



Wambugu & another v City Council of Nairobi (Environment & Land Case 402 of 2014) [2023] KEELC 20094 (KLR) (23 January 2023) (Judgment)

Neutral citation: [2023] KEELC 20094 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 402 OF 2014
JA MOGENI, J
JANUARY 23, 2023**

BETWEEN

JACOB KIOI WAMBUGU 1ST PLAINTIFF

SHELMITH GATHONI WAMBUGU 2ND PLAINTIFF

AND

CITY COUNCIL OF NAIROBI DEFENDANT

JUDGMENT

1. The plaintiffs herein Jacob Kioi Wambugu and Shelmith Gathoni Wambugu by a Plaint dated 5/8/1988 and an amended plaint dated 3/12/2012 against the Defendants herein sought for the following orders: -
 - a. A declaration that the defendant acts of evicting the Plaintiffs and putting another in possession of the Suit premises are null and void and terribly harassing and inhuman
 - b. A declaration that the defendant is not entitled to evict the plaintiffs from the suit premises as long as the plaintiffs continue to observe the terms of the tenancy.
 - c. General damages
 - d. Exemplary Damages
 - e. Special damages of Kesh 7,300,000,
 - f. Costs of the suit
 - g. Any other relief that the court may deem just to grant.



2. In their Plaintiff the 1st and 2nd plaintiffs who are husband and wife have since July 1, 1970 been tenants of Nairobi City Council, now Nairobi City Commission at the time of the suit in respect of House Number B 9 Outering Road Estate.
3. The 1st plaintiff has regularly paid his rent and never contravened any conditions and/or terms of the tenancy. In fact at the time of filing this suit he had paid his rent upto and including the month of August 1988.
4. That the 1st defendant agents/servants and or employees on 13th April around 11:00 a, and 3 p.m forcibly evicted the plaintiff, threw out his belongings beat up the 2nd plaintiff and her children and caused them to be arrested and detained in Buru Buru Police Station. He then put the 2nd defendant in possession and occupation of the suit premises.
5. The plaintiffs aver that the actions of the 1st and 2nd defendants were wrong, illegal and harassing since there were no quit notices issued.
6. The action of the 1st defendant caused damage to the properties of the plaintiffs and caused to the to spend the night in the cold. Further that the actions of the 1st and 2nd defendants was inhumane and harassing.
7. The plaintiffs contended that the allocation of the property to the 2nd defendant was done illegally and wrongfully and was meant to deprive the plaintiffs of the property which they had occupied for many years. The 1st plaintiff was also apprehensive that the property may be sold or otherwise encumbered to his detriment and he stood to suffer loss and damages. Further that despite his protest, the 1st defendant has refused to nullify the allocation to 2nd defendant. He urged the court to allow his claim.
8. The 1st defendant filed their statement of Defence dated 24/01/2013 and denied the allegations. In its Defence, the 1st defendant denied all the allegations made in the plaint and did put the plaintiff to strict proof. The 1st defendant denied having any tenancy relationship with the 1st plaintiff in respect of the suit property. He further states that should the 1st plaintiff prove any tenancy then the 1st defendant denies that the 1st plaintiff has been regular in paying rent and/or that the 1st plaintiff has paid up to and including the month of August 1988.
9. The 1st defendant also denied any illegality and wrong doing or flouting the plaintiffs' rights and puts them to strict proof thereof. He denied that the plaintiffs. He states that in the alternative and on a without prejudice basis that if any breach on tenancy occurred then it was on the part of the plaintiffs jointly and severally.
10. The 1st defendant enumerated particulars of breach of tenancy relationship on the part of the plaintiffs which include erecting structures on the suit property, raring of chicken and rabbits, production of seedlings and fruit trees without first seeking permission. contrary to the use of the suit premises. He implores the court to strike out the claim of the plaintiffs and the suit for being frivolous and vexatious.
11. The hearing commenced on 19/09/2022, when PW1- Shelmith Gathoni Wambugu (2nd Plaintiff) herein, who adopted her witness statement dated 15/05/2013 as her evident in chief and produced the attached list of documents as exhibits in the plaintiff's bundle of documents listed on pages 34 to 35. She attached the rent card, receipts and the P3 Form as a testament of the assault she suffered with her children.
12. It was her testimony that they paid the balance of Ksh. 2070 as per the receipt attached at page 41. She testified that she was arrested with her son and they were then released on a bond of Ksh.3,000. It was her testimony that the police at Buruburu Police Station took the bound papers from the her and told



her and released promising that they would call her if they needed her but she stated that to date, they have never been summoned or arraigned in any court of law.

