



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 559 OF 2012**

**ESTHER WANJIKU T/A UMBRELLA RESTAURANT.....PLAINTIFF**

**-VERSUS-**

**RETIRED MAJOR S. S. M. KAMAU.....DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 3<sup>rd</sup> July 2012, the plaintiff seeks judgment against the defendant for:-

***(a) Damages for illegal and unlawful eviction.***

***(b) Costs of this suit and interest.***

2. Upon being served with summons to enter appearance and copies of plaint, the defendant entered appearance through the firm of J. W. Wanjohi Advocates on 21<sup>st</sup> November 2012. He also filed a statement of defence dated 11<sup>th</sup> December 2012. In his statement of defence he denied each and every allegation in the plaint. Further that the plaintiff could not continue with the tenancy since she could not afford to pay the rent.

3. PW1, Esther Wanjiku the plaintiff told the court, that the defendant was her landlord. She adopted her witness statement dated 31<sup>st</sup> July 2012 as part of her evidence in this case. She told the court that she sought permission from the defendant to renovate the premises. The plaintiff was to operate a restaurant business in the said premises at Kabete. The premises were in poor state, so it was agreed that the plaintiff undertakes renovations and the monies would be deducted from future rents.

4. She further told the court she did renovations at a cost of Kshs.628,140/-. At some point they got into a disagreement and the matter was referred to the Business Premises Rent Tribunal vide Tribunal Case No. 929 of 2010. While the case was pending at the tribunal the defendant evicted her. In the process of the said eviction, foodstuff got spoilt.

5. She relied on the documents in the list of documents dated 27<sup>th</sup> September 2012 and filed in court on the same date. They are; a lease agreement dated 20<sup>th</sup> July 2008. A valuation report dated 16<sup>th</sup> February 2011 and an order from the Business Premises Rent Tribunal dated 22<sup>nd</sup> December 2010. They were produced as exhibits P1 to P3 respectively. She prays that the defendant be compelled to pay her damages for the illegal eviction. She also seeks costs of the suit.

6. DW1, Simon Mbatia Kamau, the defendant in this case, admitted that the plaintiff used to be his tenant. He adopted his witness statement undated but filed in court on 11<sup>th</sup> December 2012. He also relied on the documents in list of documents dated 11<sup>th</sup> December 2012. They were produced as exhibits D1 to D6 respectively. He further told the court that the plaintiff was in rent arrears to the tune of Kshs.272,000/- so he was allowed to levy distress.

7. That the order to levy distress was obtained from the Business Premises Rent Tribunal. The distress was levied and the goods were carried away. The plaintiff approached him and agreed to pay Kshs.100,000 whereby her goods would be released. She was issued with a receipt. That at this point, the plaintiff stated that she was not going back to the business and desired to sell the goods. Since they were on friendly terms he offered her his yard to sell the goods. Further that the plaintiff voluntarily left the premises after she got her goods back. The defendant forfeited Kshs.172,000/-.

8. DW1 further stated that the plaintiff only did renovation to the tune of Kshs.153,000/- which she recovered from the rent. He prays that the plaintiff's suit be dismissed with costs.

9. At the close of the oral testimonies parties tendered final submissions.

### **The Plaintiff's Submissions**

10. They are dated 6<sup>th</sup> June 2019 and 27<sup>th</sup> January 2020. The defendant disregarded the Business Premises Rent Tribunal orders in Case No. 929 of 2010 and illegally and unlawfully levied distress on the plaintiff's property and further evicted her from the premises. This was in contravention of Section (4) of the Landlord and Tenants (Shops Hotels and Catering) Establishments Act, Cap 301 Laws of Kenya.

11. It was agreed that the plaintiff would expend monies in improving the dilapidated state of the premises which monies were to be fully recovered. She proceeded to upgrade the state of the premises at a cost of Kshs.628,140/- which amount was deductible from rent as per the agreement dated 20<sup>th</sup> July 2008 by the parties. It was agreed that the sum expended would be factored in rent in future. The plaintiff produced a valuation report dated 16<sup>th</sup> February 2011 which shows the renovations done to make the premises tenable.

