



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO.689 OF 2001

A S t/a BUSINESS 2000.....PLAINTIFF

VERSUS

1. LAKHAMSHI VIRPAL SHAH

2. KAMLABEN LAKHAMSHI SHAH

3. SURESHCHANDRA LAKHAMSHI SHAH

4. ASHOKKURMAR LAKHAMSHI SHAH

5. HARSHA LAKHAMSHI SHAH

6. PRITMALAKHAMSHI SHAH t/a HIGHPARK INVESTMENTS.....DEFENDANT

JUDGMENT

The Plaintiff, A S, has sued the Defendants through his amended plaint dated 13th November 2003 in which he has pleaded as follows. He was a tenant of the Defendant's in premises known as Flat L.R. No. 209/5802 Highridge Shopping Centre Parklands, 3rd Avenue Nairobi from 15th July 1999 by a lease Agreement which was to last five years three months. The Plaintiff carried on therein a business of printing, copying of stationary and maintenance of office equipment under the name Business 2000 which was duly registered. He was paying a monthly rent of KShs 15,000/00 in advance every month.

The Plaintiff has further pleaded that on various occasions in March and April 2001, before expiry of the lease agreement, the Defendants through their agent James K. Kebwage of Mamuka Valuers visited the suit premises and demanded that he forthwith deliver vacant possession. He declined because he still had an unexpired 42 months period before termination of the lease by effluxion of time (till 14th October 2004). In any event, the Defendants did not avail alternative accommodation or a viable option for recompense.

Further, it is the Plaintiff's case that he had carried out renovation at the rental suit premises and completed the painting and repair works for enjoyment of his tenancy and convenience of this business. Despite this, on or about 23rd April 2001, the Defendants proceeded to the premises and began demolishing the building which housed his business thus effectively stopping the Plaintiff from peaceful enjoyment of the business premises in disregard of the lease agreement. This demolition was done in the presence of the Plaintiff and his family in total disregard of their safety, exposing them to danger and causing them to suffer acute mental anguish. Further to this, the Plaintiff lost all his office equipment, original professional certificates, stock in trade and goods held in his capacity as bailee. The Plaintiff instituted injunctive proceedings seeking Court's intervention to stop the Defendants from continuing with the demolition. An agreement was entered into between the parties which the Defendants reneged on. Particulars of loss and damage the Plaintiff suffered has been particularized in Paragraph 9A.

Finally, it is the Plaintiff's case, as pleaded, that as a result of the Defendants' illegal action, he has suffered irreparable loss and claims damages by way of compensation. He claims –

- i. Injunction to restrain the Defendants from interfering with the peaceful and quiet enjoyment of his tenancy and from carrying out demolition or any other construction;
- ii. general damages;

iii. goodwill of the suit premises;

iv. Exemplary and punitive damages;

v. special damages of Kshs. 11,123,186/70;

vi. damages for breach of contract as an alternative to prayer i. for the remaining period of the lease agreement from April 2001, hardship allowance and full costs of relocating; and

vii. costs of the suit and interest.

The Defendants entered appearance and filed a statement of defence dated 5th January 2004. While denying all the averments in the plaint, they pleaded, *inter alia*, that there was no lease agreement that existed between the parties; that they informed the Plaintiff in good faith that they sought to renovate the premises to make it economically viable; that when the Plaintiff learnt that Nakumatt Holdings Limited was interested in letting part of the premises engaged in acts of open blackmail to prevent the extensions and renovation to the detriment of the Defendants; that they had carried out renovations and fixed the fittings in the premises by the time the Plaintiff took over possession; that at the time these proceedings commenced, the Defendants were renovating servants quarters about 18 feet away from the main building in which the Plaintiff's business was located thus he was not affected by the works; that the Plaintiff unlawfully and unreasonably attempted to slow down the renovation works in order to blackmail and/or coerce the Defendants to pay him; that the Defendants gave the Plaintiff adequate notice and/or alternative premises on the same floor fully renovated and furnished but he declined to take it and thereafter voluntarily handed over vacant possession. In a counterclaim the Defendants claimed -

I. That the Plaintiff deliberately and unlawfully refused to allow the Defendants works to proceed or to hand over vacant possession or to be moved to an alternative premises which led to delay of their construction and rehabilitation of the premises for a period of three months.

