Windsor Drycleaners Limited v Muthaiga Road Trust Company Limited & another (Environment & Land Case E132 of 2022) [2024] KEELC 1787 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1787 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E132 OF 2022

EK WABWOTO, J

MARCH 20, 2024

BETWEEN

WINDSOR DRYCLEANERS LIMITED ..... PLAINTIFF

AND

MUTHAIGA ROAD TRUST COMPANY LIMITED ..... 1ST DEFENDANT

REGENT MANAGEMENT LIMITED ..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide a plaint dated 20th December, 2021 seeking the following reliefs: -
    1. Special damages as per the particulars of special damages particularized under paragraph 32 of the Plaint in the sum of Kshs. 206,083,433.
    2. General damages.
    3. Exemplary and punitive damages.
    4. Damages for trespass, wrongful seizure of the Plaintiff's properties and goods, conversation and illegal distress.
    5. Costs of the suit.
    6. Interest on all sums due to the Plaintiff; and
    7. Any other or further relief as this Honourable Court may deem just and fair to grant.
2. The Defendant contested the Plaintiff's claim and filed an amended statement of defence and counterclaim dated 6th July, 2022. The following reliefs were sought in the counterclaim:-
    a. Payment of Kshs. 5,488,001.99.

b. Costs of the suit.

c. Interest at court rates on (a) and (b) above

d. Any other relief this Honourable Court deems fit to grant in the interest of justice.

The Plaintiff's case

3. The Plaintiff's case is that since 1993 it had been a tenant on the property known as Unit number 6, Ground Floor, Ola Plaza (Originally known as Esso Plaza) erected on parcel of land known as L.R. No. 217/250 (hereinafter called the "suit premises") situate along Kiambu Road in Nairobi, where it has been carrying on business of laundry services.

4. The Plaintiff tenancy was pursuant to renewable leases until when a letter of offer to lease was issued by the 2nd Defendant to the Plaintiff on 12th May, 2017 for the renewal of the tenancy on the suit property commencing on the 1st January, 2018. The tenancy was set to expire on or about 1st July, 2023. The previous term had not yet expired.

5. It was averred that the lettable area at commencement comprised approximately 1072 square feet or retail accommodation located on the 1st floor marked as unit number 6 and 270 square feet of store number 3 space located in the upper basement.

6. It was averred that on 19th December, 2019, the Plaintiff wrote to Knight Frank Kenya Limited-the then 1st Defendant's property manager requesting it to exclude the 270 square feet of store number 3 space located in the upper basement from the lettable area owing to its inaccessibility. The size of the door did not allow the Plaintiff to put its machines in the store owing to size limitations. This would form the Plaintiff's surrender of the store. The Plaintiff wrote to the 1st Defendant through its agent in this regard again on 10th May, 2017, January 4th 2018, January 15th 2018, and on 20th January, 2018, in this regard.

7. The Plaintiff avers that from the year 1993, it continued to be a tenant, bore responsibilities and enjoyed rights and benefits accruing there from whereas the 1st Defendant was the landlord and enjoyed rights and benefits flowing there from.

8. The Plaintiff also averred that the rent schedule ought to have been as particularized at paragraph 17 of its plaint showing a total sum of Kshs. 10,033,048.80.

9. It was averred that the defendants declined any joint reconciliation drive and proceeded to levying distress for the sum of Kshs. 5,549,218.19 on 24th July, 2020. Subsequently, thereafter the Plaintiff filed suit ELC Number E061 of 2020 Windsor Dry Cleaners Limited versus Regent Management Limited and Muthaiga Road Trust Company Limited and obtained an interim injunction which orders were served upon the defendants but they proceeded to illegally auction the Plaintiff's goods.