13. It was her evidence that she later went to the Provincial Commissioner (hereinafter PC) to lodge a complaint and she has attached a letter at page 44 to this effect. At page 48 there is a letter where the PC wrote to the Town Clerk raising concern about the incidence by the Town Clerk never did anything. Further the PC wrote to the Director of Housing and the letter at Page 49 show that the Director of Housing wanted to evict someone else and put the plaintiff in the house but it is her testimony that she rejected that offer.
14. She testified that the defendant wrote to the plaintiff and stated that they could not reinstate the plaintiff to the house but they were willing to pay damages. It was her testimony that when they realized that they could not be reinstated to the house, they reported their matter to the Attorney General who wrote a letter which is at page 59 of the bundle. Realizing that reinstatement was not forthcoming for them, they undertook a valuation of their loss and this is contained at pages 60 to 84. There was no cross-examination of this witness.
15. PW2- Patrick Wambugu Kioi – Adopted his statement dated 29/09/2021. It was his testimony that the City Council Askaris arrested his mum for the first time and they took away the house doors too. The second time he testified that they threw out household belongings and they then put another person in the house. There being no cross-examination the plaintiffs closed their case.
16. The defendant did not call any witness meaning the witness statement could not be produced and therefore the plaintiff's evidence was uncontroverted.
17. Parties thereafter were directed to file their written submission. At the time of writing this judgment only the plaintiff had filed their written submissions.

Analysis and Determination

18. I have considered the parties respective pleadings, plaintiffs' evidence and submissions. I have also considered the relevant legal framework, legal principles and jurisprudence. Only the plaintiffs presented statement of five issues they considered to be key for determination in this suit. Having taken into account those issues as set in the plaintiffs' submissions, together with the parties' pleadings and evidence, the following are the issues I believe emerge for determination in this suit;
 - i. Whether the 1st defendant acted inhumanly, harassingly and unlawfully and in breach of the tenancy between it and the plaintiffs;
 - ii. Whether the eviction carried out by the 1st defendant against the plaintiffs was unlawful;
 - iii. Whether the plaintiff is entitled to the reliefs sought and if so what should be the quantum; and
 - iv. Who should bear costs of this suit? I will make brief pronouncements on the five issues sequentially in the above order.
19. The first issue is whether the defendant acted carelessly, unlawfully and in breach of the tenancy agreement between it and the plaintiffs. The plaintiffs did produce rent payment receipts and letters that testify to their being tenants at House B No. 9 Outer Ring Road Estate executed lease or tenancy agreement it had with the defendant. The defendant does however contest the fact that there was a tenancy relationship between it from and the plaintiffs. section 57(2) of the *Land Act* contemplates a scenario where a land owner permits the exclusive occupier of the land by any person at a rent. Section 57 (2) provides thus:



57. (2) If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, the occupation shall be deemed to constitute a periodic tenancy.
20. What therefore emerges from the relationship between the plaintiffs and the defendant is that of periodic tenancy. Section 57(4) provides that a periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not be less than the period of the tenancy and shall expire on one of the days on which rent is payable.
21. As a tenant lawfully paying rent to the defendant, the plaintiffs were entitled to quiet possession of the suit property. What, however, emerges from the evidence presented to the court is that the defendant entered into suit property and forcefully evicted the plaintiffs and then rented out the suit premises to someone else in July 1988. The defendant did not, however, bother to issue notice in writing to the plaintiffs about the termination of tenancy.
22. Prior to the said eviction the defendant had received rent from the plaintiffs up to the end of August 1988. I am of the view that the defendant should have issued a notice to the plaintiffs to inform them of the termination of the tenancy. The defendant therefore acted unlawfully and in breach of the existing periodic tenancy by not issuing the notice. Therefore, I am of the view that the defendant acted in an inhumane manner, harassed the plaintiffs and its actions were unlawful and illegal in breach of the tenancy between it and the plaintiff to the extent that it failed to notify the plaintiff of the termination of the tenancy. The court accordingly finds that the defendant acted carelessly, unlawfully and in breach of the periodic tenancy which existed between it and the plaintiffs.
23. The 2nd issue is whether the eviction carried out by the defendant against the plaintiffs was unlawful. Since the evidence of the plaintiffs remain uncontroverted, I find that from the testimony of the plaintiffs the action of the defendant to evict the plaintiffs without notice was unlawful. The pleadings by the defendant which could not be questioned since they did not attend court to present their evidence state that the plaintiffs had violated the tenancy agreement rules. If this were the case, the defendant out to have issued a notice and warning to the plaintiffs. No such evidence was presented to court. The defendant was therefore bound by the existing periodic tenancy and could only terminate it or evict the plaintiffs in accordance with the law. There is no evidence of any notice of termination of tenancy or any eviction order obtained against the plaintiffs. My finding on the second issue therefore is that the eviction carried out by the defendant against the plaintiffs was unlawful.
24. The 3rd issue is whether the plaintiffs are entitled to the reliefs sought in the amended plaint and if so, what should be the quantum. The plaintiffs sought the following reliefs:
- i. A declaration the defendant's action of putting another tenant in the suit premises was null and void and also inhumane and harassing
 - ii. (ii) a declaration that the defendant is not entitled to evict the plaintiffs as long as they observed the terms of the tenancy
 - iii. (iii) general damages, (iv) exemplary
 - iv. (v) special damages of Kshs 7,300,000; (vi) costs; and
 - v. (vii) any other order the court may deem fit.
- I will consider each relief one by one as listed above.
25. The first prayer is for a declaration that the defendant's action of putting another tenant in the suit premises is null and void. Further that the defendant's action was inhumane and harassing. Whereas I



