Tenderwood Industries Limited v Onsase & another (Environment & Land Case 17 of 2016) [2024] KEELC 7166 (KLR) (29 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7166 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 17 OF 2016

M SILA, J

OCTOBER 29, 2024

BETWEEN

TENDERWOOD INDUSTRIES LIMITED ..... PLAINTIFF

AND

RISPER KERUBO ONSASE ..... 1ST DEFENDANT

KISII COUNTY GOVERNMENT ..... 2ND DEFENDANT

JUDGMENT

1. This suit was commenced by way of a plaint filed on 8 February 2011 wherein the plaintiff, a limited liability company, sued Risper Kerubo Onsase as 1st defendant and the Municipal Council of Kisii as 2nd defendant. In that plaint, the plaintiff pleaded to be a tenant of the 1st defendant in the land parcel Kisii Municipality/Block II/27 from the year 2001 at the rent of Kshs. 16,000/= per month which increased over time to Kshs. 55,000/=. She averred that the parties had agreed that the plaintiff would let the whole plot and that she could construct some permanent structures to enable her carry on the sale of timber and cement. The plaintiff pleaded that she was paying by cheque and was paid up to December 2010. She pleaded that on 25 January 2011, the 1st defendant served her with a notice terminating tenancy by 1 April 2011 and served a similar notice to the Business Premises Rent Tribunal. On 1 February 2011, the Municipal Council of Kisii issued notice requiring the plaintiff to demolish all permanent structures in the premises that the plaintiff had put up in order to operate its business. She pleaded that these structures had been approved by the Municipal Council and contended that the 1st defendant was using the Municipal Council to affect her tenancy. She pleaded to be a protected tenant and that the 1st defendant could only alter the terms of tenancy after following the procedures laid down by law. In the plaint, she asked for the following orders :

    i. A declaration that the actions of the defendants are illegal as the plaintiff was a protected tenant;

ii. A permanent injunction to restrain the 1st defendant from unlawfully terminating the tenancy or through use of the 2nd defendant;

iii. Costs and;

iv. Any further relief deemed fit.

2. Together with the plaint, the plaintiff filed an application dated 7 February 2011, seeking to restrain the defendants from demolishing the permanent structures in the suit premises and also restrain the 1st defendant from unlawfully terminating the protected tenancy. Interim orders were granted by Sitati J on 9 February 2011. Despite the interim orders, the defendants moved and demolished the suit premises on the night of 17/18 February 2011 and also locked out the plaintiff from the premises. This prompted the plaintiff to file an application dated 22 February 2011 inter alia seeking a mandatory injunction to reinstate the plaintiff into the premises and to have the defendants cited for contempt. The application was heard by Sitati J who found the 1st defendant and the Town Clerk of the 2nd defendant in contempt through a ruling delivered on 28 June 2011. The court did not however make any orders regarding the prayer for a mandatory injunction.

3. On 29 November 2011 the plaintiff withdrew the application dated 7 February 2011.

4. The plaintiff filed another application dated 29 November 2011. She asked for an order of mandatory injunction to have the 1st defendant restore her into the premises, an order to have the 1st defendant give possession to the plaintiff of her motor-vehicle registration No. KBH 757C that was barricaded in the premises, and an order to restrain the defendants from terminating the tenancy or interfering with her occupation of it pending determination of the suit. This application was heard by Mutungi J, who delivered ruling on 13 May 2016. The court declined the issue the order of mandatory injunction and also declined to give the order to have the plaintiff restored to the premises, reasoning that if the tenancy was unlawfully terminated damages would be an adequate remedy. The court however ordered return to the plaintiff of the motor-vehicle registration No. KBH 757C reasoning that there was no valid reason to detain it and that the 1st defendant had not demonstrated that there was any valid levy of distress.