10. It was also averred that owing to the Defendants actions, the Plaintiff incurred loss and damages of about Kshs. 206,083,433/- particulars of which were pleaded at paragraph 30 of the Plaint. The Plaintiff also sought for special damages of Kshs. 206,083,433 /-

11. During trial, three witnesses testified on behalf of the Plaintiff; Ngugi Mwangi a Director of Plaintiff Company testified as PW1, Nobert Muhore Ikumbo a Consulting Engineer testified as PW2 and Moses Kamau Waithaka a CPA and CS testified as PW3.

12. During his evidence in Chief, Ngugi Mwangi adopted his witness statement and bundle of document on record. They were both dated 20th December, 2021.

13. On cross-examination, he stated that the last offer letter that was received was dated 12th May, 2017 and no amendments were made to the same. He also stated that there were some issues in respect to rent which they had tried to resolve. He stated that the outstanding balance was Kshs. 2,811,927.40 and that he never saw the email dated 29th July, 2020. He also stated that he had seen the comments indicating that some cheques were not received.

14. When asked about the lettable area, he stated that the letter of offer dated 12th May 2017 had stated that it would include store No. 3 and that payment of Kshs. 889,197.77 also included payment for store No. 3. He also stated that the letter of offer had a dispute resolution mechanism and that its key was always available for the landlord to collect from them. He stated that the key was returned on 24th July, 2020.

15. While referring to page 134 of the Plaintiff's bundle he stated that the Plaintiff had given a proposal on how to clear the outstanding rent and that the outstanding amount was Kshs. 88,000/- even though from the Plaintiff's documents it was about Kshs. 1,000,000/-

16. When asked about ELC Case No. E061 of 2020, he stated that the court had dismissed the Plaintiff's application for injunction and interim orders had been discharged. He also stated no appeal had been filed against the said ruling. He also stated that the order was conditional on payment of Kshs. 5,300,000 which was not paid. He also stated that no contempt proceedings were filed. He further stated that the Plaintiff's goods were carted away without any of their representative at the premises.

17. When asked about the Plaintiff's financial reports, he stated that the reports were for the entire business and that the main branch was at Muthaiga and the other branches were just collection centres.

18. He also stated that the had suffered losses and will incur costs in replacing his machinery. The price of which had been stated in the plaint.

19. When re-examined he stated that the Plaintiff had pleaded the particulars of loss at page 7 of its Plaint. He also stated that the letter of offer included Store Number 3 and gave the Plaintiff possession of the same. He further stated that he wrote to the 1st Defendant surrendering the said store and hence the Plaintiff could not pay rent for the same.

20. When re-examined on the outstanding rent, he stated that the outstanding rent was Kshs. 88,654.12 even though the Defendants had served the Plaintiff with a letter indicating the rent arrears of Kshs. 2,811,927.40 which was projected to 25th February, 2020. He also stated that the Plaintiff's case was about the illegal destruction of its property.

21. PW2, who testified as the Consulting Engineer on behalf of the Plaintiff relied on his two reports dated 3rd April, 2021 and 24th April, 2021 in his evidence in chief. He stated that he did an assessment and advised the Plaintiff on the nature and extent of damage and the applicable remediation. He added that the machines had suffered electrical damage and specifically semi-conductor failure. He also stated that all equipment's were not working and out of the 17 machines only 11 were reparable 4 had major damage 7 had minor damages while 6 could not be repaired.

22. He also stated that he prepared a valuation report dated 19th August, 2021 and that the total cost of replacement was Kshs. 39,137,240.

23. On cross-examination, he stated that he is not a dealer of the said machines and what he had indicated in his report were just the estimated costs of the machines which could be independently verified. He also stated that he could not have known which machines were not operational as at 2nd April, 2021. He also stated that he had not indicated in his report when the damage occurred to the said machines. He

also stated that he did not interview the landlord nor any officer from Kenya Power before preparing his report.