II. They consequently suffered loss and damage as a result of this refusal the contractor charged them for the delays which amounts the Defendants now claim from the Plaintiff.

III. The Plaintiff without any justification refused to allow the Defendants access to and through the rented premises or to move to an equal and fully prepared adjoining premises on the same floor of the same building and demanded to be paid over Kshs. 11 million in order to hand over possession or allow the work to proceed.

IV. The Plaintiff acted in breach of his duty and obligations as a *bonafide* tenant and his acts amounted to constructive blackmail against the Defendants.

They prayed for the dismissal of the Plaintiff's suit and Judgment in their favour amounting to Kshs. 1.6 Million being general damages.

In a reply to defence and defence to counterclaim, the Plaintiff joined issue with the Defendants upon their statement of defence. He prayed for the dismissal of the defence and counterclaim with costs and for Judgment to be entered for the Plaintiff as prayed for in the amended Plaint.

At the hearing the Plaintiff testified and called five other witnesses. The Defendants did not lead or call evidence as they did not attend the trial despite service of the hearing notice.

The Plaintiff (PW1) testified that he is an Electronic Engineer with respect to office automations like computers and copiers having undergone training in Germany. He adopted his witness statement dated 15th May 2014 as his evidence-in-chief. His list and bundle of documents was produced in a bundle as Exhibit 1. He testified that in 1988, he joined a Company called The Furniture Centre one of the top Companies in East and Central Africa and while there, he was trained and acquired two diplomas. He headed the technical department where he used to install, service and advise the mother Company in Germany on technical issues.

His work also entailed ascertaining clients' requirements, training staff and operators. He also set up equipment and advised famous personalities like the Aga Khan, Chief Justice Hancox, Lenny Kivuti of Geo Maps, and developed Tandem Computers which are used today in Automated Teller Machines (ATMs) and large industrial plants, copiers with Automatic Document Feeders and programmable cash registers.

He eventually left after eight years due to high demand in the market for the equipment he was dealing with and started his own business. This was his vision for the millennium and foundation of the future. He first set up in Ngara at Bhavesh Centre for two years but in 1999 found a suitable place in High Park- Parklands. He entered into a formal agreement with his future landlord and was given a letter of offer dated 13th July 1999. After the letter of offer, a lease followed for a period of 5 years 3 months at Kshs. 15,000/- per month. He paid 3 months deposit and a half months rent as he started occupying it mid-month.

Before the end of the lease, his landlord(the Defendants) entered his business premises and started to demolish it without giving any notice. His lawyers wrote to them under his instructions on 10th April 2001 which did not elicit any response nor did the demolition cease. While the Defendants offered alternative premises next to the one he was occupying, when he demanded written commitment, it was not forthcoming. He was not given an opportunity to move his items from the premises and as a result he suffered a lot of loss. His vision, dreams and ambitions were all shattered. The goodwill and reputation of his business went down the drain and he lost his hard earned investment. This happened at his prime and when the economy had spiraled-when the country had high business ratings.

The witness added that when the demolition took place, he was there with their children and has been psychologically traumatized to date. As a result of the humiliation, he avoided public places; he however visited a psychiatrist when he started having problems with his wife as he was getting depressed. He maintained that he has never made full recovery bearing in mind that this matter has also taken time to be concluded. Finally, he prayed for damages as sought in the plaint.

The second witness for the Plaintiff, Sunil Shah (PW2) currently involved in Governance and Election reforms though a pharmacist by profession adopted his witness statement dated 15th May 2014 as his evidence-in-chief. He testified that the Defendants were his landlords for twenty years. He ran a business of retail pharmacy. The Plaintiff was his fellow tenant in High Park and bought medicine from his chemist, he got to know the family. His tenancy was never terminated as he was a protected tenant. In 2001, it was agreed that he would relocate to another shop. But this was not to be as the Defendants defaulted despite providing him with a design. He testified that he witnessed the bull-dozer demolish the Plaintiff's business premises and asserted that the whole of his family was there when it happened. The Plaintiff disclosed to him that he had not been given any notice so he had not moved any of his goods, furniture or fixtures. They then proceeded to the police station; nevertheless the building was demolished with the goods inside which were never salvaged. He explained that he also never received any notice, has at no time been compensated for his loss though a residential tenant in the same premises was paid Kshs. 1.5 million as compensation. After the demolition, Nakumatt Holdings took over the new premises where it is still stationed to date. The Defendants had demolished the central main building and extended the building by two floors.