5. Perhaps given this turn of events, the plaintiff made an application dated 31 August 2016 to amend the plaint and leave to amend was granted on 19 June 2017 ; an amended plaint was filed on 24 October 2017. The amended plaint introduced the County Government of Kisii as 2nd defendant in place of the Municipal Council of Kisii. In the prayers, it asked for

a. a declaration that the actions by the defendants are illegal, unlawful and without basis in so far as the plaintiff is a protected tenant;

b. An order of restoration of all the properties belonging to the plaintiff (as set out in paragraph 6 of the judgment below);

c. Alternatively full compensation for the monetary value of all the said items;

d. A permanent injunction restraining the 1st defendant from unlawfully terminating the plaintiff's tenancy through other unlawful means and or through the use of the 2nd defendant;

e. Costs of the suit;

f. Such other relief that the court may deem fit and expedient to grant.

6. In the body of the plaint, it was pleaded that the plaintiff would collect Kshs. 18,000/= daily from the use of the motor-vehicle registration No. KBH 757C and the vehicle would work for 25 days a month, hence a loss of earning of Kshs. 450,000/= per month. The items said to be retained and which the plaintiff sought full value were:

    i. One Land Rover Reg. No. Kxx 379.

    ii. Three lorry loads of cedar timber 6 x 2 of sixty thousand feet worth Kshs. 7.2 million.

    iii. One Mitsubishi gear box for tipper worth Kshs. 2.5 million.

    iv. 20 pieces of assorted plastic water tanks.

    v. Two motorcycles worth Kshs. 200,000/=

    vi. Two compressors worth Kshs. 1.8 million.

    vii. Two water pumps worth Kshs. 180,000/=.

    viii. Two axles of Mitsubishi lorry worth Kshs. 200,000/=.

    ix. One Mitsubishi injector pump worth Kshs. 1.8 million.

    x. One ETR machine worth Kshs. 30,000/=

    xi. Eight tyres 315x22.5 worth Kshs. 30,000 each.

    xii. Two high pressure washing machines worth Kshs. 60,000 each.

    xiii. 400 pieces of scave folding panels worth Kshs. 1.5 million.

    xiv. One mixture machine worth Kshs. 1.5 million.

    xv. Assorted caterpillar spare parts worth Kshs. 8 million.

    xvi. 400 pairs of 6x2 cedar door frames worth Kshs. 1,800 each

    xvii. One generator worth Kshs 400,000/-

    xviii. Two poker vibrators worth Kshs. 60,000 each.

    xix. Ten tones of assorted twisted steel worth Kshs. 38 million.

    xx. Office furniture worth Kshs 150,000/=

    xxi. 8x4 twenty pieces of timber each 20 feet worth Kshs. 640,000/=

    xxii. 50 pieces of iron sheet box profile 7 meters each

    xxiii. 3000 litres of diesel worth Kshs. 240,000.

    xxiv. Cheque books

    xxv. 2 tyres for motor grader size 24x14 worth 120,000 each.

    xxvi. 20 Lorry Loads of Sand

7. The 1st defendant filed an amended defence on 8 March 2018. She denied entering into a tenancy agreement with the plaintiff in 2001, but in 2002, which tenancy she averred was not renewed on expiry of its 5 year and 3 month term and hence the plaintiff became a licencee cum protected tenant without

authority to construct permanent structures, more so permanent structures that posed a danger to the public. Service of notices by the 1st defendant and 2nd defendant were admitted and it was pleaded that the Municipal Council of Kisii rightfully served its notice as the plaintiff had illegally put up unapproved permanent structures. She pleaded that the 2nd defendant acted independently. On the items claimed by the plaintiff she pleaded that there was no inventory. She filed a counterclaim wherein she pleaded that the plaintiff illegally put up permanent structures on the suit premises and that the plaintiff has obtained restraining orders which prevent her from renting or using her property. She asked for the following orders :

a. A declaration that she is entitled to mesne profits;

b. Mesne profits from February 2011 to date at the rent payable at the time;

c. Costs of fencing and guards from February 2011 to date;

d. Costs of the counterclaim;

e. Any other relief deemed fit and just to grant.

8. A reply to defence was filed admitting that no inventory was taken but asserting that the goods were in the premises. On the permanent structures, it was reiterated that permission from the 1st defendant was sought and obtained and they were approved by the Municipal Council of Kisii. The plaintiff averred that she has not been able to access the premises since the 1st defendant fenced the property in February 2011.

