



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1260 OF 2004

GUMCHEM (K) LIMITED.....PLAINTIFF

-VERSUS-

YOUNG TRADERS LIMITED.....1ST DEFENDANT

STEPHEN KINUTHIA WAITHAKA.....2ND DEFENDANT

JUDGEMENT

1. The plaintiff herein lodged a suit against the 1st and 2nd defendants vide the plaint dated 2nd May, 2000 and sought for the following reliefs:

a) General damages for breach of contract and loss of business the quantum thereof to be determined by this Honourable Court at the Bank interest rate of 25% p.a. from 22nd September, 1998 until payment in full.

b) Special damages of Kshs.11,150,530/ on account of unlawful and malicious damage of the plaintiff's properties, as pleaded in the plaint with Bank interest rate of 25% p.a. from 22nd September, 1998 until payment in full.

c) General damages for breach of contract in respect to the lease, the quantum thereof to be determined by this Honourable Court from 22nd September, 1998 until payment in full.

d) Costs of the suit.

e) Such other and/or further orders that this Honourable Court may deem fit and just to grant in the unique circumstances of the matter.

2. The 1st defendant is sued in its capacity as the owner of the premises known as L.R. No. 209/8686 at Young Traders Godown near City Stadium ("the subject premises") while the 2nd defendant is sued in his capacity as the director of the 1st defendant.

3. The plaintiff pleaded in its plaint that sometimes in the year 1986 he took a portion of the subject premises as a tenant on a five (5)-year lease for purposes of operating its business of *inter alia*, manufacturing industrial adhesives and agricultural chemicals.

4. The plaintiff further pleaded in its plaint that since using the subject premises as a tenant, it undertook various constructions and made various improvements on the said premises, in the manner listed under paragraph 6 of the plaint.

5. It was pleaded by the plaintiff that sometime on or about the 22nd day of September, 1998 the 2nd defendant organized for and led a gang to enter into the subject premises and demolished/damaged the plaintiff's properties. The plaintiff termed the aforementioned acts as illegal, malicious and brutal, by setting out the particulars thereof in its plaint.

6. It was further pleaded by the plaintiff that subsequently the 2nd defendant was arrested and charged with the offence of malicious damage to property and that the conduct of the defendants amounted to a breach of the lease agreement, particularly the term that the plaintiff would enjoy quiet possession of the subject premises.

7. The plaintiff stated in its plaint that the defendants ultimately evicted it from the subject premises in an illegal manner.