The third witness for the Plaintiff (PW3), F A S the Plaintiff's wife adopted her witness statement filed in Court on 16th May 2014. She confirmed that PW1 was the proprietor of Business 2000. She supported his dream when he decided to open his business as he was hardworking and had a lot of skills to offer a business. She asserted that prior to her marriage; she studied law which she decided to give up to get married. She dedicated her whole life to the business which was more like a home to her. She maintained that the business held a lot of promise as they were contracted by Business Foundation to print books countrywide and were also agents of Pan-paper Limited.

At some point, they moved from Ngara to the up market area of Parklands when they got a shop in High Park Investment. That in March 2000, the Defendants approached them seeking to terminate their lease as Nakumatt was interested in the premises. During that time, her child developed diabetes and depended on insulin to survive. It is around the same time that the Defendants started demolition work behind the office without any written notice to them. The tactics used by the Defendants included threats and intimidation. At the time of demolition, they were ready to vacate upon compensation as evidenced by the letter dated 10th April 2001 by their Advocates which did not elicit any response from the Defendants or their agents.

The witness further testified that when they instituted proceedings in Court, an injunction was issued which was vacated several days after, prompting continuation of the demolition. She was in the premises when they demolished it with her babies and workers. She called PW1 and the police who instructed the Defendants to stop the demolition; she locked all the doors but they were forcefully broken. They proceeded to destroy everything inside from documents to equipment. Some good Samaritans managed to pick her children and put them in safer ground. The demolition was without warning which really affected her family psychologically, economically and socially. They sought the support of a psychiatrist. Her father started supporting them which added to her husband's frustration prompting him to go back to his family where he worked at the time of her testimony. She further averred that they now live under the mercy of others as they have lost all respect in society and her mother especially blames her for all that happened. She was then 23 years old and now at 40 feels that her prime years are gone. She then prayed for damages as set out in the plaint.

The fourth witness (PW4), Dr. Sobby Mulindi a Professor at the University of Nairobi teaching Psychiatry and behavioural science stated that he knew the Plaintiff and PW3 as his patients. He testified that he had had sessions with all of them including their children. PW3 had difficulties with the Plaintiff as he had become hostile and got into trouble with neighbours; the children were disturbed and did not feed well. She had nightmares due to destruction of their property. According to the witness, they were all going through post-traumatic stress disorder eight months after their business premises was demolished. He then referred them to other doctors where they attended clinical teaching sessions to highlight causes and effects of trauma. He prepared a report which he produced as an Exhibit. Treatment is still ongoing 15 years later as the effects subsist to date. According to him, traumatic events never end especially as this Court case continues to remind them of the incident. Patients according to him, relapse and hence the need for continued psychotherapy support.

The fifth witness for the Plaintiff (PW5), Daniel Gatama an insurance loss adjuster, a fellow of the Chartered Insurance Institute, an Associate of the Institute of Arbitrators, Member of Kenya Institute of Management and Institute of Loss Adjusters and Risk Surveyors (current Chairman of the Institute of Loss Adjusters and Risk Surveyors) stated that he was familiar with the report authored by a Mr. Charles Mwaura of Range Hawk Loss Adjusters now deceased. He explained that as there is a standard procedure and he was familiar with the circumstances of this matter, he could use the report to testify which he produced as an Exhibit. The witness confirmed that in coming up with such a report, loss adjusters look at the tangible loss of the physical assets; loss of income or profits. The calculation of loss of income was up to 2004 when the lease would have expired. According to him the summary of loss which he produced as Exhibit 13 was as follows –

i. Working equipment machinery and tools	Kshs. 1,504,479/00
ii. Fittings fixtures, decorations and other contents	Kshs. 208,375/00
iii. Stocks held for sale	Kshs. 2,877,715/00
iv. Loss of anticipated income(unexpired lease term)	<u>Kshs. 6,712,951/00</u>
Total	<u>Kshs. 11,303,502/00</u>