24. On re-examination he stated that the cause of the damage was as a result of power anomaly due to power overvoltage.

25. Moses Waithaka, PW3 testified as the last witness on behalf of the Plaintiff. He relied on his report dated 13th October, 2021 which was produced in his evidence in chief. He added that in preparing his report he relied heavily on the Plaintiff's audited financial statements and the Engineer's report. He stated that from his report the Plaintiff's loss was quantified as Kshs. 206,083,433/-

26. On cross-examination, he stated that in as much as he is a specialist in his area of expertise, he had not done this kind of work before. He also stated that he never visited the premises since he relied on the Engineers report and audited financial statements. He also stated that he never consulted the landlord.

27. On further cross-examination, he stated that the financial statement indicated the rent of 2015 being Kshs. 2,785,450/- and for 2017 as Kshs. 3,482,124/- which is above Kshs. 1,000,000/- that was paid. He also stated that the Plaintiff had only one main branch, the rest were collection centres.

28. He also stated that he dealt with income and loss computation of the Company and that he used the correct formula for loss of income computation. He further stated that the revenue for 2015 was Kshs. 83,942,876/= He stated that his work was to produce a report on financials and he had not annexed any receipts or delivery notes of clients who lost their laundry.

29. He further stated that the Plaintiff vacated the premises on 15th July, 2021. There was an outstanding loan of Kshs. 5,600,000 from ABSA Bank and Kshs. 30,000,000/- from Equity Bank.

30. When re-examined, he stated that his report was in respect to the business located at OLA Energy Plaza. He also stated that the Plaintiff rent was totalling to Kshs 792,088.13 for the quarter and that the Plaintiff was evicted on 15th July, 2021. He also stated the value of the destroyed machines was extracted from the Engineers report.

The Defendants case

31. The Defendants averred that the Plaintiff was granted a final offer for lease over the premises on the ground floor of Oil Libya Plaza the lettable area comprising approximately 1072 Sq. marked as Unit 6 and Store No. 3 approximately 270 Sq. being for 5 years, 6 months from 1st January 2018.

32. It was averred that it was agreed that the rent payable from 1st January 2018 to 31st December 2019 was as follows; with respect to Unit 6, Ksh 91,120/- per month exclusive of VAT and with respect to Store No. 3 was Ksh 15,660/- per month exclusive of VAT while service charge for both the store and the unit being Ksh 41,239.70

33. It was also averred that the Plaintiff agreed to rent Store No. 3 and the Plaintiff took up the entire lettable area at the commencement of the agreement and at the date of the commencement of the lease the Plaintiff was clear as regards the lettable area of the property and never at any time was an objection raised.

34. The Defendants averred that the Plaintiff agreed and voluntarily signed the letter of offer dated 12th May 2017 which included the provisions governing the lettable area which lease and it would be a case of unjust enrichment for the Plaintiff to occupy Store No. 3 proceed to utilize the same and the turn around and decline to pay as agreed.

35. It was also averred that the Plaintiff utilized the store and at no point did the Plaintiff surrender the portion at all. It was averred that the Plaintiff only surrendered the rentable area being store No. 3 and the key on 24th July, 2020, a period in excess of 2 years since it was let out to them and further that the Plaintiff did not fulfil its obligations as per the agreement.

36. The Defendants also averred by discharging the interim orders on 15th July, 2021, the goods remained attached while in the premises of the Plaintiff and the Defendants wrote to the Plaintiff to proceed and settle the entire sum otherwise the goods would be advertised and sold by public auction.

37. The Plaintiff failed to settle the sum due and the 3rd Defendant proceeded to advertise the goods and schedule an auction for 29th July, 2021.

38. It was also averred that when the goods were carted out of the yard, the 3rd Defendant was served with a court order issued on 30th July, 2021 which restrained the 3rd Defendant from proceeding with the sale of the attached assets pending the hearing and determination of a claim over the assets by ABSA Bank in the case of CMCC No. EL031 of 2021 ABSA Bank Kenya PLC vs Windsor Dry Cleaners Limited & 4 Others.

