



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC CASE NO. 602 OF 2008

ESTHER MWAURA KIBE.....PLAINTIFF

VERSUS

PATRICK WAMULA T/A PATROS AGENCIES LTD.....1ST DEFENDANT

SALAM SHAHID MOHAMMED.....2ND DEFENDANT

JUDGMENT

By an amended Complaint dated 23rd May 2018 and filed on the 7th June 2018, the Plaintiff sought the following reliefs;

- a) An order of Injunction restraining the Defendants from alienating, destroying, selling or in any manner dealing with the goods illegally carted away from the Plaintiff's premises NO. A2 LR. 209/138/4.
- b) An order against the 1st and 2nd Defendants, their agents and servants for the return and restoration of the goods illegally carted away from the Plaintiff's premises at shop NO. A2 LR.209/138/4 at their own expense.
- c) The costs of the goods lost or damaged and loss of business for the time the goods were carted away until their return.
- d) Costs of goods and shop merchandise illegally and or unlawfully restrained and carted away by the 2nd Defendant, his agents and or servants on three (3) various occasions from shop No. A2 premises situated along River Road, Nairobi in parcel of land known as L.R. No. 209/138/4 and which goods and merchandise still remain in actual custody and possession of the 2nd defendant his agents and or servants in contravention of the Orders of the Court issued on 18th December 2008 and July 2009 respectively – Kshs. 15,000,000/-.
- e) Loss of business occasioned upon the Plaintiff as a result of the 2nd defendant's illegal and unlawful closure of the Plaintiff's business known as shop No. A2 premises situated along River Road, Nairobi in parcel of land known as LR. NO. 209/138/4/ and the refusal of the 2nd defendant to fully comply with the Orders of the Court issued both on 18th December 2008 and 29th July 2008 – Kshs. 10,000,000/-.
- f) General damages.
- g) Costs.

The 2nd Defendant filed an Amended Defence dated the 31st October 2018 where he denied the averments in the Complaint. The 2nd Defendant stated that the goods which were carted away were returned to the Plaintiff on 31st July, 2009 in the presence of her advocate as well as his advocate. He explained that on 28th July, 2009 Justice Hatari Waweru ordered him to pay Kshs. 1,600,000 inclusive of Kshs. 400,000 as her advocates fees, with the balance of Kshs. 1,200,000 entered as judgment in her favour. He insists he paid the decretal amount of Kshs. 1,200,000 culminating in recording the consent dated the 7th February, 2012 confirming settlement. Further, that applications dated the 25th May, 2010; 19th May, 2010; 26th May, 2010 and 24th June, 2010 were withdrawn by consent on 14th July, 2010 with no order as to costs. He reiterates that in lieu of the consents, the Plaintiff cannot claim loss of goods, damages and costs since the same was settled. Further, any compensation claimed should be deducted from the monies already paid.

The matter proceeded to full hearing where the Plaintiff called two witnesses while the 2nd Defendant also had two witnesses.

Evidence of the Plaintiff

The Plaintiff as PW1 claimed that on 29th November 2008 the 1st defendant acting on the instructions of the 2nd defendant invaded her premises situated in a tenanted property known as shop No. 2A LR NO. 209/18/4 along River Road, Nairobi to levy distress. It was PW1's testimony that she moved to the Business Premises Rent Tribunal in BPRT No. 733/2008 where she sued the 2nd Defendant and on 4th December 2008 the Chairman BPRT issued the following Orders:-

- a) The tenant to proceed and break the padlocks.
- b) OCS Kamukunji Police Station to ensure that peace prevails.

The Plaintiff as PW1 testified that on 29th November 2008 the 1st and 2nd defendants had illegally carted away her shop merchandise consisting of assorted goods and a wide range of garments of a substantial sum of money which merchandise was meant for sale during the subsequent holiday season of December, 2008. She explained that for the third time in a row the 1st and 2nd Defendants agents and or employees invaded her shop in the wee hours of the 4th and 5th December 2008 at about 5.30 am and maliciously damaged the remaining merchandise and carted out the rest of the goods to unknown place. She claimed the Defendants only returned a few of the goods after the court had directed them to do so in July 2009. She provided the list of her goods. She contended that she had suffered losses and damage as she had procured a loan to run the shop. She denied having subtenants on the suit premises.