The last witness for the Plaintiff, Paresh Updadhuy (PW6) an ACCA, CPA and holder Bachelor of Commerce degree and a Diploma in Computer Programming, stated that he is an accountant by profession and a partner in Eshwar Rao and Associates Certified Public Accountants. He explained that he got instructions from the Plaintiff to do a verification of the Audit Report prepared by Mugo and Company for the years ended 1998, 1999, 2000 and 2001. He was also instructed to calculate the goodwill and profit and loss from the year 2002-2015. He produced as evidence the reports he prepared as Exhibit 14. He qualified the report because some of the documents he required were lost apparently in the demolition. According to the witness, International Standards on Auditing 600 on use of work prepared by another auditor dictates that the other auditor be communicated to but in this case, the senior partner in Mugo and Company had retired and could not be traced. Despite this, he relied on the documents prepared by the said audit firm as he verified that they had been prepared by a professional and submitted to Kenya Revenue Authority (KRA). Nevertheless, he gave a disclaimer of opinion due to his limitation of the scope of audit.

A breakdown of his findings is as follows –

- a. For the year 2001, the audit did not cover the full financial year. It ended on 31st July 2011. For five months up to 31st December 2001 the accounts were not available in the report. This was attributed to demolition of the premises. Had the accounts been prepared up to 31st December 2001, the conclusion would have been different. Loss would have been approximately KShs. 4 million.
- b. The current and non-current assets of the company would have been written off because of the demolition. As at 31st July 2001, the accounts reflected the profit as KShs. 572,634/-.
- c. Goodwill- the business had average based goodwill. Total average profit for 4 years and goodwill for two years was calculated and the findings were that goodwill for the period between 2001 and 30th April 2015 would amount to KShs. 7,113,453/- based on the assumption that the business would still be running.
- d. Loss of profit- this is money, opportunity to earn for a period of years and the loss thereof. Growth of business was at about 10% per annum. A figure of KShs. 39,013,844/- was arrived at from January 2002 to April 2015 calculated as follows –
- e. Lease period- KShs. 10,159,679/-
- f. Projected loss- KShs. 28,854,162/-
- g. Assumptions - Depreciation has been factored in, non-monetary computation has also been taken into consideration as well as expenses increasing and replacement of some of the assets. These assumptions were justified.

That was the totality of the evidence presented on behalf of the Plaintiff. Written submissions were filed on 20th January 2016. These have been considered at length together with the authorities cited.

I believe the testimony of the Plaintiff, PW2 the eye-witness and PW3 that he was illegally evicted from his business premises by his landlords-the Defendants. That this was done without any notice or an offer for alternative space is reprehensible. It was a gross violation of the Plaintiff's constitutional and legal rights. The plaintiff had a legal right to the possession and use of the premises and that right was tortuously invaded by the Defendants. He is entitled to damages for that invasion of his legal right.

In **Gusii Mwalimu Investments Ltd & others –vs- Mwalimu Hotel Kisii Ltd CA No. 160 of 1995 (UR)** it was held-

“The landlord may also have acted illegally, that is contrary to Section 90 of our Penal Code (Cap 63 Laws of Kenya) which reads:-

90. Any person who in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or threats in breaking open any house or in collecting an unusual number of people and whether he is entitled to enter upon the land or not (emphasis added) is guilty of the misdemeanor termed forcible entry:

Provided that a person who enters upon lands or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry.”

I have no hesitation whatsoever in holding that the landlord did all it could to obtain the possession unlawfully and the learned judge was entirely right in making the orders he made. If what the landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premise exercising his right of re-entry and obtaining possession extra-judicially. A Court of Law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order of possession.”

As already noted, the Plaintiff in this case was therefore wrongfully evicted from the demised premises in a forceful manner coupled with intimidation and threats for which I find the Defendants liable, and ought to compensate the Plaintiff. The Plaintiff pleaded special damages of KShs.11,123,186/70, general damages for unlawful eviction and loss of goodwill coupled with exemplary and punitive damages. On specials, the Plaintiff claimed under five heads; loss of original professional certificates (to be quantified at the hearing), loss of anticipated income for the balance of the lease (KShs.6,579,880/-), loss of business working equipment machinery and tools (KShs.1,466,284/70), loss of furniture, fittings, fixtures and tools of trade (KShs.208,307/-), stock (KShs. 2,877,715/-). These are the figures the court will work with and

not the figures introduced at the hearing as a claimant is bound by his pleadings.

