



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 112 OF 2008

WESTLANDS TRIANGLE PROPERTIES LTD.....PLAINTIFF

VERSUS

WESTLANDS SUNDRIES LIMITED.....1ST DEFENDANT

MEAT MASTERS LIMITED.....2ND DEFENDANT

DO IT YOURSELF LIMITED.....3RD DEFENDANT

JUDGEMENT

1. By a plaint dated and filed 19th March 2008 the Plaintiff herein prays for judgment against the defendants for:

(a) Recovery of possession of the units occupied by the 1st, 2nd and 3rd Defendants at the Plaintiff's premises being the property known as L.R No. 209/6368/4 at Westlands in the Nairobi Area, with mesne profits accruing calculated at the rate specified in paragraph 23 of the plaint payable monthly from the 1st February 2008 until payment in full and delivery up of possession.

(b) An injunction restraining the 1st, 2nd and 3rd Defendants severally whether by themselves, their agents or otherwise howsoever from using or entering and remaining on the Plaintiff's property known as L.R no. 209/6368/4 at Westlands in the Nairobi area.

(c) A declaration that neither the 1st Defendant nor the 2nd Defendant nor the 3rd Defendant is a tenant and a controlled tenant pursuant to section 2 of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act cap 301 of the Laws of Kenya or at all under that Act.

(d) Possession of the property or so much of it as is occupied by the 1st, 2nd and 3rd Defendants.

(e) Damages for trespass by the 1st, 2nd and 3rd Defendants upon the Plaintiff's property.

(f) Interest at court rates on mesne profits under (a) and the damages under (f).

(g) Declaration that the Plaintiff is entitled to vacant possession of the units at the suit premises occupied by the 1st, 2nd and 3rd Defendants on and after the 31st January 2008 and to put the space to such other use or occupation as the Plaintiff desires or deems fit and just.

(h) Declaration that the Plaintiff is a third party to the arrangements for occupation made by the 1st, 2nd and 3rd Defendants and which were not consented to by the Plaintiff and the arrangements do not affect the Plaintiff and the Plaintiff's right to possession and mesne profits at the going market rent rate per annum as pleaded in the plaint till delivery up.

(i) Cost of the suit with interest therein at court rates.

(j) Any other order that the Honourable Court may deem fit.

2. The Defendants filed their defence dated 4th April 2008 and later, an amended defence and counterclaim dated and filed on 30th March

2015 praying for the dismissal of the Plaintiff's suit and judgment for the Defendants against the Plaintiff in the counterclaim for:

- (a) An order of reinstatement to the Defendants to their shops on the suit premises on the basis of this Honourable Court's order issued on 28th November 2008.**
- (b) General damages for unlawful eviction.**
- (c) Exemplary damages for trespass.**
- (d) Aggravated damages.**
- (e) Damages for loss of premises.**
- (f) Exemplary and punitive damages for:**
 - 1. The 1st Defendant in the sum of Kshs 30,000,000/-**
 - 2. The 2nd Defendant in the sum of Kshs 30,000,000/- and**
 - 3. The 3rd Defendant in the sum of Kshs 30,000,000**
- (g) Special damages for:**
 - 1. The 1st Defendant in the sum of Kshs 12,004,021/-**
 - 2. The 2nd Defendant in the sum of Kshs 8,280,600/-**
 - 3. The 3rd Defendant in the sum of Kshs 3,000,000**
- (h) Damages for loss of profit for:**
 - 1. The 1st Defendant in the sum of Kshs 384,265/- per annum from 2008 to the date of determination of this suit.**
 - 2. The 2nd Defendant in the sum of Kshs 950,750/- per annum from 2008 to the date of determination of this suit.**
 - 3. 3rd Defendant in the sum of Kshs 136,981.25/- per annum from 2008 to the date of determination of this suit.**
- (i) Damages for loss of goodwill, clientele and future earnings for:**
 - 1. The 1st, 2nd and 3rd Defendants each for Kshs 20,000,000/- each per annum from 2008 to the date of determination of this suit**
- (j) Damages for relocation and setting up of new shops for:**
 - 1. The 1st 2nd and 3rd Defendants each in the sum of Kshs 5,000,000/- each**
- (k) Damages for loss of business between 2008 and 2013 for:**
 - 1. The 1st Defendant in the sum of Kshs 3,000,000/- expected to grow at the rate of 4.30% per annum**
 - 2. The 2nd Defendant in the sum of Kshs 5,000,000/- expected to grow at the rate of Kshs. 6.57% per annum and**
 - 3. The 3rd Defendant in the sum of Kshs 2,000,000/- expected to grow at the rate of 7.49% per annum**
- (l) Interest on (g), (h), (i), (j), and (k) at court rates above and costs of the suit.**
- (m) Any other reliefs.**

