REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2149 OF 1974

PETER MARK GERSHOM OUMA……. PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL…..……RESPONDENT

JUDGMENT

By a written agreement dated 2nd September 1969 (hereinafter referred to as "the agreement") the defendant Council agreed to sell and the plaintiff agreed to purchase the piece of land known as land reference number 209/6989, containing by measurement 0.0195 of a hectare or thereabout and marked "K8/H" situated at Woodley-Kibera (now Jamhuri) estate in Nairobi, together with the development erected and being on it (I shall hereafter refer to the said property as "the premises").

It was an express term of the agreement that the plaintiff would pay Shs 7700 by way of deposit and part payment of the purchase price of Shs 76,500. The Shs 7700 was to be paid before the execution of the agreement. The balance of the purchase price, amounting to Shs 68,800, together with interest on that amount for the time being remaining unpaid at the rate of 8 1/2 per cent per annum was to be paid by 240 equal monthly instalments of principal and interest combined in the sum of Shs 607; and each instalment was to be paid on the first day of each calendar month commencing from 1st September 1969, and thereafter until the whole balance owing was paid. If default was made in payment of any of the instalments of principal and interest for fourteen days after it had become due and payable, then the whole of the purchase price or the balance remaining unpaid together with interest was forthwith to become payable and be paid by the plaintiff to the Council on demand; and it was to be recoverable forthwith by action with the interest was forthwith to become payable and be paid by the plaintiff to the Council on demand; and it was to be recoverable forthwith by action with the interest at the rate aforesaid continuing to accrue until the actual date of payment of the principal in full.

The plaintiff was to be let into possession as soon as he had executed the agreement and paid the deposit and the ground rent, or such proportion as determined by the Council; and, thereafter the plaintiff was to be responsible for the payment and discharge of all rates, taxes, ground rent and development charges (if any) and all unspecified other charges, assessments, duties, expenses and outgoings of whatever kind in respect of the premises, whether payable by an owner or by an occupier or otherwise. In the event of the plaintiff failing to discharge any of the outgoings the Council could discharge them and add the amount so expended to the purchase price or recover it as a debt due from the plaintiff. The plaintiff was also required to insure the premises with an insurer in the sum selected by the Council. Clause 8 of the agreement reads as follows:

In the event of the purchaser failing to perform and observe any of the aforementioned covenants and

conditions on his part to be performed and observed or failing to make any or all of the payments herein before provided then instead of or in addition to the exercise of any other available remedy the Council may by not less than one month's notice in writing determine this agreement and resume possession of the premises hereby agreed to be demised and the purchaser shall give up possession on the expiration of such notice. The Council may then either; (i) sell or lease the premises free from any right or interest of the purchaser therein; or (ii) maintain possession and assume the management thereof without being liable for any loss occasioned thereby.

The plaintiff paid the deposit of Shs 7700 and was let into possession of the premises in 1969 by the Council. The plaintiff alleged, and it was not disputed, that he put into the premises his moveable property. The items of that property are not specified.

It appears that the plaintiff fell into arrears with his payments from time to time. In December 1973, January and February 1974 he was in arrears to the extent of Shs 2027 made up as follows: rent or loan repayments for these months Shs 1822 Insurance Premium 106 and ground rent 100

As a result of these arrears the Council sent certain correspondence to the plaintiff. The first letter is dated 22nd February 1974, addressed to the plaintiff by the city treasurer. This notice reads:

Estate Woodley/Kibera, House K84, Account 41009 I note with regret that your account in respect of the above property was in arrears to the extent of Shs 2027 as at 28th February 1974. (This figure included insurance and ground rent for 1974).

This situation constitutes a breach of your tenant purchase agreement and I have no alternative but to ask the City Council's chief assistant attorney, by copy of this letter, to initiate proceedings for repossession of the property without further warning.

If you do not agree with the figures shown as arrears above, please bring your receipts or other evidence of payment to the tenant purchase section, room 504, fifth floor, City Hall, without delay.

