



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**MILIMANI LAW COURTS**  
**ELC APPEAL NO. 72 OF 2016**

**LUCY NJERI NGUNJIRI & 6 OTHERS.....APPELLANTS**

**=VERSUS=**

**ANTHONY KIMEU & 3 OTHERS.....RESPONDENT**

***(Being an appeal against part of the judgement of Hon. Mr .C Obulutsa SPM in Milimani CMCC No. 2630 of 2008***

**JUDGEMENT.**

1. This is an appeal against part of the Judgement delivered on 30<sup>th</sup> April 2015, by Hon. C Obulutsa who despite having found that the appellants were unlawfully evicted from their business premises declined to award them either general or special damages. The appellants were tenants of one Harjeet Sehmi who owned a building on *LR No.209/2360/1* known as *Hem Singh Mansion* along *Racecourse Road* in Nairobi.
2. In February 2008, all the tenants in the building were notified of change of management and were advised not to pay rent to the person who was previously collecting the same. It would appear the new management came in with gusto and instructed a firm of auctioneers to levy distress for rent arrears from the tenants.
3. The appellants moved to the Business Premises Rent Tribunal where they filed a suit against *Mary Wanjiku Kimani*. The Tribunal issued orders barring the auctioneer from removing the attached goods from the premises on 25<sup>th</sup> April 2008, but the appellants had already been evicted the previous day at night. The appellants then moved to the Chief Magistrates' court where they filed a suit against the respondents. This is after the Tribunal ruled that it had no jurisdiction to entertain the matter.
4. The appellants' suit was heard and in a judgment delivered on 30<sup>th</sup> April 2015, the trial magistrate found that the eviction of the appellants was unlawful and illegal. The trial magistrate could not award special damages as the same were neither pleaded nor proved. On loss of income and business, the appellants left it to the court to calculate but the trial magistrate stated that it was not the business of the court to calculate the loss suffered. It was upon the appellants to tabulate the loss they suffered before the same could be granted to them.
5. The appellants raised the following grounds in the memorandum of appeal;-

**1. The learned trial magistrate erred in law and fact by failing to address all prayers sought**

**and making a finding on only one of the prayers sought by the appellants in their pleadings.**

**2. The learned trial magistrate erred in law and in fact by failing to award general damages to the appellants upon finding their eviction was illegal and unlawful.**

**3. The learned trial magistrate erred in law and in fact by failing to refer the matter for formal proof so as to ascertain special damages, despite oral evidence being adduced in court by all the appellants/plaintiffs with regard to the different businesses they each had and operated at the time of their unlawful eviction and the fact that they were unable to specifically plead special damages as all their documents had been destroyed by the defendants while undertaking the unlawful eviction.**

**4. The learned trial magistrate erred in law and in fact by failing to consider the special circumstances surrounding the failure to specifically adduce documentary evidence in support of special damages by the plaintiffs and further failing to consider the oral testimony of each of the appellant's while pleading loss of business which would thus lead to an award of special damages.**

6. I have gone through the evidence adduced in the lower court as well as the submissions filed by the appellants. This being a first appeal, I am obliged to evaluate the evidence and reach my own conclusion but of course giving room to the fact that I did not see the witnesses testify. In ground one (1) the trial magistrate is being accused of failing to address all prayers sought and only making a finding on one prayer in the appellants claim. I have carefully gone through the judgement of the trial magistrate. The trial magistrate addressed all the prayers in the appellants claim. The prayer for injunction could not be granted as the same had been overtaken by events in that the appellants had been evicted from the premises.

7. The issue of special damages was also addressed as was the case with costs. I do not therefore find any merit in ground one (1) which is hereby rejected. I will deal with grounds 3 and 4 together before I come back to ground 2. In ground 3, the trial magistrate is being faulted for failing to refer the matter for formal proof where the appellants would have adduced evidence in support of their special damages claims. Related to this is ground 4 in which the trial magistrate is being faulted for not considering the fact that the appellants had no documentary evidence to support their claim for special damages as the documents were lost during the process of eviction.

8. The law regarding special damages is that the same must be pleaded and proved in evidence. Some of the appellants tabulated their special damages loss in their statements but none of those damages were pleaded or proved in evidence. The appellants had the opportunity to testify on their losses which were in the nature of special loss. The trial magistrate should not have set aside another hearing for the appellants to prove their loss. The appellants had the opportunity to give evidence as to their loss and not just throw the figures at the court and expect to be given the amount in the statements without the same being pleaded and proved using documentary evidence.

9. In Nakuru High Court Civil Suit No.119 of 1998 between Francis Muringu Mureu ( T/A Jem Corner Bar ) and John Muranguri Karuga, the plaintiff had claimed *Kshs.9,650/= for a lost gas cooker, 1,560/= for six dozens of glasses, 740/= for a lost brief case, 4,400/= for lost two suits, 560/= for two lost shirts, 3840/= for two pairs of staff uniforms and Kshs.25,000/= for lost stock.* As in the Appellants case, the plaintiff in that case had been unlawfully evicted. He could not be awarded the sums claimed as they were neither pleaded nor proved in evidence.

10. I now move to ground 2. In this ground, the trial magistrate is faulted for failing to award general damages even after he found that the appellants had been unlawfully evicted from their business premises. In the trial magistrates judgement he was not clear as to whether the appellants were seeking special or general damages. The trial magistrate having found that he appellants were unlawfully evicted, he should have gone ahead to award general damages. The appellants did not have to prove that they suffered loss before they could be awarded general damages.

11. As the trial magistrate correctly observed the intention of the respondents was not to levy distress for rent. Their intention was to evict the appellants. The process of eviction was carried out at night such that by the time they obtained orders restraining the auctioneer from carrying away their goods the process had been completed the previous night. Though the auctioneer had obtained break-in order, what happened was more than a break in into the premises. The premises were destroyed to an extent that no appellant could go back.

12. Some of the appellants like the first appellant had no rent arrears to warrant levying of distress against him. The process of eviction had no basis and was carried out in a callous manner. The trial magistrate erred in failing to award general damages. I therefore set aside his finding that the appellants were not entitled to general damages. The appellants had been in the premises for a long period. Their crude eviction was uncalled for. I award each of the appellants Kshs.500,000/=(Five hundred thousand) as general damages for unlawful eviction and Kshs.200,000/=( Two hundred thousand) being punitive damages for each appellant against the respondents jointly and severally. The respondents shall get costs of the appeal as well.

**Dated, Signed and delivered at Nairobi on this 12<sup>th</sup> day of February ,2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of;-

Mr Odhiambo for Mrs Lugunya for appellants

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**