



Bloomfield Apartments Limited v Rubbycut Company Limited (Environment & Land Case 343 of 2014) [2025] KEELC 3388 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEELC 3388 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 343 OF 2014
OA ANGOTE, J
MARCH 27, 2025**

BETWEEN
BLOOMFIELD APARTMENTS LIMITED PLAINTIFF
AND
RUBBYCUT COMPANY LIMITED DEFENDANT

JUDGMENT

Background

1. Vide an Amended Plaint dated 9th February, 2011, the Plaintiff seeks the following reliefs:
 - i. A permanent injunction restraining the Defendant, its agents and/or servants or employees from occupying, trespassing or in any other way interfering with the parcel of land known as L.R No 2/316.
 - ii. General damages for trespass and mesne profits.
 - iii. Costs of the suit.
2. It is the Plaintiff's case that it is a limited liability company duly incorporated under the *Companies Act* and that in December, 2009, it purchased Plot No L.R 2/316 (hereinafter the suit property) which property was duly transferred to it in January, 2010.
3. At the time of the purchase of the property, it was averred, the Defendant was a tenant operating a bar and restaurant on the premises; that because it wanted to develop the premises, it issued the Defendant with a notice to vacate which the Defendant ignored and that consequently, it filed Civil Suit No 1517 of 2010 at the Milimani Chief Magistrates Court where it sought and was granted injunctive orders on the 3rd June, 2010.



4. According to the Plaintiff, the aforesaid eviction orders were effected and executed on 21st June, 2010 at around 11:00am in the presence of a Police Inspector from Kilimani Police Station and the representatives of the Defendant and the Plaintiff and that the Defendant vacated the premises and carried out all its belongings after which it begun construction.
5. On the 5th July, 2010, it contends, the Defendants servants, agents or employees stationed some goons at the site interfering with the construction and trespassing on the property for which they seek general and special damages.
6. The Defendant filed a Defence and Counterclaim on 30th August, 2011. Vide the Defence, the Defendant denied all the assertions as set out in the Plaint putting the Plaintiff to strict proof thereof.
7. It's case vide the Counterclaim is that on 24th August, 2007 or thereabouts, it entered into a 5-year lease agreement with one Samuel N Karanja in respect of the suit property; that the lease period was to commence on 1st September, 2007 and end on the 1st October, 2013 and that although the tenancy agreement was not executed by the parties, it was granted possession of the suit property in August, 2007 and paid and continued to pay rent as agreed.
8. According to the Defendant, upon occupying the demised premises, it made substantial developments thereon to enable it serve as a restaurant, the business for which it was rented; that the business flourished and was recognized as a dining place for the city's upper class making an average monthly profit of Kshs 800,000 and that by operation of law, and in accordance with the provisions of Cap 301, it became a protected tenant.
9. The Defendant states that in January, 2010, it discovered that the property had been sold to the Plaintiff and despite repeated attempts, the Plaintiff declined to receive their rent; that although the Plaintiff states that it acquired the property in January, 2010, it had never been in contact with the Defendant until 21st June, 2010 when, on the strength of an irregular and fraudulent eviction order purportedly issued on 4th June, 2010, it hired goons who stormed into the premises and vandalized its property.
10. According to the Defendant, prior to the attack aforesaid, it was never issued with any notice; that on 21st June, 2010, it moved to court and obtained orders staying the purported eviction and that in disregard of the foregoing, the Plaintiff stormed the premises on the night of the 21st June, 2010 and brought down half of the building before the police intervened.
11. In a bid to circumvent the law, it was averred by the Defendant, the Plaintiff withdrew its claim in Milimani 1517 of 2010; that as a result of the Plaintiff's actions, its business was paralyzed and properties destroyed and that it has suffered loss, special damages and injuries, the particulars of which include:
 - i. Loss of business and profit for a period of 8 months (July, 2010 to February, 2011) during which time it was forced to close down being Kshs 6, 400,000/=
 - ii. Damaged/vandalized and/or stolen property Kshs 3, 843, 100/=
 - iii. Loss of investments in terms of the credibility of its business operations, goodwill and permanent loss of high value customers.
12. The Defendant seeks vide the counterclaim:
 - i. Special damages of Kshs 10, 243, 100/= as particularized
 - ii. General damages.



- iii. Costs.
- iv. Interests on above at commercial rates from the date of July, 2010 until payment in full.

