by consent that the defendant files afresh defence and the missing documents be availed by the parties. That was indeed done and there is now a complete file.

6. In that defence the position taken was that there was a termination notice dated 23.03.2005 pursuant to which the plaintiff vacated the premises and therefore the defendant takes the position that it had had no obligation to reinstate the plaintiff to the premises, had committed no wrong against the plaintiff and therefore the plaintiff could not have suffered any loss or damage. Strict proof was therefore invited. It was also pleaded that the suit was incompetent and misconceived on the basis that at the time of filling there was no tenancy in force.

**Evidence led by the plaintiff**

7. In prosecuting his case, the plaintiff gave his evidence and called two other witnesses. The evidence by the plaintiff was to the effect that he was a tenant of the defendant upon the suit premises till the month of April 2005 when he moved out at the request of the defendant to facilitate refurbishment of the premises. In his evidence he moved out with the promise and expectation to resume occupation once the renovation was complete. He was however not allowed back despite demand and thus considered his tenancy to have been unlawfully terminated hence breach of contract.

8. The plaintiff said that he had invested heavily in the business, approximated at Kshs 500,000 and would generate gross income of some Kshs 200,000 out of which he would pay his four employees and carry home Kshs 120,000 monthly. He claimed that income as the loss suffered for the period beginning 1.7.2005 till 30.6.2007 together with general damages. He produced the tenancy agreement, letters intimating intention to renovate and his demand letter as PExh 1,2 & 3.

9. When cross-examined, the plaintiff admitted that the letters asking him to vacate did not indicate that he would go back upon completion of the works but he took it that he would go back because that was the practice. He said that he took away his goods from the shop including books of accounts which were still in his possession at the time of giving evidence but had not produced the books of accounts. He however insisted that he would make Kshs 200,000 per month but the same would vary from month to month depending on the tourism sessions. In re-examination he said that he had documents to show income and value of the fittings and furniture and that the claimed income took into account the different seasons.

10. PW2, Mayasa Khalid Tajiri, said she was a spouse and business partner to the plaintiff and the person who was managing the business. She said they kept books of accounts and that she handed over the proceeds of the business to the plaintiff. She added that the business was closed temporarily to enable renovation but the defendant refused to allow them back when works completed despite the fact that the tenancy was yet to lapse.

11. On cross-examination, the witness, the witness said she did not avail the receipts for purchase of the equipment, that she would handle the finances of the business and that the income was Kshs.200,000 per month. She reiterated that the letter seeking vacant possession by the 23.5.2005 did not say that the plaintiff was entitled to reinstatement. In re-examination the witness said that exhibit P2 did not promise reinstatement just as it did not indicate termination of the then subsisting lease.

12. PW3, Pamela Webuye, testified to have been an employee of the plaintiff as a beautician therapist since January 1997. She said there were two other employees who handled massage and gave the pricing of their services adding that at pick season they would make up to Kshs 12,000 per day. She said that in1997, the hotel closed temporarily for renovation and they were allowed back after the works but when another closure occurred in 2005, they were not allowed back. In remuneration, she said she earned a salary of Kshs 5,000 and commission of 10% of what she generated. No much came out of cross-examination and re-examination and the case was then closed.

**Evidence by the defendant**

13. For the defendant, a witness statement was filed on the 26.01.2016 by one Barry Mwangola, a retired Deputy General Manager of the defendant. He confirmed being conversant with the facts of the case having signed the letters to the plaintiff and that he knew the plaintiff as having been a tenant of the defendant as pleaded. He confirmed that there were letters asking the plaintiff and other tenants to leave for renovation asserting that that was a termination letter, and that the plaintiff complied therewith without reservations and voluntarily moved out. He termed the termination lawful and that if the plaintiff was aggrieved he ought to have filed a reference at the tribunal which failed to do. He pointed out that during renovation the plaintiff did not pay rent which was waived and never showed an intention to want the premises back. He gave the reason for not accepting the plaintiff back to be that after renovation the premises became totally different.

