REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CAUSE NO. 356 OF 2006

OSANO & ASSOCIATES LTD.....PLAINTIFF

-VERSUS-

AFRICAN MEDICAL RESEARCH FOUNDATION.....DEFENDANT

J U D G M E N T

1. Osano & Associates Limited, the Plaintiff, is a Limited Liability Company incorporated under the Companies act. It offers Management Consultancy Services. African Medical Research Foundation, the Defendant (herein after referred to as AMREF) is an international non-profit organization which operates in Kenya.

2. It is not denied that AMREF is the owner of the AMREF building situated at the Wilson Airport, Nairobi. The Plaintiff was a tenant, where it had its office on that building at the rental of Kshs. 50,000 per month, payable quarterly. It is also not denied that the Plaintiff's tenancy was governed by the provisions of the Landlord and Tenant (shop, Hotel and Catering Establishment) Act Cap 301.

3. The Plaintiff pleads in this case that AMREF, on 24th May 2006, wrongfully and illegally locked its said office in attempt to evict it from the premises.

4. The Plaintiff further pleaded that the said locking up of its office and as a direct consequence it suffered loss and damage of Kshs. 17,564,400. The Plaintiff prayed for Judgment for that amount plus aggravated general damages plus costs and interest.

5. AMREF first filed a defence and counter-claim and subsequently, on the Plaintiff amending its Plaint, filed a defence and abandoned the counterclaim. By its defence AMREF pleaded that the Plaintiff was in breach of the term and condition of its tenancy by consistently failing to remit its rent in accordance with the tenancy agreement. That because of that persistent breach AMREF sought to terminate the tenancy, after giving the Plaintiff notice of the same.

6. AMREF pleaded that on 24th may 2006 the Plaintiff had rent arrears of Kshs. 550,000 being rent for 11 months. AMREF pleaded that the Plaintiff's case arose from the principle *ex turpi causa non oritur action and/or ex dolo malo non oritur actie.*

7. AMREF denied Plaintiff's claim in damages.

ISSUES

8. Having considered the pleadings, the evidence and the submissions I find that there are four issues for determination. They are:

a) Was the locking of the Plaintiff's office on 24th May 2006 unlawful?

b) Did the Plaintiff prove its claim for damages?

c) Is the Plaintiff's claim statute barred?

d) Who will bear the costs?

ISSUE (a)

9. The Plaintiff, through its chief executive officer (CEO), Denis Osano Kute, stated that AMREF through its officer, Michael Kibe, locked the main door of its office very early in the morning before it had opened its office for the day. That AMREF also instructed its security personnel, manning the main gate, not to permit the Plaintiff's members of staff to enter. That, that closure prevented all the Plaintiff's visitors and staff from entering the premises. That by carrying out the said closure AMREF did not obtain a Court Order.

10. The Plaintiff proceeded to the business premises rent tribunal (BPRT) on 15th June 2006 seeking the re-opening of its office. That matter could not proceed because the tribunal was not operating. That it is then that the Plaintiff filed this action.

11. The Plaintiff, through its CEO, stated that AMREF's action caused it financial loss ad great embarrassment. The particular of the loss Plaintiff pleaded it incurred were:

i. Cancellation of the contract with peck air ltd. Valued at	Kshs. 7,200,000.
ii. Cancellation of the contract with Adventis Limited valued	Kshs. 2,400,000
iii. Cancellation of the contract with Pembroke Savings and credit Ltd valued	Kshs. 3,800,000
iv. Loss of new anticipated business with Kenya Wild Life Service's valued	Kshs. 4,164,400.
Total	**Kshs. 17,564,400**

12. The evidence of AMREF was adduced by Joshua Kivuva. That witness stated that the Plaintiff was consistently in rent arrears. That on 24th May 2006 the Plaintiff's CEO was informed that AMREF intended to terminate the tenancy because of the persistent rent arrears. The Plaintiff was by then in arrears of Kshs. 550,000. That on that day Mr. Kibe, AMREF's employee, spoke with the Plaintiff's CEO and they agreed that instead of AMREF distressing for rent arrears, Mr. Kibe could close the Plaintiff's office until the rent arrears were cleared. Mr. Kibe did not attend Court to give evidence of this fact. AMREF relied on Mr. Kibe's affidavit sworn on 11th July 2006 in this cause.