Hearing and Evidence

- 13. The matter proceeded for hearing on 5th June, 2024. On the said date, Counsel for the Plaintiff indicated that they were unable to procure the Plaintiff conceded to the dismissal of the Plaintiff's case. The Plaintiff's case was dismissed and the Defendant's counterclaim proceeded.
- 14. The Defendant's witness, DW1, adopted her witness statement dated the 30th August, 2011 as her evidence in chief and produced the documents of an even date as DEXHB1-8 and the photographs as DEXHB9.
- 15. She stated that at around 5.am on 21st June, 2010, the guard called her; that she went to the site and found people with lorries thereon; that they informed her that they had an eviction notice; that they had half demolished the premises which included the restaurant and boutique on the suit property and carted away the items and that the people who were demolishing the property ran away at around 8.00am and went back to the suit property in the evening and demolished everything.
- 16. It was her evidence that she is claiming 6.4 million in loss of business and profit; that they used to make approximately 800,000 gross profit per month and after paying rent and workers remained with approximately 300,000/= in net profit ; that she moved to an alternative site but the owner declined to allow them on the new site when he learned that she wanted to operate a restaurant; that she stayed for 8 months before she could get an alternative site and that all the receipts in support of her claim were carted during the demolition of the premises.
- 17. In cross-examination, she stated that she has not adduced a tenancy agreement; that she does not have evidence of the gross earnings of Kshs 800,000/= because all the documents were taken; that the Defendant deals with many other things and she deposits monies with respect to all the transactions in the same account; that she became aware that the land has been sold; that from January, 2010, they were duped by Mr Karanja and paid him and that she has no proof to show that she paid him rent for three years.
- 18. DW1 stated that she was given the orders on the day they were demolishing; that she took the photos of the process on the 21st June, 2010 in the evening; that all the receipts that she had were taken away and that you cannot value what is not there;
- 19. It was her evidence on re-examination that she was running the business herself; that the restaurant was making a gross profit of Kshs 800,000 and net profit of Kshs 300,000 and that the Defendant has an interior décor, restaurant, parking and other businesses all of whose proceeds were being deposited into one account.
- 20. According to DW1, it was agreed between Mr. Karanja, who was her friend, and Mr. James Maina, representing the Plaintiff, that she should continue paying rent and that Mr James Maina refused to pick her calls and Mr Karanja told her to pay him the rent. It was her evidence that the Plaintiff never served her with a notice demanding for rent.

Submissions

- 21. The Plaintiff did not file submissions. The Defendant's counsel submitted that the Defendant, having on the requisite balance of proof demonstrated through uncontroverted documentary and eye witness



evidence that its restaurant was vandalized and its tools of trade carted away at the behest of the Plaintiff, is entitled to the orders sought.

22. It was submitted that the court should draw an adverse inference against the Plaintiff having failed to testify. Reliance was placed on the cases of Raila Amolo Odinga & Anor vs IEBS & 2 Others [2017]eKLR, Mbuthia Macharia vs Annah Mutua & Anor[2017]eKLR, Wiliam Kabogo Gitau vs George Thuo & 2 Others[2010]1 KLR 526, and Stanley Muombo Amuti vs Kenya Anti-Corruption Commission[2019]eKLR.
23. As regards special damages, Counsel submitted that the law with respect to the same is as expressed in Hahn vs Singh[1985]KLR 716 to wit, it must be specifically pleaded and proved; that in the circumstances, the Defendant has pleaded and proved the loss of its items which were destroyed during the eviction as well as loss of business occasioned by its closure for approximately 8 months.
24. It was submitted that as expressed in Samwel Kariuki Nyangoti vs Johaan Distelberger[2017]eKLR, the loss of a profit making chattel is a claim in general damages and the balance of proof therein is on a balance of probabilities; that in Wambua vs Patel & Anor[1986]KLR 336, the court noted that a wrong doer must not be heard to say that the Plaintiff should be denied his earnings because he did not develop a more sophisticated business method and that apart from special damages, the Defendant is entitled to general damages to the tune of Kshs 50,000,000.