39. It was averred that a Notice of Forfeiture was issued to the Plaintiff specifying the breach requiring them to regularize the position within a period of 30 days failure of which the landlord Tenancy relationship would stand terminated. There was no compliance on the part of the Plaintiff and the landlord-Tenancy relationship stood terminated on 4th October, 2021. The defendant denied forcefully evicting the Plaintiff.

40. The Defendants also averred that at the time of termination of the tenancy, the Plaintiff owed the 1st Defendant a sum of Kshs. 5,488,001.99 as accumulated rent arrears.

41. During trial, two witnesses testified on behalf of the defence. Bernice Ntiritu testified as DW1. She adopted her witness statement dated 5th July, 2022 as her evidence in chief. She also produced the Defendants bundle of document dated 5th July, 2022 as her evidence in Chief.

42. In cross-examination, she stated that she was employed by the 2nd Defendant in November, 2018 and that the Plaintiff had been in the premises from 1993. She also stated that there was an active lease commencing on January, 2018. There was no lease document but only a letter of offer that had not been signed.

43. She also stated that the 2nd Defendant took over the management of premises from Knight Frank Limited and that there was no disparity between the accounts as managed by Knight Frank and them. She stated that levied distress for rent due was for Kshs. 5,500,000/- as at 23rd July 2020 and that the auctioneer only acted as per their instructions. She also stated that no fresh instructions were issued after the dismissal of the Plaintiff's application for injunction.

44. When asked about whether any notice was issued prior to levying distress he stated that he was not aware if any had been issued. She also stated that the Defendants did not lock the Plaintiff's premises on 15th July 2021 since the auctioneer just secured the goods in the premises. She also stated that the Plaintiff had access to the premises as at 15th July, 2023 and no access was denied. She also stated that no auction took place on 29th July, 2021.

45. When re-examined, she stated that the letter of offer was deemed as an agreement between the parties. She also stated that they never received any complaint from the Plaintiff accusing them of locking the premises.

46. Adam W. Ngethe a Licenced Class B Auctioneer testified on behalf of the 3rd Defendant. He adopted and relied on his witness statement dated 5th July 2022 as his evidence in chief.

47. When cross-examined, he stated that the total value of goods in the proclamation notice was indicated from the 10 entries. He also stated that as auctioneers, they are allowed to give a rough estimate of the goods and not the exact valuation value.

48. He also stated that no inventory was done on what the Plaintiff was allowed to cart away. He further stated that the auction was botched because it did not start at 11:00am as scheduled.

49. He stated that the goods were carted away and they used the same inventory of 15th July 2021 when moving to the yard. He also stated that no machines were left at the premises and they engaged experts to remove the same. He also stated that on 2nd August, 2021 they were served by with pleadings of another suit filed by ABSA in respect to the facility with bank.

50. When re-examined he stated that according to the law, the goods may be secured and sold on the premises. He also stated that the Plaintiff is yet to settle the arrears. He also stated that they did not breach any of the auctioneer rules.

The Plaintiff's submissions

51. The Plaintiff filed written submissions dated 20th November, 2023. The Plaintiff submitted on the following issues; whether the distress for rent conducted by the Defendants herein was illegal and whether the Plaintiff is entitled to the relief's sought.

52. Relying on Section 3(1) and Section 4(1) of the *Distress for Rent Act* Cap 293, it was submitted that the distress for rent was illegal since no notice had been served. It was submitted that the action by the Defendants of locking out the Plaintiff from the demised premises on 15th July, 2021 was totally illegal, unlawful and without any colour of right. The Defendants evicted the Plaintiff by locking out the Plaintiff from the demised premises under the colour of levying distress.

