



REPUBLIC OF KENYA



**Wambui v Frann Investment Limited (Environment & Land Case
207 of 2019) [2024] KEELC 4512 (KLR) (18 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 4512 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 207 OF 2019**

**LL NAIKUNI, J
MARCH 18, 2024**

BETWEEN

JAMES MWANGI WAMBUI PLAINTIFF

AND

FRANN INVESTMENT LIMITED DEFENDANT

RULING

I. Introduction

1. The Ruling before the Honourable Court regards the determination of a Notice of Motion application dated 30th November, 2023 by the Plaintiff/Applicant James Mwangi Wambui. As a background, this Honourable Court already rendered itself through the pronouncement of its Judgment delivered on 28th November, 2023.
2. The said Judgment was in favour of the Plaintiff in its entirety save for Prayer No. 1 of the Plaint with Costs to the Defendant. Further, from the said Judgement the Court partially dismissing the Amended Counter - Claim dated 5th February, 2020 instituted by the Defendant herein.
3. The impugned application was brought under the provision of Sections 1A, 1B, 3A, 80, and 99 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya, Order 45 Rule of the *Civil Procedure Rules*, 2010.
4. Upon service of the Notice of Motion application, the Defendant did file Grounds of opposition dated 26th January, 2024 and the Honourable Court shall be dealing with it at a later stage of this Ruling.

II. The Plaintiff/Applicant's case

5. The Plaintiff/Applicant sought out the following orders:
 - a. Spent



- b. That this Honourable Court be pleased to review its Judgement entered on the 28th November, 2023, by clarifying and capturing the value amount awarded in Prayer (c) of the Plaint.
 - c. Any other relief that court may deem just and expedient in the circumstances.
 - d. That the costs of this Petition be borne by the Respondents.
6. The application by the Plaintiff/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 8th Paragraphed Supporting Affidavit of James Mwangi Wambui sworn and dated 30th November, 2023 with one (1) annexure marked as ‘JMW - 1’. The Plaintiff/Applicant averred that:
- a. On the 19th November, 2019, the Plaintiff/Applicant herein instituted a suit against the Defendant/ Respondent by way of Plaint where he prayed for a Judgement against the Defendant for:-
 - i. A Permanent Injunction Order restraining the Defendant whether acting by themselves or through their agents, servants and/or workmen from doing any of the following acts, that is to say from further entering upon, interfering with, evicting, levying Distress, Leasing out to any Third Party and/or otherwise Interfering with Plaintiffs/Applicant’s possession, occupation and use of the Demised premises, being a Restaurant Space on the First Floor comprised in the building erected on Subdivision Number 1696 (Original Number 612/2) Section III, Mainland North, Kilifi District.
 - ii. General Damages for derogation from grant and Unlawful Constructive Eviction.
 - iii. Claim for reimbursement of the value of the Goods Detained.
 - b. On the 28th November, 2023, this Honourable Court vides a Judgement by Hon. Justice L. L. Naikuni (Mr.) under the Order (a) of the Judgement the Honourable Court Ordered as follows:
 - i. That Judgement be and is hereby entered in favour of the Plaintiff as against the Defendant in its entirety save for Prayer No.1 of the Plaint with Costs.
 - c. That although the Judgement was entered in favour of the Plaintiff as against the Defendant in its entirety in respect to prayer (c) of the Plaint, the Judgement is silent on the value amount awarded under prayer (c) of the Plaint.
 - d. That Prayer No. 1 was not issued as the Deponent already terminated and vacated from the premises.
 - e. That the Judgement in Paragraph 83, captured the damages amount pleaded under prayer (b) and (c) of the Plaint by the Plaintiff/Applicant as follows:
 - i. General Damages for derogation from grant- - Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs. 24,600,000/=)
 - ii. Damages for unlawful constructive eviction- Kshs. Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs. 24,600,000/=).
 - iii. Reimbursement of the value of Goods detained – Kenya Shillings Twelve Million Eight Fourty Seven Thousand Three Hundred and Fifty (Kshs.12,847,350/=).



