



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NAIROBI**

**CASE NO. 102 OF 2012**

**MAGGIE MBOGO MACNIVEN**

**T/A GARDEN OF EDEN RESTAURANT.....PLAINTIFF**

**VERSUS**

**NORTH LAKE LIMITED.....1<sup>ST</sup> DEFENDANT**

**TRANSALLIED LIMITED..... 2<sup>ND</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....3<sup>RD</sup> DEFENDANT**

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

1. The Plaintiff by a plaint dated 21<sup>st</sup> February 2012 and filed in court on 28<sup>th</sup> February 2012 prayed for judgment to be entered against the Defendants jointly and severally for:-

- a) **An order of permanent injunction restraining the Defendants or any of their servants and/or agents from wasting, damaging, alienating, selling, removing or disposing of the suit property known as L.R No. 330/351 Thomson Estate, located along Mbaazi Road Lavington, Nairobi or otherwise causing injury to the plaintiff in relation to the property in dispute in the suit;**
- b) **An order of injunction compelling the Defendants to reinstate the Plaintiff sub-tenancy forthwith.**
- c) **Special damages of Kshs 14,708,932.46**
- d) **Loss of earnings**
- e) **General damages**
- f) **Exemplary damages**
- g) **Cost**

2. The Plaintiff averred that the 1<sup>st</sup> Defendant was the registered proprietor of the parcel of land known as **LR No. 330/351 Thomson Estate**, Nairobi and the landlord of the 2<sup>nd</sup> Defendant. The Plaintiff was the subtenant of the 2<sup>nd</sup> Defendant with the consent of the 1<sup>st</sup> Defendant. In the course of time the 1<sup>st</sup> Defendant and the Plaintiff engaged in negotiations with a view of creating a tenancy but unfortunately the negotiations did not materialise. The 2<sup>nd</sup> defendant to whom the Plaintiff was paying rent was not remitting rent to the 1<sup>st</sup> Defendant prompting the 1<sup>st</sup> Defendant to attempt to levy distress on the premises where the Plaintiff was carrying on her bar and restaurant business but the distress was unsuccessful as the plaintiff objected before the Business Premises Rent Tribunal. The Plaintiff alleged that when the distress failed, the 1<sup>st</sup> Defendant in collusion with the 3<sup>rd</sup> Defendant without any justifiable cause brought the business of the Plaintiff into a halt through a series of acts of destruction and looting of stock, furniture, fixtures and other structures thereon. The Plaintiff further contended that the 2<sup>nd</sup> Defendant was under the obligation of ensuring that the Plaintiff enjoyed peaceful and exclusive possession.

3. The 1<sup>st</sup> Defendant filed its statement of Defence and counterclaim on 25<sup>th</sup> April 2012 in which it acknowledged entering into a lease agreement with the 2<sup>nd</sup> Defendant. The occupation of the property known as **L.R No. 330/351 and 330/377** (hereinafter referred to as **“the suit premises”**) by the Plaintiff was however not sanctioned by the 1<sup>st</sup> Defendant. It was the 1<sup>st</sup> Defendant’s case that sometime in August 2010 the Plaintiff approached the 1<sup>st</sup> Defendant with a bid to get a proper lease and the 1<sup>st</sup> Defendant prepared and sent to the Plaintiff a

lease agreement which was never executed by the Plaintiff, and efforts to distress for rent was thwarted by an order made by the Business Premises Rent Tribunal in favour of the Plaintiff. The 1<sup>st</sup> Defendant claimed that the 3<sup>rd</sup> Defendant on 16<sup>th</sup> December 2010 proceeded to the suit premises to remove the unauthorized and unapproved developments effected by the Plaintiff on the suit premises and as result the 1<sup>st</sup> Defendant consequently suffered loss and damage to its property. In its counterclaim therefore, the 1<sup>st</sup> Defendant seeks general damages against the plaintiff for the loss suffered.