53. It was also submitted that Defendants being aware of the orders issued in respect to ELC Case No. E061 of 2020 Windsor Dry Cleaners Limited vs Regent Management Limited and Muthaiga Road Trust Company Limited they illegally proceeded to evict the Plaintiff on the guide of levying distress for rent. The cases of Cyo Owaya vs Goerge Hannington Zephania Aduda T/A Aduda Auctioneers and Another (2007) eKLR, Interoven Store Co. Ltd vs Hibbard and Another (1936) 1 All ER, Raghavji Madhavji vs B.M.K Ogol Kisumu HCCC 122 of 1980, Gusi Mwalimu Investment Company Ltd & 2 Others vs Mwalimu Hotel Ltd Civil Appeal No. 160 of 1995 (1995-1998) 2 EA 100 among others were cited in support.

54. In respect to the reliefs sought, it was submitted that for the period from 2015 to July, 2021 the Plaintiff's business was a going concern with services, income and property and the claimed loss amounted to Kshs. 206,083,433.

55. In respect to exemplary and punitive damages, the Plaintiff urged the court to grant a sum of Kshs. 20,000,000. The Plaintiff also prayed for costs and interest.

The Defendants' submissions

56. The Defendants filed written submissions dated 15th January, 2024. It was submitted that it was not disputed that the Plaintiff was in rent arrears of Kshs. 5,300,000/- which had been admitted by the Plaintiff and had also been captured by the court vide its ruling of 15th July 2021 in respect to ELC No. E061 of 2020, Windsor Dry Cleaners Ltd. vs Regent Management vs Muthaiga Road Trust Ltd.

57. It was also submitted that the distress process was legal and carried out in accordance with the law. It was argued that the Plaintiff was in rent arrears as per the finding of the Court in ELC No. E061 of 2020.

58. It was submitted that as per the admission of the Plaintiff and the statement of account exhibited by the Defendants there existed genuine basis to commence and complete distress seeking payment of outstanding rental arrears.

59. The Defendants submitted that by a letter of instructions dated 23rd July, 2020, the 2nd Defendant on behalf of the 1st defendant instructed the 3rd Defendant to proceed and levy distress against the Plaintiff to recover Kshs. 5,549,218.14. The Plaintiff filed suit ELC No. E061 of 2020 on 10th August, 2020 and obtained an interim order of injunction on 12th August, 2020 which was later discharged by the orders issued by the court on 15th July, 2021. Reliance was placed on the following cases in support of the contention that the distress was lawful, Arun C. Sharma versus Ashana Raikundalia t/a Raikundalia & Co. Advocates (2014) eKLR, National Industrial Credit Bank Limited vs S.K. Ndegwa Auctioneer (2005) eKLR, Alsabah versus East Africa Fitness Limited & 3 Others (20220 KEHC2975 (eKLR) among other several cases.

60. In respect to the Plaintiff's claim for loss of income it was argued that the same was in the nature of special damages and thus the claim of loss of income of Kshs. 148,703,713.00 ought to have been strictly proved. Reliance was placed to the case of Douglas Kalafa Ombeva versus David Ngama [2013]eKLR and it was argued that the purported monthly average which the report utilizes to generate a weighted average computation was grossly erroneous and ought to be ignored by the court.

61. Citing the case of Jack & Jill Supermarkets versus Victor Maina Ngunjiri [2018]eKLR, it was argued that it was speculative to claim that the business would automatically make constant profits with no contemplation of loss at all since in business profit and loss goes together.

62. In respect to the claim for furniture and fitness replacement costs, it was argued that the same is equally a special damage claim and there exists no pleaded particulars and it is not clear which furniture and fittings were and how the figure of Kshs. 2,564,000/- was arrived at. The same position was also taken in respect to the claim of Kshs. 7,333,300.00 for client's clothing and linen replacement together with machinery replacement.

63. The Defendants also argued that this court does not have jurisdiction to entertain the Plaintiff's claim which does not arise from any claim as regards to distress for rent. The Defendants submitted that the cause of action claimed has no relation or connection with either the claim of rent or possession of the suit premises. Does not relate at all on the issues relating to use of land but it is based on negligence. The case of Thomas Okumu vs Jeremiah Matoke Nyang'wara & 2 Others [2021]eKLR was cited in support.