12. The plaintiff paid rent regularly as evidenced by the receipts produced as exhibit p2. She was not in any rent arrears. The defendant alleged that she was in rent arrears prompting her to refer the matter to the Business Premises Rent Tribunal. It was during the pendency of the said case that the defendant illegally and unlawfully levied distress on the plaintiff's property and further evicted the plaintiff from the premises thereby occasioning her great loss and damage. No notice of termination of tenancy was served on her as per clause 4(g) of the lease agreement and no monies used for renovations were refunded upon eviction.

13. The defendant was in breach of the lease agreement and without her consent trespassed onto and entered into the demised premises thereby effectively evicting the plaintiff from the suit premises. She has put forward the cases of **Gusii Mwalimu Investment Co. Ltd vs Mwalimu Hotel Kisii Ltd CA Civil Appeal No. 160 of 1995 (unreported)**.

14. The defendant conceded that he went and obtained police assistance to evict the plaintiff when the order clearly indicated that the plaintiff was not to be evicted from the premises until the matter was finalized. The eviction carried out was unlawful. Once the plaintiff was evicted she was no longer a tenant in the said premises and therefore the tribunal lacked jurisdiction to entertain the matter. She has put forward the case of **Narshidas & Co. Ltd vs Nyali Air Conditioning and Refrigeration Services Ltd**.

15. The plaintiff's goods were carted away by the defendant's agents who were duly instructed by the defendant and the plaintiff never received the said goods even after paying the auctioneers charges which she did under duress from the defendant. The plaintiff is entitled to damages for the invasion of her legal rights.

16. The defendant's illegal and unlawful actions brought the plaintiff's business to a halt as she was unable to carry on her business after the defendant illegally evicted and carted away her goods. She has suffered loss and damage. The plaintiff prays that the defendant be compelled to compensate her for the loss she has suffered for unlawful closure of her business premises and unlawful eviction.

### **The Defendant's Submissions**

17. They are dated 30<sup>th</sup> September 2020. The plaintiff was a tenant in the defendant's premises known as LR No. 23947/4 where the agreed rent was Kshs.30,000 per month. Sometimes in 2010, the tenant was in rent arrears and the defendant sent her a demand letter which was not honoured. The plaintiff had filed Tribunal Case No. 929 of 2010. The court heard the matter *ex parte* and on 22<sup>nd</sup> December 2010. The Chairperson, Mrs. Mochache certified the matter urgent to be served upon the Landlord. She also granted prayer (2) of the application prohibiting the landlord from proceeding on with distress for rent pending the hearing of the complaint.

18. The tribunal case was heard *inter partes* where the court considered all the evidence, heard both the plaintiff and the defendant who were represented by their respective advocates.

19. On 11<sup>th</sup> May 2011 Mochache D (Chairperson) in the presence of Ms Asuna for the landlord and Mr. Anambo for the tenant ordered that "the landlord (now defendant) is permitted to levy distress but should not evict". This order has not been set aside or appealed. The defendant instructed Nathan M. Pala t/a Muhatia Pala Auctioneers to get police assistance to execute the court order on 23<sup>rd</sup> May 2011 the Chief Magistrate's Court granted orders for police assistance.

20. The Auctioneer attached the plaintiffs goods and the plaintiff requested the defendant to give her a place to store the goods. The plaintiff pleaded with the defendant to agree to a payment of Kshs.100,000 all inclusive of auctioneers fees and rent arrears instead of Kshs.272,0000/- that the court awarded. The defendant agreed and the plaintiff paid and was agree to take away her goods.

21. The plaintiff was not able to prove the allegation of eviction. The lease agreement was for three (3) years from 1<sup>st</sup> July 2008 to 30<sup>th</sup> June 2011. The plaintiff left the premises peacefully after expiry of the lease. Under clause (2) (1) of the lease, the tenant was not allowed to make any alterations of erecting fixtures on the premises. No receipts were produced to confirm the plaintiff made payment to the tune of Kshs.628,000/-. The valuation report by Real Estates Limited is of no consequence as the valuer was not called to testify. He who alleges must prove.