4. The 3<sup>rd</sup> Defendant denied the allegations by the plaintiff and averred that it was not party to any dispute between the Plaintiff, 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant neither entered appearance nor filed its statement of defence.

5. During the hearing of the matter, Maggie Mbogo Macniven (PW1) and Geoffrey Ngatia Karugu (PW2) testified for the Plaintiff, while Reuben Gikonyo Maina (DW1) testified for the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> Defendant did not offer any evidence at the trial but did cross examine the witnesses who testified at the hearing.

6. PW1 gave evidence that the 2<sup>nd</sup> Defendant with the consent of the 1<sup>st</sup> Defendant sublet to her premises where she set up her business, the Garden of Eden Restaurant in 2009, and that she was paying rent for the premises to the 2<sup>nd</sup> Defendant. She testified that she took over an old building on the suit premises which she renovated to suit the purpose of her business. She told the court that the 1<sup>st</sup> Defendant later approached her and wanted her to enter into a lease agreement for the premises at a monthly rent of Kshs. 250,000/=. The parties started negotiations but failed to agree on terms. Despite the negotiations coming to unsuccessful end, PW1 testified that the 1<sup>st</sup> Defendant insisted that the Plaintiff pay rent directly to it which was untenable as the plaintiff still had contractual obligations to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant responded by sending an auctioneer to distress for rent and PW1 through her lawyers obtained injunctive court orders against the distress from the Business Premises Rent Tribunal. PW1 testified that the 1<sup>st</sup> Defendant continued to harass the Plaintiff, and after about 4 weeks after being served with the injunctive order issued by the Business Premises Rent Tribunal the 1<sup>st</sup> defendant together with the 3<sup>rd</sup> Defendant descended on the plaintiff's premises and demolished structures erected by the Plaintiff on the premises on 3 occasions in December 2010. She told the Court that Nairobi City Council had issued the Plaintiff with all the appropriate and necessary licences to enable her operate her business on the premises. She testified that the representatives of the 1<sup>st</sup> Defendant, one, John Weru and one, Ann Kirima were present when her business premises demolished. She testified that the structures she had put up were damaged together with the hotel's equipment including seats, fittings and consumable goods. The Plaintiff testified that she commissioned Triple Seven Assessors to do a loss assessment and prepare a report on damages which report PW2 prepared that showed damage in the aggregate sum of Kshs. 14,931,500/= which formed the basis for her compensation claim before the court.

7. PW2 gave evidence that Triple Seven Assessors is licenced by the commissioner of insurance. He testified that he prepared a report dated 26<sup>th</sup> January 2011 on instructions of the plaintiff. He told the court that he proceeded to the site where he saw most of the items that were said to have been damaged. It was his evidence that the plaintiff did not have most of the receipts to support the purchases of the items but gave him a schedule of the inventory of the damaged goods. He told the court that he took pictures and obtained another inventory of similar goods from the market to establish the value of similar goods. He told the court that the renovations were only a few months old. His conclusion was that the total loss occasioned to the Plaintiff was at Kshs. 14,931,500/- as itemised on the report that he tendered in evidence.

8. Upon the close of the plaintiff's case, the 1<sup>st</sup> Defendant called DW1 who testified that he was a manager of the 1<sup>st</sup> Defendant and that he had worked for the 1<sup>st</sup> Defendant since 2004. He told court that the 1<sup>st</sup> Defendant had a contract with the 2<sup>nd</sup> Defendant but not with the Plaintiff. He told the Court that when the 2<sup>nd</sup> Defendant refused to pay rent, the 1<sup>st</sup> Defendant terminated its lease with the 2<sup>nd</sup> Defendant. The witness in cross examination affirmed that the Plaintiff was a subtenant of the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant was aware of the fact. At the conclusion of the trial on 13<sup>th</sup> December 2018 the court directed the parties to file their closing submissions within 60 days. By the time the matter was mentioned before the Deputy Registrar on 18<sup>th</sup> February 2019 only the Plaintiff and the 3<sup>rd</sup> Defendant had filed their submissions. The file was transmitted to me to prepare judgment thereafter. I have reviewed and considered the pleadings, the evidence and the submissions filed by the parties and the following issues arise for determination:

- (i) Whether or not the 3<sup>rd</sup> Defendant is properly sued in the present suit.**
- (ii) Whether the Plaintiff was licensed by the 3<sup>rd</sup> Defendant to carry on business of a restaurant on the suit premises.**
- (iii) Whether the Plaintiffs structures on the suit premises were unlawfully demolished and if so by whom?**
- (iv) Whether the defendants are liable in damages to the Plaintiff, and if so, to what quantum?**
- (v) What reliefs or orders should the court make?**

9. On the question whether or not the 3<sup>rd</sup> defendant is properly sued, I take cognisance that the 3<sup>rd</sup> Defendant is a body corporate within the scope of Section 2 of the County Government Act 2012 and is established by Article 176 of the Constitution. The date of assent for the County Government Act was 12<sup>th</sup> July 2012 though the Act was inoperationalized in 2013. The suit by the plaintiff was filed on 28<sup>th</sup> February, 2012 before the County Government Act came into force. Nonetheless the 3<sup>rd</sup> Defendant, Nairobi County Government, is the successor of the now defunct City Council of Nairobi, and by operation of law has inherited both the assets and liabilities of the City Council of Nairobi, and is properly sued in this suit. The 3<sup>rd</sup> defendant all along has been aware of the present suit and the fact that the name of the 3<sup>rd</sup> Defendant was not amended to read "**Nairobi County Government**" cannot render the suit against the 3<sup>rd</sup> defendant defective.

10. On the evidence by the Plaintiff it is clear that she sublet the suit premises from the 2<sup>nd</sup> Defendant and her intention was to carry out a restaurant business. The Plaintiff renovated the premises whose user was designated as residential to fit the use she wanted to put the

premises into. It would appear the Plaintiff commenced doing the renovations and putting up the temporary structures before approval was given by the 3<sup>rd</sup> Defendant. The Plaintiff equally sought the business licence for business from the 3<sup>rd</sup> Defendant before a change of user for the premises was obtained. The court in the case of **Wainaina Kinyanjui & 2 Others -vs- Ng'ang'a [2013]eKLR** outlined the considerations in granting licensing and building permissions where it stated as follows:-

**“the law regards the effects of development on the private rights of others as a material consideration in the granting of development permission, and that is why there are elaborate provisions on the consultation and the participation by those who may be affected by a development in the Physical Planning Act....It is also clear from the provisions of section 30 of Physical Planning Act and section 58 of the Environmental Management and Co-ordination Act that approval is required to be given before the commencement of any development or material change of use of land, and not after such change has occurred. I must add that one of the main reasons for this prior approval is to address and mitigate the issues and objections like the ones now being raised by the plaintiff in this court before such development or user commences.”**

11. PW1 on cross examination gave evidence that the user of property was residential and admitted to conducting a hotel business on the residential property. The Plaintiff through her advocates Gatheru Gathemia & Company wrote to the 1<sup>st</sup> Defendant on 28<sup>th</sup> September 2010 addressing the issue of change of user as follows;

**“ii. Change of user to a commercial lease.**

**Our client is currently running a duly licensed Bar and Restaurant Business with a shoe shop. She has invested heavily in masonry, plumbing, carpentry, electrical, landscaping, works, interior décor and designing amongst other things thus converting your client's premises into a classy and tasteful well designed joint from what she took up as a run down and abandoned dwelling house.**

**Our client is currently paying monthly rent on a regular basis without delay or default at an “over-priced monthly amount” for any residential dwelling house located within this environ.**

**It has now emerged that your client does not wish to apply for change of user of the premises and consequently there are no basis for varying or altering the amount of rent that our client is currently paying to the Head Tenant.”**