8. Upon service of summons, the 1st and 2nd defendants entered appearance and filed their statement of defence on 9th June, 2000 to refute the plaintiff's claim.
9. The defendants pleaded in their statement of defence that while it is true that the parties entered into a tenancy agreement at all material times and that the 2nd defendant was charged with the offence of malicious damage to property, the additional averments made in the plaint are denied.
10. The defendants further pleaded that it is the plaintiff who breached the terms of the lease by failing to pay its rent on a regular basis.
11. The record shows that the 2nd defendant died in July, 2000 and hence the suit against him abated. In the circumstances, the plaintiff proceeded with the case against the 1st defendant.
12. At the hearing of the suit, the plaintiff summoned two (2) witnesses while the 1st defendant called four (4) witnesses.
13. John Peter Kamau Ruhangi (PW1) adopted his signed witness statement as evidence and stated that he is the founder member and Managing Director of the plaintiff company.
14. The witness stated in his evidence that the subject premises was invaded by goons on the material date and that the plaintiff's goods were destroyed, and that the plaintiff was eventually evicted from the subject premises despite having occupied it for over 22 years.
15. The witness further stated that the City Council had lodged a complaint to the effect that the subject premises had not been maintained to the requisite health standards and that he was charged before the City Court with the nuisance but that he eventually carried out the necessary renovations in a bid to remove the nuisance.
16. It was the testimony of PW1 that upon eviction of the plaintiff from the subject premises, he lodged a complaint which led to the arrest and arraignment of the 2nd defendant in court to face criminal charges of malicious damage of property, for which he was ultimately acquitted. According to the witness, the state later sought leave to appeal against the acquittal of the 2nd defendant upon his request but that the 2nd defendant died before the application for leave to appeal could be heard and determined.
17. It is further the testimony of PW1 that subsequently, he engaged the services of Top Assessors and Investigators to assess and value the damage occasioned to the properties damaged by the defendants, and that the said loss/damage was assessed at Kshs.11,065,530/; following which the witness paid the assessor for the services rendered and a receipt was issued to that effect.
18. The witness gave evidence that at the time the properties of the plaintiff were destroyed, he had no other business running and that he had existing loan arrears in the sum of Kshs.15,000,000/ which resulted in the sale of the securities to realize the debt owed, including a lorry that was doing deliveries on behalf of the plaintiff.
19. In cross-examination, the witness stated *inter alia*, that following the acquittal of the 2nd defendant in the criminal court, he lodged a complaint to the effect that there was corruption since the 2nd defendant had been boasting about his acquittal.
20. The witness also stated that the sums indicated in the assessment report are based on the actual cost of instruction incurred and that the report which has been produced is unsigned.
21. It is the testimony of the witness that the subject premises was let out to him as an empty space and that he could not make any alterations without obtaining the consent of the 1st defendant. The witness added that no written authority was given by the 1st defendant as required in the lease agreement.
22. PW1 in his evidence stated that he had put up the illegal structures on the subject premises, which partially led to the case which was lodged before the City Court.
23. According to the witness, the plaintiff was making approximately Kshs.3,000,000/ every month and that he would submit annual returns. The witness added that there was no court order warranting the demolition of the plaintiff's properties and that no other tenant on the subject premises was treated in a similar manner.
24. The witness stated that he had leased two (2) separate godowns from the 1st defendant and that he surrendered one of them to the 1st defendant while the other; located on the subject premises; was destroyed.
25. The witness further stated that he never had any rent arrears and that no claim for the said arrears was ever made by or on behalf of the 1st defendant.
26. It was the evidence of PW1 that the plaintiff is still in existence but it is not in operation.
27. Harrison Ruhangi Njuguna who was PW2 adopted his executed witness statement and stated that he is a trained technician majoring in biology and that he joined the plaintiff in 1991 as the Production Manager.
28. In cross-examination, the witness testified *inter alia*, that he gave evidence at the criminal trial of the 2nd defendant and that he did not

participate in the preparation of the assessment and valuation report but that some of the items listed therein belonged to his office.

29. In re-examination, it is the evidence of PW2 that on the material date, the 2nd defendant appeared on the subject premises and showed him a piece of paper which he claimed to be a court order. That immediately thereafter, he rounded about 50 people who began the destruction of the plaintiff's properties.

30. It is also the evidence of PW2 that at the time, he was the only employee of the plaintiff who was present at the scene. The witness went on to state that some of the properties which were destroyed were taken out of the subject premises by the agents of the 2nd defendant. This marked the close of the plaintiff's case.

31. For the defence, Thomas Victor Oduor (DW1) adopted his witness statement and testified that he worked for Insurance Regulatory Authority ("the Authority") at all material times.

32. According to the witness, Top Assessors and Investigators were not licensed in 1998 since they had failed to comply with the licensing requirements of the Authority and hence the report is invalid.

33. In cross-examination, the witness stated that he worked as a Supervision Officer I for the Authority and that at the time of the assessment and valuation report was made by Top Assessors and Investigators in 1998, the Authority was not in force.

34. The witness further stated that the maker of the report; Patrick Mambo; had not been authorized to prepare it by virtue of failing to obtain a license in 1997.

35. Rispa Achieng' being DW2 similarly adopted her signed witness statement as evidence before this court and stated that she is a Public Health Officer with the Nairobi City Council and that she inspected the subject premises being occupied by the plaintiff and that such inspection gave rise to criminal proceedings against PW1, who pleaded guilty and blamed the defendants herein.