- f. The total amount pleaded by the Plaintiff/Applicant in the Pleadings amounts to Shillings Sixty Two Million Forty Seven Thousand Three Hundred and Fifty (Kshs. 62,047,350/-) as 23rd May, 2023.
- g. The Judgement is silent on the value amount awarded under prayer (c) of the Plaint as it allowed the Prayers of the Plaintiff were granted in entirety.
- h. On the Plaintiffs submissions which were captured under Paragraph 83 of the Judgement the value of prayer(c)for the Reimbursement of the value of goods detained is a sum of Kenya Shillings Twelve Million Eight Fourty Seven Thousand Three Hundred and Fifty (Kshs. 12, 847, 350/=) and although the same was granted in entirety it is not clear from the Orders issued.
- i. There was a need for clarity on the amount awarded to the Plaintiff/Applicant under prayer (c) as the same was awarded in entirety to enable the Parties to finalize this suit.

III. The Grounds of Opposition by the Defendant.

7. While opposing the Notice of Motion application dated 30th November, 2023, by the Plaintiff/Applicant herein, the Defendant filed and served a four (4) Grounds of Opposition. These were:-
 - a. The said application never set out the grounds upon which the Court had been invited to review its said Judgement.
 - b. The application had not annexed the Decree or Order from which the review was being sought.
 - c. The Honourable Court clearly and emphatically awarded the Plaintiff a sum of Kenya Shillings Two Million (Kshs. 2, 000, 000.00/=) as damages for breach of contract and unlawful eviction and therefore the Court had no Jurisdiction to review the said Judgement.
 - d. The Honourable Court could not sit on appeal over its own Judgement.

IV. Submissions

8. On 29th January, 2024 in the presence of both parties in Court, the Honourable Court directed that the Notice of Motion application dated 30th November, 2023 be canvassed by way of written submission. Indeed, the parties were accorded an opportunity to highlight their submissions vide virtual means. Mr. Gachie and Mr. Gikandi Advocates executed their tasks with great resilience, devotion, dedication and diligence. The Honourable Court was sincerely grateful to the Learned Counsels. Pursuant to that the Honourable Court having confirmed complied reserved the date of the ruling on 14th March, 2024.

V. Analysis and Determination

9. I have carefully read and considered the pleadings herein being the application dated 30th November, 2023 by the Plaintiff/Applicant, the myriad of cases cited herein by the parties, the relevant provisions of the *Constitution* of Kenya, 2010 and statutes.
10. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 30th November, 2023 by the Plaintiff / Applicant has made out a case of the review of the Judgment of this Honourable Court delivered on 28th November, 2023?
 - b. Who meets the costs of the Notice of Motion application dated 30th November, 2023?



ISSUE No. a) Whether the Notice of Motion application date 30th November, 2023 by the Plaintiff / Applicant has made out a case of the review of the Judgment of this Honourable Court delivered on 28th November, 2023.

11. Under this Sub – heading, the main substrata is one for causing the Honourable Court to consider review, setting aside, varying and/or discharging its Judgment. Principally, the laws governing the aspects of review are founded under the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 of the *Civil Procedure Rules*, 2010. I have noted that the application by the 1st Defendant/ Applicant was brought under these two provisions of law. Therefore, this Honorable Court finds it significant to critically examine the provisions for review, setting aside and/or varying Court orders. These are found mainly under the provisions of law already stated herein. A clear reading of these provisions indicates That Section 80 is on the power to do so while Order 45 sets out the rules on doing it.
12. The provision of Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -
- “ Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
13. While the provision of Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows: -
- “ 1.
- (1) Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”



14. I am compelled to refer to the case of:- “[Republic – Versus - Public Procurement Administrative Review Board & 2 others](#) [2018] eKLR” it was held: -

“Section 80 gives the power of review and Order 45 sets out [the rules](#). The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

15. Additionally, the case of:- “*Sarder Mohamed – Versus - Charan Singh Nand Sing and Another* (1959) EA 793” where the High Court held that Section 80 of the [Civil Procedure Act](#), Cap. 21 conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

16. Broadly speaking, the case of:- “[Republic – Versus - Public Procurement Administrative Review Board & 2 others](#) [2018] e KLR” it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

17. From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.

- a. There should be a person who considers himself aggrieved by a Decree or order;
- b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
- c. A decree or order from which no appeal is allowed by this Act;
- d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
- e. On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.
- f. The review is by the Court which passed the decree or made the order without unreasonable delay.



