



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KANTAI, J.J.A.)

CIVIL APPEAL NO. 432 OF 2018

BETWEEN

VIKTAR MAINA NGUNJIRI.....APPELLANT

AND

JACK AND JILL SUPERMARKET LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (L. Njuguna, J.) delivered 25th October, 2018

in

H.C.C.C. No. 317 of 2014)

JUDGMENT OF THE COURT

The appellant, **Viktar Maina Ngunjiri**, acquired a commercial building in the year 2006 erected on **L.R. No. 209/869** situate along Temple Road in Nairobi. The respondent **Jack and Jill Supermarket Limited** was one of the tenants on those premises who had occupied the same since the year 1998. On acquiring the premises the relationship between the two parties was not good at all which led to many suits being filed in various courts. In the end the respondent was evicted from the premises and filed at the High Court at Nairobi **Civil Case No. 317 of 2014**. It was alleged in that suit that the respondent had been a protected tenant within the meaning of **The Landlord and Tenant (Shops Hotels And Catering Establishments) Act**; that the respondent had within the term of tenancy always met its obligations as a tenant to the appellant as landlord; that the appellant had failed to accord the respondent quiet possession and peaceful enjoyment of the premises since he took over the same; that on the 30th of October, 2007 the appellant had served the respondent with a notice dated 27th August, 2007 seeking to terminate the tenancy on the ground that the appellant intended to pull down the building and put up a modern building on the premises; that the respondent had successfully challenged the termination notice in **Business Premises Rent Tribunal Case No. 806 of 2007** and that the tribunal had struck out the notice; that the appellant had then challenged those orders in High Court Civil Appeal No. 570 of 2008 which appeal was later withdrawn; that on the 30th of October, 2008 the appellant issued to the respondent another notice dated 27th October, 2008 to terminate the tenancy; that the respondent had challenged that notice through

Business Premises Rent Tribunal Case No. 795 of 2008; that the tribunal had refused to strike out that notice leading the respondent to file High Court Civil Appeal No. 710 of 2009 where the court in a judgment delivered on 20th November, 2011 allowed the appeal and struck out the termination notice; that on or about 6th of February, 2009 the appellant prompted the Public Health Department of the then City Council of Nairobi to have the premises condemned and successfully got a court order from the City Court on the same day and notices nos. 5445 and 5446 were issued condemning the premises; that aggrieved by those notices the respondent filed Judicial Review Cause No. 185 of 2009 in the High Court seeking to quash the said notices and that on the 27th of March, 2009 the High Court issued stay orders prohibiting the eviction of the respondent from the premises or demolition of the premises or any other interference with the respondent's occupation and granted leave to the respondent to commence judicial review proceedings. However, on 21st March, 2009 the appellant without any lawful authority or order moved into the premises and demolished the same; that the appellant had been arrested and charged with certain criminal offences because of the said events; that on 24th March, 2009 the respondent with other tenants of the premises filed various causes at the **Business Premises Rent Tribunal** which tribunal issued orders of injunction against the appellant barring him from further demolishing the suit premises; that on 3rd April, 2009 the tribunal suspended payment of rent by the respondent as the suit premises had been extensively damaged and its business disrupted; that on 7th May, 2009 the said tribunal had issued orders against the appellant prohibiting him from harassing the respondent; that the appellant had been found guilty of contempt of court and fined; that on 25th March, 2013 upon application by the appellant it was ordered that the respondent vacate the premises temporarily so that the appellant could effect repairs; that being dissatisfied with those orders the respondent had filed **Civil Appeal No. 266 of 2013** seeking stay of execution of the said orders which application was successful but that on 23rd May, 2013 the appellant and his agents invaded the respondent's premises, demolished the wall extensively, damaged and facilitated the looting of goods from the respondent's supermarket bringing its business to an end – this despite the existence of the said court order where the respondent had been granted seven days stay. The respondent averred in the plaint that it was a going concern with goods and property worth hundreds of millions of shillings and a goodwill of Kshs.300,000,000 and that it was indebted to various suppliers who either were threatening to sue or had sued. In the particulars of loss and damage, it was alleged that the respondent had lost money used in refurbishment, installations and partitioning of the suit premises to accommodate the supermarket and the wholesale business; that it had lost stock and goodwill; that it was entitled to legal fees and other charges; that it had lost its good reputation; that it was exposed to debts from suppliers; that it was exposed to payment of redundancy and other terminal dues to employees and salaries. Particulars of malice were set out in the plaint which included frustration of the tenancy agreement so as to evict the respondent from the premises; disobeying court orders, malicious destruction of the respondent's business and goods, evicting the respondent from the business premises, stationing thugs, hooligans and a caterpillar within the premises to intimidate the respondent, its employees and customers; damaging or wasting the respondent's installations and machinery used in conducting its business and purporting to forcefully evict the respondent in pretext of repairing the premises without compensation. The particulars of special damages were: loss of stock stated at Kshs.86,249,950; loss of profits mark up on stock in hand at Kshs.7,762,495; loss of fixtures and fittings installed in the premises at Kshs.49,199,788; loss of building improvements and major repairs at Kshs.56,502,053; salaries to employees from 3rd May, 2013 to 30th April 2014 Kshs.10,873,740; redundancy payments Kshs.8,913,213; loss of profits for 5 years Kshs.179,701,337; cash loss Kshs.5,200,936; goodwill Kshs.300,000,000; loss of prepaid expenses Kshs.736,760 all to the grand total of Kshs.703,642,423.