Lost business assets

PW3 testified that when the eviction took place, no prior warning had been issued and therefore they were not given any time to remove any equipment, fixtures and fittings from the premises. The premises was demolished with fixtures and equipment still inside. The Plaintiff never removed anything. PW2 corroborated this evidence and stated that on ejecting the Plaintiff, the Defendant used a bull-dozer which meant nothing could be salvaged. At the trial, PW5 produced at pages 30 to 34 of Exhibit 10 a detailed inventory of items destroyed. PW5 was not challenged on the same and his evidence thus remains uncontroverted. I accept the same as evidence of the cost of purchase of the items claimed. The same totals Kshs.1,674,591/-. I allow that sum as proved.

Loss of anticipated income for the balance of the lease

It was commonly agreed that the lease was to run from 15th July 1999 up to 14th October, 2004 (letter of lease at page 1). The Plaintiff was evicted on 23rd April, 2001. There was a term three years and six months (42 months) left on that lease. The Plaintiff's Audited Accounts for the years 1999 and 2000 show the profits for those years to be Kshs.1,358,525 and Kshs.1,344,902/-, respectively. The average monthly profit for those two years would be Kshs.112,642/79. A business is expected to make a profit. I am satisfied that by being evicted, the Plaintiff lost the expected profit he could have made for the 42 months the lease remained unexpired. This is because the Defendants carried out an illegal eviction. I will award that sum per month for 42months. Accordingly, I award a sum of Kshs.4,730,997/18 under this head.

Loss of profits for the period after renewal of the lease

No amount was claimed under this head in the amended plaint but the same was calculated at Kshs. 39,013,844/00 by PW5. However, though the lease had a renewal clause, it stipulated that renewal was at the sole discretion of the Defendants failing which the Plaintiff was to give up vacant possession of the premises. There was a high probability that the said lease would not have been renewed by the Defendants since as pointed out by the Plaintiff, Nakumatt Holdings was already eyeing the premises. In any event, there was no evidence that the parties would have exercised the option to renew and/or the Defendants would have granted the same. Accordingly, I reject this claim.

As regards general damages for wrongful eviction and loss of goodwill, It has already been noted that the eviction was illegal. It is no doubt that the Plaintiff suffered loss of opportunity as well as damage. The goodwill in the business went down the drain. I am satisfied that the Plaintiff is entitled to compensation for the said loss and damage. In the case of **Rev. Simon Ndungu Mungai & Anor -vs- Municipal Council of Kiambu (2011) e KLR** the Plaintiff was awarded Kshs.2 Million for unlawful eviction. Considering the circumstances of this case and considering that there is an award for loss of profits for three (3) years, an award of Kshs.5Million will be adequate under this head.

Exemplary damages were also sought. Exemplary damages are punitive in that they are given as a way of punishing the defendant, or as a deterrent, and are not limited to compensating the Plaintiff for the Defendant's act (see **Dumbell v Roberts[1944] 1 All ER**). In torts affecting property, the Court will allow exemplary damages if there has been wanton intentional interference on the part of the defendant. The most common example is trespass to land. In this case, it was the testimony of PW1, PW2 and PW3 that the eviction took place in a very inhumane manner considering the Plaintiff had opened for business as usual. A bulldozer descended on the premises smashing it into pieces as they watched. Even with the intervention of the police, the Defendants did not back off. The Defendants' action in this case was calculated to procure him some benefit at the expense of the Plaintiff as there was a new potential client who could take up more space and pay more in terms of rent. Kshs. 1,000,000/- was sought under this head. Kshs. 800,000/- is adequate as general damages.

The foregoing is the judgment for the plaintiff against the defendants, jointly and severally. General damages will carry interest from the date of delivery of judgment while the special damages will carry interest from date of filing the suit. I also award costs of the suit to the Plaintiff together with interest thereon from the date of this judgment until payment in full.

It is so ordered.

Dated, signed and delivered at Nairobi this 6th day of April, 2016.

A. MBOGHOLI MSAGHA

JUDGE