3. The Defendants raised a Preliminary Objection *in limine* to the Plaintiff's suit as the Plaintiff did not issue the mandatory statutory notice to the Defendants to terminate their tenancies as required under section 4(2) of cap 301. The Defendants denied that the Plaintiff is the registered proprietor of L.R no. 209/6368/4 and further deny that the suit property was ever transferred to Agip properties. The Defendants aver that the Lessor having waived its rights under clauses (i) & (k) the Plaintiff cannot seek to determine the tenancies of the Defendants who are protected under section 2 of cap 301. They deny being trespassers on the suit property and denied having being served with the

mandatory notice under section 4(2) of cap 301. In counterclaim, the Defendants seek exemplary damages for the unlawful eviction and trespass. They aver that they have suffered loss of use of the premises and that the Plaintiff evicted the Defendants so as to benefit from profits from other tenants. The Defendants each tabulated their respective claims for exemplary, general, special and other damages. Plaintiff made a reply to defence and defence to counterclaim dated and filed on 28th July 2015. In reply to defence the Plaintiff reiterated the contents of the plaint, averred that it is the registered owner of all that property known as L.R. no 209/6368/4 as per the title deed issued to it under the RTA subject to Grant no. IR 21827. The Plaintiff further averred that it did not waive its rights under clauses (i) and (k) of the lease or at all and denied giving or being sought for written consent with respect to the Defendants' occupation/possession of the suit property. The Plaintiff denied entering into a tenancy agreement with the Defendants thus their possession amounted to trespass and also mandatory notice was not applicable between the parties and that in the circumstances the notice given was sufficient given that there was no contractual relationship. Further that the BPRT's jurisdiction with regard to determining fair rental value is consequently irrelevant to the extent that concerns the Defendants.

4. In defence to the counterclaim, the Plaintiff denied the claims in the counterclaim, denied that the Defendants were ever tenants as the Plaintiff had leased the property to one George Njau Mwagiru which then passed on to his beneficiary. The Plaintiff denied alleged damage and put the Defendants to strict proof. The Plaintiff also denied knowledge of the Defendants alleged businesses and contended that in any case they were being operated unlawfully as the Plaintiff did not consent. The Plaintiff argued that in an effort to take advantage of a ruling delivered in their favour, the Defendants amended their defence to include the counterclaim which raises statute barred issues.

Evidence of witnesses

Plaintiff's witness

5. The witness statement of **Nicholas D'Lima** is dated 15th April 2016. Nicholas worked as a property manager of the Plaintiff. He stated that the Plaintiff is the registered owner of L.R. No. 209/6368/4 as per the title issued to it under the Registration of Titles Act subject to Grant No. IR 21827. The first lessor of the property was Agip Limited which entered into a leasehold agreement with Westlands Securities Limited which lease was registered and dated 7th September 1970 for 40 years starting from 1st February 1968 and ending 31st January 2008. Agip Limited changed its name to Agip (Kenya) Limited and on or about 12th October 2000 transferred its interest in the property to Agip Properties Kenya Limited which subsequently changed its name to Westlands Triangle Properties Limited. He stated further that Westlands Securities Limited transferred its interest in the lease to George Njau Mwagiru by a Transfer of Lease dated 23rd December 1997. Following his demise his interest was transferred to his beneficiary widow Rosemary Wanja Njau by a 'Transfer (Assent)' registered on 10th July 2001. He stated that it was a clause in the lease that the lessee would not sell, transfer, assign, sublet, charge or part with possession, occupation or use of the demised premises, or any addition, buildings or improvements thereon without written consent from the lessor and the President of the Republic of Kenya. Another clause was that upon any sub-lease of the demised premises, the same must be registered with the Lessor's Advocates paying them a fee of Kshs. 63/- and upon such sub lease, to obtain:

(a) An unqualified covenant on the part of the under-lessee not to assign, underlet or part with the possession of the premises thereby demised without the previous consent in writing of the Lessor.

(b) An unqualified covenant on the part of the under-lessee in terms of sub-clause (i) hereinabove contained on the part of the lessee to be performed and observed.

6. It was stated that the 1st, 2nd and 3rd Defendants failed to conduct any search before occupying the premises which would have revealed the conditions of sub-letting, and in breach of the covenants they entered and took possession without the Plaintiff's consent. Further, that Rosemary Wanja Njau surrendered the lease on 31st December 2007 which surrender took effect from 31st January 2008. The 1st, 2nd and 3rd Defendants were notified and urged to regularize their occupation by entering a fresh agreement with the Plaintiff with new terms but they did not. The witness contended that their failure to regularize their occupation and their continued occupation amounted to trespass. Further, that the Defendants were never tenants of the Plaintiff, no lease was signed and therefore no contract between them. Moreover, that the agreement between the 1st, 2nd and 3rd Defendants and Rosemary Njau was illegal due to failure to obtain prior consent by the Plaintiff. He added that the terms of the said agreement were formulated at the BPRT in Tribunal case no. 373,374 and 378 of 2002 which tended to regularize the Defendants as protected tenants expired due to effluxion of time. Nicholas stated that on or about 29th January 2008 the Plaintiff served the 1st, 2nd and 3rd Defendants through their advocates at the time with notices to quit and had over vacant possession of the premises if they will not have entered into agreements over the premises or corrected the anomalies in the agreement but they disregarded the notices and continued occupation of the premises thus depriving the Plaintiff use of the prime property. The witness stated that the rent at the time was Kshs. 175.00/- per square foot per month excluding VAT and service charge at 10% of the fair letting rent with effect from 1st February 2008.