The respondent also claimed punitive and exemplary damages against the appellant for what it said was flagrant disregard of the law and impunity which occasioned the respondent loss and wastage. General damages were also claimed for loss of invaluable and irreplaceable documents and records kept in the premises by the respondent which were lost during the destruction of the premises.

All those matters were repeated in a written statement of **Schon Ahmed Nurani**, the Chairman of the respondent, that was filed with the plaint.

The appellant delivered a statement of defence which denied the respondent's claim. He admitted being the proprietor of the suit premises but denied that the respondent had met its obligations as a tenant. He

averred that the premises had been condemned by the City Council of Nairobi's Public Health Department; that on 21st of March, 2009 he acted on the orders of the court in re-entering the premises and his actions were therefore lawful and authorized; he admitted being fined for contempt of court and also admitted the various suits that had been filed either by himself or against him by the respondent. He denied that the respondent had any goods in the premises and denied all particulars of loss and damage claimed. He averred that the respondent had refused to vacate the suit premises and thus had failed to mitigate damage and thus the respondent was not entitled to any compensation.

The suit was heard by **Njuguna, J** who in a judgment delivered on 25th October, 2018 found in favour of the respondent on the issue of exemplary and punitive damages which were awarded at Shs.20,000,000, and the respondent was also awarded special damages Shs.1,508,000. The rest of the claim was found to have no merit and was dismissed.

The appellant was dissatisfied with those findings and filed this appeal premised on the memorandum of appeal drawn by its lawyers **Odera Obar and Company Advocates** where 10 grounds of appeal are set out. The judge is faulted for awarding the said special damages at Shs.1,508,000 which the appellant says was awarded without any evidence at all and that the same was not pleaded or proved; that the judge erred in awarding exemplary and punitive damages where the premises had been condemned; that orders of a lower court had not been challenged and the judge should have so found; that the judge erred in relying on wrong principles in awarding exemplary and punitive damages and finally that the judge erred in arriving at a decision which was unsupported by law or evidence.

The respondent was also dissatisfied with the said judgment and filed a cross appeal drawn by its lawyers **Messrs Daly and Inamdar Advocates**. The judge is faulted for what the respondent says is failure to appreciate that the special damage claim had been pleaded and proved; that the judge erred in not awarding damages to the respondent for loss of stock, loss of property, plant and equipment, loss of building improvements and major repairs, loss of profit mark up on stock in hand, loss of profit for 5 years and loss of cash. The judge is also faulted for not awarding the respondent general damages; that the judge did not uphold the respondent's constitutional right to own property; that the judge erred in not awarding goodwill to the respondent; that the award of Shs.20,000,000 exemplary and punitive damages was too low considering the nature of injury caused to the respondent's business and we are therefore asked to dismiss the appeal and to allow the cross appeal, award special damages to the respondent as prayed in the plaint, assess general damages, enhance the sum awarded for exemplary and punitive damages, that we declare the judgment delivered by the High Court to be in breach of **Article 40(1)** and **50(1)** of the Constitution of Kenya and that we enhance the costs awarded by the High Court and give any other relief that we may deem fit.

When the appeal and the cross appeal came up for hearing before us on 19th June, 2019 **Mr. O.K. Odera** appeared for the appellant while **Mr. Mac'Oduol** appeared for the respondent. Both parties had filed detailed written submissions which we have perused. In a highlight of the same, Mr. Odera submitted that the award of Shs.1,508,000 was not properly pleaded or proved and he attacked the award of exemplary or punitive damages at Shs.20,000,000. According to counsel, the respondent had not improved the suit premises in any way and thus was not entitled to compensation. On the award of exemplary and punitive damages it was Mr. Odera's submission that the High Court had failed to take into account existing orders of a lower court where the suit premises had been condemned.