18. I have previously stated in this Honourable Court in the case of “*Sese (Suing as the Administrator of the Estate of the Late Shali Sese) – Versus - Karezi & 8 others* (Environment and Land Constitutional Petition 32 of 2020) [2023] KEELC 17427 (KLR)” held that:-

“The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible.”

19. Now application of this legal principles to the instant case. The Plaintiff/ Applicant herein has urged the Court to review its Judgment dated 28th November, 2023 by Hon. Justice L. L. Naikuni (Mr.) under the Order (a) of the Judgement the Honourable Court Ordered as follows:

- i. That Judgement be and is hereby entered in favour of the Plaintiff as against the Defendant in its entirety save for Prayer No.1 of the Plaint with Costs.
- ii. That although the Judgement was entered in favour of the Plaintiff as against the Defendant in its entirety in respect to prayer (c) of the Plaint, the Judgement is silent on the value amount awarded under prayer (c) of the Plaint.

20. The starting point is that the background of the case at hand. On the 19th November, 2019, the Plaintiff/Applicant herein instituted a suit against the Defendant/ Respondent by way of Plaint where he prayed for a Judgement against the Defendant for:-

- i. A Permanent Injunction Order restraining the Defendant whether acting by themselves or through their agents, servants and/or workmen from doing any of the following acts, that is to say from further entering upon, interfering with, evicting, levying Distress, Leasing out to any Third Party and/or otherwise Interfering with Plaintiffs/Applicant’s possession, occupation and use of the Demised premises, being a Restaurant Space on the First Floor comprised in the building erected on Subdivision Number 1696 (Original Number 612/2) Section Iii, Mainland North, Kilifi District.
- ii. General Damages for derogation from grant and Unlawful Constructive Eviction.
- iii. Claim for reimbursement of the value of the Goods Detained.

21. For avoidance of doubt, and ease of reference, in its Judgment the Honorable Court rendered itself as follows verbatim:-

“The upshot of the foregoing is that after conducting such an intensive and elaborate analysis to the framed issues, the Honourable Court based on the principles of Preponderance of Probabilities and the balance of convenience, is satisfied that the Plaintiff has established its case and is entitled to the prayers sought in the Plaint dated 19th November, 2019 against the Defendant. For avoidance of any doubts, I proceed to specifically order:-

- a. That Judgment be and is hereby entered in favour of the Plaintiff as against the Defendant in its entirety save for Prayer No. 1 of the Plaint with costs.
- b. That the Amended Counter - Claim dated 5th February, 2020 by the Defendant and against the Plaintiff herein be and is hereby partially dismissed with costs to the Plaintiff.



- c. That the Plaintiff be and is hereby awarded a sum of Kenya Shillings Two Million (Kshs. 2,000,000/-) as damages for breach of contract and unlawful eviction.
- d. That the Honourable Court does not deem it fit to award Prayer 1 of the Plaintiff on the permanent injunction sought by the Plaintiff against the Defendant as the tenancy agreement has already been terminated.
- e. That an order be and is hereby issued that the Plaintiff does quit, vacate and hand over forthwith the demised premises to the Defendant and in default an order of eviction of the Plaintiff from the Defendant's property namely; Sub-division No. [particulars withheld] does issue.
- f. That an order be and is hereby do issue directing the Plaintiff to forthwith as soon as the Defendant effects the payment of the damages awarded on (c) above remove and/or lift the Caveat placed on the Defendant's Title for Plot Sub-division No. [particulars withheld] and in default, an order do issue directing the Land Registrar at the Mombasa Land Registry to remove the Caveat aforesaid, at the Plaintiff's cost.
- g. That the Plaintiff shall have the Costs of this suit and the Amended Counter - Claim which costs are awarded with interests at Court rates.