12. It is clear that the plaintiff was aware that the suit premises were **“run down and abandoned dwelling house”** and the user of the suit premises was residential but proceeded to operate her bar and restaurant business without first obtaining a change of user. The Plaintiff however adduced evidence to the effect that she obtained all the necessary licences and clearances to operate the business of bar and restaurant which included: a Single Business Permit for the plaintiff to engage in the business of bar and restaurant; a clearance certificate issued by the 3<sup>rd</sup> Defendant's fire prevention Department upon inspection of the premises; and a licence issued by the public health department of the 3<sup>rd</sup> Defendant. It does appear the 3<sup>rd</sup> Defendant issued the Plaintiff with the licences and clearances to operate a business within what was a residential premises without requiring that she obtains a change of user first. The Plaintiff adduced evidence that she renovated the old building on the property and set up structures to fit the operation of a bar and restaurant business. The pictures of the suit premises that were taken before renovations were done depicted an **‘old residential house’**, while subsequent pictures of the premises taken when the Plaintiff was operating the bar and restaurant business show several structures had been put up. These photographs were annexed and illustrated in the report produced in evidence by PW2. There was no evidence produced to show that the 3<sup>rd</sup> Defendant had indeed objected to the structures or that any notice had been given to the Plaintiff by the 3<sup>rd</sup> Defendant to remove the said structures. Section 30(4) of the Physical Planning Act Cap 286 Laws of Kenya lays down the procedure that ought to be followed in the event a developer/party erects unauthorised structures. It provides as follows:-

**30(4) Notwithstanding the provisions of subsection (2) -**

**(a) the local authority concerned shall require the developer to restore the land on which such development has taken place to its original condition within a period of not more than ninety days;**

**(b) if on the expiry of the ninety days' notice given to the developer such restoration has not been effected, the concerned local authority shall restore the site to its original condition and recover the cost incurred thereto from the developer.**

13. The 3<sup>rd</sup> Defendant offered no evidence during the trial and there was no evidence that there was any compliance by the 3<sup>rd</sup> Defendant with Section 30(4) of the Physical Planning Act before the suit premises were invaded and the Plaintiffs structures demolished. On the evidence adduced by the Plaintiff I was satisfied it was the 3<sup>rd</sup> Defendant's officers and/or agents who actively participated in the demolition of the structures erected by the Plaintiff in the suit premises. The 1<sup>st</sup> Defendant corroborated the Plaintiff's evidence that it was the agents of the 3<sup>rd</sup> Defendant who demolished the Plaintiff's structures on the suit premises. DW1 in paragraph 14 of his witness statement dated 3<sup>rd</sup> December 2018 stated as follows:-

**14. On 16<sup>th</sup> December, the 3<sup>rd</sup> Defendant's agents stormed into the suit property and demolished the Plaintiff's structures. Later on, I learned that the Plaintiff was running the business illegally, without approval of the 3<sup>rd</sup> Defendant and without obtaining the requisite change of user.**

14. Under the provisions of Section 30(4) of the Act, the 3<sup>rd</sup> Defendant was required to issue the Plaintiff with a notice requiring it to restore the land into its original condition. If that was done, the Plaintiff would have had sufficient time to salvage most of her property. As the Plaintiff was never issued with any notice requiring her to restore the land to its original condition, I find that the actions of the 3<sup>rd</sup> Defendant

were in disregard of Section 30(4) of the Physical Planning Act and were therefore unlawful and illegal.