A further letter dated 1st March/1st April 1974 which purported to be a notice was addressed to the plaintiff by the town clerk. This letter reads as follows:

Re Woodley/Kibera, House K84, Account 41009 I am informed by the city treasurer that you have failed to pay for the above house contrary to the tenant purchase agreement made between you and the city council of Nairobi, the particulars of which are well known to you. Your account has fallen into arrears to the tune of Shs 2027 as at 28th February 1974. Take notice therefore that unless the said amount of Shs 2027 is paid within the next thirty days of the date of this letter, my instructions are to terminate the said agreement and enter into and upon the above premises and exercise all its rights expressed or implied by the said agreement on behalf of the City Council. Please take further notice that such repossession of the house will not exonerate you from your liability to pay the said sum of Shs 2027 plus any other claim, interest and any related costs.

On 2nd April 1974 the Council wrote to the plaintiff a further letter on the following lines.

Re Woodley/Kibera, House K84 KSH, Account 41009 You were on 1st March 1974 served with a notice of the Council's intention to repossess the above premises on the expiration of the notice unless all the arrears of rent outstanding to your account were paid up before such expiration.

The notice has now expired and neither have you cleared your indebtedness nor delivered vacant possession of the above premises to the Council.

In the circumstances, I, on behalf of the City Council of Nairobi, have no alternative but to have you forcibly evicted from the premises which you are now occupying without authority.

By copy of this letter I am instructing the chief city superintendent to have you, your family and any other

person now occupying the above premises duly evicted on 9th April 1974.

Please note that: (1) While every care will be taken to safeguard you personal belongings from damage, the Council shall not be responsible for any damage that may be caused to such belongings during their removal or otherwise caused. (2) any expenses incurred by the

Council in so evicting you will be your responsibility. (3) You will be responsible for any repairs to the premises which may be necessitated by your stay therein since the date of your first occupation.

On 9th April 1974, Council *askaris* went to the plaintiff's premises and evicted his family. The plaintiff was not present then as he had gone on *safari.* The plaintiff filed this suit on 16th December 1974 against the Council asking for specific damages of Shs 26,78/60; general damages for wrongful eviction, and costs and interest.

In paragraph 6 of the plaint the plaintiff stated:

On or about 1st March 1974 by a letter dated 1st March 1974 and describing the plaintiff's premises as K84, [Council] purportedly gave a notice to the plaintiff of thirty days of the [Council's] intention to repossesses the premises described, the which premises never existed. This notice was taken to the plaintiff by had and was delivered to the plaintiff's wife by the [Council's] servants on 18th March 1974 at 1.40 pm Thus under the provision of the agreement this notice was invalid as it did not contain the proper reference of the premises and it did not constitute the one month's notice required by the agreement. Further the plaintiff states that the amount mentioned therein as Shs 2027 is not correct as the plaintiff had only Shs 1821 in respect of rent arrears. He was never given any notification of any other payments required from him.

On 7th February 1975, the Council filed a defence and denied that there was any improper or insufficient reference or description of the suit premises on the notice or as alleged in paragraph 6 of the plaint, or at all; and put the plaintiff to very strict proof of all and singular allegations of fact contained in it, and maintained that the notice was valid and proper and that the outstanding rent at the date of eviction was Shs 2027. This figure was subsequently amended to read Shs 1841 in the defence. In paragraph 4, the defence states:

Alternatively but without prejudice to the foregoing the [Council] says that if the notice was invalid, which is denied, its invalidity is of no legal consequence as the [Council] never determined the agreement referred to in the plaint, which agreement still remains in force and is valid as between the parties thereto and the [Council] avers that it was entitled to evict the plaintiff for nonpayment of rent on giving reasonable notice, which notice was amply given to the plaintiff.

I am of the opinion that the notice of eviction referred to in paragraph 4 of the defence is the letter dated 2nd April 1974.

Paragraph 6 of the defence admits the eviction of the plaintiff from the premises on 9th April 1974, but denies that the eviction was unlawful or wrongful; and also denies that in removing the plaintiff's property from the premises the Council's agents were negligent or careless, or that the property of the plaintiff were stolen.

There is a counterclaim in which the Council states that Shs 7117 is owed to it by the plaintiff who has failed to pay the same for a period of more than fourteen days in contravention of clause 2(b) (ii) of the agreement, and, in consequence the plaintiff is indebted to the Council in the sum of Shs 53,164, being the balance of the purchase price. The council therefore has asked for dismissal of the plaintiff suit with costs, and judgment for Shs 53,164 against the plaintiff together with costs and interest on the counterclaim.