7. He further stated that the then City Council of Nairobi served the Plaintiff with notices showing that the premises occupied by the Defendants among others had been illegally or irregularly altered, extended or added and required the Plaintiff to remedy the situation within 3 months from 22nd February 2008. Further, that on or about that date the Defendants filed a Reference at the BPRT under cap 301 being Tribunal case no. 111,112 and 113 of 2008 wherein, claiming to be protected tenants sought restraining orders against the Plaintiff and for the Plaintiff to accept rent with respect to the premises or that the rent be deposited in court. The Plaintiff raised a P.O dated 11th November 2008 as to the jurisdiction of the Tribunal and by a ruling dated 14th November 2008 the Tribunal held that it had no jurisdiction and dismissed the References.

8. The witness stated that following the ruling of the BPRT the Plaintiff acted on the notice of surrender of lease that had taken effect from 31st January 2008 and took possession of the suit premises. The Defendants then filed an application for reinstatement which was granted on 28th November 2008 by Honourable Lady Justice Sitati. The witness contends that the order extracted from the said ruling was incapable of enforcement as the mandatory order was uncertain and ambiguous; the Learned Judge's guidance to the Defendants to resort to Order XXI Rule 28 of the then applicable Civil Procedure Rules was gratuitous and nonetheless ill-advised as the provision referred to applies to decree holders and cannot be based on an interlocutory order such as the one obtained by the Defendants and thirdly that before the said Ruling

none of the Defendants occupied any of the Plaintiff's premises following the notice by the Plaintiffs for them to vacate or take out leases. The witness states that pursuant to the directive issued by the then City Council of Nairobi the Plaintiff redeveloped the premises and let them out to new tenants. They entered agreements to lease on 20th November 2008 after the injunction granted by the BPRT had lifted. These leases were subsequently registered on 10th December 2008.

Defendants' witnesses

9. Aside from their individual claims for damages, the statements given by the witnesses for the 1st, 2nd and 3rd Defendants are identical. The Defendants stated that they were some of the first tenants of the suit premises taking possession of their shops in 1971 and had been in continuous and uninterrupted occupation without ever having their leases reduced into writing for a period of more than 5 years until 17th November 2008 when they were forcefully and unlawfully evicted by the Plaintiff. Further, that the property was a lease registered and dated 7th September 1970 between then Agip Limited and Westlands Securities Limited for a term of 40 years from 1st February 1968. That following the expiry of the lease Rosemary Wanja Njau surrendered it to the Plaintiff who sought to evict the Defendants which led them to file complaints in the BPRT. Pending the hearing of the complaint the Plaintiff filed this suit seeking Defendant's eviction. They stated that Justice Angawa delivered a ruling on 30th April 2008 holding that the Defendants are protected tenants. Thereafter the Plaintiff filed a successful P.O before the Tribunal on grounds of jurisdiction. Subsequently the Plaintiff unlawfully forcefully evicted them from the suit premises damaging their stock, furniture and equipment. The Defendants stated that they then applied to the High Court for reinstatement and by a ruling delivered on 28th November 2008 Lady Justice Sitati allowed the application pending hearing and determination of this suit. The Defendants state that the Plaintiff thereafter applied unsuccessfully for stay of the reinstatement orders pending appeal. Since then the Plaintiff has refused to comply with the order of reinstatement. They each prayed for punitive and exemplary damages of Kshs 30,000,000/-.

10. **Yasmin Manji**, witness for the 1st Defendant written statement dated 7th September 2015. Managing Director of the 1st Defendant. Stated that the 1st Defendant had been operating a bookshop on the suit premises dealing in rare collections as well as to stock books for resale to retailers and as a result of the unlawful eviction the books were torn and damaged. The witness tabulated the various types damages claimed by the 1st Defendant.

Diamond Velji, Managing Director and witness for the 2nd Defendant's written statement dated 7th September 2015 also tabulated the various damages claimed by the 2nd Defendant. The witness stated that the 2nd Defendant had been operating a butchery on the suit premises specializing in the sale and supply of fresh quality meat both to wholesale and retail clientele. He stated that as a result of the eviction the 2nd Defendant suffered heavy losses of equipment including heavy duty freezers.

Nazeem Merali, Managing Director and witness for the 3rd Defendant's written statement also dated 7th September tabulated the damages as prayed for by the 3rd Defendant. Mr. Merali stated that the 3rd Defendant had been operating a hardware store retailing household hardware and electrical supplies. He stated that the 3rd Defendant suffered losses as its properties were destroyed during the eviction.

Plaintiff's written submissions

11. They are dated 13th August 2019. Counsel for the Plaintiff pointed out that at the hearing Mr. D'lima testified that the 3rd Defendant had already closed shop and abandoned the business it had been conducting at the premises long before the eviction. Further that Mr. Merali confirmed that the 3rd Defendant had transferred its business to elsewhere in Westland. Counsel also stated that the Plaintiff was unable to comply with the orders by Justice Sitati as they expressly directed the Defendants to act in accordance with Order XXI rule 28 to give effect to the orders, and to deposit their monthly rent in court yet the Defendants never did so. Further, that in the Judicial Review proceedings initiated by the Defendant, Justice Odunga quashed the decision of the BPRT contrary to Ang'awa Js findings for lack of jurisdiction as they were not protected tenants. The Plaintiff raised three issues for determination: Whether the Defendants are protected tenants; whether the Defendants' eviction from the premises was lawful and whether the Defendants are entitled to the prayers sought in the counterclaim.

