



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC CASE NO 232 OF 2017**

**JULIUS MASIVA OBUGA.....1<sup>ST</sup> PLAINTIFF**

**GODFREY ONDEGO.....2<sup>ND</sup> PLAINTIFF**

**JAMATRIX KWETE.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**KARIUKI KARARAHU.....1<sup>ST</sup> DEFENDANT**

**JOSEPH LELE AMBUNDO.....2<sup>ND</sup> RESPONDENT**

**JOYCE NASIMIYU.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

By a plaint dated 21<sup>st</sup> October 1994 the plaintiff sued the defendants jointly and severally seeking for the following orders:

a. The defendants be restrained from evicting the plaintiff from the property known as ELDORET MUNICIPALITY/BLOCK 6/89 U&I BAR & RESTAURANT

The plaintiff filed an application for leave to amend and amended the orders sought by adding the following reliefs:

- a. An order for release of the distrained properties.
- b. Special damages
- c. General damages and exemplary damages loss of business
- d. Costs of the suit
- e. Any other relief the court may deem fit to grant

**PLAINTIFF'S CASE**

PW1 gave evidence and stated that the 3<sup>rd</sup> defendant acted as an agent of the management of U&I bar and restaurant. That the suit premises was registered in the names of Joel Wairehire Kuria and Kararaho Kariuki and the 5<sup>th</sup> defendant was the administrator of the estate of Joel Wairehire Kuria.

PW1 also stated that the premises were leased to one Amritalal Gupta by the deceased persons who operated the U&I bar and restaurant business. That the 3<sup>rd</sup> defendant managed the bar and restaurant on behalf of the lessee who had appointed him in writing before leaving the country.

It was further PW1's evidence that he entered into a sublease agreement with the management of U&I Bar and restaurant represented by

John Silas Ambundo. The agreement was for rent of 2 rooms at kshs. 4,000/- per month and a three year rent deposit of kshs. 144,000/- was made in advance and the lease period was to run from 28<sup>th</sup> December 1993 to 27<sup>th</sup> December 1996.

PW1 testified that the representative of the restaurant died in 1994 and the rest of the defendants locked the premises and levied distress against the plaintiff. The plaintiff moved to court seeking an injunction preventing the defendants from removing the plaintiff from the suit property.

It was PW1 's evidence that due to the distress and eviction he lost business. He therefore urged the court to grant the orders as prayed in the plaint.

### **ANALYSIS AND DETERMINATION**

This is a matter which has seen better days in the court corridors. I am surprised that the matter was filed in 1994 which makes it one of the oldest files in the court. To be precise it has taken 26 years to finalize this matter. This led to many of the parties passing on and the suit abating against them as there was no substitution done.

The plaintiff and the 1<sup>st</sup> defendant's counsel confirmed to the court that the 1<sup>st</sup> defendant died in 2005 and as such the suit abated against him. The plaintiff later filed an application dated 4<sup>th</sup> September 2018 seeking for orders that the suit do proceed solely against the 2<sup>nd</sup> defendant which application was allowed by the court.

The issues for determination are as to whether there was a valid lease agreement and whether the plaintiff is entitled to the orders sought.

On the issue as to whether there was a valid lease agreement between the plaintiff and the defendants, PW1 stated that they entered into a tenancy agreement dated 28<sup>th</sup> December 1993. He claims to have entered into the sub lease agreement with the management of U&I bar and restaurant who were represented by John Silas Ambundo (deceased) who was their agent.

The plaintiff has not produced any evidence that the defendants were agents of the lessor. The burden of proof is upon the plaintiff to show that indeed they were agents and had the authority to enter into the agreement on behalf of the management of the bar and restaurant. The plaintiff claimed that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant had been appointed in writing but did not adduce any evidence to that effect.

Further, there is no evidence on record that the plaintiff paid the kshs. 144,000/- to the alleged management. The lessor had left the country and allegedly authorized the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to act as his agents, there was no such evidence that he had given authority to them to enter into an agreement with the plaintiff. I find that the plaintiff has not proved that there was a valid agreement. The documents produced were in respect of the political activities of the plaintiff and not related to the current case. The plaintiff fell short of the required standard of proof on a balance of probabilities.

The plaintiff prayed that the defendants be restrained from evicting them but the same is overtaken by events as they were evicted 26 years ago. Courts do not give orders in vain

The plaintiff also sought for an order for release of the detained properties but there was no evidence that they owned the properties, no receipts or a notice for distress of rent with the particulars of the properties. This makes it an uphill task for the plaintiff to prove his case. This case has taken 26 years and most all the defendants are deceased apart from one whom the plaintiff proceeded with the case against. Where are these purported distrained properties, are they still in existence after 26 years. I find that this limb of the plaintiff's claim must also fail.

The plaintiff sought for special damages, exemplary damages and general damages. It is trite law that special damages must be specifically proved. This could be done by way of receipts or documents that prove the loss incurred. The plaintiff has not adduced any evidence or specified the amount sought in special damages.

In the case of **Provincial Insurance Co East Africa Ltd versus Nandwa 1995-1998 2EA 288 at page 291 the Court of Appeal** expressed the need to plead specifically a claim that is ascertainable and quantifiable and stated thus:-

“It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.”

The plaintiff also sought for general and exemplary damages which were not proved. I have considered the plaintiff's evidence and submissions and find that the plaintiff has failed to prove his case on a balance of probabilities and is therefore dismissed with no orders as to costs.

**DATED and DELIVERED at ELDORET this 12<sup>TH</sup> DAY OF MARCH, 2020**

**M. A. ODENY**

**JUDGE**

**JUDGMENT** read in open court in the presence of the Plaintiff and in the absence of the Defendants.