agree that the defendant's action was null and void due to the failure to issue notice, I am aware that there is already a tenant in the suit premises. I have already pronounced myself on the inhumane nature of the action of evicting and removing doors to a house subjecting the plaintiffs and their family to untold suffering by exposing them to harsh weather conditions.

26. The second prayer is a declaration that the defendant is not entitled to evict the plaintiffs as long as they observed the terms of the tenancy. It is on record that the defendant has already allowed a tenant into the suit premises. Courts do not make orders in vain. The matter of eviction has been overtaken by events. If the court were to issue an order of eviction, how will it be implemented and yet the plaintiffs have vacated the demised premises. Further the plaintiffs have outrightly rejected the offer of an alternative rental premise offered by the defendant.
27. The third prayer is for general damages. General damages are compensatory damages which the law presumes follow as a result of any wrong or harm done to a claimant. Unlike special damages, general damages need not be specifically proved. Once the claimant demonstrates that he suffered harm as a result of the defendant's conduct, the court undertakes an assessment and makes an award in exercise of its discretionary jurisdiction. As outlined in the preceding paragraphs, the plaintiff has proved carelessness, unlawfulness and breach of periodic tenancy by the defendant. In the face of uncontroverted evidence, the plaintiffs have also proved that the eviction carried out by the defendant was unlawful.
28. The plaintiffs did not propose the figure they consider to be appropriate in general damages. I hold the position that there were wrongs committed by the defendant against the plaintiffs. The net effect of those wrongs is that the plaintiffs and their children were harassed and inhumanely treated by the defendant. I will therefore award the plaintiffs general damages to borne by the defendant.
29. The fourth prayer is for exemplary damages. Now, the principles applied by the court in awarding exemplary damages were summarized in [*Godfrey Julius Ndumba Mbogori & another v Nairobi City County* \[2018\] eKLR](#) as follows:

The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of [*Rookes v Barnard* \[1964\] AC 1129](#) where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are:

 - i. in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
 - ii. cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
 - iii. where exemplary damages are expressly authorized by statute.
30. The plaintiffs proved that the defendant entered the house they had rented forcefully having and threw out the plaintiffs' family who were in occupation and even removed the door of the house. The defendant's actions were arbitrary, oppressive and were carried out with impunity with the aim of achieving pecuniary benefit for the defendant. This in my view is an appropriate case in which exemplary damages should be awarded.



31. The fifth prayer relates to special damages. It is settled law that a claim for special damages must be specifically pleaded and proved. The Court of Appeal emphasized this legal principle in *Banque Indosuez v D J Lowe & Company Limited* [2006]eKLR as follows:

“Though special damages were specifically pleaded or claimed, they were not proved at all. It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the Court and expect them to be awarded. It is trite that special damages must not only be claimed specifically but also proved strictly for they are not direct natural or probable consequences of the act complained of and may not be inferred from the act...