12. On the first issue Counsel argued that subject to section 2 of cap 301, in the absence of the requisite consent, whatever arrangements between the Njaus and the Defendants were not binding on Agip nor its successor, the Plaintiff. Counsel relied on the case of **Martin M Odhiambo t/a Express Insurance Services -v- Marshalls E. A Ltd & another [2005]eKLR** where the court held that "if the Plaintiff had established that the 1st Defendant had consented to the sub-tenancy, then the rights of the Plaintiff as a protected tenant would have secured as against the 1st Defendant. The Plaintiff has submitted that the 1st Defendant was aware of his sub-tenancy. That may be so. However since it has been established that the 1st Defendant's consent was not procured by the firm Karigo Thuo & Company Advocates before the said firm entered into a sub-tenancy agreement with the Plaintiff, in so far as the 1st Defendant is concerned, the Plaintiff is a stranger to it." And also on the case of **Joseph Muriithi Njeru-v- Mary Wanjiru Njuguna & another [2018]eKLR** where the court held that without written consent from head lessor a leasehold property cannot be sold.

13. Counsel further submitted that another requirement is a valid tenancy relationship however there was no valid sub tenancy in favor of the Defendants and they cannot claim to be protected. He referred to the Court of Appeal decision **Jitendra Mathurdas Kanabar & 2 others -v- Fish and Meat Limited [1997]eKLR** and the holding of Aburili J in **Di Koisagat Tea Estate Ltd -v- Eritrea Orthodox Tewhdo Church Ltd [2015]eKLR**.

Counsel contended that since the Defendants were neither subtenants nor protected tenants, they were trespassers and as such they were not entitled to any notice requirement. **East African Railways Corporation-V- Karangi [1988] eKLR** where the Court of Appeal held that the respondent, who had based his claim for damages on not being given notice, was not entitled to damages for trespass or wrongful eviction.

14. On the second issue Counsel for the Plaintiff submitted that the removal of the Defendants was fully in accord with the orders of the BPRT which lapsed on 14th November 2008. They were therefore lawfully evicted. As to the third issue it is submitted that it has been

demonstrated that the Plaintiff did not breach the Defendants' rights that would warrant the grant of any relief in their favour. Counsel opined that the reliefs sought by the Defendants disclose factually unsound, legally misconceived, excessive, duplicative, conjectural speculative, unattractive smorgasbord of plain gluttony. Counsel dealt with each of the prayers. As to reinstatement, it was argued that as the Defendants' occupation of the premises was pursuant to unlawful sub-leases, even if it was held that removal was unlawful, the remedy of reinstatement is unavailable **Mohammed Jaffer v Rent Restriction Tribunal & another [2016]eKLR** where Mureithi J said that where the tenancy agreement is founded on illegality an order of reinstatement cannot be issued. In addition, it was submitted that the premises are unavailable to the Defendants to do the remedial works ordered by the City Council as they have already been let out to other people. **Republic-v-Ambrose Odwaya Onyango & another ex-parte Ceasar Ngige Wanjao [2014]eKLR**.

15. On general damages Counsel argued that general damages is not a remedy available for breach of contract and relied on **Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited-v- Janevams Limited [2015]eKLR** and **Capital Fish Kenya Limited-v- The Kenya Power and Lighting Company Limited [2016]eKLR**.

As to exemplary and aggravated damages it was submitted that the Defendants did not how they were entitled to aggravated damages which are unavailable in an action for breach of contract. **Halsbury Laws of England, 4th Edition, volume 12** at paragraphs 1186&1187- "Aggravated damages may not be awarded in actions for breach of a contract. The general rule is that the Defendant's motive and conduct are not to be taken in account in assessing damages and damages are not to be awarded in respect of disappointment or wounded feelings. This is because they are too remote."

It was contended that the Defence witnesses could not justify exemplary damages on cross examination and could not give reasons as to why they failed to commence contempt proceedings as the right course for violation of Hon Sitati J's orders and neither did they pay the deposit required. It was further contended that upon cross examination the defence witnesses could not explain how they each settled at a figure of Kshs. 30,000,000/- each.

16. It was submitted that special damages must be specifically pleaded and strictly proved. Court of Appeal in **Christine Mwigina Akonya-v- Samuel Kairu Chege [2017]eKLR**. That the 1st and 3rd Defendants' claims fall for want of particularity and strict proof and while the 2nd Defendant did provide some particulars, it failed to discharge its burden of proof. On damages for loss of use of the premises, loss of profit, earnings and/or business, the Plaintiff submitted that the Defendants are merely claiming different sums for the same kind of loss by describing them differently. They relied on definition of income v earnings in 8th edition of Black's Law Dictionary. The witnesses did not provide evidence as to such loss and the financial statements relied upon by the defence witnesses could not be spoken to or relied upon during cross examination. The 1st Defendant for example relied on profits from both his shop in the suit premises and another more lucrative branch in Village Market. The Plaintiff argued that since this was a matter peculiarly within the 1st Defendant's knowledge, by section 118 and 119 of the Evidence Act, the burden of proof was upon the 1st Defendant to demonstrate the share of profit attributable to the bookshop at the premises and a dip in earnings as a result of its November 2008 closure. The 2nd Defendant's proof was discredited and the 3rd Defendant witness admitted that he had moved the business to Centro House in July 2008 way before eviction. Further, it was submitted that the claim of Kshs. 20,000,000/- is a duplication among the three Defendants and not proven.