15. The Plaintiff under paragraph 18 of the plaint pleaded special damages against all the Defendants jointly and severally and itemized the destroyed and stolen items during the demolition. During the hearing, the Plaintiff placed reliance on a report dated 26<sup>th</sup> January 2011 made by PW2 of Triple Seven Assessors in regard to the special damages claimed. The evidence given by PW2 was in the nature of expert evidence and the court will treat the same as such. The principle governing evidence by expert witnesses is well established that a court is not bound by expert evidence. In the case of **Stephen Kinini Wang'ondu -vs- The Ark Limited [2016] eKLR** the court held that;

**“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.”**

16. The qualifications of PW2 as an expert was not in dispute. During cross examination of PW2 it emerged that he held an Architecture degree from University of Nairobi and he was a trained loss assessor/or claim investigator. He gave evidence that his business was licenced by the Commissioner of Insurance who was the regulator of such business. His evidence was that he visited the site and observed that the plaintiff's property and structures had been extensively damaged. He stated the Plaintiff did not furnish any receipts for the lost and damaged items as the Plaintiff sated they were lost and/or damaged during the demolition. It is trite law that special damages must be specifically pleaded and proved. In the case of **Hahn -vs- Singh [1985] Kenya Law Reports 716**, the Court of Appeal stated thus,

**“...special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the Act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves.”**

17. The report presented before the court in evidence by PW2 contains photographs illustrating the state of the property before the Plaintiff effected the renovations, while the Plaintiff's business was in operation after the renovations were effected and the state following the demolitions. Looking at photographs depicting the state after the demolitions, it is evident brutal force was applied. Debris including smashed concrete, torn grill railings, broken chairs and fittings are strewn all over. There are smashed toilets, window panes and stair cases which are testimony of the wanton destruction that was inflicted on the suit premises.

18. I have held that it was the 3<sup>rd</sup> Defendant's agents who perpetrated what was in effect an unlawful demolition of the Plaintiff's business premises. It is possible that the Plaintiff had erected unlawful and unapproved structures but the 3<sup>rd</sup> Defendant had licensed and authorised the Plaintiff to carry out a bar and restaurant business on the premises. The 3<sup>rd</sup> Defendant had no right to descend on the property to effect demolitions of the structures thereon without notification to the Plaintiff. Due process as provided under Section 30(4) of the Physical Planning Act had to be followed, the Plaintiff may perhaps have been able to avoid the damage and losses that she was exposed to as a result of the demolitions. The 3<sup>rd</sup> Defendant took the law into their hands and are liable for their actions.

19. In determining the quantum of damages the Plaintiff would be entitled to and from whom, I have carefully reviewed the loss assessors report produced in evidence by PW2 and it is my view that the damages/loss relating to **“Buildings and Structures”** in the sum of kshs. 7,931,500/= could not be properly borne by the 3<sup>rd</sup> Defendant who I have found and held to be culpable for the demolitions. These damages/loss related to renovations and structures that were put up by the Plaintiff to make the suit premises fit for her business. As the Plaintiff made the renovations and erected the structures before she had obtained a change of user from residential to commercial, my view is that had the 3<sup>rd</sup> Defendant followed due process and required the removal of the structures the Plaintiff would have been obligated to restore the premises to what they were before conversion to commercial. PW2 stated he visited the suit premises on two occasions soon after the demolitions and he witnessed first-hand the devastation occasioned by the demolitions. The photographs attached to the report clearly shows the magnitude of the damage. It has not been disputed that the Plaintiff was indeed running a bar and restaurant business. The items that are shown in the report as damaged/ destroyed and/or stolen are such as would be expected to be found in the nature of business that the Plaintiff was carrying out. The stock-in-trade items shows those of the items that were recovered and those that were not recovered. I accept the evidence as contained in the loss assessment report by PW2 and I find special damages as established in the sum of **Kshs. 6,777,432.46** being the gross sum of **Kshs. 14,708,932.46** less **Kshs. 7,931,500/=** which I have discounted.

20. Although the Plaintiff in her evidence stated that the agents of the 1<sup>st</sup> Defendant had accompanied the agents of the 3<sup>rd</sup> Defendant when the demolitions were effected, there was no evidence to show that the 1<sup>st</sup> Defendant was an active participant in the demolitions. There was further no evidence to link the 1<sup>st</sup> Defendant to the actions of the 3<sup>rd</sup> Defendant. There is for instance no evidence that the 1<sup>st</sup> Defendant was acting in collusion with the 3<sup>rd</sup> Defendant to get the Plaintiff ejected from the suit premises.

21. The 1<sup>st</sup> Defendant's counterclaim against the Plaintiff is unproven. The Plaintiff was not responsible for the demolitions on the suit property that resulted in damage to the 1<sup>st</sup> Defendant's building in the premises. The 1<sup>st</sup> Defendant leased the suit premises to the 2<sup>nd</sup> defendant ostensibly to carry on business thereon. The 1<sup>st</sup> Defendant was aware the user of the premises was restricted to residential. The 1<sup>st</sup> defendant was aware that the 2<sup>nd</sup> defendant had sublet the premises to the Plaintiff to carry on a restaurant business. Indeed the 1<sup>st</sup> Defendant wanted the Plaintiff to regularise the tenancy of the premises with them as the owners of the premises only that the negotiations did not materialise. In those circumstances, it is my finding that there was no proof of culpability by the Plaintiff to the 1<sup>st</sup> Defendant.

22. The Plaintiff's claim for loss of earnings was unsubstantiated and no basis was provided to enable the court to make an assessment of any loss that may have been suffered. The Plaintiff did not furnish any statement of income from the time when the business commenced up

to the time of the demolition. Equally no projections of income were availed and the court would not make an assessment out of the blue. The Plaintiffs claim under this head therefore fails.

23. The 3<sup>rd</sup> Defendant's entry onto the plaintiff's business premises was unlawful and constituted trespass for which they would be liable in damages. For the unlawful entry and trespass, I award as against the 3<sup>rd</sup> Defendant general damages in the sum of 1,000,000/=.

24. The 3<sup>rd</sup> defendant's actions in undertaking an authorised demolition were reckless and wanton. The Plaintiff having regard to the high handedness with which the 3<sup>rd</sup> defendants agents undertook the demolitions, would without doubt be entitled to exemplary damages. The Court of Appeal in the case of **Godfrey Julius Ndumba Mbogori & Another -vs- Nairobi City County [2018]eKLR** outlined the circumstances under which exemplary damages may be awarded. At paragraph 32 of its judgment the court stated thus:-

**“32. The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes -vs- Barnard [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.”**

25. In the present case, it is clear the agents and/or servants of the 3<sup>rd</sup> Defendant, an organ of state acted with impunity and in a high handed manner definitely with the object of causing damage and obtaining the ejection and eviction of the Plaintiff from the premises. In those circumstances, it is my finding that the 3<sup>rd</sup> Defendant was liable to pay exemplary damages for their uncalled for actions. I award the Plaintiff exemplary damages in the sum of kshs. 5,000,000/=.

26. In the net result, it is my finding and holding that the Plaintiff has proved her case on a balance of probabilities as against the 3<sup>rd</sup> Defendant and I enter judgment in favour of the Plaintiff as against the 3<sup>rd</sup> Defendant and make the following final orders:-

**(i) Special damages in the sum of kshs.6,777,432.46 together with interest at court rates from the date of filing the suit until payment in full.**

**(ii) General damages in the sum of kshs.1,000,000/=.**

**(iii) Exemplary damages in the sum of kshs.5,000,000/=.**

**(iv) Interest on (ii) and (iii) above at court rates from the date of judgment until payment in full.**

**(v) The 3<sup>rd</sup> Defendant to pay the Plaintiff's and the 1<sup>st</sup> defendant's costs of the suit.**

**JUDGMENT DATED AND SIGNED AT NAKURU THIS 4<sup>th</sup> DAY OF OCTOBER 2019.**

**J. M. MUTUNGI**

**JUDGE**

**JUDGMENT DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF OCTOBER 2019.**

**S.OKONG'O**

**JUDGE**