64. In respect to the claim for general and exemplary damages, it was submitted that no such damages can arise for breach of contract and that the circumstances surrounding the manner in which the distress was conducted does not warrant the award of punitive damages. The case of Godfrey Julius Mbogori & Another versus Nairobi City County [2018]eKLR and Kenya Tourism Board versus Sundowner Lodges Limited [2017]eKLR were cited in support.

65. The Defendants concluded their submissions by urging this court to dismiss the Plaintiff's claim with costs on the basis that the Plaintiff has failed to discharge its legal burden of proof. Their also urged the court to grant them the reliefs sough in their counterclaim.

Analysis and Determination

66. The Court has considered the pleadings filed and evidence adduced herein. The following issues are the salient issues for determination: -

    i. Whether this Court has jurisdiction to hear and determine the Plaintiff's claim.

    ii. Whether the distress for rent was lawfully and undertaken in accordance with the law.

    iii. Whether the Plaintiff is entitled to the relief sought.

    iv. Whether the Defendants Counterclaim is merited.

Issue No. I Whether this Court has jurisdiction to hear and determine the Plaintiff's claim.

67. This issue was raised in the Defendants written submissions dated 15th January, 2024. It was contended that the court has no jurisdiction to hear the Plaintiff claim which does not arise from any as regards distress of rent at all. It was argued that the claim specifically based on alleged damage of equipment arising from an alleged electrical fault which was purely a Civil Claim.

    It was contended that the Plaintiff had sought the services of Norkun Intakes who in their report never blamed the defendants for the damage and further had admitted that they did not examine and report on the age of the charring Intakes who in their report never blamed the defendants for the damage and further had admitted that they did not examine and report on the age of the charring of the power supply units. It was also argued that there is no evidence of the functionality of the machines before the 3rd April, 2021 and the absence of the specific report of a specific report as regards the actual age of the charring of the power units and that there exists no causal link between the specific events that occurred on 1st and 2nd April, 2021 and the actual damage to the machines.

68. In Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA expressed himself as follows:

> " By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

69. The Supreme Court in the case of Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, observed that:

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

70. It therefore behoves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings. Article 162(2)(b) of *the Constitution* states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, Section 13 of the *Environment and Land Court Act* expounds on the jurisdiction of this Court as follows:

> "(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
>
> (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> (b) relating to compulsory acquisition of land;
>
> (c) relating to land administration and management;
>
> (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> (e) any other dispute relating to environment and land."

71. In the instant case the Plaintiff pleaded that the court had jurisdiction to entertain its claim. It was also pleaded that the cause of action herein arouse from the Defendants acts, behaviour and conduct leading to closure of the suit premises and forceful eviction of the Plaintiff from the premises frustrated the tenancy upon which the Plaintiff suffered loss and damage.

72. From the evidence that was tendered herein, it can be discerned that the dispute herein was due to the outstanding rent arrears which led to the Defendants' action of levying distress for rent upon the Plaintiff. The Plaintiff being aggrieved filed this suit seeking several reliefs as enumerated in the plaint. In view of the foregoing, it is therefore evident that the Plaintiff's claim is properly before this court and the ELC has the jurisdiction to hear and determine the same. The Defendants' objection to the jurisdiction of this court is misplaced.

Issue No. II Whether the levying of distress for rent herein was lawful

73. The Plaintiff submitted that the distress for rent conducted by the Defendants was illegal. It was contended that no notice was issued and that the Defendants action of locking out the Plaintiff from the demised premises on 15th July, 2021 was totally illegal and unlawful.

74. Section 3(1) of the *Distress for Rent Act*, Cap 293 provides as follows:-

> "Subject to the of this Act and any other written law, any person having any rent or rent service in arrears and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the Common Law of England in a similar case."

