



REPUBLIC OF KENYA



KENYA LAW
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**Obuon & another v Muli & 3 others (Environment and Land Appeal
E073 of 2023) [2024] KEELC 13441 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E073 OF 2023
MD MWANGI, J
NOVEMBER 14, 2024**

BETWEEN

DANCAN OCHIENG OBUON 1ST APPELLANT

GRACE AWOUR 2ND APPELLANT

AND

JOEL MULI 1ST RESPONDENT

WILSON KIMANZI 2ND RESPONDENT

WELSSMEN INVESTMENT PLC LIMITED 3RD RESPONDENT

BETA BASE AUCTIONEER 4TH RESPONDENT

JUDGMENT

1. The appeal was commenced by way of a Memorandum of Appeal dated 26th June, 2023. It is indicated that it was filed pursuant to leave granted by Hon. Lady Justice Mbugua on 14th June, 2023.
2. The appeal is against the ruling and order of Hon. A. Mumma, Vice Chairperson of the Business Premises Rent Tribunal (BPRT) in BPRT Case No. E112 of 2022 delivered on 20th January, 2023. The Appellants have raised 8 grounds in their Memorandum of Appeal. They pray for orders;
 - a. That the appeal be allowed by setting aside the orders issued in BPRT Case No. E112 of 2022 dismissing the Appellant's suit.
 - b. That this Honourable Court does issue orders granting the Appellant's special and general damages for loss of business for illegal distress with interest until payment in full.
 - c. That costs of the Tribunal (case) and this appeal be awarded to the Appellants.
3. The Respondents, in spite of service, did not participate in the appeal.



Court's Directions

4. The Court's directions were that the appeal be canvassed by way of written submissions. The Appellants filed their submissions dated 29th July, 2024. I have had occasion to read the submissions and consider.

Issues for Determination

5. Having considered the Memorandum of Appeal and the submissions by the Appellants I will condense the grounds of appeal into three and frame them as issues for determination as follows;
 - i. Whether the Tribunal erred in finding in favour of the Respondents;
 - ii. Whether the Tribunal erred by failing to assess and award damages to the Appellants against the Respondents; and
 - iii. Whether the Appellants are entitled to special and general damages for loss of business for illegal distress.

Determination

6. Mativo J (as he then was) in the case of *Mursal and Another -vs-Manese (Suing as the legal administrators of Dalphine Kanini Manesa)*{2022} (Civil Appeal E20 of 2021) KEHC 282 (KLR)(6 April 2022) (Judgement), rightly pronounced that;

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”

7. The Appellants who were tenants of the 1st Respondent at ‘a premise situated at Umoja Inner-core’, filed a reference and a Notice of Motion application dated 21st February, 2022 before the BPRT claiming that the 1ST Respondent had cut off the water supply to the premises and welded the door thereby denying them access to the premises despite them paying rent. That was what triggered the proceedings before the tribunal eventually leading to the impugned ruling of 20th January, 2023.
8. I have had an opportunity to peruse the proceedings before the BPRT and the impugned ruling of the Tribunal. The body of the ruling of 20th January 2023 accurately captures the sequence of events from the filing of the reference to the delivery of the ruling. I now proceed to consider the issues identified for determination.

A. Whether the Tribunal erred in finding in favour of the Respondents.

9. The Appellant's first motion before the Tribunal that was filed alongside the reference and dated 21st February, 2022 was supported by the affidavit of GRACE AWOUR. The deponent referred to herself as the Tenant/Applicant. She made various allegations but did not attach any documentary evidence to back up the allegations. In spite of the failure to attach documentary evidence, the Tribunal issued interim orders pursuant to the prayers sought in the application.
10. The second motion by the Appellants was dated 5th July 2022. It was supported by the affidavit of Duncan Obuon sworn on 5th July, 2022. Again, no evidence was attached in support of the allegations therein.



11. The Appellants did however file a further affidavit sworn by Duncan Oboun on 1st November 2022 protesting against the levying of distress by the Respondents. The evidence attached was of the court order of 22nd August, 2022, copies of affidavits of service and photographs and inventory of the goods distrained.
12. Having carefully considered the evidence before the Tribunal in form of affidavits and submissions, both oral and written, I agree with the findings of the Tribunal. The levying of distress against the Appellants was not illegal. It had been sanctioned by the Tribunal vide its order of 19th May, 2022. In the said order, the Tribunal had ordered the Tenants (Appellants) to pay rent for the months of April, May and June before the next hearing date of 10th June 2022. In default, the Tribunal granted the Landlord the liberty to distress for rent against the Appellants.
13. The Appellants did not appeal against the Tribunal's order of 19th May, 2022; neither did they seek a review of it. It is the order that the Respondents acted on in levying distress. The Tribunal was therefore justified in holding that the levying of distress against the Appellants was not unlawful; it had issued that order earlier on.

B. Whether the Tribunal erred by failing to assess and award damages to the Appellants against the Respondents.

14. The Tribunal having made a finding that the levying of distress was unlawful could not have proceeded to assess or award damages; both special and general damages.
15. I however need to add that even if the Tribunal had found otherwise, I do see what evidence it would have relied on in assessing the special and general damages for loss of business for illegal distress.
16. In the case of *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177, where he stated that:

“[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”

17. In *Union Bank of Nigeria PLC v Albaji Adams Ayabule & another* (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), Mahmud Mohammed, JSC. delivering the judgment of the supreme court of Nigeria stated;

“I must emphasize that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.”

18. The Appellants did not lead any evidence at all in support of the alleged loss of business and or damage as required of them. As it were, the Appellants merely threw figures at the trial court and this court in



their submissions without any credible evidence in support thereof and expected the court to award them.

19. The upshot is that the appeal herein fails in its entirety and is dismissed but with no orders as to costs. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

The Appellants in person

N/A by the Respondents

Court Assistant: Yvette

M.D. MWANGI

JUDGE