14. In cross-examination, the witness confirmed that by the plaintiff's letter accepting to move out, he expressed the desire to come back after the works were complete but the defendant never wrote back to say they would not accept him back as a tenant. He said that the defendant's letters to the plaintiff gave an approximate period needed for renovation but did not give the contractual notice to vacate. When shown exh. P3, he denied having seen the letter before being so shown. The witness confirmed that the plaintiff was carrying out business at the premises even before he was employed and that he did not register any complaints about the plaintiff's tenancy which was due to expire in June 2007. In re-examination, the witness said that he never received any demand before the action was filed.

**Submissions by parties**

15. The submissions by the plaintiff were dated 30.09.2016 and filed on 03.10.2016 with further submissions being filed on27.02.2016. Those by the defendant were dated 10.11.2016 and filed on the 11.11.2016. I have had the benefit of reading the said submissions in line with the pleadings and proceedings taken. In those submissions both sides have cited to court decisions to support the rival positions.

16. The plaintiff has identified three issues for determination by the court which issues the defendant has adopted by making submissions along the said issues. The issues as viewed by the parties are; whether there existed a tenancy between the parties; whether the tenancy was validly terminated and what is the quantum of damages payable.

17. In the submissions as filed and highlighted, the plaintiff maintains that there was indeed a tenancy as shown in the agreement dated 12.01.2002, produced as PExh 1. That fact is not contested but confirmed by the defendant in the evidence of DW1. On termination, the plaintiff take the position that the letters produced as PExh 2 and DExh 1&2 did not amount to termination notices but were rather requests for temporary closure to enable renovation be undertaken and that using same as termination was deceitful. It was the plaintiff's position that the tenancy was a controlled one and under cap 301 could only be terminated by issuance of a statutory notice failure of which made the termination dishonest and fraudulent and thus an illegality. The decision in **Mistry Amar Singh vs Kulubya (1963) EA** was cited for the law that a court should never allow itself to be used as an instrument of enforcing an illegal contract however the illegality is brought to its attention.

18. On quantum of damages, it was urged that the plaintiff was deprived of possession for the defendant to carry out the same services and therefore the decision was propelled by the desire for financial gain hence a ground had been laid for the award of aggravated/punitive damages. It was equally urged that the evidence of earnings at Kshs 200,000 was never rebutted at all and therefore there had been financial loss which the court should award as general damages. It was stressed that the loss for the period of 28 months and more be awarded. The plaintiff proposes a sum of Kshs 10,000,000 for general damages with reliance being placed on the decision in **Mwaura Mwiruri vs suera flowers ltd (2014)eKLR** on when to award damages for loss of earning capacity. In the further submissions, what is urged is that failure to produce documents or difficulties in computing damages should never be a bar to awarding merited damages. For such propositions of the law, counsel cited to court the decisions in **Godfrey Kamau Kimani vs Ruth wambura & others, Mbs HCCC No. 27 of 2015** as well as **Jacob Ayiga Maruja vs Simeon Obayo(2005)eKLR.**

19. For the defendant, the submissions offered were tailored along the issued as crafted by the plaintiff with an emphasis that the defendant did issue a notice to the plaintiff dated 22.9.2004 and again on23.3.2005 to enable it undertake renovations for a period but did not guarantee the plaintiff possession after the works. While admitting the existence of a tenancy between the parties, the defendant denies that the tenancy was controlled pursuant to section 2 of cap 301because it was reduced into writing and was for a period in excess of five years. The existence of the tenancy was however admitted and acknowledged save that it was lawfully terminated and by the time the suit was filed there was no tenancy to ground this suit.

