



**Ojwang & 2 others v Onyango (Environment & Land Case
53 of 2019) [2024] KEELC 271 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 271 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 53 OF 2019
OA ANGOTE, J
JANUARY 25, 2024**

BETWEEN

PETER OJWANG 1ST PLAINTIFF

DAVID OMONDI AWUOR 2ND PLAINTIFF

MAURICE ANDITI 3RD PLAINTIFF

AND

LILIAN AKEYO ONYANGO DEFENDANT

JUDGMENT

Introduction

1. The Plaintiffs filed this suit vide a Plaint dated 15th December 2006, which was later amended on 6th May 2008. In the Amended Plaint, the Plaintiffs sought for the following orders:
 - a. An order compelling the Defendant to re-open the suit premises L.R. No. 209/8554/3 Kariobangi North, Nairobi forthwith and reinstate the Plaintiffs unconditionally therein, and restraining the Defendant from interfering with the Plaintiffs quiet enjoyment and trade in the suit premises.
 - b. Special damages in the total sum of Kshs. 638,000/- and Kshs. 5,520,000/- as specified in Paragraphs 5 hereinabove, retrospectively.
 - c. General damages for unlawful eviction.
 - d. (i) Punitive and exemplary damages.
 - e. Costs of this suit.
 - f. Interest on b, b(i) and c above at court rates.



- g. Any other relief this Honourable Court may deem just to grant.
2. The Plaintiffs averred in the Plaint that the suit property was leased by the Defendant to them jointly at a monthly rate of Kshs. 20,000 beginning 1st July 2006, based on a verbal monthly lease agreement and that they jointly deposited 6 months deposit up-front rent in the sum of Kshs. 120,000 into the Defendant's deceased father's mortgage bank account at Housing Finance Company of Kenya Ltd, Account number 60XXXX76.
 3. It was averred that the deposit included rent up to and including December 2006, as per the verbal rental agreement; that they consequently took possession of the suit premises running therein a bar, restaurant and hotel business under the name "Chuth Ber Bar" and that they ran their business in the said premises until 5th December 2006 at 4am, when without any written or any other notice from the Defendant, the Defendant in the company of 8 police officers from Muthaiga Police Station stormed the said premises and forcefully evicted them.
 4. The Plaintiffs averred that the Defendant locked in the suit premises their tools of trade, being furniture, music equipment, food, drinks and cash for the previous day and that day's collection amounting to Kshs. 52,000; that the Defendant has never returned the said tools of trade and cash to date, amounting to Kshs. 638,000; that the said eviction was unlawful on the grounds that they were not in arrears of any rent and that they were not served with any prior eviction notice or any written notice to vacate the suit premises as required by law before any lawful eviction.
 5. It is the Plaintiffs' case that the tenancy of the suit premises with the Defendants falls under the provisions of Cap 301 Laws of Kenya and therefore they were protected tenants under the said Act, and could not be evicted except in strict adherence to the mandatory provisions of the Act, which were not complied with.
 6. According to the Plaintiffs, due to the said unlawful eviction, they have suffered immense loss, special and general damages, as at the time of filing this suit, their business remained closed. Further, that the Defendant continued to illegally hold their tools of trade, despite the fact that they obtained a mandatory injunction in this suit on 14th February, 2007 against the Defendant requiring the hand over and re-opening of the said business.
 7. It was averred in the Plaint by the Plaintiffs that they could not re-open for business immediately as the Defendant had rented out and continues to illegally rent out the suit premises to tenants in breach of the consent status quo orders and that their estimated loss of profits over sixteen months until 5th April 2008 is Kshs. 5,520,000.
 8. In her Defence, the Defendant denied that the Plaintiffs were joint tenants and also denied that she is an administratrix of the Estate of her father, the Late Reuben Omolo.
 9. According to the Defendant, the suit premises was leased to a single tenant, Dan Onyango, who is a third party to this suit; that the lease was subject to a tenancy agreement dated 20th May 2006 at a monthly rent of Kshs. 30,000, which was to be deposited by the said third party and that the said third party deposited a sum of Kshs. 120,000/- to Housing Finance Company of Kenya Limited, which sum was made up of two months' rent deposit and two months' rent for May and June 2006.
 10. It is the Defendant's case is that the third party deserted the suit premises and locked the same due to a conflict between himself and the Plaintiff and that on or about 2nd December 2006, the Plaintiffs accompanied by policemen from Muthaiga Police Station stormed the suit premises and took away the cash till which Kshs. 40,000 meant for rent.