9. The 2nd defendant filed an amended defence on 12 March 2018. Save for amendment on the description of the 2nd defendant, i.e Kisii County Government in place of Municipal Council of Kisii, there was actually nothing amended from the original defence of 23 March 2011 filed by the Municipal Council. In that defence, the 2nd defendant denied approving construction of permanent or temporary structures in the premises. It pleaded that it lawfully issued a notice dated 27 January 2011 to the 1st defendant, as registered proprietor of the premises, requiring her to demolish an unauthorized permanent perimeter wall and all internal permanent structures within 14 days.

10. On 22 November 2018, parties entered into a consent allowing the plaintiff to access the suit premises and collect all her goods therein. They were to prepare an inventory which was to be filed in court. It was agreed that upon collecting her items the plaintiff would unconditionally yield possession of the premises to the 1st defendant, who would be at liberty to use it as she deemed fit. On 6 May 2019, parties appeared in court and it was mentioned that the plaintiff did not remove all items. The court (Mutungi J) gave the plaintiff 21 days to remove any items and the plaintiff was also to ensure that the premises are fully restored to their original state by levelling and removing any loose materials from the premises. On 25 June 2019, the court extended compliance with the orders to 30 September 2019 as it was said that it had been difficult to comply owing to heavy rains. It is not clear whether the orders were complied with as Mutungi J was moved from the station and the matter taken up by Onyango J. I have not seen any mention of the orders of Mutungi J while she handled the matter.

11. Hearing commenced before me on 5 March 2024 when the plaintiff called John Speke Mongare, her director, as her first witness. He testified that the plaintiff undertakes the business of road construction, hardware and timber. He testified that the plaintiff took over the premises as an empty plot in 2001. They had a written agreement but he stated that he lost it when the premises was locked. He testified that the tenancy was for 15 years with a grace period of one year as he was going to construct a temporary building to put the plaintiff's equipment. He testified that he constructed the premises before starting occupation of it. The initial rent was Kshs. 16,000/= which rose gradually to Kshs. 55,000/=. In

January 2011, he received a notice terminating tenancy from the 1st defendant with effect from 1 April 2011 and he responded by filing a reference at the tribunal in Kisumu. One month later, he received a notice from the Municipal Council giving him 14 days to remove the structures therein on the basis that they were not approved by the Municipal Council. He then filed suit and injunctive orders were duly issued but disobeyed. He testified that on the same night that the order was served, the perimeter wall was knocked down and his office broken into. All the hardware items including timber, steel, construction tools and sand, were locked inside and he was unable to access the premises. He reported to the police and filed the application for contempt upon which the defendants were found guilty. He testified that as a result his business was completely destroyed. He testified that the court issued the order for the plaintiff to collect her items but the timber had been destroyed by rain, the plastic water tanks were cut, that he did not find any steel, that he only found 20% of scaffolding material, and he salvaged 60% of the sand. He however collected the main gate, doors, one window, the office chair and desk, though they were vandalised and incapable of being used. He produced the inventory of items taken on 14 January 2019.

12. Regarding the construction, he testified that he made an application for approval. He stated that they had verbally agreed with the 1st defendant that he could construct before they entered into the tenancy agreement, and since the premises was not his, the documentation would be in her name though the plaintiff would fund it. The development application was therefore made in her name. He testified that he presented the same to the Municipal Council and it was approved upon which he constructed the premises. He testified that the moveable items in the premises were in excess of Kshs. 30 million. That there was timber, steel and sand that was sold on a daily basis, and in one day all operations stopped. He testified that the Mitsubishi vehicle (KBH xxxC) was a tipper that earned Kshs. 18,000/= per day and had been acquired through a loan. He stated that generally he lost immensely and had to reschedule payment of the loans. He had no desire to go back to the premises but only asked for damages and costs.