It is so ordered accordingly.

22. Clearly and from all means, from the current application and I fully concur with the Learned Counsel for the Defendant/Respondent, the Plaintiff/Applicant has not demonstrated that there has been discovery of new and important matter or evidence, or that there is an error apparent on the face of the record. Should these limbs have been the only standards to determine this application, then my hands would be tied and I would proceed to declare that this application should see the light of the day. It should never succeed. However, there exists some hanging fruits in form of a rider upon which the application for review may be allowed. This is in form of the existence of any "other sufficient reason". Being such a delicate and perhaps the only room to resuscitate the application, I insists on deliberating indepth on this legal term. From a loose view point, the expression sufficient reason means a reason sufficiently analogous to those specified in the rule. Furthermore, I am forced to seek refuge from the "*Shanzu Investments Limited – Versus - Commissioner for Lands* (Civil Appeal No 100 of 1993)" the Court of Appeal held that:-

"Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the *civil procedure act*: and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

23. I need say no more on the definitions nor interpretation. According to the Plaintiff/Applicant the Judgement in Paragraph 83, captured the damages amount pleaded under prayer (b) and (c) of the Plaintiff by the Plaintiff/Applicant as follows:
- i. General Damages for derogation from grant – Kenya Shillings Twenty Six Million Six Hundred Thousand (Kshs. 24,600,000/=)



- ii. Damages for unlawful constructive eviction - Kenya Shillings Twenty Six Million Six Hundred Thousand (Kshs. 24,600,000/=)
 - iii. Reimbursement of the value of Goods detained – Kenya Shillings Twenty Million Eight Fourty Seven Thousand Three Fifty Hundred (Kshs.12,847,350/=).
24. Which begs the question what are pleadings and do submissions constitute pleading were parties particularize damages that were not particularized in the pleadings. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in “*Erastus Wade Opande – Versus - Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007”:
- “Submissions simply concretize and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”
25. The same Judge stated in the case of:- “*Nancy Wambui Gatheru – Versus - Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993” expressed himself as follows:
- “Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”
26. As stated by the Court of Appeal in the case of:- “*Daniel Toroitich Arap Moi – Versus - Mwangi Stephen Muriithi & Another* [2014] eKLR”:
- “Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”
27. The Court of Appeal in the case of:- “*Avenue Car Hire & Another – Versus - Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997” held that no Judgement can be based on written submissions and that such a Judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the *Civil Procedure Rules*, 2010 [now Order 18 rule 2 of the *Civil Procedure Rules*]. The same Court in “*Muchami Mugeni – Versus - Elizabeth Wanjugu Mungara & Another* Civil Appeal No. 141 of 1998” found the practice of making awards on the basis of the submissions rather than the evidence deplorable.
28. During the proceedings these were the testimonies of the Plaintiff’s witnesses and whereby I have been forced to re – reproduce verbatim:-
- A. Examination in Chief of PW - 1 by Mr. Muchiri Advocate
 - 13. He was sworn and testified in English language. He identified himself as Mr. James Mwangi Wambui. He was the Plaintiff, an Environmentalist and a resident of Nyali



estate of the County of Mombasa. He recorded a witness statement dated 19th November, 2019 filed in Court on 21st November, 2019. He adopted it as his evidence in chief and list of documents dated 19th November, 2019 produced as Plaintiff Exhibit Exhibits numbers 1 and 2. He had duly executed a tenancy - Lease with the Lessor for 10 years, terms and conditions stipulated thereof. According to him, the Lease had not yet expired. However, in the course of time, a disagreement ensued between him and the son of the Lessor who subsequently closed down the business premises.

14. The Lessor was now deceased. PW – 1 had received a demand letter to vacate the suit premises. He never had a peaceful enjoyment of the suit property. The value of the goods detained were a sum of Kenya Shillings Fourty Million (Kshs. 40,000,000/-). The goods were detained.