17. As for loss of clientele, goodwill and future earnings the Plaintiff challenged the existence of good will in this case since the 1st Defendant was conducting business in two locations and the business is still going strong in the Village Market and did not show how his business suffered as a result of goodwill after the closure of the premises. The 2nd Defendant continued his business on Kangundo Road and had one of his most profitable years in 2010 which would be impossible without the ability to attract customers on the goodwill it had established. The 3rd Defendant of its own motion shifted its business to a probably more profitable location in Centro house prior to eviction. In defining goodwill the Plaintiff relied on **David Njuguna Ngoth -v- Family Bank Limited & another [2018] eKLR** where Nyakundi J adopted the definition by Lord Macnaghten in **Inland Revenue -v- Muller & Co. Margarine Ltd** as the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a business at its first start...." The Plaintiff also pointed out that it is astonishing how three separate and distinct businesses with presumably different dates of incorporation and commencement of trading would claim an identical figure as goodwill. Further, the Plaintiff contended that the claim for loss of clientele and future earnings is a duplication of the claim for loss of profits as admitted by the 2nd Defendant during cross.

18. As for damages for relocation and setting up shop it was again pointed out that the three different businesses all each claimed the same round figure of 5,000,000/- with respect to relocating to different locations from each other. Further, the witnesses offered no evidence of these expenses and also the 1st and 3rd Defendant witnesses admitted that neither incurred any expenses as the 1st Defendant simply moved to its pre-existing bookshop and the 3rd Defendant had already moved of its own volition. Reliance was placed upon **Christine Akonya v Samuel Chege (supra)**.

Defendants' written submissions

19. They are dated 9th December 2019, the Defendants outlined four issues for determination:

- (i) Whether the Defendants are protected tenants on L.R. no. 209/6368/4?*
- (ii) Whether the Plaintiff unlawfully evicted the Defendants from the suit property?*
- (iii) Whether the Defendants have suffered loss of business as a result of unlawful eviction by the Plaintiff?*
- (iv) Whether the Defendants are entitled to reliefs sought in the counterclaim?*

20. On the first issue, relying on description of controlled tenancy in **section 2(1)(b) cap 301**, the Defendants submitted that they have been in possession of the shops in the suit premises since 1971, 1979 and 1976 respectively and have had continuous uninterrupted occupation without ever having their lease reduced into writing for a period of more than 5 years until November 17th 2008 when they were unlawfully evicted. The Defendants submit that they never entered any lease agreement with the Plaintiff and that they had only known and paid their rent to Mr. George Mwagiru and later Ms. Rosemary Wanja Njau. The Defendants leaned on Justice Ang'awa's ruling in JR no. 287 of 2009 that their relationship with the Plaintiff is as protected tenants and the Plaintiff must comply with the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act if it desired to terminate the tenancy and placed reliance on **Al-Riaz International Limited vs Ganjoni Properties Limited** where the Court stated inter alia "In my view, the provisions of section 2 of cap 301 are clear. Thus, if a tenancy satisfies any of the conditions provided at section 2, the tenancy automatically becomes a controlled one and subject to the provisions of cap 301 and it does not matter whether the parties had agreed that cap 301 shall not apply to their relationship....."

21. On the second issue the Defendants submit that after the expiry of their landlord's lease in 2008 the Plaintiff sought to evict them in complete disregard of the provisions of cap 301 section 5. They referred to **Rajabali Kassam T/A Giraffe Snack Bar vs Total Kenya Ltd** where the Court held that "the section (section 5 cap 301) provides that the termination of a tenancy between such a landlord and such head tenant does not itself terminate a controlled sub-tenancy, but has the effect of transforming such sub-tenancy into a tenancy between the sub-tenant and the landlord owner..." Thus the Defendants submitted that although the lease of the head tenant on the premises had lapsed, this did not amount to the termination of the controlled tenancy as the Defendants were tenants by operation of law and not under contract.

22. The Defendants also rely on Lady Justice Sitati's ruling reinstating them for failure of the Plaintiff to comply with section 106 of the ITPA in evicting the Defendants without notice and the subsequent appeal where the Court of Appeal upheld Justice Sitati's ruling in dismissing the Plaintiff's application for stay by stating "the Order by Ang'awa J dated 30th April 2008 has not been vacated...when the Tribunal held that the Respondents were not tenants within the meaning of the Act it meant that the parties were obligated to go back to the superior court to continue with the Applicant's pending suit". As such, the Defendants submit that the Plaintiff acted in contempt of Justice Sitati's Ruling.

23. The Defendants contend that even assuming they had lost their status as protected tenants they were still entitled to proper notice of termination of their tenancy. They relied on the Court of Appeal case of **Caledonia Supermarked Ltd V Kenya National Examinations Council**.