In his defence to the counterlaim the plaintiff stated that he had always been willing and ready to meet the payment of Shs 7117, but that such payment was stopped by the Council: see its letter addressed to the

plaintiff which stated that the council would only accept payments from the plaintiff "without prejudiced", as the Council maintained that it had repossessed the premises. This letter from the council was not produced in this Court. The plaintiff added that the Council having expressly, or by implication, refused to accept payments from the plaintiff cannot in law rely on any part of the agreement to claim the balance of the purchase price.

In his submission the counsel for the Council submitted that the notice of 22nd February 1974 was the basis of the eviction and that the notice dated 1st March 1974 was unnecessary duplication. He added that the council did not determine the agreement but merely repossessed the premises. In the same breath counsel stated that the city treasurer assumed that on 22nd March 1974, that is one month after the notice, the agreement would come to an end. As regards the letter of 22nd February, the plaintiff argued that this letter was never served on him and that it did not constitute one month's notice. With respect, I found the arguments of Mr Agutu for the Council confusing and difficult to follow.

The letter of 22nd February was informative. It was intended to inform the plaintiff that he was in breach of the tenant purchase agreement and what steps the Council intended to take or was taking. It was neither a notice contemplated under clause 8 nor a demand contemplated under clause 2(b)(ii) of the agreement. The notice contemplated by clause 8 is in the form of and has wording similar to that in the letter of 1st March/1st April 1974. It must specify the period of the notice, that is one month. A demand under clause 2(b) (ii) must demand payment of the whole of the purchase price or the balance remaining unpaid together with interest.

Mr Agutu for the Council submitted that clause 8 allows for other remedies in addition to determining the agreement and repossessing the premises, and that one such remedy might involve eviction, and that, in default being made, the Council has an alternative remedy of managing the property without determining the agreement. Counsel did not seem to understand clause 8. Under clause 8, the Council can manage the premises only after determining the agreement. This is why the words "the Council may then…" have been used in that clause. Those words mean that after the Council has (by not less than one month's notice in writing) determined the agreement, it resumes possession of the premises. It is correct to say that, in resuming possession, it would have to evict the purchaser, unless the purchaser voluntarily gives up possession. When the Council has regained possession it may choose to sell or lease the property, thus parting with possession of it; or it may keep possession of the property, and manage it without being liable for any loss occasioned thereby. This may mean managing a vacant property and that is why loss or liability is disclaimed. The agreement is in both cases determined and the words "the council may then either…" in clause 8 are in no way bad drafting.

The way I understand clause 8 of the agreement is that in the event of default by the purchaser instead of, or in addition, to the council exercising any other remedy available to it (like demanding payment of the whole of the purchase price or the unpaid balance plus interest), the council may give to the purchaser one month's notice and at the expiry of one month determine the agreement. After determining the agreement the Council resumes possession and manage the property with vacant possession. To determine the agreement one month's notice is mandatory; and to regain possession the agreement must be determined. There is no way and no clause by which the council could repossess the premises without first determining the agreement as the agreement allows resumption of possession only after its determination, and not otherwise.

Having found that the Council's letter of 22nd February 1974 was neither a notice under clause 8 nor a demand under clause 2(b) (ii), the notice the Council could have acted on is that dated 1st March/1st April 1974. The wording of that letter is proper, and, in my opinion amounts to the notice required by clause 8 of the agreement. The back of that notice shows that it was served on 18th March 1974 at about 1.40 pm. This was not denied by the plaintiff or his witnesses. The thirty days, or one month, therefore started running against the plaintiff on 18th March 1974 and it expired on 17th April 1974. No eviction could be lawfully carried out and possession of the premises resumed until 18th April 1974. As is admitted, eviction was carried out on 9th April 1974, ten days before the lawful date. As the Council had no right to evict the plaintiff on 9th April 1974, its servants and/or its agents committed the tort complained of and they were trespassers on the suit premises. The plaintiff did what he was entitled to do when he went back