B. Further Examination in chief of PW – 1 by Mr. Gachie Advocate

15. When PW – 1 was further examined, he stated that he had seen the documents which bore his signature and that of Mr. Edward Wahome. He had this case and another with the father. From the house which was in the suit property, he had vacated but there was another house situated at Port Reitz which he was still occupying. These payments were for the other premises. He was the one who demanded for the goods from his landlord. PW – 1 held that usually at Mombasa there was a lot bacteria in the air and good tend to get moisty and rusty when they were not in use.

C. Cross examination of PW - 1 by Mr. Njoroge Advocate

16. PW -1 informed Court that he occupied the entire floor of the demised premises. His Landlord was known as Frans Investment Limited. He had spent over a sum of Kenya Shillings Thirty Million (Kshs. 30, 000, 000.00/=) in renovations and other improvements of the premises. He would have tenants. There was also a financial institutions – the Family Bank Limited who were still tenants in the building. There was a Lease agreement dated 31st November, 2021. They had agreed that would be for the sale of the premises eventually but the Lessor later on declined and they proceeded with the 10 years lease effectively from 31st December, 2021. The Lease agreement was with Frann Investment Limited.

17. He reiterated that, there was a lot of harassment meted by the Lessor. He was in Nairobi, unwell. There was no letter on the harassment because he was the one who was demanding rent arrears. In the cause of time, he started getting a lot of harassment from the Landlord and someone started demanding for some money from him. He filed the case after receiving the demand letter for an outstanding rent arrears of a sum of Kenya Shillings Fourteen Million Three Eighty Three Thousand (Kshs 14,383, 000.00/) and there was no notice and that caused him to institute this case. From the pleadings, he prayed for permanent injunction until the case was heard and determined. He was interested in getting his goods from the premises. On 27th May, 2021, the ELC No. 1 directed that he enters the premises and obtain his goods from the premises. The good had been damaged. On 28th December, 2016, they entered into an agreement between them and the Landlord (evidenced in page 40). He went to look for another place. But he was not successful. The damaged property which he photographed.

18. PW – 1 told the Court that he was surprised to see a demand letter dated 11th September, 2019. He never replied. It was from there that he approached the



Honourable Court. He denied the signature in the document was his. He told the court that from the property at Port Reitz in the County of Mombasa, he had owed an outstanding rent for a sum of Kenya Shillings Seven Million (Kshs 7,000,000/-). It was settled. He had seen the document dated 15th March, 2022 when he last testified, he had not paid the amount. The last time he testified on 2nd November, 2021.

D. Re - examination of PW - 1 by Mr. Muchiri Advocates

19. PW – 1 confirmed that from the demand letter, he had not been in occupation of the premises. There was registration of a restriction against the premises. He knew of the tenant who was unable to pay the Landlord. He had the right to levy distress to have retained the property but they never obliged. He had always payed rent. He left all his goods in the premises. He was only able to access his goods through a court order. From the letter dated 28th December, 2016, all his sons died.
20. He was referred to page 40 where they all agreed and had the debt settled. By the time he testified in Court, he had fully paid up debt owed to the Landlord. That was all.
21. On 23rd February, 2023, the hearing for the PW – 2 proceeded in earnest. He testified as follows:-

A. Examination in chief of PW - 2 by Mr. Gachie Advocate

22. PW - 2 was sworn and testified in the English language. She informed Court that she was called Patricia Lillian Muthoni. She resided in Thika of the county of Kiambu. According to PW – 2, she was an Interior Designer by profession, She knew PW - 1 for a long duration being her client. She signed a witness statement on 16th February, 2023 and which she adopted as part of her evidence in chief. She was the one who designed she interior of a night club for the Plaintiff situated at Mtwapa of the County of Mombasa in the year 2010. She undertook the assignment to its completion in the year 2012. For that work, she charged the Plaintiff a sum of Kenya Shillings Twelve Million (Kshs. 12,000,000/-) or thereabout for the work done. The assignment to its completion took her two (2) years instead of the one (1) year they had agreed on. When she started the project, there was an agreement and an expectation by the owner to have completed the construction. The agreement had a penalty clause. It was duly entered between the owner of the club and the son on one hand and herself.
23. She told the court that the building was bear when they engaged. They were to start with the pillars but they had problems with the sewage line. She had been engaged to design the floor, the gypsum ceiling and the disco floor lightings to detail, the installation of the kitchen and a bar which could hold alcohol and other non – alcoholic drinks all worth a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) and the installation of a power back - up generator. For all tasks, she was referred to the Supplementary List of documents. In particular, to an invoice for 28th May, 2022 and the Supplementary list of documents dated 16th February, 2023. She produced all these documents and were marked as Plaintiff Exhibits.



24. She informed Court that, occasionally the roof water would pour down the roof and pillars and would spoil the gypsum. From the best of her knowledge, subsequently, the club was subsequently closed.

B. Cross examination of PW - 2 by Mr. Njoroge Advocate

25. PW – 2 told the court that the document she had presented in court was not a Valuation report. She had not presented a contract that they had duly entered with James Mwangi in Court but she stressed that they had it. Thus, they may not have the benefit of perusing the Penalty Clause that she referred to. She emphasized that the contracted sum was for a sum of Kenya Shillings Twelve Million Eight Fourty Seven Thousand Three hundred and Fifty Hundred (Kshs. 12,847,350 which included labour, travelling and the profit they made. What she presented in Court were invoices to the client but not receipt for payment. But they issued Electronic Transfer Receipts (ETR) receipts to the clients. She did not have them as the ink had faded off. She may prove that she paid VAT; the VAT payable was not shown from the receipts.

26. She told the court that she had done this type of work for many years. She was experienced. Mr. Mwangi was a tenant; Mr. Wahome and Mr. Mwangi had an interesting relationship. When she met them she was not introduced to them as Land Lord – Tenant. Infact she thought they were partners. They never had a Lease agreement. She clarified that they were more like father and son. In other words, they had a deep and mutual relationship of friendship. Her work entailed the design drawings but they were all part of a contract. On the issue of watering and sewage leakage, they had no written complaint made to the Land Lord. She stated that the way Mr. Mwangi handled the Landlord was with soft (velvet) gloves. She was aware Mr. Mwangi made the claim. They did not have the invoices for these expenses. From her statement, she stated that she was not privy to the cause of the dispute between them. From her statement it meant, She was in Court to state the dispute between the Landlord and his tenant. Just the bit of what she did as an Interior designer. She was not involved in the dispute.

27. She told the court that when, Mr. Mwangi vacated from the premises, she may not know what had been carried away out of the premises. She was referred to the invoices of 28th May, 2012. All these items mentioned there were carried away from the premises. The generator was bought by Mr. Mwangi and she fixed it.

C. Re - examination of PW - 2 by Mr. Gachie Advocate

28. She reiterated that the club was closed down by Victor. She never saw James Muchemi Munene carrying anything from the premises as he was not allowed to do so. That was all. It was the close of the Plaintiff's case.



