



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO.130 OF 2005**

**ROBERT W. MUTAHI ..... PLAINTIFF**

**-VERSUS-**

**ATTORNEY GENERAL ..... DEFENDANT**

**J U D G M E N T**

1. This suit was brought by the Plaintiff through a Plaint dated 14<sup>th</sup> January 2005. The plaintiff alleges that on 1<sup>st</sup> May 1996 by a renewed lease agreement he leased to the defendant a residential block comprising of 15 flats and 1 bed sitter comprised in L.R. 36/VII/558, Eastleigh for a period of 3 years. It was a term in the lease agreement that the defendant would carry out all the necessary repairs/redecorations upon the expiry of the lease term restoring the property into its original state save for wear and tear and was also liable for all electricity charges, water and conservancy; that by a letter dated 15<sup>th</sup> June 2000 the defendant sought to renew the lease for a further 2 years save for an increment in rent which the defendant agreed to. That by a letter dated 26<sup>th</sup> January 2001 the defendant informed the plaintiff of his intention to vacate the premises by 31<sup>st</sup> May 2001 in conformity with the change in Government policy and proposed for either the defendant or plaintiff to carry out the repairs and renovations. By a letter dated 17<sup>th</sup> April 2001 the defendant indicated that they would not hand over the premises as promised and only managed to do so on 2<sup>nd</sup> May 2002 without carrying out any repairs. The plaintiff carried out the repairs and redecoration and requested the defendant to refund him Kshs. 5,059,000/- where upon the defendant paid Kshs. 2,840,351/- in part payment. That inspection of the premises revealed that various items had been destroyed and required to be replaced and the amount tendered by the defendant was greatly under-valued and below the prevailing market rate. That the defendant vacated the premises prior to paying outstanding charges for electricity, water and conservancy and consequently electricity and water was disconnected by Kenya Power and Lighting Ltd and Nairobi City Council respectively; that the defendant sought to have them reconnected pending payment but the service providers declined. The plaintiff completed the repairs in December 2002 but was unable to lease the same due to lack of water and electricity. The plaintiff prays for menses profit from 2<sup>nd</sup> May 2002 upto March 2003 amounting to Kshs.1,425,000/-, electricity charges Kshs. 221,304/-,water and conservancy Kshs. 1,087,261/-,security for premises Kshs. 135,000/- and outstanding repairs and redecoration charges Kshs. 2,228,649/-. That despite demand the defendant neglected to pay the outstanding debts. The plaintiff prays for Kshs.5,097,214.35/-, plus interest at commercial rates plus costs of the suit.
2. The Defendant countered this claim and filed a defence on 25<sup>th</sup> April 2005 and denied that they were liable to electricity, water and conservancy charges owing to the plaintiff or the money claimed and put the plaintiff to strict proof thereof. They stated that the plaintiff agreed to repair

the premises and accepted Kshs. 2,840,351/- as full and final settlement for the same. They denied allegations in paragraphs 9,10,11,12, 14 and 15 and stated that the plaintiff's suit was frivolous, vexatious and did not disclose any cause of action and prayed for its dismissal with costs.