36. The witness stated that consequently, she issued a notice to the defendants to abate the nuisance and upon issuance of a court order to that effect, the properties in the subject premises were demolished and subsequently, the 2nd defendant was charged with the offence of malicious damage.

37. It was the testimony of the witness that the illegal structures were not removed in the manner directed in her report dated 10th July, 1998 which was produced as an exhibit, among various other documents.

38. In cross-examination, DW2 gave evidence that going by the court order issued by the City Court, the 2nd defendant was ordered to abate the nuisance on the subject premises and the said premises was not to be used as a dwelling. According to the witness, upon inspection she established that the defendants had complied with the court order for abating the nuisance.

39. Monica Wambui Kinuthia (DW3) first adopted her witness statement as evidence and produced the documents in the defendants' list and bundle of documents dated 15th May, 2014 as exhibits; and averred that she worked with the 1st defendant at all material times.

40. In cross-examination, it was the evidence of this witness that together with the 2nd defendant who is her late husband, she was a director of the 1st defendant company, and that the plaintiff had rented out two (2) godowns from the 1st defendant.

41. The witness also gave evidence that there were two (2) plots which were adjacent to each other and that each plot had eight (8) godowns in it, including those leased to the plaintiff.

42. It was the testimony of DW3 that the plaintiff's properties were demolished pursuant to a court order but that she was not present in the subject premises at the time of the demolition.

43. It was equally the testimony of DW3 that the plaintiff had also been authorized to remove all illegal structures from the subject premises.

44. The witness stated that the plaintiff subsequently fell into arrears of rent and issued bouncing cheques, and that auctioneers seized some of the plaintiff's goods and carried them away. The witness stated that the court order did not specifically state that the goods of the plaintiff be demolished but that the plaintiff was to remove all illegal structures therefrom.

45. According to DW3, though the plaintiff issued a notice to vacate the subject premises, it continued to occupy the premises for a while thereafter, until the demolition was undertaken.

46. The witness also stated that the other tenants' structures were not touched since they abated the nuisance. It was the evidence of the witness that she had no knowledge that the plaintiff had been engaged in manufacturing business though she is aware that it would bring some material to the subject premises for purposes of mixing and selling.

47. The witness gave evidence that it was a term of the lease agreement that the subject premises would be used as a workshop/godown for mechanical engineering and for no other purpose.

48. In re-examination, it was the testimony of DW3 that the plaintiff eventually surrendered the godown due to loss of business and that the

defendants had no intention of evicting the plaintiff.

49. Samuel Wangai Mugo (DW4) adopted his executed witness statement as evidence and stated that he has been an auctioneer for the last 30 years or so.

50. In cross-examination, the witness gave evidence that he received instructions from the defendants to levy distress for rent on 10th February, 1998 though the instructions do not constitute the 1st defendant's list and bundle of documents.

51. The witness gave evidence that he was instructed to recover the sum of Kshs.72,000/ being arrears in rent by the plaintiff but that he cannot say how much was available in the absence of the letter of instructions. The witness also indicated that he could not recall whether the goods which were attached were sold neither is he aware on whether the plaintiff's structures/properties were destroyed.

52. In re-examination, DW4 indicated that he testified in the criminal proceedings against the 2nd defendant. This marked the close of the 1st defendant's case.

53. Upon close of the hearing, this court invited the parties to file and exchange written submissions. At the time of writing this judgment, only the plaintiff's submissions in reply to those of the 1st defendant had been availed to this court. This court has also seen the 1st defendant's amended list and bundle of authorities.

54. In its submissions, the plaintiff restated the position that the suit survived the demise of the 2nd defendant since the 1st defendant is a separate legal entity and that no objection was ever raised that the suit was incompetent.

55. The plaintiff further submits that the author of the report on investigations of the goods lost has since died and was therefore not present to give evidence at the trial in support of his report.

56. It is the contention of the plaintiff that no court order was issued directing the defendants to destroy its properties.