13. Cross-examined by the 1st defendant, he reiterated that the company dealt with road construction but he did not have any licence to this effect. He was shown a signed lease showing a term of 5 years and 3 months. He initially disowned this lease claiming that the genuine one bore a term of 15 years, though he subsequently conceded that this was the proper lease. He acknowledged receipt of the notice to terminate tenancy dated 23 December 2011, effective 1 April 2011, which he received in January 2011. He stated that the reason given for termination was that the landlord wished to demolish and carry out substantial construction on the premises though the notice itself showed that it was issued on basis that the tenancy was expiring on 31 December 2010. He stated that they did not reply to the notice but filed a reference at the tribunal. On the notice by the Municipal Council, he testified that it was issued on basis that the structures were not approved. He insisted that he had obtained approval and claimed that the approval document was trapped in the premises. He acknowledged that he had issued bounced cheques for payment of rent and had some rent arrears which the 1st defendant demanded payment of through her advocates. On the destruction of the premises, he stated that this was done at night and he was not present. He acknowledged that he had not brought the KRA returns or audited books of accounts to demonstrate the income of the plaintiff. He testified that after the premises was demolished it was sealed and he could not operate in it. It was in 2019 that he removed the plaintiff's items.

14. Cross-examined by counsel for the 2nd defendant, he claimed that the approval was issued in name of the 1st defendant. The notice to demolish from the Municipal Council was issued to the 1st defendant as landlady. The application for development approval was put to him and he conceded that it has no signature of the 1st defendant despite it showing that the application was being made by her. He testified that he put up a wall upon which he superimposed the structure. In the application for approval, he

applied for approval of a temporary timber yard. He made a development of bricks. He insisted that the development was approved and the 2nd defendant could not therefore move to demolish it.

15. Re-examined, he testified that when he did the construction neither the 1st nor 2nd defendant moved to stop him from doing so. He stated that when the premises was demolished he was not in rent arrears. On the lease, he testified that it had an option to renew twice so that it would bring the term to 15 years.

16. With the above evidence the plaintiff closed her case.

17. DW – 1 was the 1st defendant. She affirmed being the owner of the suit premises and agreed that the plaintiff had leased it. They had a written lease drawn by Swaleh Kanyeki Advocate for a term of 5 years and 3 months (commencing 1st January 2002). She testified that according to the lease there was an option to renew if a two month notice was given but no such notice was given. The plaintiff nevertheless continued being in the premises beyond the initial 5 year and 3 month term. She stated that the plaintiff was a difficult tenant who paid rent with difficulty and she referred to the many letters that her advocate had written to the plaintiff demanding payment of rent. She testified that when the plaintiff took possession, the plot was plain and vacant. She denied that she agreed that the plaintiff could construct and refuted that the plaintiff sought her permission to construct. She denied that she allowed the plaintiff to apply to the Municipal Council for permission to build. She testified that she got a letter dated 27 January 2011 from the Municipal Council requiring her to demolish the structures therein. She also acknowledged issuing a notice of termination to the plaintiff dated 23 December 2010 requiring vacant possession by 1 April 2011. She testified that it was the Municipal Council that demolished the structures and she was not even there. She came the following day and found it open. She bought some mabati (iron sheet) structures and sealed the premises and put guards. She wanted to be paid the moneys in the counterclaim as she had not used the premises since the court issued orders. She stated that even banks have approached her to jointly develop the property but she has not been able to do so because of the injunction orders issued by court. She wished to be paid for not using the land since 2011 and also be paid for the money she has used to post guards at the premises.

18. Cross-examined by counsel for the 2nd defendant, she testified that the plaintiff leased the premises to use it as a timber yard for her business. She stated that at no time did PW-1 inform her that he needed to build a structure on the plot. She testified that she never went to the Municipal Council to have the plaintiff permitted to build a structure. She stated that the Municipal Council never issued permission to build and she was given notice to remove the structures. She did not comply with the notice since she was not the one who had put up the structures. She did not see any wrong that the Municipal Council did by demolishing the structures.

