IN THE COURT OF APPEAL

AT NAKURU

(Coram: Nyarangi, Platt & Gachuhi JJA)

CIVIL APPEAL NO 60 OF 1987

BETWEEN

NYABOGA.....APPELLANT

AND

MURIITHI.....RESPONDENT

JUDGMENT

(Appeal from the judgment of the High Court at Nakuru, Masime J)

May 27, 1988, **Platt JA** delivered the following Judgment.

The appellant/plaintiff had sued the defendant for damages (exemplary; punitive, general and special) but the special damages indicated something more. The claim was for "special damages at the rate of Kshs 600 per day from October 31, 1986 until the time the shop will be open." The plaintiff averred that he was a tenant of the defendant in business premises known as LR No 8836/528 (Shop No 3) in Nakuru, and according to paragraph 5 of the plaint, he alleged that from October 31, 1986 he had been locked out. Consequently he had lost the use of the stock in trade inside the shop, and had been prevented from going on with his day to day business. The plaintiff envisaged that once the defendant had seen sense, the plaintiff would continue in the shop let to him. In the meantime he suffered loss of profits of Kshs 600 per day and loss of goodwill. Quite how the plaintiff hoped to achieve the continuance of his tenancy was not pleaded; and moreover the terms of the tenancy were not pleaded. The defendant denied that the plaintiff was his tenant in shop No 3 LR 8836/528. He denied that he painted the glass and every other allegation. The defendant counterclaimed on the basis that the plaintiff stored his goods in the defendant's premises from January 1986 to March 1986, after which the plaintiff failed to vacate the premises or pay rent at the rate of Kshs 5,000 per month. The defendant therefore claimed general and punitive damages and mesne profits from April 1986 at Kshs 500 per month.

The plaintiff's defence to counter-claim contained the allegation that the monthly rent from February 1986 was agreed at Kshs 3,500 per month. He did not entirely rely on that figure, although he noted that the defendant said the rent would rise to this figure after one month.

The defendant's reply to that defence contained the even stranger allegation that the plaintiff was only a tenant in his old premises LR 8836/ 528 at a rent of Kshs 1,500 per month and not LR 8836/528 (sic).

The learned judge summarised the evidence very well. The plaintiff had been a tenant in LR 8836/528 (thereafter referred to as "No 582") from February 1, 1986 until January 1986. It had then been agreed that the plaintiff would vacate No 582, situated on a rear street, and move his hardware business to better premises LR 8836/528 (hereafter called "No 528). The rent had been Kshs 1,500. According to the plaintiff he moved into the new premises which was the third shop and made several arrangements. On January 9, 1986 he bought the defendant's shelves in No 528 for Kshs 2,000 and that was admitted by the defendant. Then on January 16, 1986 the plaintiff paid a deposit to the defendant's wife of Kshs 5,000 "for the new shop." The words "Advance Rent" were later cancelled by the defendant. The plaintiff later paid a further Kshs 10,000 on February 6, 1986. But the rent agreed had been Kshs 2,000 per month.

The plaintiff agreed and paid for renovations to No 582, and the defendant converted those premises into a lodging. The defendant agreed to renovate the third shop at No 528, which took two weeks. However, the main dispute occurred in drawing up a lease. There were two problems, the sum of Kshs 45,000 for goodwill; and a term of lease of over five years. The plaintiff did not agree with the defendant's demands. All sorts of difficulties then arose; the defendants painted over the glass window of the shop on May 19, 1986; the defendant wrote to the Municipal Council at Nakuru to refuse the plaintiff a business licence; it is claimed that the defendant turned off the water and finally the premises were locked. Notice to quit was served on June 3, 1986 effective from September 1, 1986. The plaintiff got help from the Business Premises Tribunal to get the paint removed from the window, which the defendant obeyed on June 26, 1986. The plaintiff admittedly did not pay any rent after March 1986. There were proceedings on that account before the Tribunal also.

The first issue at the trial was whether there was a tenancy of shop No 3 (ie at No 528) as a shop or a store, and if so, what was the rent? The learned judge held that there was an agreement for a lease in principle, but that there was no enforceable tenancy. The plaintiff's suit was dismissed. The defendant's counterclaim was also dismissed. There was no question of a storage agreement.

But on the rent the plaintiff said he had leased the premises for Kshs 2,000.

That was disputed, but the learned judge chose that figure for mesne profits. The plaintiff was held to owe the defendant Kshs 2,000 per month from February to October 1986 inclusive but excluding May, and the defendant was entitled to deduct that sum from the deposit. That would seem to be Kshs 16,000. Kshs 15,000 had been paid in January and February, 1986. Kshs 20,000 had been paid in the first contract for No 582. I am not clear how these sums were to be worked out, but from what will follow it does not matter. Finally the learned judge gave an order for vacant possession, which he may have inferred from prayer (c) in the counterclaim.

On the whole the learned judge relied on the plaintiff's version of what happened for instance he thought that:

> "The defendant created the claim of a tenancy for a store in order to offset the plaintiff's claim."

The inference seems to be that the defendant did paint the windows (issue No 2) and the defendant did lock the plaintiff out (issue No 3). But on the last point he observed:

> "As during the subsequent period the parties were content to have the premises locked up while they litigated their rights in the case I make no order as to mesne profits for that period."

The plaintiff was dissatisfied with those decisions and appealed. The first ground, as would be expected, is that there was an enforceable tenancy. It was wrong to find merely an "agreement in principle." The effect of the notice to quit had not been considered. It was wrong to find that goodwill, or refundable deposit, and the period of the tenancy were such vital terms that the tenancy was unenforceable.

It will be convenient to determine the question raised by these first four grounds of appeal to begin with.

The learned judge was right that the full terms of the lease were not agreed, let alone executed and registered. However, as *Rogan Kamper v Lord Grosvenor* (1977) KLR 123 explained in the absence of an agreed lease there may still be a monthly tenancy arising out of possession and payment and payment of rent. Such a tenancy being unwritten it is protected by the Landlord and Tenant (Shops, etc) Act (cap 301). There is no doubt that the plaintiff took possession of the new premises with the consent of the defendant, and indeed the plaintiff bought the shelves in the new premises. The plaintiff paid for renovations in the old premises. Thereafter the defendants converted the old premises (No 582) into lodgings. There was no going back, there was no possibility of the plaintiff being the tenant of both Nos 582 and 528, as the defendant seems to have attempted to allege at one stage. The defendants gave evidence as follows:

> "In December 1985 the plaintiff came to me and asked that he wished to transfer his hardware business from behind the building on Nyaundo road, to the front of the building on Ngala road where I had a butchery shop … I agree with the plaintiff's proposals and asked him to pay me Kshs 1,500 rent per month as before. He paid me Kshs 1,500 on January 1, 1986."

Hence according to the defendants there was an exchange of premises and the tenancy continued. The plaintiff alleged that their affairs were not so simple as that. Kshs 2,000 per month rent, rising to Kshs 3,500 was agreed. The defendant then seems to have switched to an agreement for storage space at Kshs 5,000 per month. But the first payment of Kshs 5,000 was for rent in advance for the new premises. Later the words rent in advance were cancelled. But the plaintiff had paid rent in advance on January 9, 1986 in the first place. It follows that while the terms were being bargained for, some rent was being paid. Together with possession that spelt out a monthly tenancy and the defendant's notice to quit in the proper form under cap 301 confirmed that position. There was a monthly tenancy.

On the other hand, as the learned judge pointed out, as no reference was made to the tribunal to dispute the notice, it took effect. (See section 6 of the Act). Thus the tenancy came to an end on September 1, 1986. By this time the parties had become enemies. The premises had been locked; the plaintiff's goods were detained inside, and two proceedings had been taken to the tribunal. The first concerned the painting over of the window of the shop by the defendant, thus obliterating the name of the plaintiff's business. This occurred in May and the defendant removed the paint at the end of June. The second concerned the non-payment of rent. It is not clear what happened in the tribunal. But the plaintiff admitted paying no rent after March.

In the schedule to the Act (cap 301), the implied undertakings are set out. The defendant had to give quiet possession. He failed to do this in May and June when he painted the windows, turned off the water and when he locked the premises preventing the plaintiff having access to his goods. The plaintiff was wrong not to have paid rent and should have vacated the premises on September 1, 1986.

Both sides claim punitive damages and the plaintiff claims exemplary damages. This case does not fall in either of these categories. Both sides were at fault.

It is not very clear what loss of business the plaintiff incurred by the painting over the window. The 1096 accounts had not been completed by the time the trial was held. The plaintiff's wife testified that she saw a loss of business during the time the glass windows were painted over. But she could not say how much. It was not a complete loss. The accountant Mr Obwocha calculated the daily net earnings as between Kshs 200 and Kshs 300 per day; not as Florence thought Kshs 1,000 or Kshs 1,200 per day, or as claimed at Kshs 600 per day. But if Florence who saw the loss could not say what it was, and the accounts are not prepared, the court cannot do more than award nominal damages in the region of Kshs 1,000.

The plaintiff has had his goods locked up since October 1986. For this he claims loss of profits and goodwill. He is not entitled to either. Her should have vacated the premises on September 1, 1986. Had he done so, eh would have incurred no loss. Having not done so, he could have referred the matter to the tribunal who could have ordered the delivery of the goods against vacating the premises. There can be no claim for special damages.

On the plaint, the plaintiff is entitled to Kshs 1,000 damages and costs on that sum.

On the counterclaim, the learned judge dismissed the claims arising out of storage as well as he may have done. There is no claim for failure to pay rent, which on the plaintiff ‘s own admission he claims. It is then difficult to fit in the judge’s award of mesne profits to the plaintiff for the months February, march, April, June, July, August, September and October 1986. The plaintiff did not claim them. He wanted mesne profits after October until the shop was opened. That award cannot stand.

It is then said that this award can be deducted from sums deposited. That is also not claimed. The parties have not raised the repayment of the deposit. At a guess, if one were to consider the non-payment of rent from April 1 to August 31, and then two months holding over in September and October at Kshs 2,000 per month as the learned judge suggested, that would seem to be Kshs 14,000 as against the deposit of Kshs 10,000. It may be that this rough equality caused the parties to leave this matter out of the pleadings. But there is certainly no case for the defendant paying the plaintiff mesne profits. There is no cross-appeal on the counterclaim.

September 1, 1986. I would allow the plaintiff half unsuccessful. As to the trial I would order each party to bear his own costs. They were and still are both at fault equally.

Nyarangi JA. I agree, and do not wish to add anything. As Gachuhi JA concurs, the appeal is allowed in the terms, including costs proposed by Platt,

JA. Gachuhi JA I have had the advantage of reading the judgment prepared by Platt JA in draft form.

I entirely agree with the conclusion therein reached. I would add that the parties were not certain of their claims either in their pleadings or in their evidence. The court cannot adjudicate on matters which are not clearly set out in the pleadings and to be proved by the evidence.

Dated and delivered at Nakuru this 27th day of May , 1988

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

Cases

Rogan-Kamper v Lord Grosvenor [1977] KLR 123

Statutes

Landlord and Tenant (Shops, Hotels & Catering Establishments) Act (cap 301) section 6