Analysis and Determination

25. Having duly considered the pleadings, testimonies and submissions the following arise as the issues for determination;
 - i. Whether the Defendant's eviction from the suit property was lawful and if not?
 - ii. Whether the Defendant is entitled to the damages sought?
26. Vide the present claim, the Defendant seeks damages for losses occasioned to it on account of its eviction from the suit property by the Plaintiff.
27. It is the Defendant's case in this respect that it was a tenant in the suit property pursuant to a tenancy agreement entered into between it and one Mr. Karanja on 24th August, 2007 for period of 5 years ending on the 1st October, 2013; that sometime in 2010, they learnt that the property had been sold to the Plaintiff and that they made several attempts to pay rent to the Plaintiff but the same was rejected.
28. According to the Defendant, on 21st June, 2010, the Plaintiff on the basis of fraudulent court orders stormed the premises without any prior notice to them, destroyed the same and carted away their property and that they seek damages as a result of the foregoing.
29. The Defendant adduced into evidence the un-executed Tenancy Agreement dated 24th August, 2007; inventory dated 1st September, 2007; documents filed CMCC 1517 of 2010; transfer dated 4th December, 2009 in respect to L.R 2/316; Standard Newspaper cutting excerpt of 23rd June, 2010 and the court order issued on 21st July, 2011.
30. No testimony was rendered by the Plaintiff to counter the Defendant's evidence and consequently, the Defendant's counter-claim is uncontroverted and unchallenged.
31. The above notwithstanding, it is now settled that uncontroverted evidence is not automatic evidence. The burden on a party to prove its case remains the same and that burden of proof is in no way lessened because the opposing party did not testify. As expressed by the Court of Appeal in Charterhouse Bank



Limited (Under Statutory Management) vs Frank N. Kamau [2016]eKLR, albeit discussing a scenario where the Defendant did not testify stated as follows:

“The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct.”

32. While the Plaintiff’s failure to testify had fatal consequences for its suit, the Defendant still bore the burden of proving its counterclaim, in line with the elementary principle that he who alleges must prove. This principle is codified under Section 107(1) and (2) of the *Evidence Act*, Cap 80, which provides as follows:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

33. Sections 109 and 112 of the same Act provide as follows:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”

34. The court will be guided by the afore-stated principles noting that there is no contest regarding the validity of the adduced evidence.

35. To begin with, it is not disputed that the Plaintiff is the registered owner of the suit property, having purchased the same from one Samuel Njoroge Karanja, vide a conveyance dated 4th December, 2009.

36. It is also apparent that at the time of the transfer aforesaid, the Defendant was a tenant in the premises. Whereas the Defendant pleads in its Defence that it was a protected tenant and could only have been evicted pursuant to the laws applicable to its tenancy, it seeks nothing in this respect. Rather, it claims damages arising from its eviction from the suit property by the Plaintiff.

37. It is the Defendant’s case in this respect that on 21st June, 2010, the Plaintiff hired goons who descended on the suit property, vandalized the same and carted away its property. It contends that on inquiring, it was informed that the same was pursuant to court orders issued on the 4th June, 2010. The said orders were adduced in evidence.

38. According to the Defendant, on the same day, it moved the court and was granted orders staying the eviction and that despite serving the Plaintiff with these orders, its agents returned at night and continued with the demolition of the suit property.

39. Despite contending that the orders of 4th June, 2010, upon which the Plaintiff was carrying out evictions were illegal, this has not been demonstrated. As such, the presumption remains that the eviction, as executed on the strength on the court orders was duly authorized and lawful up until the issuance of the orders staying the same.



40. Consequently, the Defendant was to clearly establish that the orders of 4th June, 2010 were stayed; that the aforesaid stay orders were served upon the Plaintiff and that in willful disobedience thereof, the Plaintiff proceeded with the eviction.
41. Having considered the evidence in this respect, the Defendant has adduced the stay orders granted on 21st June, 2010 in CMCC 1517 of 2010. However, while DW1 indicated that they duly served the same upon the Plaintiff, no evidence was adduced in this respect. This is critical because it is only upon service of the orders of 21st June, 2010 upon the Plaintiff, that its continual eviction would constitute an illegality.
42. Even if the court were to presume that the orders were indeed served at the end of the day, there is no evidence to show that eviction took place on the night of 21st June, 2010 as alleged, and the nature of the destruction thereof. The pictures adduced by the Defendant are of no relevance in this regard because they only show the destroyed property, with no further context.
43. Ultimately, the Defendant has failed to establish that its eviction from the suit property was illegal entitling it to any damages.
44. In the end, the Defendant's counterclaim dated 30th August, 2011 be and is hereby dismissed. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 27TH DAY OF MARCH, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Agwara for Plaintiff

No appearance for the Defendant

Court Assistant: Tracy