20. On whether the termination was valid, submissions were offered to the effect that the tenancy having not been a controlled one, there was no legal requirement to issue a formal termination letter and that the two letter served upon the plaintiff sufficed. It was the added that if the tenancy was indeed controlled then the plaintiff's remedy was a reference to the tribunal and not this court. The decision in **Ann Mwaura vs David Wagatua (2010)eKLR** was cited for the position that the jurisdiction to determine the validity of a notice was vested in the Tribunal and not ordinary courts. The decision in **Mistry Amar (supra)** was said to be inapplicable in this case.

21. On quantum of damages, it was submitted that there was no evidence of Kshs 200,000 per month but that the earning differed from month to month. It was submitted that the claim seem to seek damage s for lost earning/profits but the quantification of same at 5,600,000 had not been substantiated. It was in particular pointed out that even though the plaintiff had filed a list of documents including bank statements, balance sheet and Revenue payment receipts, the same were never produced or used as evidence. Counsel cited to court the decision in **Delta Haulage services vs Complant ltd (2015)eKLR** as well as **Halsbury's laws of England** for the proposition that merely filling a document does not make it evidence but a document must be produced in court and evidence led on it.

22. In addition it was urged that the court ought to differentiate between lost earning and loss of earning capacity which are available in the area of personal injury claims unlike here the decisions in **Nicholas Njue Njuki vs Eliud Mbugua (2014)eKLR** and **Karauri vs Ncheche (1995-1998)1 EA 87** were cited to support the position. Based on such submissions, the defendant urged the court to find that the plaintiff had failed in his duty to prove the case and prayed that the suit be dismissed with costs.

23. With the leave of the court the defendant filed further submissions in which issues were taken with the with the plaintiff's claim for general damages for mental anguish resulting from breach of contract and the prayer for loss of business it being contended that no evidence was adduced to merit such an award. The prayer for dismissal was then reiterated.

**Issues, analysis and determination**

24. In this suit, there being the common position that there was in deed a lease between the parties for a period of five years six month due to terminate at the end of June 2007, what remains for determination is whether that lease was lawful terminated and if not whether the plaintiff is entitled to an award of any damages.

25. The agreement between the parties as shown in the lease dated 12.01.2002 was indeed in writing, for a period of more than five years but was never registered. The dispute is whether that lease created a controlled tenancy or not. Cap 301, section defines a controlled tenancy to be one which '*has not been reduced into writing; or which has been reduced into writing and which is for a period not exceeding five years; or contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or relates to premises of a class specified under subsection (2) of the section but excludes a tenancy to which the government, community or local authority is a party'*.

26. I interpret the provision to make any agreement reduced into writing, even if it is for a period in excess of five years, but provides for termination within five year, for reasons other than breach of a covenant, to be a controlled tenancy and subject to the requirements of cap 301. In this case therefore I do find that the defendant was in law bound to serve upon the plaintiff a statutory notice of intention to terminate and giving reasons. It would be after such a notice that a disputing tenant would file a reference to challenge the notice. In this case however the defendant instead of giving a termination notice wrote a letter seeking a temporary closure of the plaintiff's shop for a specific and clear reason- enable a '***major renovation program'*** in 2005. The two letters never intimated an intention to terminate but availability of the premises to ensure the '***works commence on schedule'.*** The tone and tenure of the two letter, even though clearly not on the prescribed statutory for, conveys no intention to terminate. I do therefore find that there was never a valid termination of the plaintiff's tenancy when the renovation works completed and the plaintiff not reinstated to the shop. That I find to constitute a breach of contract by the defendant.

27. I also find that when the reason given was renovation of the premise which could not be done with the tenant in situ, with approximate time lines, the plaintiff was had every reason and expectation that one refurbished he would as of course resume possession and operation of the business in the premises. When that expectation was made to evaporate, it only obvious that the plaintiff's plans were disarrayed which I consider an injury to him. All in all I do find that the plaintiff was wronged and injured by the defendant in the manner he was led to vacate his leased tenement only to be evicted without the contractual notice. For that injury I do find that the plaintiff is entitled to damages.