In opposing the appeal and in urging the cross appeal Mr. Mac'Oduol submitted that the respondent had claimed the special damages in the sum of Shs.703,000,000 as tabulated in the plaint. He relied on the accountant's report submitting that special damages were specifically pleaded and proved. According to counsel there was evidence for a value of goodwill of Shs.300,000,000 which was not controverted. Counsel faulted the judge for not awarding general damages when it had found that there was trespass. Counsel submitted that the award of Shs.20,000,000 exemplary and punitive damages was too low and submitted that we should enhance the same.

In a brief reply it was Mr. Odera's submission that the appellant's re-entry into the premises was lawful as he had obtained orders from a lower court.

We have considered the whole record and the submissions made. The trial judge in the judgment appealed from considered the various claims separately and reached the conclusions which we have stated. That judgment aggrieved both parties thus this appeal and the cross appeal. We shall consider the complains by both parties together.

In evidence before the judge, Mr. Schon Ahmed Nurani referred to his written statement which he had filed with the plaint and relied on the same together with a list of documents which had been filed in court. He testified that the respondent had run a supermarket business since 1988 and that upon the appellant taking over the premises he had served the respondent with a notice to vacate the premises on grounds that the appellant wanted to demolish the premises and put up a modern building. Upon receipt of the notice he challenged the same before the Business Premises Rent Tribunal together with other tenants. The outcome of the case was that the the appellant was restrained from interfering with the occupation of the premises by the tenants. He further testified that despite those orders the appellant had served another notice requiring the respondent and other tenants to vacate and that this was again challenged leading to various suits either at that tribunal or at the High Court. He referred to an order of the tribunal where the appellant was required to rebuild a wall and carry out other repairs. He stated:

“On the 23/5/2013 in the afternoon the plaintiff was forcefully and illegally evicted from the premises. It occurred at around 4 p.m. On that day, hired goons with caterpillar came to the supermarket stealing money and looting anything that they came across. I had left the supermarket but my supervisor Noor Mohammed who told me same goons had invaded the supermarket and goods had been destroyed and there was alot of theft of the goods ...”

He further stated that he went to the premises and he had to hide because he feared that he could be injured or killed. There was then a case going on between the appellant and the respondent at Milimani Commercial Courts where the appellant sought to evict the respondent from the premises and that in a ruling delivered by the High Court it was ordered that the respondent vacate the premises within 7 days from 21st May, 2013 for a period not exceeding 3 months to pave way for repairs as directed by the then City Council of Nairobi. Further, that the eviction occurred on 23rd May, 2013 when the court order was subsisting; that he obtained stay orders on 23rd of May, 2013 but that it was on the same date that the respondent was evicted from the premises. He denied defaulting in payment of rent and produced documents to show that rent had been paid. He produced various documents in support of the claim which we shall revert to in this judgment.

In cross examination the witness stated that he had not taken any contingent measure to vacate the premises but was ready to vacate the premises as ordered by the court. He did not have any documents to support most of the claims made stating that his auditor or accountant would testify on that.

Robert Kadogo Matamba was called in support of the respondent's case. He was a photographer who had taken photographs and a video on the date when the respondent's premises were invaded. He produced them as part of the evidence.

Samuel Njihia Gachau was also called as a witness. He was an accountant of the respondent but admitted that although he held a certificate as an accountant he had not been admitted to practice. He stated that he had been in employment for the respondent for 7 years. He was responsible for preparation of financial statements for the time he worked for the respondent. According to him various documents had been lost either before or on the date that the appellant re-entered the premises and evicted the respondent. He was not able to prove loss of the items that were lost. The trial court found on whether special damages had been proved that there was no evidence produced to show that goods were in the respondent's supermarket as at 23rd May, 2013 when the appellant took over the premises. The court held:

“It was not enough for the plaintiff to just list them without any accompanying document to prove their existence at the material time. Though PW3 stated that they obtained the list from their back up of stock, nothing was shown to the court to support that back up. It was just the plaintiff and PW3's words which are not sufficient to support a claim being a special damage

claim.”

As stated this witness was not licenced to practice as an accountant and was thus not an expert as provided by **section 48** of the **Evidence Act**. The section provides:

“When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

Such persons are called experts by the Evidence Act.”

The evidence of this witness would have been of some help to the court but as we have found it was not helpful at all as he did not produce material to support the special damages claim.

Benjoh Odala Tomas testified on the events of the fateful day when the respondent's premises were invaded. He witnessed a caterpillar destroying a wall and when the wall came down people entered the supermarket and looted it through the night. The police arrived later but were unable to stop the looting.

That was the evidence placed before the court by the respondent in support of the whole claim.