24. Further, the Defendants contend that a landlord cannot forcefully take possession of its premises without obtaining a court order. They relied on the Court of Appeal case of **M/S Gusii Mwalimu Investment Co. Ltd & 2 others vs M/S Mwalimu Hotel Kisii Ltd. Teresia Irungu v Jackton Ocharo & 2 others**.

25. The Defendants submitted that the Plaintiff's action to evict them and subsequently decline to reinstate them to the suit property was calculated to undermine the judicial process and to steal a march on the court process. They placed reliance on **Haircare Beauticians Ltd vs Standard Properties Ltd & ano** where the Court of Appeal observed that 'the applicant was evicted as the respondent stole a march over the process of the court by evicting her before the application was heard. This court will not sit back and encourage conduct, unlawful or wrongful as a passport to favour'.

26. On the third issue the Defendants relied on **Nanga Kamau v Patrice Kiiru, Nakuru** where Justice Kimaru observed "where the law offers protection to a citizen...it is the duty of the court to uphold such law". The Defendants submitted that they suffered heavy losses and their property was destroyed in their respective businesses and as such they are all entitled to damages for their losses as a result of unlawful forceful eviction as set out in paragraphs 32 to 54 of the Defence and Counterclaim dated 30th March 2015. The Defendants contend that they are entitled to damages in lieu of reinstatement since the premises have already been leased out to third parties. They rely on **Semfeb Limited T/A Cinnamon Tree vs Dhiren Hair Designer Limited** wherein the Court quoted **Coach Safaris Limited V Shariff Hussien Nairobi HCCC 370 of 1995** where Justice Waki as he then was held inter alia that "a person who shows he is entitled to a mandatory injunction must not be compelled to take damages in lieu. Nor must a wrongdoer be permitted to benefit, however remotely from his wrongdoing. More so when the wrong is blatant or where the act or the wrong done is contrary to the law. In cases where conduct of the Defendant is contrary to the law, the Court has no discretion."

The Defendants further contend that they are entitled to general and exemplary damages for trespass. They contend that the Plaintiff evicted them in order to create vacancies for tenants who would pay higher rents to its advantage in the expense of the Defendants. **Kamau Muchua v Ripples Ltd** where Court of Appeal stated "A party as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act."

Further, the Defendants contend that having established that they are protected tenants the Plaintiff's actions amounted to trespass. **John Kiragu v Rural Electrification Authority** on definition of trespass. The Defendants submitted that the Plaintiff being a trespasser on the suit property, the Defendants are entitled to judgment against it for unlawful eviction. Reliance was placed on the case of **Ochako Obincho vs Zachary Oyoti Nyamongo** in which the Court cited **Nakuru Industries Ltd vs S.S Mehta & Sons [2016]eKLR** where the court observed that "In tort, damages are awarded as a way to compensate a Plaintiff for loss he had incurred due to wrongful action on the part of the Defendant. The damages so awarded are intended to return the Plaintiff back to the position he was before the wrongful act was committed. In cases where trespass land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed." The Defendants submit that they are entitled to damages of Kshs. 5,000,000.00/- each.

27. On exemplary and punitive damages the Defendants relied on **Obongo v Municipal Council of Kisumu**. They submitted that following their illegal eviction, the 2nd and 3rd Defendants ceased operations in the year ended 31st December 2010 following a radically reduced turnover rendering the companies' operations no longer financially viable and the 1st Defendant's business suffered significantly reduced turnover. They relied on **The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo** where the court quoted Halsbury Laws of England in instances where exemplary damages are awarded. The Defendants further submitted that the Plaintiffs actions of wrongful eviction and refusal to reinstate and the Plaintiff's goal of profit making have opened up the Plaintiff for an award of exemplary damages.

They relied on **Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa** where Maraga J (as he then was) held that “Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the Defendant and vindicate the strength of the law... The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the Defendant’s conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute.” The Defendants thus submitted that the conduct of the Plaintiff should satisfy the court to award them each Kshs. 30,000,000/. As for aggravated damages the Defendants referred the Court to **The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo**.

28. On special damages the Defendants submitted that they have tendered sufficient evidence to prove they incurred substantial losses and damage to their furniture, fittings, stock and equipment which was destroyed by the Plaintiff’s agents and servants. They referred to the Court of Appeal decision in **Kampala City Council v Nakaye S** where Lutta JA observed that “Secondly, in regard to the question of the value of the articles, household and personal of the Plaintiff, the latter gave evidence as to what she paid for the articles in question and stated that the receipts in respect thereof had been removed or lost as a result of the demolition of the house, and the Judge believed her, I am satisfied that the Judge was right in accepting her evidence in this regard and I see no reason to differ....” The Defendants submit that they are entitled to special damages as prayed they also rely on their respective financial reports. The 1st Defendant claims damages to stock in the sum of Kshs. 11,248,503/- plus damages to office equipment and fittings in the sum of Kshs. 755,518/- totaling to Kshs. 12,004,021/-.

29. The 2nd Defendant claims damages to equipment in the sum of Kshs 7,280,600/- plus damage to the high quality tiled floor and ceiling in the sum of Kshs. 1,000,000/- totaling Kshs. 8,280,600. The 3rd Defendant claims damage and loss of furniture, fittings and machinery in the sum of Kshs 3,000,000/-.