11. The Defendant averred that the Plaintiffs are merely busybodies and strangers to the Defendant. She denied the claim for loss of profits. Further, she denied that subsequent to the order of this court dated 14th February 2008, the Plaintiffs took possession of the premises and collected rentals from sub-tenants within the premises.

Hearing and Evidence

12. The Plaintiffs presented the testimony of one witness, David Omondi Awuor as PW1. PW1 relied on his statement dated 14th July 2016, which he adopted as his evidence in chief. In his statement, he averred that on 5th December 2006, at about 4pm, the Defendant in the company of 8 police officers came to his place of business and closed the bar.
13. According to PW1, she chased him away from the suit premises after taking, removing and carrying away all his properties including beds, beer crates and band instruments.
14. PW1 stated that the Plaintiffs had paid rent but the Defendant came and closed their bar business; that the Defendant came with the police at night on 5th December 2006, and they have never been allowed back to the premises since then. He stated that they were never allowed to remove their items, which are listed in the Plaint.
15. According to PW1, the receipts were inside the building, and that they did not manage to get copies of the same and that the Defendant allowed another tenant in the premises.
16. PW1 produced a bundle of documents dated 19th July 2016, which included: a replying affidavit by the Defendant filed on 6th September 2011; a copy of proceedings dated 15th June 2010 from the Business Rent Tribunal; a copy of notice from the Defendant dated 7th April 2008; a copy of the Plaintiff's letters dated 6th April and 31st March 2008 and a copy of the order issued on 17th March 2008 before Justice Nambuye.
17. In cross-examination, PW1 stated that he did not have the authority of the other two Plaintiffs to file this suit. He reiterated that the tenancy was based on a verbal agreement between himself and Lilian and that the two Plaintiffs joined him in the business at a later date.
18. PW1 stated that he knew Dan Onyango, who joined him in the business after he had entered into the rental agreement; that Dan was an investor who contributed money in the business, and that he left after they were evicted.
19. He stated that he paid a deposit of Kshs.120,000 and had the banking slip from Housing Finance; that the slip shows that the person who paid the rent was Dan Onyango; that that was the only payment he made; that they deposited Kshs. 60,000 with the court, which was refunded to them after they entered into a consent and that he did not have any documents to support his claim as they were locked up in the premises.
20. The Defendant, DW1, relied on her Replying Affidavit sworn on 19th January 2007, in which she averred that in 2006, one Dan Onyango telephoned her and requested to be her tenant; that three days later, they met and agreed that he would pay two months' rent and two months' rent security deposit and that a tenancy agreement was executed on 20th May 2006.
21. The Defendant asserted that as the property was charged by her father, the late Reuben Onyango Omolo, she informed Mr. Onyango that the bank must be informed about the tenancy as the tenant would remit the monies to Housing Finance and that in May 2006, Mr. Onyango came to see her in the company of the 2nd and 3rd Plaintiffs, whom he introduced to her as friends.



22. DW1 averred that on 9th June 2006, Dan Onyango paid Kshs. 120,000/- to the bank made up of two months' rent and security deposit and that on that same day, Dan Onyango took possession of the suit premises under the name of Chuth Ber Bar and Restaurant, which was the name under which her late father operated the bar.
23. The Defendant stated that her caretaker informed her that there was a dispute between Dan Onyango and the 2nd and 3rd Plaintiffs; that in July 2006, the 2nd and 3rd Plaintiffs came to where she worked but she declined to discuss with them the issue of the tenancy because she considered them strangers and that later, she met the Plaintiffs together with Dan Onyango, who verbally informed her that he was vacating the premises.
24. She averred that Dan Onyango was in arrears of rent from August to December 2006; that due to disagreements between Dan Onyango and the Plaintiffs, the business was closed on or about December 2006 and that on 8th December 2006, the musicians who had been hired by Dan Onyango to perform in the premises persuaded her to allow the business to resume.
25. According to DW1, the 1st Plaintiff supervised the business and collected monies from customers directly; that the police officers from Muthaiga Police Station stormed in and arrested her for allegedly operating the business after 11pm and that they later released her when she explained that she was the landlady of the premises.
26. It was her evidence that on 2nd December 2006, she was at the premises to ensure that the day's proceeds were paid to her to defray rent arrears and that while she was at the police station, the 1st Plaintiff stormed the cashier's till and took the Kshs. 40,000 which was to be paid to her.
27. DW1 denied that she was the administratrix of her father's estate; that she did not carry anything from the premises as the building did not have anything; that the business had the Defendant's seats and that Dan found the few items in the building.