The appellant gave evidence in person. He produced into evidence notice nos. 5445 and 5446 issued by the Public Health Department of the City Council of Nairobi where he had been given 30 days to comply. He said that the notices were to lapse on 31st November, 2008 (this date does not exist in the calendar). According to those notices he was required to repair worn out shutters, worn out pavement floor, reinforce metal pillars and rebuild a wall. He testified that he had been unable to comply with the orders of the City court because of intimidation by the tenants.

He was charged by the City court because of failure to comply with the said notices. The witness further testified that a magistrate had issued an order on 25th April, 2013 ordering him to comply within 30 days and he was to go back to court on 28th of May 2013 to confirm compliance; that by the time he wrote to the respondent on 21st May, 2013 he had three days to comply with the magistrate's order. He denied that the demolished premises had any goods in them and stated that the respondent had refused to relocate to other premises he had offered. He denied that the respondent was entitled to any orders.

The respondent claimed special damages at Shs.703,642,423 on various headings as particularized in the plaint. The judge found that special damages although specifically pleaded had been proved only to the extent of Shs.1,508,000. The appellant complains that special damages were not proved. This complaint has merit. Although special damages were specifically pleaded in the plaint the judge found that the respondent was only able to specifically prove a sum of Kshs.1,508,000 which was supported by a receipt for that sum produced by PW1. The receipt was issued by Unit Metal Fabricators for steel doors and aluminum locks plus labour costs for installation of the same.

On other complaints raised by the appellant in the memorandum of appeal the trial court specifically found as a fact that the City court had issued orders allowing the respondent seven days in the premises but that before the seven days elapsed the appellant moved into the premises and demolished the same. The court found:

“The plaintiff averred that the defendant upon being issued with orders to serve and hoard the building that accommodated the suit premises by the City Court in Criminal Case Number CC CA NO. 559A/2012 instead of seeking a hoarding license opted to seek orders in Civil Suit No. 1589 of 2013 which court; (sic) declined to issue eviction orders but ordered the plaintiff to temporarily vacate the premises for 90 days to allow the defendant to make repairs. The court gave the plaintiff seven days to vacate which period had not lapsed by 23/5/2013.”

The court therefore found that the appellant moved into the premises occupied by the respondent before

the time allowed by the subordinate court had lapsed. That finding is supported by the evidence. In the order issued by the acting Chief Magistrate Mr. Obulutsa on 21st May, 2013 it was ordered *inter alia*:

“... the court will consider and as asked give leave of 30 days to file an appeal, and have the proceedings and ruling availed to the defendant and lastly, the court will give the defendant 7 days to vacate within which period the defendant is so moved to file a formal application for stay.”

That appears at page 112 of the record.

On the same date 21st May, 2013 the appellant wrote a letter to the respondent asking the respondent to vacate the premises. The trial court found as we do that the appellant re-entered the premises and demolished the same before seven days period granted by the subordinate court expired.

There was evidence led and which was not seriously challenged that the appellant moved into the premises, brought in a caterpillar and a hired gang of people who proceeded to demolish a wall of the premises which led to members of the public invading the respondent’s premises and looted stock and other goods in the premises. It was proved to the satisfaction of the trial court that it is the appellant who arranged for the said acts of trespass upon the respondent's premises. The trial court found that although no specific credible evidence had been led on the issue of general damages the respondent had proved that the appellant had invaded its premises leading to looting of goods in the same which led to the respondent suffering loss. The High Court did not find the basis for awarding general damages but awarded punitive or exemplary damages instead. Looking at the evidence led on behalf of the respondent we are of the same view as the trial court that the respondent did not lead evidence on the issue of suffering general damages but that it was entitled to punitive or exemplary damages for the manner in which the appellant invaded the premises, trespassed on the same which led to members of the public entering the premises and engaging in acts of looting of goods in the supermarket.

The respondent complains in the cross appeal that the award of the punitive or exemplary damages at Shs.20,000,000 was low and that we should interfere and enhance the same. We have considered that prayer. Award of damages is at the discretion of a trial court. This has been the law in this country for many years. An Appellate Court should be hesitant in interfering with an award of damages unless it can be shown that the same is too low or too high as not to reflect the particular circumstances of the case. Law, JA in considering this issue in the case of **Butt v Khan [1981] KLR 349** stated:

“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. 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.”

Considering the circumstances and the evidence that was led before the trial court we think that the award made was reasonable in the circumstances. We have no right to interfere.

We have considered the whole record and have reached the conclusion that the trial judge reached a correct determination of the matters in the suit. The appeal and cross appeal have no merit and they are accordingly dismissed. Let each party meet their own costs of the appeal and cross appeal. These are the orders of the court.

Dated and delivered this 22nd day of November, 2019.

M.K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR