



Masters Sweet Limited v Oshwal Education and Relief Board (Civil Appeal E385 of 2021) [2025] KEHC 1282 (KLR) (Civ) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E385 OF 2021**

REA OUGO, J

FEBRUARY 27, 2025

BETWEEN

MASTERS SWEET LIMITED APPELLANT

AND

OSHWAL EDUCATION AND RELIEF BOARD RESPONDENT

(Being an appeal arising from the judgment and decree of the Chief Magistrate's Court at Nairobi in Civil Suit No. 5971 of 2018 delivered on 4/06/2021 by Hon. L.L Gicheha (CM))

JUDGMENT

1. This appeal is a contestation of the outcome of the lower court's suit where Masters Sweet Limited - the appellant herein were the plaintiff while Oshwal Education And Relief Board -the respondent was the defendant.
2. The suit before the trial court was instituted by the appellant vide a plaint dated 26/06/2018 where it was the appellants case that it runs a canteen shop/business in the school premises belonging to the respondents situated on Plot No. 209/1561, 1st Parklands Avenue, Nairobi since 05/01/2015 being up to date in terms of the rent payable. The Appellant's claim was that the Respondent on 07/07/2017 without any justification in law and without serving a legal notice for termination of the Tenancy or License agreement maliciously and unlawfully terminated the agreement, evicted the Appellants, took over their canteen business and withheld their property/items which they are currently using to run the business. The Appellant itemized particulars of malice and illegality and went on to state that as a result of the Respondents action he has suffered losses and damages. They particularized the alleged losses as follows;
 - a. Loss of income for two terms



(Sept 2017 to March 2018) - Kshs. 9000,000/=

- b. Loss of goodwill of the business
and business opportunity - Kshs. 4,000,000/=
 - c. Loss (value for replacement) of confiscated
/withheld property/items of the plaintiff (as listed below)- - Kshs.3,076,288/=
- TOTAL: Kshs.16,076,288/=
3. The appellant sought for judgment against the respondent for;
 - a. Special damages of 13,000,000/= for loss of business, income, /profits, goodwill and or business opportunity as stated in paragraph 18(a) and (b) above.
 - b. A declaration that the Defendant's actions of unilaterally terminating the tenancy/license by email dated 07/07/2017 and subsequently barring the Plaintiff, its employees and suppliers from accessing its business in the said suit premises and the confiscation/conversion of its properties therein even when the valid restraining orders issued by the Business Premises Rent Tribunal on 04/09/2017 and 11 were in force were unlawfully, maliciously and unjustifiable acts of trespass to property and a breach of the tenancy/license agreement.
 - c. A mandatory injunction compelling the defendant to forthwith release the Plaintiff's property/goods listed in paragraph 18 above or the monetary value thereof (Kshs. 3,076,288/=) as stated in paragraph 18 (c) above.
 - d. General damages for trespass to property and breach of contract.
 - e. Costs and interests on (a) and (b).
 4. The Respondent filed the statement of defence dated 22/01/2020, which was amended by the amended statement of defence and counter-claim on 31/1/2020. It was their case that there existed a canteen license agreement dated 05/01/2015 which expired in June 2016 and contrary to the Appellant's assertion, there was no agreement to review the rent terms of Kshs. 80,000/= from the initial 100,000/= i.e. Kshs.25,000/= per week payable via cheque in advance. This sum was not an all-inclusive figure as argued by the appellant as per the agreement dated 05/01/2015. They did send an email to the Appellant notifying them of their intention to discontinue the canteen license since the Appellant was unwilling to discuss about dues owed which informed the termination of the agreement. They refuted the particulars of malice itemized in the plaint together with the particulars of loss thereunder. That under the expired canteen license, the Respondent was at liberty to terminate the license at any time without notice for breach of any covenant therefore, it was their case that they lawfully terminated the license as per the contract and as such the damages sought could not arise.
 5. In their counter-claim the Respondents reiterated the averments as above and added that despite the expiry of the said agreement in June 2016, the parties continued operations on the terms of the expired license. The license fee was exclusive of electricity, water, and garbage collection. That the Appellant was afforded a full-term notice on 08/05/2017 and that at the time of the said termination, the Appellant was in arrears of Kshs. 1,376,518/= broken down as;
 - a. Rent arrears for the months of February, March, April, May & June - Kshs.490,000/=.
 - b. Electricity bill for the period 01/04/16-31/08/2017 -Kshs. 706,718/=
 - c. Water bill as at 31/08/2017 - Kshs 179,800/=