75. Section 4(1) of the *Distress for Rent Act* Cap 293 stipulates as follows:-

> " Where any goods or chattels are distrained for rent resolved and due upon a grant, demise, lease or contract, and the tenant or owner of the goods or chattels so distrained does not, within fourteen days after distress has been made and notices thereof stating the cause of the making of the distress/left on the premises charged with rent distrained for, pay the rent together with the costs of the distress or replacing them, with sufficient security to be given to the licenced auctioneer according to the law the person distraining may lawfully sell on the premises or remove and sell the goods and chattels so distrained for the best price which can be obtained for them towards satisfaction of the rent for which they are distrained and the charges of the distress, removal and sale, handing over the surplus (if any) to the owner."

76. It is clear from the totally of the documentary evidence and oral evidence that was tendered during trial that no notice for distress for rent was issued by the Defendants. The 2nd and 3rd Defendant's witness stated that they were not aware of any notice that was issued and neither could they point out the same to this court.

77. The Court of Appeal in the case of Kariuki vs Wang'ombe [2015]1EA 107 held that the tenant must be given notice stating the cause for making the distress.

78. In view of the foregoing it is the finding of this court that while the Defendant may have had every right to levy distress for rent, the levying for distress for rent herein in the manner that it was undertaken was illegal and unlawful.

Issue No. III Whether the Plaintiff is entitled to the reliefs sought in the plaint

79. The Plaintiff sought for several reliefs as enumerated on the Plaint and equally made submissions in support of the same.

80. From the analysis of the issues that were outlined herein and specifically as to whether or not the distress undertaken herein was legal, it was indeed the finding of this court that the said distress was illegal and as a consequence which the Plaintiff suffered loss and damages.

81. The Plaintiff sought for special damages of Kshs. 206,083,433 as particularised as follows; Loss of income Kshs. 148,703,713, Machinery replacement of Kshs. 39,137,240, furniture & fitting replacement costs Kshs. 7,333,300, Bank Interests and penalties of Kshs. 8,032,623 and Miscellaneous items and replacement costs Kshs. 312,557.

82. Loss of income must be pleaded and proved as they are in the nature of special damages. Loss of income is compensated for real assessable loss which is proved by evidence. See Cecilia W. Mwangi and Another vs Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR.

83. In respect to special damages, it is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect.

84. From the Plaintiff pleadings the particulars as relates to loss of income had been particularized as required by law. The Plaintiff did not adduce cogent evidence on how the actual income generated from the business conducted was strictly within the demised premises. The revenue for the year 2017 as per the financial statement was Kshs. 63,739,170. At page 309, revenue was misrepresented as Kshs. 102,532,885 and this is repeated for the rest of the years. In the circumstances, and considering the evidence tendered, it is the finding of this court that the Plaintiff's claim on loss of income has not been specifically proved to the required standard and and the same is declined.

85. The Plaintiff also sought for general damages, exemplary and punitive damages, damages for trespass, wrongful seizure of the Plaintiff's properties and goods, conversion and illegal distress.

86. The Plaintiff submitted that the distress for rent conducted by the Defendant's was illegal and unlawful and hence an award for general damages should be granted. The Plaintiff urged the court to grant a sum of Kshs. 60,000,000.

87. In respect to the claim of exemplary and punitive damages, the Plaintiff urged the court to grant an award of Kshs. 20,000,000 for the same.

88. The Defendants were opposed to the grant of the same and submitted that general damages cannot be granted for breach of contract since damages that arise from breach of contract are ascertainable quantifiable and known from the onset.