57. The plaintiff also challenged the relevance of the authorities relied upon by the 1st defendant, including the case of **Peter Umbuku Muyaka v Henry Sitati Mmbasu [2018] eKLR** where the court held that nominal damages can be awarded for breach of contract where no actual damage has been proved. According to the plaintiff, this authority would not apply to the present circumstances since the plaintiff herein has proved the loss suffered.

58. I have considered the evidence tendered in court and the submissions made available coupled with the authorities quoted and availed to me.

59. From the reply submissions filed by the plaintiff, I note that one of the preliminary issues which was raised concerns the survival of the suit in respect to the demise of the 2nd defendant.

60. Upon perusal of the record, I established that the 2nd defendant; though deceased; was at all material times a director of the 1st defendant. DW3 stated in her evidence that she is a co-director of the 1st defendant.

61. It is trite law that a company is a legal entity and separate from its directors. Consequently, a company continues to subsist separate from its directors and the fact that the 2nd defendant has died does not cause the suit to be incompetent on that basis alone. In view of the fact that the suit has also been brought against the 1st defendant, I am satisfied that the same is competent before this court.

62. On the merits of the suit, I have identified the following as the key issues for determination:

- i. Whether the plaintiff entered into a lease agreement with the 1st defendant in respect to the subject premises;*
- ii. Whether the plaintiff carried on construction works on the subject premises;*
- iii. Whether there was a breach of the lease agreement in respect to the subject premises;*
- iv. Whether the 2nd defendant undertook the demolition of the plaintiff's goods situated on the subject premises;*
- v. Whether such demolition was lawfully done;*
- vi. Whether the plaintiff suffered loss/damage resulting from the demolition; and*
- vii. Whether the plaintiff is entitled to the reliefs sought.*

63. Under the **first** issue, it is not in dispute that the parties herein entered into a lease agreement at all material times. Both parties produced as exhibits the lease agreements relating to the subject premises, which show that the 1st defendant had leased the subject premises to the plaintiff beginning 1st January, 1989 for a term of five (5) years and two (2) months and which lease was apparently renewed in intervals.

64. The evidence also show that the 1st defendant leased an adjacent premises known as L.R. No. 209/8685 at Young Traders Godown to the plaintiff and which lease was similarly renewed until such time as the plaintiff decided to surrender the same in the year 1998. I will now address the issue to follow.

65. On the **second** issue, from my examination of the pleadings and material placed before me, I established that in the course of the lease agreement, the plaintiff admits to having put up various developments and constructions on the subject premises so as to achieve its objectives. Going by the evidence, it is apparent that the 1st defendant is not disputing this fact. I however note that according to the lease agreement, the consent of the 1st defendant ought to have been sought but PW1 admitted that this consent was not sought and/or obtained before the constructions were put up.

66. Having established the above, I now turn to the **third** issue for determination, touching on the existence or otherwise of a breach of contract by any of the parties.

67. Concerning breach on the part of the plaintiff, from my study of the pleadings and evidence I observed that the 1st defendant averred that the plaintiff did not adhere to the terms of the lease agreement pertaining to the use of the subject premises. The 1st defendant further averred that the plaintiff was in arrears of rent in the course of the lease. In reply, the plaintiff stated that it had no rent arrears and that it paid its rent regularly and in full.

68. Going by the evidence, the 1st defendant levied distress for rent by engaging the services of Rosam Enterprises who are consultants and auctioneers. It however remains unclear whether the 1st defendant was able to recover the outstanding rent arrears in full from the goods distressed.

69. Be that as it may, as pertains to the use of the subject premises, clause 1 (g) of the lease agreement stipulates that the subject premises was to be used as a workshop for mechanical purposes and for no other purpose. Going by the pleadings and evidence, the plaintiff operated its manufacturing business on the subject premises which entailed manufacturing industrial adhesives; agricultural, industrial and laboratory chemicals.