PW2 a Valuer from Tuliflocks Ltd produced his Valuation Report as an exhibit and provided the highlights therein in respect to the loss of business and value of the goods that had been carted away. He confirmed that he did not inspect the goods but relied on the information the Plaintiff had furnished him as well as the Auctioneer's Proclamation. He explained that he visited the suit premises in 2016 when the distress had already been undertaken and used comparables from neighbouring shops based on the information the Plaintiff had given him. The Plaintiff produces the following documents as exhibits: Statement of Accounts from Balozi Cooperative Savings and Credit Society Limited, Notification of Sale for Distress of Movable Properties for Rent, Copies of business receipts, Copy of Valuation Report dated 23rd November, 2016 including receipt by Tuliflocks Co. Ltd, Pictures of destroyed properties.

Evidence of the Defendants

DW1 who was an Advocate confirmed acting for the Defendants to prepare an agreement where two subtenants of the Plaintiff sought their goods from the 1st Defendant after the distress. He confirmed that the said subtenants signed Agreements and each paid the auctioneer's fees of Kshs. 5000/= after which their goods were released to them. He confirmed swearing an affidavit. He clarified that he was not present during the distress for rent and was not acting for the Defendants by then.

The 2nd Defendant as DW2 confirmed that he was a landlord to the Plaintiff and had instructed the 1st Defendant to distress for rent. He explained that after the distress, the Plaintiff filed this suit, which he was not aware of until he was arrested and cited for contempt. It was his testimony that they entered into a consent on 29th July, 2009 and on 31st July, 2009, he released the distrained goods to the Plaintiff in the presence of her advocate, the Deputy Registrar, Auctioneer and his lawyer. He further paid Kshs. 300,000 to be purged for contempt; Kshs. 400,000/= legal fees and Kshs. 1.2 million to the Plaintiff. He insisted that this suit had been compromised, as the Plaintiff never complained that some of her goods were not released to her and she had been compensated. Further, that they entered into a Consent on 7th February, 2012 to confirm that the matter had been settled.

The Plaintiff and the 2nd Defendant thereafter filed their respective submissions.

Analysis and Determination

Upon consideration of the Pleadings filed herein including the testimonies of the witnesses, exhibits and submissions, the following are the issues for determination:

- Whether the order dated the 28th July, 2009, consent orders dated 14th July, 2010 and 7th February, 2012 respectively extinguished the Plaintiff's entire claim.
- Whether the Plaintiff is entitled to general and special damages as a result of the Defendants acts of distress

As to whether the Order dated 28th July 2009 and consent orders dated the 14th July, 2010 and 7th February, 2012 respectively extinguished the Plaintiff's entire claim. The Plaintiff claims that the said court order and consent orders did not compromise the suit which fact is opposed by the 2nd Defendant. The Plaintiff in her submissions insist that the said order as well as the two consents were a demonstration that the Kshs. 1. 2 million had been paid in full, goods returned and inventory taken in accordance with the direction of the Court. Further, that the said Consents could not have compromised the suits as the two orders of the subject consents emanated from interlocutory applications and not the main suit. I wish to reproduce the court order and the two consents hereinbelow:

As for the Order dated 28th July, 2009 and issued on 29th July, 2009, it states as follows:'

IT IS HEREBY ORDERED:

- 1. THAT the balance of Kshs. 1, 200,000/= be paid in 12 equal instalments of Kshs. 100,000/00 with effect from the 15th August, 2009 and on the 15th of each succeeding month until payment in full.**
- 2. THAT the aforementioned balance of Kshs. 1, 200,000/= is hereby entered herein as judgement in favour of the plaintiff.**

3. THAT in default of payment of any one instalment the entire outstanding balance shall become due and payable and the plaintiff shall be at liberty to execute for the same as a decree of the court.

4. THAT the plaintiff's shop Merchandise Equipment and other goods taken by the Defendants shall be brought by the 2nd defendant to the court precinct on 29th July, 2009 at 4.00 p.m. and these be released to the Plaintiff upon a inventory to be signed by both parties.

5. THAT regarding what punishment the court may impose upon the 2nd Defendant for the contempt that shall be dealt with upon completion of the purge or upon default of any of the orders that the court has made above.

6. THAT the 2nd defendant SALAM SHAHID MOHAMED shall be released upon a cash bail of Kshs. 300,000/00.

7. THAT in default a payment of this cash bail he shall be remanded in custody until such time as the cash bail shall be paid, such time not to exceed the period of six (6) months from the date hereof.

As for the Consent dated 14th July, 2010, it states thus:'

By consent the Plaintiff, the 2nd Defendant and the Objectors hereby confirm that the Orders of Court dated 28th July 2009 having been complied with in respect as to the payment of the decretal sum of Kshs. 1, 200,000/=.

The following Applications pending before this court are hereby withdrawn with no orders as to costs.

1. N.T.S.C – dated or filed in court on 25th May, 2010.

2. Objections Proceedings dated 19th May, 2010.

3. Notice of Motion dated 26th May, 2010.

4. Notice of Objection lodged on 24th June, 2010.'

While the consent dated the 7th February, 2012 provides that;-

1. The 2nd defendant/contemnor has fully complied with the orders of Court dated 28th July 2009 hence contempt has been fully purged.

2. The sum of Kshs. 88,000/- deposited by the Plaintiff in Court pursuant to the Court Order dated 18th December, 2008 as disputed rent be released to the Plaintiff.

3. The sum of Kshs. 300,000/= deposited in Court on 28th July 2009 by NIAS DIN SAIQA TABBASM as security for the Contemnor SALAM SHAHID MOHAMMED be released to the said depositor.

4. Cost to the Plaintiff.

I note from the order dated the 28th July 2009 and issued on 29th July, 2009 after the Plaintiff had been distressed for rent, it was evident that the 2nd Defendant was to pay Kshs. 1.6 million inclusive of advocates costs with the balance of Kshs. 1.2 million entered as judgement of the court. As a result of the said order and consents dated 7th February, 2012 and 14th July, 2010, it is not in dispute that the Plaintiff received all the monies and her advocate was paid the fees. The Plaintiff insists the matter was not settled. I however note that in the consent dated 14th July, 2010, the parties confirm the 2nd Defendant paid the decretal amount while the one for 8th February, 2012 the 2nd Defendant was purged for contempt with the Plaintiff released to the disputed rent. In the said consents there are no indications that the Plaintiff still had a claim as against the 2nd Defendant. I opine that when parties enter into consents to compromise a dispute it is intended to render the matter settled and stop litigation as it takes effect of a judgment resulting from a court's decision. In associating myself with the decisions of **Edward Acholla vs. Sogea Satom Kenya Branch and 2 others (2014) eKLR** and **Samuel Mbugua vs. Barclays Bank of Kenya (2015) eKLR** where the Courts held that a consent order binds both parties and it changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside for instance fraud, contrary to the court's policy or concealment of material facts or if certain conditions remain unfulfilled or not complied with, I find that since the said consents were never set aside, they indeed settled the dispute herein.

As to whether the Plaintiff is entitled to general and special damages as a result of the Defendants acts of distress. The Plaintiff as PW1 contended that she suffered as a result of the Defendants acts of distress. She lost goods and business with her son not completing his education. PW2 presented a valuation report where he quantified the losses the Plaintiff had incurred. On cross examination, PW2 stated that he based his valuation on the instructions from the Plaintiff and the Auctioneers Proclamation. The Plaintiff insisted that the goods surrendered to her were simply shells. She however admitted that she received her goods in the Court precincts in the presence of her advocate, 2nd Defendant's advocate and the Court Registrar. I note she signed for the said goods and I wonder why she did so when she knew the said goods were less than had been proclaimed by the 1st Defendant. Further, in Notification of Sale of Distress of Movable Property for Rent dated the 29th November, 2008 the Auctioneer clearly indicated the goods it had distressed and their value which the Plaintiff has disputed. I opine that if indeed the goods proclaimed were more and the 2nd Defendant brought less, why did the Plaintiff proceed to receive them and only amend the Plaintiff ten (10) years later to claim they were more. In her evidence, she failed to adduce evidence that the loan she

took from Balozi Cooperative Savings and Credit Society Limited was indeed used for the business. On cross examination on whether she had her latest tax returns to confirm the income she was getting from the business, she was unable to produce the same. Further, she admitted that her daily sales varied from Kshs. 30,000 to 5,000 but she never used to bank the same daily. Section 109 of the Evidence Act, stipulates that :-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

In the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR**, the Court of Appeal held that:’ **Considering the above holding in the light of the now crystalized principle of law that special damages must not only be specifically pleaded but also proved, we agree with the trial Judge’s holding that it was not sufficient for the appellant to merely state the loss that he had allegedly suffered, and throw the resulting figure to the Court, and then ask the Court to allow it.**

It is not in dispute that the 2nd defendant levied illegal distress for rent when he confiscated the plaintiff’s goods. It is also undisputed that he released the plaintiff’s goods on 31st July, 2009. The plaintiff was in breach of the tenancy agreement by subletting the premises to other people which resulted in rescission of the contract and was also in rent arrears as a lessee. The Plaintiff however disputed the 2nd Defendant’s averments that she had sublet the suit premises but admitted being in arrears.

Since the Plaintiff is seeking colossal amount of money amounting to Kshs. 25,000,000/= the onus is on her to prove the loss with credible documentary evidence. No documentary evidence was tendered to substantiate the amount. Loss of business was estimated at Kshs.10,000,000, but there was no evidence tendered to prove this claim in the form of books of account or any other form of documentary evidence. Based on my analysis above, I find that the plaintiff threw to the court abstract figures and no proof of loss of business she was claiming. In addition, the plaintiff herself was in breach of contract and the 2nd Defendant returned her goods and merchandises less than a year after he took them. The Plaintiff specifically pleaded but not proved special damages. In relying on the Court of Appeal decision cited above, I find that the Plaintiff failed to provide credible evidence to support her claim for special damages.

On the issue of general damages, the Plaintiff claims that she suffered as a result of the Defendants actions. As per the Court records, I note the Plaintiff deposited the disputed rent in court and even admitted she was yet to pay rent in January 2009 as she did not trade. On 28th July, 2009, the Plaintiff’s lawyer in court stated that the Plaintiff was ready to take KShs. 1.2 million in exchange for the lease and a further Kshs. 400,000 for his costs. Further that the goods were to be released unconditionally in a neutral place. She insists the monies were not for the damages suffered. Further, her lawyer stated in court that she was accepting the Kshs. 1.2 million in exchange for the lease, which in essence means, she was paid for the damages she is now seeking. The Court proceeded to make the order on 28th July, 2009 which I have quoted above.

Based on the evidence before me, and relying on the legal provisions cited above, I find that the order issued on 28th July, 2009 awarding the Plaintiff monies and directing her to extract a Decree demonstrated that this was the final judgment and not an interlocutory one as the Plaintiff seeks this Court to believe. Further, that she had indeed been compensated for the damages she suffered as a result of the Defendants’ acts of distress. In the circumstance, I hold that she is not entitled to the general damages sought.

I note the Plaint herein was amended on 23rd May, 2018 after the order of the Court granted on 28th July, 2009 and the two consents dated 14th July, 2010 and 7th February, 2012 intimating the matter had been settled. The Plaintiff sought for the amendment to include the prayers for general and special damages and proceeded to hire a valuer when the matter had already been settled. To my mind, I believe this amounts to seeking unjust enrichment.

It is against the foregoing that I find that the Plaintiff has failed to prove her case as per the Amended Plaint on a balance of probability and will proceed to dismiss it

Each party to bear its own costs

Dated signed and delivered in open court at Kajiado this 17th day of December, 2019.

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Atieno holding brief for Wangalwa for plaintiff

Kimondo holding brief for Murango for the defendant

Court assistant- Mpoye