19. Cross-examined by counsel for the plaintiff, she testified that whatever they discussed with PW-1 was put down in writing. She testified that there had been a previous tenant who had a barbed wire fence and she denied agreeing that the plaintiff could put up a permanent fence. She testified that she was not aware that the structures would be demolished on 17 February 2011. She came the following day in the afternoon and found the structures demolished. She fenced the plot the same day and put askaris. She denied going to the Municipal Council to instigate the demolition of the premises. She denied disobeying any court orders though she recalled being fined Kshs. 100,000/= for contempt which she paid. She denied that the plaintiff put up a wall round the plot and stated that she had put her structures against the wall of the next plot. She engaged a security firm to secure the premises but they did not put down a record of what they found on the plot. She testified that she issued notice to the plaintiff to vacate as she wished to develop the premises.

20. DW – 2 was Harun Kenyoru Oyaro, the Municipal Engineer working with the 2nd defendant. He started working with the 2nd defendant in 2014. His evidence was that prior to one erecting a structure

he needs to apply for development permission and fills in a PPA 1 Form titled "Application for Development Permission." Ordinarily, it would be the owner of the land making the application. On the development application produced by the plaintiff, he testified that it was not signed and that the application was for a temporary structure. He elaborated that a temporary structure is most often portable and does not have structural components such as a foundation and steel reinforcement. From the plans, he could see that they were for a permanent structure. He testified that they issue an Improvement Notice for one to rectify a building to conform to the approved plan. They also issue an Enforcement Notice to a person who has built an unapproved structure. If there is no compliance they issue a 7 day notice to demolish. He stated that the law allows the County to demolish if the structure contravenes the approval. He testified that they prefer doing demolition at night to avoid confrontation and imminent danger to the public. He testified that the Municipal issued a notice dated 27 January 2011 addressed to the 1st defendant pointing out that the structures in her premises were unapproved and were causing danger to the public. It gave 14 days to comply and in default the structures would be demolished.

21. Cross-examined, he testified that they can proceed to demolish any time on expiry of the notice and they do not ask for cooperation from the developer. He testified that a tenant can apply for development approval depending on the lease terms in which case the agreement needs to be availed or alternatively the landlord does the application. He could see approval stamps in the development plans of the plaintiff but was not aware if approval was issued. He testified that the Municipal Council gave notice to demolish and proceeded to demolish. He was not aware of an order stopping interference with the premises though he was aware of the then Town Clerk being found in contempt.

22. The defence closed their case with the above evidence.

23. I invited counsel to file submissions and I have taken note of the submissions filed by counsel for the plaintiff and counsel for the defendants. I take the following view of the matter :

24. I will start by reiterating the prayers in the plaint which are orders for (a) declaration that the actions of the defendants are illegal; (b) restoration of various items (which are outlined in paragraph *6* of this judgment) or (c) alternatively their value; (d) damages for loss of business; (e) a permanent injunction against the defendants to restrain her from terminating the tenancy; (f) costs and (g) any other relief deemed fit. I have opted to start here because I think some of the prayers are overtaken or the plaintiff does not wish to pursue them. In his evidence, PW-1 did testify that the plaintiff no longer wishes to be back in the premises. It would mean that prayer (e) is abandoned. On restoration of various items, the parties did go to the premises and the plaintiff collected the items therein. The plaintiff produced an inventory with 82 items. I would have thought that the plaintiff would now go through the 82 items and match them with what he has pleaded then say what it is that was pleaded and not collected. I have no such evidence. I also do not have any evidence that the items were of the value that is pleaded in the plaint. Even assuming that it was clear what item was lost or destroyed, there is nothing to confirm that they are of the value pleaded in the amended plaint. Neither do I actually have any evidence of what items were there in the suit premises before the demolition and prior to the 1st defendant taking control of the premises. I am afraid I cannot make any orders to restore items when I do not even know what items are sought to be restored, and I cannot make an order for compensation for items whose value was never proved. That takes care of prayer (b) and (c) of the plaint. The substantive prayers left are therefore (a) and (d).