22. The plaintiff has not proved that she was evicted. The defendant executed a court order and levied distress. The defendant prays that the plaintiff's suit be dismissed with costs.

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

*(i) Whether the plaintiff was evicted by the defendant. if so was it unlawful?*

*(ii) Is the plaintiff entitled to the reliefs sought?*

*(iii) Who should bear costs of the suit?*

24. The lease between the plaintiff and the defendant is dated 20<sup>th</sup> July 2008. It is for a term of three (3) years from 20<sup>th</sup> July 2008 to 30<sup>th</sup> June 2011 at a monthly rent of Kshs.30,000/- Clause 2(m) of the lease agreement provides that the lessor covenants;

**“Not to make any alterations in or erect any fixtures thereon or drive any nails, screws, bolts, or wedges into the floor, walls, ceiling or woodwork thereof without the consent in writing of the lessor just held and obtained”.** The plaintiff ought to have produced an agreement between her and the defendant to do renovations.

25. There is a valuation report by Interlink Real Estates dated 16<sup>th</sup> February 2011. It is signed by Mwathi Kungu Ruthuago (Valuer). The said valuer was not called to testify in respect of the said report. The plaintiff seeks Kshs.628,000. These are special damages. The same are not pleaded. It is trite law that special damages ought to be pleaded and proved. The plaintiff alleged to have done the said renovations at the commencement of the lease. No receipts were produced to prove that she did expend such monies. I find, that this claim must fail. The defendant admitted that the plaintiff did some renovations following a verbal agreement to a tune of Kshs.150,000/- which amount she recovered from the rent due. In the absence of any proof by the plaintiff, the court will take the defendant’s testimony as true. The plaintiff told the court that she sought the defendant’s permission to renovate the premises. She has however adduced no evidence to prove this fact.

26. Section 107(1) of the Evidence Act, provides that:-

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that these facts exist”.**

27. It is the plaintiff’s case that she was unlawfully evicted from the premises by the defendant, before the case in the Business Premises Rent Tribunal was finalized. That her tools of trade and food stuffs got spoilt in the process. To show that there was a case pending in the Business Premises Rent Tribunal she relied on the order dated 22<sup>nd</sup> December 2010 where ex parte orders were granted against the defendant.

28. It is the defendant’s case that by an order dated 11<sup>th</sup> May 2011 the defendant was permitted to levy distress but should not evict. In order to levy distress, he sought orders seeking police assistance vide Misc.330 of 2011 in Chief Magistrate’s Court Milimani. The said order was granted.

29. There is a letter dated 2<sup>nd</sup> June 2011 to Muhatia Pala Auctioneers to release the goods to the plaintiff upon payment of his costs. The said letter is written by the defendant it reads:-

**Ref: Release of goods attached form Esther Wanjiku Umbrella Bar and Restaurant.**

**“Kindly release the goods attached from the above tenant.**

**NOTE: Sort ought the issue of costs with the tenant within reasonable terms.**

**Yours faithfully,**

**SIGNED**

**S S M Kamau**

**Landlord”**

30. The plaintiff in her evidence did not challenge the contents of this letter. It is clear that her goods had been attached for failure to pay rent.

31. In her submissions she states that she was not in rent arrears yet no single receipt was produced to confirm that the rent due had been paid. I find that the plaintiff has failed to prove that she was evicted at all by the defendant.

32. I am also unable to find that the eviction was unlawful as the same eviction was not proved. In the circumstances I find that she is not entitled to the reliefs sought.

33. In conclusion I find that the plaintiff has failed to prove her case against the defendant on a balance of probabilities. The plaintiff’s suit is dismissed with no orders as to costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 10<sup>th</sup> day of December 2020.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Mukiri for the plaintiff

No appearance for the defendant

Kajuju

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Court

Assistant