3. The matter came up for hearing on 21/1/2014. The defendant despite being served with a hearing notice dated 4th November 2013 failed to send a representative for the hearing of the main suit. There is an affidavit of service on record dated filed on 20<sup>th</sup> January 2012. The hearing of this matter proceeded *ex parte* and the plaintiff called 3 witnesses in support of his case.
4. The PW1 was the Plaintiff Robert Wamiti Mutahi who relied in his sworn statement and list of documents filed on 18/7/2005. He testified that the lease was for 3 years from 1<sup>st</sup> May 1996 but he requested to increase the rent in 2001; that later the Government wrote indicating that they wanted to surrender the premises for 3 years the rent was Kshs.145,000/- per month for the 15 flats and 1 bed sitter; that the defendant had indicated they would get a representative from public works to hand over the premises. That they went and established what was to be done and it emerged that the whole block required repairs; that the tenant the Ministry of Roads and Public Works collected the bills and gave them to individuals; that the letter dated 25/5/10 gave him the option to repair and redecorate the house and the government was there to check what had been done but differed on the pricing and agreed that the plaintiff carries out the repairs; that the repairs took about 5 months and repairs came to Kshs. 5,069,000/- but the government paid Kshs. 2,840,351/- leaving an outstanding of Kshs. 2,228,649/-; that there was an outstanding water bill of Kshs. 1,087,261/- and electricity bill of Kshs. 221,304.35/- that the defendant left owing. That the government did not pay the said amount but wrote to the service providers requesting they reconnect the same pending payment a request that the service providers declined. He was unable to lease out the premises from May 2002 to March 2003 since the block had no water and electricity which forced him to pay the water and electricity bill reasons why he sought *menses profits* in the amount of Kshs.1,425,000/-; that he was also forced to hire security guards to avoid vandalism of the premises which cost him Kshs. 15,000/- per month which translated to Kshs.135,000/- per month and total amount owing is Kshs.5,097,214.35/- which sum has been owing since 2003 and urged the Court to order the defendant to pay the amount owing plus interest and costs. He added that the cost was higher than the quantity surveyors as the estimates did not consider transport, cost of removing and replacing.
5. PW2, **Peter Njoroge Ngugi** testified that he was a Quantity Surveyor and a Construction Manager that he had been contracted by the plaintiff to carry out an inspection and status of flat block on L.R. 36/VII/556 in Eastleigh on 22/2/2002 and took photographs showing the status of the house. He stated that the original colour was off white, that there was soot on the walls and roof, that the inspection was done jointly with the Ministry of Works, he sought to produce the bills of quantities as exhibits and indicated the work that was to be done and costing of the works however they disagreed with the representative from ministry of work on the costing of the works to be done. That the costing was highly undervalued e.g. buying and fixing a tile was kshs.6,200/- while they quoted Kshs. 1,500/-, buying and fixing a flush door they quoted Kshs. 2,000/-, while the cost was Kshs. 4,484/-, fixing the roof which was a major item was Kshs.607,450/- using water proof materials paint work Kshs.140 instead the quoted Kshs.110/-. All in all he stated that the entire project cost Kshs.5,069,000/- while the Government gave Kshs.2,084,351/-. His fees was only 5% of the cost of the project sum, he indicated that the amount was highly negotiated as the plaintiff was a family friend. He also added that he was being paid Kshs. 5,000/- for attending Court and has been coming to court tirelessly from 2005.
6. **PW3 Stephen Nderitu** testified that he is in construction business and prior to August 2007 he was employed by Express Painters and Decorators. He sought to rely on his statement dated 22/2/11. He testified that he was a supervisor at Express Painters and decorators and had inspected the premises site in question on 21/8/2002 before commencing work on the same in August 2002. He stated that the money paid included cost for materials, labour and transport and that the payments for the same were done in installments.
7. Mr. Amuga Counsel for the Plaintiff submitted that the plaintiff had proved the case as pleaded and to the required standards and had explained the area of dispute. The security and conservatory charges and *mesne profits* had been proved and urged the court to grant the plaintiff's prayers and

award him costs with interest from the date of filing the suit February 2005 and urged the court to strike out the defendant's defence as it lacks merit.

### **Issues for determination**

- i. Whether the plaintiff has proved his case on a balance of probability?
  - ii. Whether the plaintiff is entitled to the mesne profits of Kshs. 1,425,000/-
  - iii. Whether he is entitled to interest on amount owed?
  - iv. Whether he is entitled to cost of the suit?
8. I have examined the pleadings and the annexures thereon and there is no doubt that the Defendant had breached the terms of the Tenancy Agreement. Photographs taken of the said property show the deplorable state in which the premises were in. There are also photos that sought to show the amount of work that was needed to put the said premises in good order. In a premises requiring the door to be replaced the same required security to avoid the premises from being vandalized thus the two guards hired to man the building one in the day time and one night guard was justified on part of the plaintiff. The plaintiff has sufficiently supported his claim by annexing the invoices and account statement. The defendant's defence is a mere denial to the plaintiff's claim and no evidence has been advanced challenging the plaintiff's claim. The Plaintiff has adduced in evidence measured works, bill of quantities indicating the repair and redecorations required in restoring the property in good order and the cost that would be incurred. The plaintiff has also admitted into evidence summary of installment payments as made by the plaintiff towards the settlement of the amount as quoted by the Shelter Costs Systems.
9. Upon perusal of the lease agreement duly signed and executed by both the plaintiff and the Permanent Secretary for Ministry of Works on 5/5/97, page 2 of the lease agreement provides that; *'the leasee to pay all charges in respect of lighting, water and conservancy'* this is an express term in the said agreement and as such the defendant was liable for the amount owing in term of water, electricity and conservancy. The property handed over by the defendant's representative on 2/5/2002 as evidenced by the handing over certificate subsequently the plaintiff had written to the defendant requesting they follow up on the outstanding water and electricity bills via a letter dated 16/5/2002 and then one dated 15/08/2002 upon which the Ministry of Public Works wrote to the service providers Nairobi water and sewerage company and the Kenya Power and Lighting company on 5/2/2003 requesting they reconnect power and water as they were in the process of recovering the money owed from the civil servants who were in occupancy of the said flats. This is evident and indeed clear that the defendant were liable to pay the utility bills.
10. The plaintiff has adduced before this Court sufficient evidence to prove that there was a lease agreement and upon termination of the same the defendant had acknowledged that there were outstanding water and electricity bills by the civil servants previous occupants of the said premises and also acknowledged that there were repairs and redecorations to be done on the said premises save for the disagreement on the cost of repairs and re-decorations. The plaintiff has adduced supporting documents for costs incurred for the repairs and decorations, payment for security, given those circumstances, the burden shifts onto the defendant to show that it has a good defence. Which I find it has failed to do. The defendant's defense is a mere denial of the plaintiff's claim and despite the defendant being served with a hearing Notice it omitted and/or failed to send a representative to Court to counter the claims as pleaded by the plaintiff.
11. On whether the plaintiff is entitled to the mesne profits of Kshs. 1,425,000/- ?