Submissions

28. Counsel for the Plaintiffs submitted that the Plaintiffs have proved their case to the required standard and that the Defendant admitted that there existed a tenancy relationship between the parties and the fact that Plaintiff's items were never taken out from the premises.
29. Counsel asserted that they have established their claim for special damages as laid out in the Plaint and that the Plaintiffs have been unable to avail receipts because they were in the custody of the Defendant who evicted them. Counsel relied on the case of Kenya Power & Lighting Co. Ltd v Quentin Wambua Mutisya t/a Bondenyi Wholesalers Civ Appeal No. 16 of 2013.
30. On the claim for loss of profits, Counsel submitted that the claim was uncontroverted and should be allowed as claimed; that evidence to prove such profits was left in the suit premises which were locked up by the Defendant and that the Defendant failed to comply with the injunction issued by Nambuye J, which granted the Plaintiffs access to the premises.

Analysis and Determination

31. Upon consideration of the pleadings, evidence and submissions of the parties, the following are the issues for this court's determination:
 - a. Whether there was a tenancy agreement between the Plaintiffs and the Defendant.
 - b. Whether the Defendant unlawfully evicted the Plaintiffs.



- c. What remedies this court should issue.
32. The Plaintiffs' case is that they entered into a verbal tenancy agreement with the Defendant from 1st July 2006 and deposited six (6) months up-front rent in the sum of Kshs. 120,000 into the Defendant's deceased father's mortgage bank account at Housing Finance Company of Kenya Ltd.
 33. It is the Plaintiffs' case that that they agreed to pay a monthly rental sum of Kshs. 20,000, and that the aforementioned deposit included the month of December 2006.
 34. In spite of this, it is the Plaintiffs' case that on 5th December 2006 at 4am, the Defendant, in the company of police officers unlawfully evicted them from the suit property and that they locked up the sale proceeds of Kshs. 52,000 as well as their tools of trade valued at Kshs. 638,000, which have never been returned to them. The Plaintiffs also claim that they consequently suffered loss of profits in the sum of Kshs. 5,520,000 over sixteen months until 5th April 2008.
 35. The Defendant has opposed the suit on the ground that the Plaintiffs are busybodies and strangers to her; that she leased the suit property to one Dan Onyango, who is a third party to this suit and that they entered into a written Tenancy Agreement with respect to the suit property dated 20th May 2006, and the agreed monthly rent was Kshs. 30,000.
 36. It was the evidence of the Defendant that while the Plaintiffs were in arrears of rent between August and December 2006, she did not evict them on 5th December 2006; that there were conflicts between the Plaintiffs and Dan Onyango; that no money or tools of trade belonging to the Plaintiffs were locked in the suit premises and that on or about 2nd December 2006, the Plaintiffs accompanied by policemen from Muthaiga Police Station stormed the suit premises and took away the cash till which had Kshs. 40,000 intended by the third party to be paid to her for rent arrears.
 37. The Plaintiffs' case is that the parties entered into a verbal tenancy agreement, whose terms included payment of rent on a monthly basis, at the rate of Kshs. 20,000 per month. They assert that they are joint tenants in the suit property. The Defendant on her part, asserts that it entered into a written tenancy agreement with Dan Onyango, who the Plaintiffs concede was an investor in their business. The Defendant avers that the terms of the tenancy agreement were for rent to be paid at the monthly rent of Kshs. 30,000.
 38. It is not contested that indeed a sum of Kshs. 120,000 was paid into the account of the late Reuben Omolo at Housing Finance Company of Kenya Ltd, Head Office, Rehani House Kenyatta Avenue/ Koinange Street Account number 600-0004576. It is also not contested that the said sum was paid by Dan Onyango.
 39. The relationship between Dan Onyango and the Plaintiffs in this case is therefore undeniable. While the 2nd Plaintiff (PW1) testified that Dan Onyango was an investor who joined the business after the rental agreement had been made, it is apparent that Dan Onyango was a part of the negotiating team.
 40. This is so because the deposit of KShs. 120,000 was made by Dan Onyango on 9th June 2006. In a Replying Affidavit filed by the Defendant in this matter (previously Milimani High Court Civil Suit No. 1335 of 2006), sworn on 6th September 2011, the Defendant admitted that the Plaintiffs were tenants pursuant to a verbal agreement.