30. On damage for loss of profit and use of premises the 1st Defendant claimed compensation of Kshs 384,265 per annum from 2008. It stated that its turnover declined by -27.46% due to loss of goodwill, clientele and profits. The 2nd Defendant claimed compensation of Kshs. 950,750/- per annum from 2008. It stated that its turnover declined by -7.12% in 2008 and by a further -63.9% in 2009 due to loss of goodwill, clientele and profits. The 3rd Defendant claimed Kshs 136,981.25 per annum from 2008. That despite their efforts to mitigate the losses by trying to acquire equally prestigious premises and advertising their new locations to their customers the Defendants lost goodwill, clientele and expected profits.

31. For the loss of goodwill, clientele and future earnings the Defendants submitted that had it not been for their unlawful eviction by the Plaintiff they would have continued on the suit premises indefinitely. They submit the eviction cost them their clientele and future earnings and each of the Defendants claimed Kshs. 20,000,000/- per annum from the year 2008.

32. The Defendants also submitted that they are entitled to damages for relocation and setting up of new shops and claimed Kshs 5,000,000 each for it. They relied on the financial report prepared by Stratagem for the 2nd Defendant and on the case of **African Highlands Produce Limited vs Kisorio** where it was held that “It is the duty of the Plaintiff to take all reasonable steps to mitigate the loss he has sustained consequently upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect....”

33. The Defendants also claimed damages for loss of business between 2008 and 2013. They submitted that before the unlawful eviction their businesses were growing at an average rate of 4.30%, 6.57% and 7.49% respectively and future profits were projected to grow at the same rate thus they claimed sums of Kshs 3,000,000/-, Kshs 5,000,000/- and Kshs 2,000,000/- for loss of business between 2008-2013 respectively.

34. I have considered the pleadings, the evidence on record, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the defendants were lawful tenants of the plaintiff at the time of their eviction from the premises constructed on LR No. 209/6066/4 (“the suit premises”).

(ii) Was the eviction unlawful?

(iii) If so have the defendants suffered loss of business as a result of the unlawful eviction?

(iv) Is the plaintiff entitled to the reliefs sought?

(v) Are the defendant’s entitled to the reliefs sought?

(vi) Who should bear costs?

35. It is not in dispute that once the plaintiff acquired the suit premises it negotiated a surrender of the lease with Mrs. Rosemary Wanjau who duly notified the defendants to who were sub-tenants to regularize their occupation of the premises with the plaintiff before 31st January 2008 as the lease was to lapse on that date. It is the plaintiff’s case that it invited the defendants to regularize their occupation but they (defendants) went to the Business Premises Rent Tribunal. The plaintiff filed this suit but was referred to the Business Premises Rent Tribunal which has jurisdiction to determine the legality of the sub-tenancies. By a ruling dated 14th November 2008 the Business Premises Rent Tribunal held that it had no jurisdiction to hear the references as the defendants were not tenants of the plaintiff. With no orders in their favour the 1st and 2nd defendants were forcibly but peacefully removed from the suit premises. PW1 Nicholas D’lima told the court the 3rd defendant had stopped operating from the said premises and had transferred to another location within Westlands area.

36. **Sections 2** of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya provides that:-

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—

(a) which has not been reduced into writing; or

(b) which has been reduced into writing and which—

(i) is for a period not exceeding five years; or

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(iii) relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

In the instant case the defendants had to demonstrate that there was a valid tenancy between them and the plaintiff.

37. PW1, told the court, the first lessor on the suit premises was Agip Limited, Agip Limited changed its name to Agip (Kenya) Ltd on 12th October 2000 and transferred its interest to Agip Properties Kenya Limited which later changed its name to Westlands Triangle Properties Limited (the plaintiff herein). That on 23rd December 1997, Westlands Securities Limited the first lessor transferred its interest in the lease to one George Njau Mwangi. Following the demise of the said George Njau his interest was transferred to his beneficiary Rosemary Wanja Njau. The transfer was registered on 10th July 2001.

38. Further that the said Rosemary W. Njau as the lessee would not sell, transfer, assign, sublet, charge or part with possession occupation or use of the demised premises or any additions, buildings or improvements thereon without written consent from the lessor and the president of the Republic of Kenya. These consents were neither sought nor obtained.

39. I agree with the plaintiff’s submissions that in the absence of such requisite consent whatever arrangements between the said Rosemary Njau and the defendants were not binding on the Agip Kenya Limited or the plaintiff. In the case of **Martin M. Odhiambo t/a Express Insurance Services vs Marshalls E.A Limited & Another [2005] eKLR**, the court held that

“If the plaintiff had established that the 1st defendant had consented to the sub tenancy then the rights of the plaintiff as a protected tenant would have secured as against the 1st defendant. The plaintiff has submitted that the 1st defendant was aware of his sub tenancy. That may be so. However since it has been established that the 1st defendant’s consent was not procured by the firm of Karigo Thuo & Co. Advocates before the said firm entered into a sub tenancy agreement with the plaintiff. In so far as the 1st defendant is concerned the plaintiff is a stranger to it. I agree with the 1st defendant’s argument in this regard.”