The Civil Procedure Act Cap 21 Laws of Kenya defines profits, in relation to property means:-

*"those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;*

In addition

Order 21, Rule 13 of Civil Procedure provides;

*“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-*

- a. *For the possession of the property.*
- b. *For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.*
- c. *Directing an inquiry as to rent or mesne profits from the institution of such suit until :-*
  - i. *The delivery of possession to the decree-holder*
  - ii. *The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or*
  - iii. *The expiration of three years from the date of the decree, whichever even first occurs.*

*“(2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”*

Mesne profits are special damages which not only need to be pleaded, but also proved. In the case of **Njeri Kimani vs Joseph Njoroge Murigi and others HCCC. 819 of 2009**. It was held;

*“A claim for mesne profits is in the nature of special damages, which require to be pleaded and strictly proved”.*

In this case it is not disputed that the premises were handed over on 2<sup>nd</sup> May 2002 and there were repairs and re-decorations that were to be done. The plaintiff had been provided with two options to allow the defendant to carry out the repairs or he does the repairs. To mitigate his loss the plaintiff paid the electricity and water bill owing to be able to put in other tenants. In my view what the plaintiff did was justified in the circumstances as he was mitigating his losses with intention to claim the amount owing from the defendant. In the case of **Ryce motors ltd. Vs Elias Muroki CA 119 of 1995 of 1995** where it was held;

*“The position in law is that a man in the respondent’s position must take steps to mitigate his damages for this purpose there is no distinction between a damaged & destroyed article.”*

The plaintiff has stated the rent he was being paid, this was not challenged by the defendants, I therefore find that he has proved his claim for mesne profits.

The plaintiff has claimed that he hired security to guard the premises to avoid the same from being vandalized. It is trite law that special damages must be specifically pleaded and proved. In the case of **Hahn vs. Singh [1985] KLR 716**, where the Court of Appeal held as follows:

*“Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves.”*

From the receipts he has adduced three receipts only for the month of May Kshs. 13,500 and for June and August Ksh. 15,000/- each respectively this amounts to Kshs. 43,500/-

The plaintiff had claimed Kshs.135,000/- from the receipts annexed the amount approved is Kshs. 43,500/-, and this is what I award the plaintiff.

The Sale agreement signed by the plaintiff and Permanent Secretary for Ministry of Works and Housing on 5<sup>th</sup> May 1997. Paragraph 2(2) of the said agreement states that *“Lessee to pay all charges*

*in respect of lighting, water and Conservancy.*” The plaintiff vide a letter dated 15<sup>th</sup> August 2002 wrote to the defendant on outstanding electricity and water bills outstanding at Kshs.162,000/- and Kshs.741,766.56 respectively. The defendant through its maintenance department responded to the plaintiff’s letter vide their letter dated 5<sup>th</sup> February acknowledging the outstanding electricity and water bills and indicated that they were following up on the same from the various civil servants. This clearly shows that there were water and electricity bills owing the bills. From the bills annexed by the plaintiff, I find that the plaintiff has proved his claim to the tune of Kshs. 137,753/- and not the Kshs. 162,000/- I therefore award the plaintiff Kshs. 137,753/- being the amount of electricity bills owing. On the issue of water bills going by the bills annexed by the plaintiff are of amounts outstanding as at June 2004, it is not in dispute that the said premises were handed over to the plaintiff on 2nd May 2002 and I believe that the bills accrued should be till the date the premises was handed over and from the bills attached, I find that the plaintiff has proved a sum of Kshs. 1,087,261/- as water and conservancy charges, the plaintiff has also proved the outstanding repairs and redecoration charges at Kshs. 2,228,649/-. He is entitled to mesne profits and I award the sum claimed of Kshs. 1,425,000/-. The total sum proved as per the plaintiff’s claim is Kshs. 4,922,163/-. I therefore enter judgment for the plaintiff in the sum of Kshs. 4,922,163/- with interest at Court rates from the date the suit was filed until payment in full. The plaintiff has not justified why this Court should give him interest at commercial rates. The plaintiff is also awarded costs of the suit.

Orders accordingly.

Dated, signed and delivered this 6<sup>th</sup> day of June 2014.

**R. E. OUGO**

**JUDGE**

In the presence of:-

..... For the Plaintiff

..... For the Defendant

..... Court Clerk