25. Prayer (a) seeks a declaration that defendants acted illegally as the plaintiff was a protected tenant. On the issue of notice to terminate tenancy, I see no illegality. The 1st defendant was certainly entitled to issue notice of termination of tenancy. Anything arising out of that notice to terminate would have probably needed to go to the Business Premises Rent Tribunal. In their evidence both plaintiff and 1st

defendant did actually state that they went to the tribunal. None however provided any documents to show what transpired there. But as I am saying there was nothing barring the landlord from issuing a notice to terminate tenancy, so I cannot declare the mere issuing of a notice to terminate tenancy to have been an illegal act. Any issue regarding the veracity, or otherwise, of the tenancy notice ought to have been a subject of litigation before the tribunal.

26. The other matter said to be illegal in the amended plaint was the Enforcement Notice dated 1 February 2011 issued by the Municipal Council of Kisii. The plaintiff asserts that the notice was illegal in that the Municipal Council had approved development. I cannot declare that the issuance of the Enforcement Notice was illegal as the plaintiff did not provide any evidence of approval of his development plans. He in fact did not even provide evidence that the development application had been made with the approval of the 1st defendant as the application was not signed by the 1st defendant and he did not avail anything written confirmation that the 1st defendant had given go-ahead to develop the premises. The plaintiff did not avail the approval which he said was locked up in the premises. However, it will be recalled that the premises was opened up for him to collect his items and there is no mention of an approval notice being locked up. What the plaintiff developed were permanent structures that would have needed development permission. I see nothing wrong with the 2nd defendant issuing an Enforcement Notice to what it considered to be an unapproved development. It was within its mandate to do so. The plaintiff of course came to court to challenge the notices through this suit and he obtained injunction and now the legality of the notices was subject to judicial interrogation.

27. I think what is illegal and cannot be condoned is what the defendants did after the issuance of the order of injunction. In fact, the assessment of whether or not the Enforcement Notice was legal may very well be irrelevant and overtaken by events given that a demolition took place despite the court issuing an order of injunction to stop the enforcement of the notice. It now does not matter that the 1st and/or 2nd defendants thought that the notices were properly issued and it does not even matter that they may have been properly issued. Once an order of injunction was made, it was the duty of the 1st and 2nd defendants to ensure that the order was obeyed. The order of injunction issued was very clear as it inter alia provided as follows :

> That pending the inter partes hearing of this application (the application dated 7 February 2011) this Honourable Court has hereby issued a temporary injunction restraining the respondents, their agents or servants from demolishing or damaging those permanent structures on Plot No. Kisii Municipality/Block II/27 when the applicant operates its business.

28. Once the order of injunction was made, it was the duty of the defendants to obey it. It follows that the defendants could not legally proceed to execute a notice that had been stayed by an order of the court and the act of demolition of the premises was clearly unlawful.

29. I would have thought that the reason the plaintiff proceeded to file an amended plaint was because of the now changed circumstances of the dispute. The plaintiff had initially filed suit to stop a demolition but the demolition took place while the case was still pending. The defendants were tried over whether or not they were in contempt of the order of injunction and they were found guilty of contempt. One would have expected that the plaintiff will now amend the plaint to plead that the defendants unlawfully demolished the suit premises in face of the order of injunction, but surprisingly, the amended plaint has no pleadings whatsoever regarding the demolition of the premises and there are no prayers specifically seeking damages for the demolition of the premises. No pleadings were made in the amended plaint to the effect that the defendants unlawfully effected a notice which had been stayed by order of court. The amended plaint still bore the original pleadings that restricted themselves

on issuance of the notices claiming that the notices were illegal. As I have mentioned before, there was nothing wrong in the issue of the Enforcement Notice but there is everything wrong in executing the notice despite the order of injunction. Once demolition took place the substantive question would change from whether the notices were legal to whether the demolition of the premises was lawful, and whether the plaintiff would be entitled to damages arising from enforcement of a notice that has been stayed by an order of court. But as I have said, unfortunately, the plaintiff made no such pleadings. Without the requisite pleadings I cannot go into assessment of any specific loss that the plaintiff suffered as a result of the demolition of the premises.