29. Going by the pleading of the Plaintiff/Applicant and the evidence adduced thereof there was nowhere where the Plaintiff/Applicant mentioned through his witness the amount quoted in Paragraph 83 of the Judgment which subsequently is made up of the submissions of the Plaintiff/Applicant through his Learned Counsel. Having said that, critically speaking, are there any grounds for the review of the Judgement delivered by this Court?
30. Be that as it may, I will proceed to examine the merits of the claims by the Plaintiff/Applicant beginning with the claim for General Damages for derogation from grant – a sum of Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs. 24,600,000/=), Damages for unlawful constructive eviction - Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs. 24,600,000/=) and reimbursement of the value of Goods detained - a sum of Kenya Shillings Twelve Million Eight Fourty Seven Thousand Three Hundred and Fifty (Kshs.12,847,350/=). A reimbursement is a special damage in nature. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in *“Jogoo Kimakia Bus Services Limited – Versus - Electrocom International Ltd [1992] KLR 177”* where it was stated that:
- “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.”
31. Regarding proof of loss, rightfully so, it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances. That is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See the cases of:- *“Nizar Virani T/A Kisumu Beach Resort – Versus - Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269”*, *“Gulhamid Mohamedali Iwanji – Versus - Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98”*, *“Coast Bus Service Ltd – Versus - Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992”*.
32. It was therefore held by the Court of Appeal in the case of:- *“Jackson K Kiptoo - Versus - The Hon Attorney General [2009] KLR 657”* that:
- “The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of.”
33. The issues in this Court for determination in a suit flowed from the pleadings and that a trial court could only pronounce Judgment on the issues arising from the pleadings and that unless pleadings were amended, parties were confined to their pleadings. The exception to the general rule that parties are bound by their pleadings, is expounded in such cases as *“Odd Jobs – Versus – Mubea [1970] EA 476”* and *“VYAS Industries Ltd. – Versus - Diocess Of Meru [1982] KLR 114”* arises where the parties raise and address unpleaded issues and leave them to the Court to decide. There was no evidence of the reimbursement produced before Court but the Plaintiff/Applicant testified to the same through PW – 2. Therefore, I find that in that issue there was an error apparent on the record of the Honourable Court.



34. On the issue of damages for derogation and constructive eviction, the provision of Section 77 of the Land Act No. 6 of 2012 provides the steps to be taken before a lessee is evicted from the leased premises:-

“(1) A lessee who is evicted from the whole or a part of the leased or buildings, contrary to the express or implied terms and conditions of a lease, shall be immediately relieved of all obligation to pay any rent or other monies due under the lease or perform any of the covenants and conditions on the part of the lessee expressed or implied in the lease in respect of the land or buildings or part thereof from which the lessee has been so evicted.

(2) For purposes of this section, a lessee shall be considered as having been evicted from the whole or part of the leased land or buildings, if, on the commencement of the lease, the lessee is unable to obtain possession of the land or buildings or part thereof, as a result of any action or non-action of the lessor or any of the lessor’s agents or employees, contrary to the express or implied terms of the lease: Provided that a lessee who is aggrieved as a result of unlawful eviction under this section may commence an action against the lessor for remedies.”

35. The Plaintiff/Applicant did not in any way prove to this Honourable Court that he was entitled to damages for derogation from the grant and unlawful constructive eviction, since the Plaintiff/Applicant was not evicted by the Defendant/Respondent, the claim for damages could not succeed. In any event the Plaintiff/Applicant could not seek to quantify its claim on the basis of unpaid rent, for the remainder of the term, as the rent benefits the Defendant/Respondent and not the Plaintiff/Applicant. In his statement as PW - 1 he stated that he vacated the premises.

36. Under paragraph 154 of the Judgment this Honourable Court opined itself as follows:-

“This court having found that the locking up of the Plaintiff’s premises was unlawful, tortious and amounted to constructive eviction, it finds and holds that a breach of the law ought to attract reprieve to the violated. In *Mattarella Limited – Versus - Michael Bell & another* [2018] eKLR the Court awarded the Plaintiff damages in the sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) and held as follows:

“While the Defendants were not specifically levying distress for rent, what they sought to do and actually did was to take possession by use of the law of the jungle. That must be, as has always been, frowned upon by the courts. Not only frowned upon but equally remedied by award of damages so that everybody seeking to live within the territory of Kenya, a county whose citizens have chosen to be led by the rule of law, gets to know, if one be otherwise under some illusion, that arbitrariness and or just impunity is not a virtue but a vice. Vice cannot be countenanced but must be curtailed and discouraged. I am saying all the foregoing because I have come to the conclusion that a violation of a right, due process and the law invite a reprieve or remedy to the violated.”

37. On this ground the Court opines there was an error on the Court record that would warrant the issuance of the order to review the Judgment.