DISCUSSION ON ISSUE (a)

13. As stated before, it is admitted by the parties in this cause that the Plaintiff's tenancy was a controlled tenancy which means it fell within the provisions of Cap 301. Section 4 of that Act forbids termination of a controlled tenancy other than the manner provided under Cap 301. A landlord wishing to terminate a controlled tenancy must as provided under Section 4 give notice in the prescribed from to the tenant. If the tenant wishes to oppose that notice it must inform the landlord, as provided under Section 4(5), whether it intends to comply. If the tenant does not intend to comply it must file a reference before the BPRT.

14. The law, that is Cap 301, does not permit termination of tenancy in any other way other than what is provided therein.

15. AMREF stated, through its witness, that it issued the Plaintiff with notice to terminate the tenancy. There was no such notice as provided under Cap 301 produced before Court in evidence.

16. AMREF stated that the Plaintiff's CEO consented to the locking up of the Plaintiff's office until the rent arrears were cleared. The Plaintiff denied consenting to such closure.

17. There is before Court Plaintiff's inventory of its office furniture and equipment, which AMREF stated was recorded before the closure. Although the Plaintiff denied the same was done that inventory is stamped and signed on behalf of the Plaintiff. And although the Plaintiff alleged the closure of the office was early in the morning before its members of staff arrived, that allegation is contradicted by the affidavit of denis Osano Kute, sown on 15th June 2006 for the matter before BPRT where he stated:

> ***"That on 24th May 2006 one Mr. Kibe the Human Resource Manager of AMREF had forcibly entered our premises and taken inventory of our office furniture and business fixtures without any colour of right.***
>
> ***That on the same day of May 2006 the same person led a group of persons who Ordered my people out of the premises and then locked it.***

18. Even if AMREF locked the Plaintiff's office in the Plaintiff's CEO's present it did not excuse AMREF from following the laid down law of terminating a controlled tenancy. And if indeed the Plaintiff consented to the locking up of its office the question is why did AMREF not obtain that consent in writing.

19. As stated before the prerequisite notice to the Plaintiff under Cap 301 before termination of tenancy was not produced by AMREF. There is also no evidence that the Plaintiff consented to move out of its office. The Court of appeal in discussing that notice in the case **SOUTH C FRUIT SHOP LIMITED V HOUSING FINANCE COMPANY OF KENYA LIMITED [2013] eKLR** stated:

> ***"A controlled tenancy can only be terminated by issuing the notice prescribed under the Act. See the holdings of this Court in Tiwi Beach Hotel Limited v Juliane Ulrike Stamm [1991] klr 658: Munaver N. alibhai t/a Diani Boutique v South Coast Fitness & Sports Centre Limited [1995] eKLR (Civil Appeal 203 of 1994).***

It is apparent that the appellant had been informed, by word of mouth, that the respondent intended to take over the premises. This of course did not amount to notice as is envisaged under Landlord and Tenant (Shops, Hotels & Catering Establishments) Act.

Even if the appellant was not an approved tenant as has been contended by the respondent, we are still of the view that it ought to have been given appropriate notice before eviction.

In Caledonia Supermarket Ltd v Kenya National Examination Council [2000] 2 EA 351, this Court differently constituted considered a case on the termination of a controlled tenancy. In that case, the national examination council, who was the appellant, had acquired property upon which Caledonia Supermarket Ltd, the respondent, was carrying on the business of a supermarket. The tenancy held by the respondent was a controlled tenancy. The Court held that in Order to terminate a controlled tenancy, the appellant had to comply with Section 4 of the landlord and tenant (shops, Hotels & Catering Establishments) Act. The Court also considered that even if the supermarket had lost its status as a protected tenant, then the Council was still obliged to give notice to the appellant. The Court expressed itself as follows:

"…But even assuming for the sake of argument only that the appellant had lost its status of a protected tenant… Then even in that situation the Council was obliged by law to issue a proper notice of termination in accordance with Section 106 of the Law of Property Act of 1882."

20. In my view the locking up of the Plaintiff's office was illegal, null and void. It follows that the finding of issue (a) is in the affirmative.

ISSUE (b)

21. On this issue the Plaintiff should prove the damage it suffered, if any, as result of the locking of its office.

22. The Plaintiff produced letters written by its clients in respect of each head of claim for special damages to show that its contracts with those client were cancelled and it therefore suffered damage.

DISCUSSION

23. The Plaintiff should have specifically pleaded and specifically proved each head of its claim in special damages. This was so stated in the case **ABUDI ALI MAHADHI V RAMADHANI SAIDI & ANOTHER (1999) eKLR:**

"It has been held time and again by this Court special damages must be pleaded and, of course, strictly proved. The claim for the loss of user and of the value of the vehicle in the event it had been destroyed are matters of special damages ought to have been strictly pleaded but was not done. Nor were they proved. I refer to the case of O V NAIROBI CITY COUNCIL 1976 KAR 297 AT 304 where Chesoni, J., (as he then was) held:

"Although special damage had been specifically pleaded by listing in the Plaint the items as to have been stolen or damaged, the Plaintiff's failure to prove such damage at trial with certain and particularity precluded the Court from making any award of special damages."

Also, see KENYA BUS SERVICES V MAYENDE 1991 2 KAR 232 at 235 where it was held refereed to the remarks by this Court in Mariam Maghema Ali V Jackson M. Nyambu t/a Sisera Store CA 1990 and in Idi Ayub Omari Shabani v City Council of Nairobi (1985) 1 KAR 681 AT 684:

"…Special damages in addition to being pleaded, must be strictly proved as was stated by Goddard, C.J. in Bonham Carter v Hyde Park Hotel Ltd (1948) 64 T.L.R. 177 thus: "Plaintiff must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying "this is what I have lost, I ask you to give me these damages". They have to prove it."

24. In all the letters that the Plaintiff exhibited, allegedly written by its clients, none of them set out what the contract sum was. One therefore wonders where the figures pleaded in the Plaintiff came from. They are not supported by any document setting out the contractual amount.

25. I also support the submissions of AMREF where it was stated that the Plaintiff should have produced other documents, such as bank account, to prove the alleged loss. I would go further and state that the Plaintiff should have produced books of its accounts to prove that it indeed carried the business it alleges was lost due to the closure of its office.

26. The Plaintiff's claim under this head fails for lack of proof.

ISSUE (c)

27. This issue arises from the pleading of AMREF that Plaintiff's claim for special damages was statute barred. AMREF submitted that the said claim was included in the Plaint when the Plaintiff amended its Plaint. AMREF submitted that since that claim fell under tort it was time barred under Section 4 (2) of the limitation of Action Act Cap 22.

28. The simple answer to AMREF's contention is that the Plaintiff was granted leave by the Court to amend its Plaint on 22nd May 2009. That leave having been granted and in the absence of appeal AMREF is not permitted to question it. But perhaps more importantly Order 8 Rule 3(2) of the civil procedure Rules permits amendments to be made even where the relevant period of limitation had expired.

29. The submission and pleading of AMREF on this issue is rejected.

DETERMINATION

30. In the end the Court finds that the closure of the Plaintiff's office by AMREF on 24th May 2006 was unlawful. But I do also take into account the Plaintiff was in rent arrears in this regard I will grant Plaintiff damages for Kshs. 500,000 with interest at Court rate from the date of this Judgment until payment in full.

31. The Plaintiff's claim for special damages fails for lack of proof.

32. Since the Plaintiff only partially succeeds I shall award it quarter costs of this suit.

33. Accordingly, the Judgment of this case is:

a) There shall be Judgment for the Plaintiff for Kshs. 300,000 as damages for the unlawful closure of its office. Those damages will accrue interest at Court rate from the date of this Judgment until payment in full.

b) The Plaintiff is granted quarter (1/4) costs of this suit.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **8TH** day of **MAY,** 2019.

MARY KASANGO

JUDGE

Judgment Read *and* ***Delivered*** *in* ***Open Court*** *in the presence of:*

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

……..FOR THE DEFENDANT