89. In assessing and determining the quantum of recompense due and payable on account of General damages, it is instructive to take cognizance of the established and trite principles that underpin the assessment and award of such damages. For brevity, the principles to be adopted, deployed and utilized for purposes of assessing general damages for trespass, were well articulated and elaborated upon by the Court of Appeal in the case of Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment), where the court stated as hereunder:

> 38. The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:
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> i) Halsbury's Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.

ii) Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.

iii) Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.

iv) Ephantus Mwangi & Another vs. Duncan Mwangi [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence.

b) A Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.

v) Kiambu Dairy, Farmers Co-operative Society Limited vs. Rhoda Njeri & 30 Others [2018] eKLR, - the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.

vi) Kemfro Africa Limited vs. Lubia & Another [No. 2] [1987] KLR 30 as approved in Peter M. Kariuki vs. Attorney General [2014] eKLR, - before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable.

vii) Johnson Evans Gicheru vs. Andrew Martin & Another [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum.

b) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.

viii) Sumaria & Another vs. Allied Industries Limited [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did.

ix) Butt vs. Khan [1981] KLR 349, - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate.

x) it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

vii. Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevans Limited [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;

(b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;

(c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.

90. On the other hand, the Plaintiff has also sought for both exemplary and punitive damages. However, I beg to point out and underscore that the claims for exemplary and punitive damages are like Siamese twins and thus both cannot be awarded in the same course.

91. Considering the above elaborate principles and considering the court's finding that the distress for rent herein as undertake by the Defendants herein was unlawful and illegal in the manner that it was undertaken, the only relief that this court can grant to the Plaintiff is the claim for general damages for trespass, wrongful seizure of the Plaintiff's properties and goods, conversation and illegal duties. In view of the foregoing it is the finding of this court that an award of Kshs. 10,000,000/- for damages under that line would be sufficient.

Issue No. IV Whether the Defendants are entitled to the reliefs sought in the counterclaim

92. The Defendants sought for payment of a sum of Kshs. 5,488,001.99 plus costs of the suit and interest in their counterclaim.

93. A counterclaim just like any other suit ought to be proved to the required standard. The Defendants submitted that the Plaintiff in flagrant breach of the tenancy agreement had refused and neglected to pay rent arrears of Kshs. 5,488,001.99 which had fallen due.

94. In a letter dated 16th July, 2021 that was written by the Plaintiff to the 2nd Defendant and was produced in evidence during trial, the Plaintiff admitted indebtedness of Kshs. 5,300,000 and even made proposals for payment of the same. Equally in the ruling delivered In ELC No. E061 of 2020, Windsor Drycleaners Ltd. Versus Regent Management versus Muthaiga Road Trust Ltd that was delivered on 15th July, 2021 the court noted that the Plaintiff was liable to pay rent to the suit property and the said store that was due. The court also noted that the Plaintiff had not pay any rent for the said store from 2018 up to the time that the same was due.

95. In view of the foregoing it is the finding of this Court that the Defendants have laid a basis and are entitled to the payment of the a sum of Kshs. 5,300,000/- as outstanding rent and this Court shall proceed to award the same. The Court further directs that the said sum of Kshs. 5,300,000 shall be deducted from the sum of Kshs. 10,000,000/- that has been awarded to the Plaintiff as general damages for illegal distress. Hence the net payment to be made to the Plaintiff is Ksh 4,700,000/-

96. In respect to costs, having considered that the Plaintiff has partially succeeded in its claim and that equally the defendants have been successful in their counterclaim, these Court shall direct each party to bear own costs of the suit and counterclaim.

Final Orders

97. In the end, the suit by the Plaintiff and the counterclaim by the Defendants are disposed as follows: -

    a. Damages for trespass, wrongful seizure of the Plaintiff's properties and goods, conversion and illegal distress be and is hereby awarded to the Plaintiff in the sum of Kshs. 10,000,000/- only payable by the Defendants.

    b. Payment of the sum of Kshs. 5,300,000/- to the Defendants payable by the Plaintiff.

    c. Each party to bear own costs of the suit and counterclaim.

    Judgement accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MARCH, 2024.

E.K. WABWOTO

JUDGE

In the presence of:-

Mr. Githinji for the Plaintiff.

Ms. Obiero for Mr. Ogembo for the Defendants.

Court Assistant-Caroline Nafuna.