40. The court went further to state

“The schedule of the Act provides that:-

(xii) the lessee shall not transfer, part with possession or sublet the premises or any part thereof without the consent of the lessor which consent shall not be unreasonably withheld”

This court has found that there is no privity of tenancy between the plaintiff and the 1st defendant. In the circumstances of this case the plaintiff is therefore in illegal occupation of the said premises. He is ordered to give vacant possession to the 1st defendant on or before 31st August 2005 in default the 1st defendant be at liberty to resort to the law to procure the plaintiff’s eviction from the premises”

I am guided by the above authority in finding that the defendants were not tenants of the plaintiff hence did not deserve any protection.

41. DW1, Yasmin N. K Manji admitted that she received a letter in which Rosemary W Njau informed them she was surrendering the lease. In my view this constituted proper notice. The defendants were therefore not protected tenants as there was no valid sub tenancy between them and the plaintiff or its predecessor. In the case of **East Africa Railways Corporation vs Karangi [1988] eKLR** the Court of Appeal held that:-

“The one ground which the respondent put forward and or which he based his claim for damages namely that he had not been given notice to quit, was found against him. In my humble view, the respondent was not entitled to damages for trespass or wrongful eviction and the learned judges contrary holding was in my respectful view erroneous..... This is a hard result for the respondent. It ought not to be thought that I am unfeeling towards him. But this court is governed by principles of law not the hardship of any individual case. At all events this court should resist the temptation of allowing its feelings to get the better of its judgment. My conclusion is that the damages awarded against the corporation for trespass or wrongful eviction was not warranted in law and should be set aside”

42. I find that the defendants were lawfully evicted following a ruling of the Business Premises Rent Tribunal dated 14th November 2008. In

the said ruling the Business Premises Rent Tribunal vacated the orders granted on 1st February 2007. It is therefore clear that by the time the defendants were evicted there were no orders subsisting. J Sitati on her ruling dated 28th November 2008 directed that the defendants be reinstated on the suit premises. The defendants on cross examination by the plaintiff's counsel admitted that they had done nothing to effectualise the ruling. It is not clear whether they cited the plaintiff for contempt for refusing to reinstate them.

43. Having found that the plaintiff did not breach any of the recognised rights of the defendants, I will still go ahead and say something about the reliefs they are seeking in the counterclaim. The defendants were in the suit premises pursuant to unlawful subleases. I find that reinstatement into the suit premises cannot issue. It was PW1's evidence that the suit premises are now occupied by new tenants in the case of **Republic vs Ambrose Odwaya O. Onyango & Another Exparte Caesar Ngige Wanjao [2014] eKLR** Odunga J stated that

“in this case, it is submitted that the 1st interested party has since vacated this suit premises. If that be the position it would follow that the application has been overtaken by event and that the orders sought herein are no longer efficacious and may only serve as an academic exercise.....”

44. I had the opportunity of seeing, the three witnesses for the defendants testify. I find that they were not able to demonstrate that they deserve any damages of any sort as the plaintiff had not breached any contract. I am not satisfied that the defendants demonstrated that they deserved any general damages or aggravated damages.

45. As regards special damages I find that the defendants failed to prove that they are entitled to the special damages as sought. In the case of **Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nadwa Kisumu CA Civil Appeal No. 179 of 1995 (UR)** It was held that:-

“.....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. It is clear that no general damages may be award for breach of contract.....”

The defendants herein have pleaded special damages but could not at the hearing prove that they had incurred such losses. Most of the documents they relied on could not justify the said amounts. I find that this claim fails as well.

46. All in all I find that the plaintiff has proved its case on a balance of probabilities as against the defendants. The defendant's counterclaim is dismissed with costs to the plaintiff.

47. Accordingly judgment is entered for the plaintiff as follows:-

(a) That the plaintiff do have recovery of possession of the units occupied by the 1st, 2nd and 3rd Defendants at the Plaintiff's premises in the property known as L.R No. 209/6368/4 at Westland's in the Nairobi Area, with mesne profits accruing calculated at the rate specified in paragraph 23 of the plaint payable monthly from the 1st February 2008 to the date of eviction.

(b) That an order of injunction restraining the 1st, 2nd and 3rd Defendants severally whether by themselves, their agents or otherwise howsoever from using or entering and remaining on the Plaintiff's property known as L.R no. 209/6368/4 at Westland's in the Nairobi area.

(c) That a declaration is hereby issued that neither the 1st Defendant nor the 2nd Defendant or the 3rd Defendant is a tenant and a controlled tenant pursuant to section 2 of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act cap 301 of the Laws of Kenya or at all under that Act.

(d) That declaration is hereby issued that the Plaintiff is entitled to vacant possession of the units at the suit premises occupied by the 1st, 2nd and 3rd Defendants on and after the 31st January 2008.

(e) That a declaration is hereby issued that that the Plaintiff is a third party to the arrangements for occupation made by the 1st, 2nd and 3rd Defendants and which were not consented to by the Plaintiff and the arrangements do not affect the Plaintiff and the Plaintiff's right to possession.

(f) That the plaintiff shall have cost of the suit with interest.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18th day of June 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

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

.....**Advocate for the Defendants**

Kajuju - Court Assistant