32. I have painstakingly gone through the documentary evidence presented to the court by the plaintiffs. The evidence essentially relates to the tenancy. It mostly consists of rent receipts and rent card. The plaintiffs’ claim of special damages was particularized in paragraph 12 of the amended plaint as follows:

- a. Personal Effects..... Kshs 1,100,000
- b. House Hold Goods.....Ksh 3,400,000
- c. Vehicle Nissan Urvan..... Kshs 1,400,000
- d. Vehicle Sodka Saloon car.....Ksh 700,000
- e. Fencing, chicken & Rabbits sheds
Seedlings, fruit trees etc.....Ksh 200,000
- f. Miscellaneous items and consultancy fees..Ksh 500,000

33. The plaintiffs exhibited receipts relating to the rent which they paid to the defendant. She did not, however, exhibit any other evidential material in support of the claim for special damages. Relevant evidence such as log books for the car, receipts for payment of household items among others were all omitted. While the court is alive to the fact that the illegal eviction could have led to loss of some documents, the court has no doubt that copies of some items such as the log books would have been obtained from government institution where the motor vehicles were registered.

34. In the case of *Ryce Motors Ltd & another v Muchoki* (1995-98) 2 E A 363 (CAK) commenting on statements of accounts presented without more as in this case stated, this Court observed;

“... The pieces of paper produced as evidence of income could not be accepted as correct accounting practice. They did not constitute proof of special damages.”

For all the foregoing reasons, we are satisfied that although the trial court correctly found that the special damages had been specifically pleaded, there was no credible evidence whatsoever that proved the pleaded special damages. The trial court’s finding on that score can thus not be faulted.’

35. In applying the principles in this case to the circumstances at hand, I associate myself with the observation made that the burden of proof was upon the Plaintiffs to prove how they had arrived at the figures they shared. The Plaintiffs filed a schedule of loss and damages that is undated which they produced as an exhibit in Court but failed to tender evidence to support the itemized claims therein. Except for the Valuation Report, they never tendered any further evidence to prove the special damages claimed. Be that at it may, I note the Plaintiff produced the Valuation Report which indicated the value of the items lost and or damaged. The Defendant never offered any contrary Valuation Report nor



evidence to confirm or rebut the plaintiffs' claim. In the circumstances, I will base my quantum on the Valuation Report prepared by Dantu Valuers dated the 22/11/2011 where they remarked as follows:

“To enable us come up with what is reasonable assessment and loss we have relied on the records dating back to 1988. These records were prepared by the family and were part of the documents for the civil case that he finally filed against the Nairobi City Commission at that time. We have worked out what should be fair assessment at today's prices and costs.”

36. Consequently, I will now summarize the disposal orders. Before I do so however, I am compelled to say one or two things about the defendant's action of not attending the hearing. First the officers charged with the responsibility of providing legal services for the City Council of Nairobi now Nairobi City County have let the city and its dwellers down. The enforcement officers behave like an army of outlaws when enforcing legal orders which leaves the county exposed to paying damages in the tune of millions of shillings if not billions of shillings which sadly again are tax-payers hard earned monies in form of taxes.
37. The Nairobi City County must of necessity invest in training its enforcement officers to ensure that they incorporate a human rights based approach to any enforcement they undertake. How in God's name can some one remove a door to leave a family exposed to the penuries of the harsh environment that we leave in? This is unacceptable.
38. Secondly the Nairobi City County to rethink its approach to how it litigates and ensure its officers are accountable for each and every matter that in court. This is not asking too much it just requires an audit of the number of cases in court and installation of a monitoring system.
39. Nairobi City County may want to borrow a leaf from emerging good practice that is coming from the Attorney General's office whose officers have pleasantly surprised me not just on their professionalism but the commitment to the call of duty. I honestly believe there are some very dedicated public officers at the Attorney General's office and we can learn from these dedicated public servants.

Disposal Orders

40. And now to my disposal orders. In light of the above findings, I enter judgment for the plaintiffs against the defendant in the following terms:
 1. Plaintiff is awarded damages to be paid by defendant as follows;
 - a) Special damages - Kshs. 8,300,000.00
 - b) General damages - Kshs. 2,000,000.00
 - c) Exemplary damages – Kshs. 15,000,000.00Total Kshs. 25,300,000/-
 2. Interest of a, b, and c above at court rate 60 days from the date of delivery of this judgment
 3. Costs of this suit shall be paid by the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF JANUARY 2023.

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MOGENI J

JUDGE



In the virtual presence of:-

Ms. Lamweya for Defendant

No appearance for the Plaintiff

Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