and regained use of the premises in possession of which the Court was told he still is. If the notice was given on 1st April 1974, eviction could not have taken place on 9th April 1974 (as it did) as the notice would in that case be insufficient. Eviction of the plaintiff could be carried out only under clause 8 of the agreement that is, after properly and lawfully determining the agreement. The basis of the eviction was determination of the agreement under clause 8. If the determination of the agreement was unlawful, the eviction would be unlawful too. I am inclined to add that I agree with the plaintiff that he was not given one month's notice as required by clause 8, and there is no doubt that the Council by evicting the plaintiff on 9th April 1974, assumed that it had determined the agreement. Since the purported determination of the agreement did not comply with the provisions of the agreement, it was unlawful, and as the eviction was founded on the determination of the agreement, it follows that the eviction was wrongful. Even if I agree with Mr Agutu for the Council, which I do not, that the agreement was not determined, then as I have stated above any eviction of the plaintiff without first determining the agreement was wrongful. The plaintiff, therefore, succeeds in his action for wrongful eviction.

The plaintiff has asked for specific damages amounting to Shs 26,768/60, this being the value, it is alleged, of his property damaged and stolen by the Council's servants, or through their negligence, during the illegal eviction on 9th April 1974. The Council has in its defence denied that in removing the plaintiff's property from the premises its servants or agents were negligent or careless and does not admit that any of the property of the plaintiff was stolen. When the eviction was carried out the plaintiff was away on *safari* and the plaintiff's wife, Tabitha Oyola Ouma, stated in her evidence that she was not at home at the time of the eviction. She was at the City Hall and, when she returned home at about 1 pm, she found all the property which had been in the house outside the premises. The things were scattered and some were broken; others were missing.

She could, therefore, not tell us who broke the things she found broken, and who took the missing property. John Jagam who then stayed at the plaintiff's house left the home at 7.30 am on 9th April and did not go back till 2 pm when he found all the things outside. He is not of much help in telling us who broke or stole what property. On the other hand, city inspector Joseph Kamau Gicheru who was in charge of the evicting squad and has been carrying out evictions for the last seven years told the Court that he and four other city *askaris* supervised the eviction to ensure that no property was stolen or broken and none was broken or stolen. He also stated that they found two ladies at the house who were very co-operative and assisted in removing some of the things. He stated that Tabitha Oyola Ouma was one of the ladies he found at the house, and after the eviction they left the ladies in charge of the property. The evidence of another city inspector, Samwel Mwangi Macharia, who was with Joseph Kamau Gicheru is to the same effect that no property of the plaintiff was damaged or stolen.

Mr Agutu contended that before the plaintiff could get specific damages he had to aver that specific damage had been incurred. That the plaintiff had done. In the plaint the plaintiff listed the number of items damaged and/or stolen. Mr Agutu, however, argued that it was a legal requirement that the plaintiff has to prove that he had suffered specific damages and for this he relied on *Clerk & Lindsell on Torts* (11th Edn) page 165 which reads: "If there be any special damage, which is attributable to the wrongful act, that special damage must be averred and proved." In the 13th edition of the same text, paragraph 352, page 220 "measure of damages – general and special damages", the authors have this to say:

'Special damage', on the other had, means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise of the trial.

The terms "general" and "special" damages are used with different meanings. They refer, firstly, to liability; secondly, to proof; thirdly, to pleading; and, fourthly, to the meaning of special damage only. We are here concerned with proof and pleading and I shall make no attempt to be philosophical about these two. Here it simply means that for special damages to be awarded they must be pleaded and proved. The English case of *Stroms Bruks Aktie Bolag v John & Peter Hutchison* [1905] AC 515 sums up the position, which is applicable in this country, at pages 525, 526 where Lord Macnaghten said:

'General damages', as I understand the term, are such as the law will presume to be the direct natural or

probable consequence of the act complained of. 'Special damages', on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly.

Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damage, *Ratcliffe v Evans* (1892) 2 QB 524 where Bowen L J said at pages 532, 533:

The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

In the instant case there was an allegation and a list of some stolen or broken property of the plaintiff. This was in the pleading, but certainty and particularity of proof were lacking. In the circumstances the claim for specific damages must fail, and it is dismissed.