70. It is apparent from the foregoing that the plaintiff strayed from the terms of the lease agreement by using the subject premises for purposes outside those stipulated therein, thereby constituting a breach of the agreement. Nevertheless, it is also apparent that the 1st defendant did not raise any complaints with the plaintiff regarding the use of the subject premises in the manner it did, thereby going to show that the 1st defendant essentially accepted the altered use of the subject premises and therefore enabled the breach.

71. In respect to breach on the part of the defendants, I am convinced that this will be answered under the fourth and fifth issues below.

72. Having determined so, I will now address the **fourth** issue for determination, to do with whether the 2nd defendant undertook the demolition of the plaintiff's properties/goods. I considered the evidence of the plaintiff's witnesses that the 2nd defendant orchestrated the demolition/destruction of its properties on or about 22nd September, 1998, through his agents. PW2 in particular stated that he witnessed the demolition and saw the 2nd defendant on the subject premises on the material date.

73. In their evidence, the witnesses for the 1st defendant did not refute this fact though none of them indicated that they were present at the time of such demolition. I am therefore satisfied that the demolition was undertaken by the 2nd defendant, whether by himself or through his agents.

74. It is now for me to determine whether such demolition was lawful, which is the **fifth** issue for determination. From the evidence tendered by the parties, I observed that in the course of the lease agreement, it was noted that the subject premises and adjacent premises had not complied with the public health and safety regulations, thereby resulting in a complaint against the 2nd defendant on behalf of the 1st defendant.

75. It is apparent from the evidence that criminal proceedings were subsequently lodged against the 2nd defendant whereby he was charged before the City Court with the offence of failing to comply with the notice issued under Section 119 of the Public Health Act contrary to Section 115 as read with S. 120 (1) of the said Act.

76. Upon hearing the criminal case, the City Court issued closing orders against the 2nd defendant on 8th April 1998, essentially ordering him to abate the nuisance complained of in the notice.

77. The respective parties tendered in evidence correspondences shared between them to the effect that the plaintiff temporarily vacates the leased premises to enable compliance with the closing order. The record shows that the plaintiff did not object to the request but subsequently chose to surrender the adjacent premises known as L.R. No. 209/8685 at Young Traders Godown, which the defendants accepted.

78. From my study of the evidence tendered, I observed that later on in the month of September, 2008 the 2nd defendant was charged with the offence of malicious damage to property contrary to Section 339(1) of the Penal Code. The particulars of the charge are that the 2nd defendant together with others not before the court wilfully and unlawfully damaged the property of PW1 who is the managing director of the plaintiff, valued at Kshs.17,440,580/.

79. The record shows that upon hearing the prosecution's case, the criminal court found that the 2nd defendant had a case to answer and

therefore it put him on his defence. However, upon hearing the defence case, the criminal court found that the prosecution had not proved its case against the 2nd defendant beyond reasonable doubt and consequently acquitted him under Section 215 of the Criminal Procedure Code.

80. Upon perusal of the pleadings and evidence, it is not in dispute that some of the structures put up by the plaintiff on the subject premises were illegal. It is also not in dispute that the plaintiff was instructed to take down the illegal structures and from the evidence of PW1, this was done soon after the instructions were given. Furthermore, it is not in dispute that the abatement of the nuisance was triggered by the court order mentioned hereinabove.

81. Nonetheless, I established from the evidence of the witnesses who testified that the aforementioned court order did not necessarily order for the demolition of the properties in the subject premises and other related premises but merely ordered for the removal of any nuisances. This was confirmed by the evidence of DW3 who inspected the premises in question, when she stated that the court order made no provision for demolition of the plaintiff's properties.

82. The 1st defendant on its part did not bring any credible evidence to show that the act of demolition by the 2nd defendant was in any manner justified or that the 2nd defendant had written to the plaintiff to request it to remove any unsuitable structures from the subject premises and that the plaintiff declined to comply.

83. Moreover, since it is apparent that the plaintiff was not the only person utilizing the subject and adjacent premises, the 1st defendant has not brought any credible evidence to show that the remaining tenants were treated in the same manner in the sense that their properties were similarly demolished.