38. On the issue on prayer (a), from the Pleadings filed, the Plaintiff/Applicant sought for a Permanent Injunction Order restraining the Defendant/Respondent whether acting by themselves or through



their agents, servants and/or workmen from doing any of the following acts, that is to say from further entering upon, interfering with, Evicting, levying Distress, Leasing out to any Third Party and/or otherwise Interfering with Plaintiff/Applicant's possession, occupation and use of the Demised premises, being a Restaurant Space on the First Floor comprised in the building erected on demised suit premises.

39. The Honourable Court rendered itself under paragraph 161 that the demised premises belong to the Defendant/Respondent and restraining them from further entering upon, interfering with, Evicting, levying Distress, Leasing out to any Third Party and/or otherwise Interfering with Plaintiff/Applicant's possession, occupation and use of the Demised premises, being a Restaurant Space on the First Floor comprised in the building erected on demised suit premises would be detrimental to their business will be tantamount to pure abstract and academic – Otoise - exercise to no avail at all. For these reasons, I therefore outrightly decline granting this prayer sought by the Plaintiff herein. I still find the prayer unmeritorious.
40. I find that this limb of the Application met the threshold set out under Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 and thus this is a proper case for the Court to exercise its discretion in favour of the Plaintiff/Applicant.

ISSUE No. b). Who meets the costs of the Notice of Motion application dated 30th November, 2023

41. The issue of costs is at the discretion of the Court. Costs is the award granted to a party at the conclusion of the legal action or proceedings in any litigation. The proviso of Section 27 (1) of the [Civil Procedure Act](#), Cap. 21 holds that costs as the general rule, ordinarily costs shall follow the event. By follow the event it means the result or outcome of the legal action.
42. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See “*Hussein Janmohamed & Sons – Versus - Twentsche Overseas Trading Co. Ltd* [1967] EA 28”.
43. The court finds no good reason why the successful party should not be awarded costs of the action. But nonetheless, in the instant case there shall be no orders as to costs.

VI. Conclusion and Disposal

44. The upshot of the foregoing is that after conducting such an intensive and elaborate analysis to the framed issued, the court is satisfied that the Plaintiff/Applicant in the Notice of Motion application dated 30th November, 2023 has on balance and preponderance of probability established its case and is entitled to the prayers sought in the Plaint against the Defendant/Respondent. Therefore, for avoidance of any doubts, I proceed to specifically order:-
 - a. That the Notice of Motion application dated 30th November, 2023 be and is hereby found to have merit and is allowed strictly with regards to the orders on the damages .
 - b. That an order be and hereby issues that the judgment herein delivered on 28th November, 2023 is set aside for purposes of review.
 - c. That the Judgement be and is hereby entered for the damages amount pleaded under Prayers (b) and (c) of the Plaint by the Plaintiff as follows:
 - i. General Damages for derogation from grant at a sum of Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs. 24,600,000/=).



- ii. Damages for unlawful constructive eviction at a sum of Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs. 24,600,000/=)
 - iii. Reimbursement of the value of Goods detained at a sum of Kenya Shillings Twelve Million Eight Fourty Seven Thousand Three Fifty Hundred (Kshs.12,847,350/=)
 - iv. The total amount pleaded by the Plaintiff at an amount of Kenya Shillings Sixty Two Million Forty Seven Thousand Three Hundred and Fifty (Kshs. 62,047,350/-) as 23rd May, 2023.
- d. That for avoidance of doubt, the Honourable Court has does not deem it fit to award Prayer 1 of the Plaint on the permanent injunction sought by the Plaintiff against the Defendant as the tenancy agreement has already been terminate and therefore that prayer shall not be reviewed.
 - e. That there shall be no orders as to costs.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAM VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 8TH DAY OF MARCH 2024.

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HON. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula, the Court Assistant
- b. Mr. Omondi Advocate holding brief for Mr. Gachie Advocate for the Plaintiff/Applicant.
- c. Mr. Eliud Otieno Advocate holding brief for Mr. Gikandi Advocate for the Defendant/Respondent.