**What are the damages available to the plaintiff?**

28. In his plaint, the plaintiff has prayed for special damages calculated at Kshs 200,000 per month from April 2005 till date of reinstatement

and in the alternative an order for reinstatement, general damages, costs interests and any other remedy deemed just by the court. From the onset, it is clear that the lease having been time bound and such tenure having ended on its own terms as the matter pended in court no order for reinstatement can lawfully and justly be made without the court casting itself as all set to impose a contract between the parties. I do find that the alternative prayer for reinstatement is not available and the prayer is thus dismissed.

29. On special damages the law remains that, these must not only be specifically pleaded but must also be strictly proved[1]. In this matter there was a pleading for loss at Kshs.200,000 per month, even though there was never precise computation of the sum due. That however does not make the claim to be damages at large. They are not at large because as the plaint was being crafted, the alleged loss was known just at the period thereof must have been easy to discern the moment the lease period ended. It was therefore incumbent upon the plaintiff to compute his loss with exactitude and make a specific prayer for a definite sum. That was not done hence I doubt if the limb of specific pleading was satisfied. On the second requirement of strict proof, the plaintiff utterly failed on hid duty to court. I note that financial statements including bank statements and accounting statement together with tax were indeed filed but no mention was made of them in evidence nor was any attempt made to produce them despite prodding by the defendant's counsel of the 1st and 2nd witnesses. The effect is that there was, at the close of the plaintiff's case, nothing to show how much was the monthly taking by the plaintiff. Without such critical evidence I can only say that no special damages were proved as the law demand and therefore the prayer cannot succeed and is therefore dismissed.

30. The above findings leave me with only one substantive prayer, general damages. The purpose for which damages for breach of contract as a remedy exist is to compensate the wronged party in a way that puts him in the same position he would have been if not for breach of contract. In ***Consolata Anyango Ouma vs South Nyanza Sugar Company Ltd [2015] eKLR*** the court said:-

> **"As a general, principle the purpose of damages for breach of contract is, subject to mitigation of loss, that the claimant is to be put as far as possible in the same position he would have been had the breach not occurred. This principle is encapsuled in the Latin maxim/phrase, *restitutio integram*".**

31. The remedy developed from the principle of law that no injury should lie without a remedy. In commercial contract, there is invariably a benefit that persuades a party towards a deliberate breach. Like in this case, the evidence led by the plaintiff, which was never controverted, was that the defendant intended to use the same premises to carry out the same business. I see in that a financial benefit being the propelling factor. Where such is the case, it is only fair that a benefit improperly obtained should not be permitted to be retained by the wrongdoer.

32. I take notice that the defendant had been in the premises for more than five year before he was deceitfully made to leave. During all that time I am prepared to accept that he was making profits otherwise there would have been nothing to propel him to continue occupation and the tenancy. When that business was scuttled by the breach, there followed as a natural consequence financial losses that the plaintiff ought not to be denied merely because he has not availed documents to show his profits.

33. As the court of appeal said[2], *'a wrongdoer must take his victim as he finds him. He cannot be heard to say that the injured should not get his entitlement merely because he did not develop more sophisticated business method…a victim does not lose his remedy in damages because the quantification is difficult'.*

34. Having taken into account the finding that the termination was wrongful and deceitful, and that the defendant was accentuated by prospects of financial benefits from the breach, and even in the absence of the precise taking by the plaintiff, being fully aware that assessment of general damages is at the discretion of the court but a difficult task, I do assess damages in the sum of Kshs.2,000,000.

35. In conclusion I do enter Judgment for the plaintiff against the defendant in the sum of Kshs.2,000,000 with costs and interests. The interest, I direct, shall be computed from the date of the suit till payment in full.

**Dated, signed** and **delivered** at **Mombasa** this **8th** day of **May 2020**

**P J O OTIENO**

**JUDGE**

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[1] *Caltex Oil (Kenya) Limited vs. Rono Limited [2016] eKLR*

[2] Wambwa vs patel (1986)KLR 336