84. While the 2nd defendant was acquitted in the criminal proceedings, it is appreciated that the standard of proof in criminal proceedings is higher than that in civil cases.

85. In view of the foregoing and in the absence of any credible evidence to the contrary, I am satisfied that the plaintiff has shown on a balance of probabilities that the demolition/ destruction carried out by the 1st defendant through the 2nd defendant and his servants/agents was without any lawful cause, thereby making it illegal/unlawful. I also find that this amounts to a breach of the agreement since the 1st defendant breached its contractual obligation that it would allow the plaintiff to peacefully hold and enjoy the subject premises without interruption.

86. This brings me to the *sixth* issue touching on loss/damage, if any, that the plaintiff suffered. In his testimony, PW1 stated that he suffered financial loss as a result of the demolition, both in terms of the plaintiff's goods, the business and the financial liabilities towards its borrowers.

87. In addition, I examined the photographs in the plaintiff's list and bundle of documents, which were produced as exhibits which show the extent of damage occasioned to the plaintiff's properties. It is noteworthy that the 1st defendant did not bring any credible evidence to challenge this position at the trial, thereby leading this court to conclude that the plaintiff has satisfactorily shown that its business suffered some degree of loss/damage as a result of the defendants' unlawful actions.

88. I therefore find liability solely against the 1st defendant in view of the demise of the 2nd defendant.

89. Having found in favour of the plaintiff, I will now address the reliefs sought under the *seventh* and final issue and under the following heads.

90. On general damages for breach of contract, in the absence of the submissions originally filed by the parties, I am unable to tell whether any suggestions were given for an award under this head.

91. In the circumstances, I considered the case of **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR** where the Court of Appeal rendered itself thus:

***“...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 vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also SECURICOR (K) v BENSON DAVID ONYANGO & ANOR [2008] eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent “had suffered serious damages...”*”**

92. In the present instance, the damage/loss suffered by the plaintiff was particularized or otherwise quantified in the plaint and the plaintiff cannot therefore seek general damages for breach of contract in addition to seeking special damages as it has done. Consequently, I decline to award any damages under this head.

93. On general damages for loss of business, upon my perusal of the pleadings and evidence, I established that the plaintiff did not bring any credible evidence to show its financial standing and earnings. Though PW1 stated in his evidence that the plaintiff was making about Kshs.3,000,000/ every month, he did not tender any evidence to support his averment. In the absence of any actual proof of loss of business, I similarly decline to award any damages here.

94. Under the head of special damages in the sum of Kshs.11,150,530/ sought in the plaint, I note from the evidence that PW1 adduced the report of investigations dated 28th September, 1998 and prepared by Top Assessors and Investigators, assessing the value of goods destroyed on the subject premises. The report assessed the total loss in the sum of Kshs.11,065,530/. The witness also produced a copy of the receipt being payment made for preparation of the report, at a sum of Kshs.25,000/.

95. The evidence tendered that DW1 in his testimony, stated that the report is invalid by virtue of the fact that its maker (Patrick Mambo) had not taken out a license for the year 1998.

96. Upon examination of the pleadings and evidence, I did not come across any credible evidence to show that the aforementioned report is invalid for the reasons given at the trial. I will therefore rely on its contents.

97. From the foregoing, the value of goods destroyed in the report plus the receipted amount, total to the sum of Kshs.11,090,530/. However, it is noted that the plaintiff sought a slightly higher sum of Kshs.11,150,530/. It is trite law that special damages must be specifically pleaded and strictly proved. Consequently, I can only award the sum of Kshs.11,090,530/ which is both pleaded and proved.

98. In the end therefore, judgment is hereby entered in favour of the plaintiff and against the 1st defendant as follows:

- i. Special damages** **Kshs.11,090,530/**

- Total** **Kshs.11,090,530/**

- ii. Costs of the suit.**

- iii. Interest on special damages at court rates from the date of filing the suit until the date of full payment.**

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 6th day of November, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

.....**for the Plaintiff**

.....**for the 1st Defendant**

.....**for the 2nd Defendant**