30. It is apparent that the 1st defendant took charge of the premises pursuant to the illegal demolition and kept the plaintiff out of it. She even kept the good and tools of trade of the plaintiff. There was no justification to do so. If it was rent arrears you would have expected the 1st defendant to distress for rent but no such levy of distress was made. There is no legal basis upon which the 1st defendant would keep the items of the plaintiff for all those years. That was completely unjustifiable and inhumane. The 1st defendant was of opinion that the tenancy is terminated and that being the case the reasonable thing to have done would have been to ask the plaintiff to collect her items from the suit premises, not keep them indefinitely. Her action must have caused the plaintiff to suffer loss particularly the detention of the motor-vehicle KBH 757C which the plaintiff was kept away from until 13 May 2016 when an order for its release was made. It will be observed that the 1st defendant took charge of the premises together with all the goods of the plaintiff from 18 February 2011 and it is on 22 November 2018 when a consent was entered into that the plaintiff could collect her goods from the premises. That was a period in excess of 7 ½ years. As I have said, there is no justification for the 1st defendant to have kept the plaintiff away from her tools of trade and I am persuaded that the 1st defendant is liable to the plaintiff for damages for loss of business.

31. Unfortunately, other than merely saying orally that the plaintiff has suffered loss, there was nothing presented to prove this loss. In her pleadings, the plaintiff pleaded that she lost income of Kshs. 18,000/= per day for not using the motor-vehicle registration No. KBH 757 C but the plaintiff presented absolutely nothing to prove this loss. This claim is in the nature of special damages and it is trite that special damages must not only be pleaded but must be proved as well. Without any proof, I am afraid that I cannot make such an award. But I recognise that the actions of the 1st defendant of keeping the premises locked and keeping the plaintiff away from her tools of trade led to the plaintiff suffering loss and in lieu of an award of special damages, which as I have said is not specifically pleaded and proved, I will award a global sum of Kshs. 1 million in general damages for the common law tort of detinue and/or unlawful detention of goods.

32. I observe that the 1st defendant has a counterclaim wherein she seeks that she be paid mesne profits from February 2011 to date. She bases this claim on the allegation that the plaintiff obtained an injunction restraining her from the premises. I am afraid that the 1st defendant cannot succeed. There is no order of injunction that the plaintiff enjoyed other than the interim orders. These interim orders were anchored on the application dated 7 February 2011 and they must have been discharged and/or spent once the application was withdrawn on 29 November 2011. The 1st defendant cannot therefore be heard to say that the plaintiff illegally enjoyed an order of injunction to the date of this judgment. The plaintiff did enjoy an order of injunction from 8 February 2011 up to 29 November 2011, but even then, I do not see how the 1st defendant can claim damages for that period, since it is her own action which led to the withdrawal of the application for injunction; her actions made the application to be overtaken by events. She cannot benefit from her own illegal deed. Given that position, I do not see any basis upon which the 1st defendant can make a counterclaim for damages against the plaintiff and the counterclaim is dismissed.

33. I believe that I have dealt with all issues herein. In brief, all I award the plaintiff is a sum of Kshs. 1,000,000/= in general damages for the illegal action of the 1st defendant in forcefully taking over the premises and illegally detaining the goods of the plaintiff. Probably the plaintiff would have been better compensated by an award of general damages for an illegal demolition despite the order of injunction and/or an award of special damages for loss of business if the plaintiff had bothered to present proof of loss. But as I have explained, I am unable to award the foregoing for want of specific pleading and specific proof. The plaintiff will have to live with the consequences of her poor pleadings and lack of sufficient evidence, and that is the best I can do for her in the circumstances. There is no pleading seeking damages from the 2nd defendant for the illegal demolition and I need not go into that. The pleadings for damages against the 2nd defendant are for the enforcement notice which as I have explained is spent and overtaken and I need not go into that. I will therefore not make any order for or against the 2nd defendant. Yet again, the plaintiff suffers from poor pleadings.

34. The plaintiff will however get costs of the suit and of the dismissed counterclaim against the 1st defendant.

35. Judgment accordingly.

DATED AND DELIVERED THIS 29 DAY OF OCTOBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Getanda for the plaintiff

Mr. Olewe for the 1st defendant

Ms. Bosire for the 2nd defendant

Court Assistant – David Ochieng'