41. What's more, the Defendant also averred that the relationship between the parties was that of a controlled tenancy within the meaning of Section 2 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya. This section defines 'controlled tenancy' as: -

- “a) A tenancy of a shop, hotel or catering establishment-
 - b) Which has not been reduced into writing; or
 - c) Which has been reduced into writing and which-
 - i. Is for a period not exceeding five years; or
 - ii. Contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
 - iii. Relates to premises of a class specified under subsection 2 of this section.
- Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy.”

42. The same section also defines a “hotel” to mean any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable consideration. It also defines a “shop” to mean premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth.

43. It is clear that the premises herein fall squarely within the jurisdiction of Cap 301. The said affidavit has not been challenged and remains properly on the record. This court therefore finds that a verbal tenancy agreement subsisted between the parties to this suit, which created a controlled tenancy.

44. The second issue is whether the Defendant unlawfully evicted the Plaintiffs. Having found that this was a controlled tenancy, the eviction ought to have complied with the provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301. Section 4 of the Act prescribes as follows with respect to termination of a controlled tenancy:

- “ 4. Termination of, and alteration of terms and conditions in, controlled tenancy
 - (1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.
 - (2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.
 - (3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy,



shall give notice in that behalf to the landlord in the prescribed form.

- (4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:

Provided that—

- (i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;
- (ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;
- (iii) the parties to the tenancy may agree in writing to any lesser period of notice.
- (5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.”

45. In this case, it is not disputed that the Plaintiffs were evicted on 5th December 2006. The Plaintiffs have averred that the eviction was conducted by the Defendant, while the Defendant has denied her involvement in the eviction. Rather, she claims that the Plaintiffs deserted the premises after they fell out with the third party in this suit, Dan Onyango.
46. In her testimony, while the Defendant denied closing the business at 4am on 5th September 2006, she admits that she went to the premises at around 4pm to see Dan Onyango as the Housing Finance Company were on her case. She averred that she found different people on the premises who harassed her, and that the people who were in the bar locked it and walked away. She also claimed that the seats in the premises belonged to her and there was no furniture or tools of trade left in the suit premises.
47. This runs contrary to her testimony in court where she admitted that she reported the dispute between herself and the Plaintiffs to the police, and placed a padlock on the premises, which she later found to have been broken. The narrative propounded by the Defendant therefore does not ring true.
48. In any case, guided by the terms set out in Section 4 of the *[Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#)*, this court can only conclude that the tenancy between the Plaintiffs and the Defendant was not terminated lawfully under the Act.
49. The Defendant has not provided any evidence of a tenancy notice seeking to terminate the Plaintiffs’ tenancy, or any evidence that such a notice was served upon the Plaintiffs at least two months before the eviction. This court must consequently find that the eviction of the Plaintiffs was illegal and unlawful.



50. This court notes that pursuant to the ruling and order of this court made on 14th February 2008, the Plaintiffs deposited a sum of Kshs. 60,000 with the court as a condition of their re-instatement to the suit premises. This sum was released to the Defendant pursuant to an Order of the court dated 13th December 2011.
51. This court has found that the Defendant unlawfully evicted the Plaintiffs and deprived them of their tools of trade. What now remains is the orders which this court should issue.
52. The first remedy that the Plaintiffs have sought is an order compelling the Defendant to re-open the suit premises and reinstate them unconditionally therein and restrain the Defendant from interfering with their quiet enjoyment and trade in the suit premises.
53. In light of the fact that the suit property is currently occupied by third party tenants, this court cannot allow this relief as prayed. Such an order would cause disproportionate harm to the current tenants in seeking to remedy the harm caused to the Plaintiffs.
54. The second remedy sought is that of special damages in the total sum of Kshs. 638,000 and Kshs. 5,520,000. The Plaintiffs have also sought for general damages. It is trite that special damages must be specifically pleaded and proved. This was held by the Court of Appeal in *Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd* [2013] eKLR as follows:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

55. Special damages are those damages that are ascertainable and can be proved at the point of filing suit. The distinction between general and special damages was explained by the Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs Electrocom International Ltd* [1992] KLR 177 as quoted in *China Wu Yi Limited & Another vs Irene Leah Musau* [2022] eKLR as follows:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

56. The Court in the *China Wu Yi* case (supra) also considered the dicta of the Court in *Joseph Kipkorir Rono vs Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003*, where Kimaru, J held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses.”



57. The Plaintiffs in this case have indeed specifically pleaded for special damages for the goods locked up in the suit premises and later taken away by the Defendant and for loss of profits for 16 months.
58. The Plaintiffs however did not produce any receipts or evidence to support their claim for the tools of trade that were locked into the suit property. This, they claim, is because these documents were locked up in the suit property.
59. In *David Bagine vs Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter vs Hyde Park Hotel Limited* (1948) 64 TLR 177, where held that:
- “[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”
60. The law on specific damages is that such damages must be strictly proved. In this case, the Plaintiffs have been unable to prove the loss of their tools of trade that were locked in the premises. This court can therefore not allow this prayer.
61. With respect to the prayer for special damages for loss of profits, the Plaintiffs have stipulated that they lost profits from the bar, estimated at Kshs. 7000 x 30 days x 16 months (Kshs. 3,360,000); profits from the rooms, estimated at Kshs. 3,000 x 30 days x 16 months (Kshs. 1,440,000); and profits from the hotel per day, estimated at Kshs. 1,500 x 30 days x 16 months) Kshs. 720,000/-.
62. However, loss of profits does not refer to loss of revenue or gross profits, but rather refers to loss of net profits. In *Desert Commercial Shipping Limited & Another vs OCPD Changanwe Police & 2 Others* [2022] eKLR, Mativo J extrapolated the law on loss of profits as follows:
- “Lost profits are damages for the loss of net income to a business and, broadly speaking, reflect income from lost business activity, less expenses that would have been attributable to that activity.” However, courts may award gross profits when operating expenses are fixed. After calculating net lost profits, the plaintiff (typically, but not always) must show:- (a) that the conduct upon which the claim is based caused the lost profit damages; (b) that the parties contemplated the possibility of lost profit damages or that the lost profit damages were a foreseeable consequence of the conduct; and (c) that the lost profit damages are capable of proof with reasonable certainty. These three elements of the claim are commonly known as proximate cause, foreseeability, and reasonable certainty.
- The other element the plaintiff must prove is that lost profit damages are “reasonably certain and not speculative.”¹⁷ I fail to see how the petitioners expected to surmount the above elements of burden of prove by simply enumerating their claim in the petition and the supporting affidavit and leave it to the court to assess instead of tendering oral evidence to substantiate the above elements. Simply put, the petitioners ought either to have approached the court by way of a plaint so that they can adduce oral evidence or in the bare minimum, they ought to have requested at the directions stage to proceed by way of oral evidence so that they can adduce evidence to surmount the standard of prove required.”
63. In this case, it is clear that the Plaintiffs erroneously calculated their lost profits as a loss of revenue, rather than a loss of net profits. The Plaintiffs did not deduct the operating costs, nor did they establish that the operating costs were indeed fixed. Further, neither documentary nor oral evidence was adduced to support the figures enumerated in the Plaint.



64. The Plaintiffs thereby failed to discharge the burden of proof of their claim for special damages.
65. With respect to general damages, as stated above, these are damages awarded by the court where a party's rights have been infringed. It can be granted as damages for pain and loss as well as for loss of amenities.
66. This court has found that the Plaintiffs suffered unlawful eviction from the suit property which resulted in loss of income as well as loss of their tools of trade. On this basis, this court awards the sum of Kshs. 3,000,000 as general damages.
67. This court finds that the Plaintiffs have proved that they were unlawfully evicted from the suit premises. Consequently, Judgement is entered for the Plaintiffs as follows:
 - a. The sum of Kshs. 3,000,000 in general damages to be paid by the Defendant to the Plaintiffs.
 - b. Interest at court rates on the above sum from the date of this Judgment until payment in full.
 - c. The costs of this suit to be borne by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF JANUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Oronga for Plaintiff

Ms Nyabundi for Interested Party

Ms. Machora holding brief for Thuita for Defendant

Court Assistant - Tracy