I now turn to the claim for general damages. In the English case of *Ashby v White* (1703) 2 Ld Raym 938, 955 Holt CJ propounded a dictum that is often cited in support of the proposition that the law presumes or implies damage in every breach of contract or whenever a legal right is tortuously invaded and, consequently, in such cases, nominal damages may be awarded without proof of actual loss. In that Holt C J said: "every injury imports a damage, though it does not cost the party one farthing". The dictum indeed explains nothing. The approach I support is that contributed to by the authors of *Mayne & McGregor on Damages* (12th Edn) paragraph 202, page 192, and that is to regard an injury or wrong as entitling the plaintiff to a judgment for damages in his favour even without loss or damage, but where there is no loss or damage such judgment will be for nominal damages only. Thus in the words of McCormick, *Damages* (Minnesota, 1935):

The recognition of a right unrelated to detriment sustained is merely a metaphorical prophetical way of stating that in given conditions an adverse judgment will be given without a showing of loss.

Such a judgment has attracted, as stated, only nominal damages of a token sum of forty shillings or even sums as low as one shilling sixpence and there are cases where a farthing has been awarded in England in the past. Nevertheless, there are cases where general damages are said to be at large. This is mostly in defamation cases and related cases where damages are particularly difficult to assess and the Court cannot point out any measure or yardstick by which the damages can be assessed. In such cases the Court is not bound to give nominal damages only and the yard-stick is the opinion and judgment of a reasonable man (see *Prehn v Royal Bank of Liverpool* [1870] LR 5 Exch 92, 99, 100, per Martin B).

In the present case the plaintiff and his family were deprived of user of the suit premises for three days. This was stated in evidence and remained unchallenged. He was paying a monthly rent of Shs 607 which represented the monthly instalments. This may have represented the value to the Council of the plaintiff's monthly use of the premises. I, however, do not consider the monthly rent as a measure by which damages can be assessed in a case of this nature, and I am unable to point to any specific yardstick.

The plaintiff had a legal right to the possession and use of the premises and that right was tortiously invaded by the Council. He is entitled to damages for that invasion of his legal right. In my opinion this is a case where the damages are at large. The plaintiff in his closing submission requested the Court to award exemplary damages if possible. Exemplary damages are punitive in that they are given by way of punishment of the defendant, or as a deterrent example, and are not limited to compensating the plaintiff for the defendant's act (see *Dumbell v Roberts* [1944] 1 All ER 326, 330). In torts affecting property the Court will allow exemplary damages if there has been a wanton intentional interference on the part of the defendant. The commonest example is trespass to land.

I am satisfied and have found that the Council's servants and/or agents trespassed to the plaintiff's premises. There was, however, no evidence of their acting with a high hand or wanton or violence. There are no circumstances to justify an award of exemplary damages and I will not award the same. I am not on the other hand bound to limit the amount of damages to any precise sum in this case. Applying the opinion and judgment of a reasonable man, I would and do award the plaintiff Shs 2000 as general damages for wrongful eviction, plus court fees and outof- pocket disbursements with interest thereon at court rates.

The Council has filed a counterclaim, in which it claims Shs 53,164 being the balance of the purchase price of the suit premises. The claim in the counterclaim is based on clause 2(b)(ii) of the agreement which reads:

If default shall be made in payment of the instalments of principal and interest motioned in clause 2(b) above for fourteen days after the same shall have become due and payable then the whole of the purchase price or the balance thereof remaining unpaid together with interest thereon as aforesaid shall forthwith become payable and be paid by the purchaser to the Council on demand and be forthwith recoverable by action but so that interest at the rate aforesaid shall continue to accrue until the actual date of payment of the principal.

The sum of Shs 53,164 claimed in the counterclaim is therefore payable "on demand". There is no evidence that that demand has been made, and none was adduced in this Court or otherwise. Normally the Council, having not demanded, would in the circumstances not be entitled to judgment for the balance of the purchase price. But the plaintiff filed a defence to the counterclaim on 24th February 1975, and in that defence he raised no defence of no demand having been made and no such defence was raised by the plaintiff at the hearing of the suit. In the circumstances the Council's counterclaim must succeed. There will be judgment for the Council in the sum of Shs 53,164 plus costs and interest thereon at court rates as prayed in the counterclaim.

Orders accordingly.

Dated at Nairobi this 24th day of November 1976

Z.R. CHESONI

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JUDGE