TOTAL: Kshs.1,376,518/=

6. The Respondent sought for the following orders in the counter-claim;
 - a. The sum of Kshs. 1,376,518/=
 - b. Interests on (i) above at Courts rates.
7. The Appellant filed a reply to defence and defence to counter-claim dated 15/12/2020 where they refuted the Respondents claim as contained in their amended defence and counter-claim.
8. The matter proceeded by way of viva voce evidence where each party called one witness.
9. PW1 Panna Mukesh Thanky a director at the Appellant company adopted his witness statement filed on 26/06/2018 as his evidence in chief. He produced his list of documents dated 27/06/2017. That the license fee in the first year they paid Kshs. 100,000/= which was increased thereafter to Kshs. 110,000/= and later reduced to Kshs.80,000/=. He stated that the respondents never issued demands for the claimed arrears and that they have never been asked to collect their items after the termination. In cross-examination he testified that after the license agreement expired, the parties met on various dates in July and August and agreed to have the license fees reduced to Kshs. 80,000/= but the minutes of the meeting were not shared to them. That they visited the premises with the police and only took cutlery and small machinery. They stated that they had not called for a valuation of the kitchen equipment and neither had they supplied their audited books of account.
10. DW1 Ramash Shah testified that he was one of the directors of the Respondent Company. He adopted his witness statement dated 03/06/2020 as his evidence in chief. He produced into evidence his list of documents dated 03/06/2020 and 31/11/2020. He testified that the initial license fee was Kshs 1,000/= i.e from 2015-2017 which was increased to Kshs. 110,000/= for 2 months then reduced to Kshs. 100,000/=. The witness denied ever reducing the fee to Kshs.80,000/=. It was his evidence that they issued a term notice on 02/05/2017. That they later issued a notice and sent an email that the Appellant refused to acknowledge. That the Appellants took out some items in May, 2017 leaving those listed in their supplementary agreement and the Appellants were at liberty to collect. In cross-examination the witness stated that they decided to terminate the agreement after the Appellants refused to meet them. That the demands for the arrears were made orally. That the Appellants left the premises on 22/06/2016.
11. The trial court in determining the suit dismissed the appellant's case with no orders as to costs and allowed the respondents counter-claim with costs.
12. Being dissatisfied with the trial court's judgment, the appellant preferred this appeal on the following grounds;
 - a. The trial magistrate erred in law and in fact in finding that the appellant had failed to prove special damages of Kshs. 13,000,000/= yet there was default/interlocutory judgment entered on the same on 7/09/2018 on record which had never been set aside.
 - b. The trial magistrate erred in law and in fact in ignoring the fact that the respondent's acts were blatantly unlawful in the manner it proceeded in terminating the appellants tenancy, evicting it, taking over its canteen business and confiscating its property without a court judgment/decree or order or any other lawful justification.
 - c. The trial magistrate erred in law and in fact in failing to order the respondent to release the Appellants property that it admitted by clear affidavit and oral evidence that the respondent had kept/confiscated without a judgement/decree or order of the Court.



- d. The trial magistrate erred in law and in fact in justifying the unlawful confiscation and conversion of the Appellant's property (the inventory/list thereof having been given in the Plaint and witness statement of Panna Mukesh Tahanky) without a court order or decree or other justification in law.
 - e. The trial magistrate erred in law and in fact in misapprehending/misunderstanding the pleadings and evidence and holding that the appellant should have collected its property when it went to the premises accompanied by the police yet the relevant order of the Business Premises Rent tribunal had ordered/directed that the Appellant be restored into the premises to continue undertaking its canteen business and not to carry away its property as reasoned by the said Magistrate.
 - f. The trial magistrate erred in law and in fact in deliberately ignoring correspondences that proved that the rent payable had kept varying pursuant to various negotiations/factors and that the respondent had without any explanation or justification withheld the relevant signed minutes/evidence of the meetings where the rent payable was negotiated and reviewed and further correspondences that gave the appellant the right to continue operating its business in the premises pending the investigation of a new tenancy agreement in view of the confusion in the respondents office.
 - g. The trial magistrate erred in law and in fact in ignoring all the evidence showing that the Respondent had never previously demanded or claimed the sums claimed in the counter-claim which she awarded to the respondent without any cogent evidence to prove the said counter-claim and even unlawfully shifted the burden of proof to the Appellant.
 - h. The trial magistrate erred in law and in fact in considering evidence selectively and completely ignoring or casually treating the Appellants evidence, submissions and authorities placed on the court record.
 - i. The judgment/Decree was against the weight of the evidence before the Court and the same is clearly unjust in the circumstances.
13. The appellant sought for the following prayers;
- a. The appeal be allowed.
 - b. The said judgment and decree of the lower Court dated 04/06/2021 be set aside.
 - c. Judgment be entered for the Appellant against the Respondent as prayed in the Plaint and the Court be pleased to assess general damages for breach of contract.
 - d. The Respondent's counter-claim be dismissed with costs.
 - e. The costs of this Appeal and the Court below be awarded to the Plaintiff.
14. The Appeal was canvassed by way of submissions.
15. The Appellant filed submissions dated 29/02/2024 where they expounded the grounds of appeal by reiterating the evidence as summarized in preceding paragraphs.
16. The respondents on their part filed submissions dated 13/03/2024 where they argued that the sum claimed of Kshs. 13,000,000/= was not a liquidated sum. Reliance was placed in the case of Mombasa HCCC No. 78/1990 Mawji vs. Kaderdina Majee Essak Limited. It was argued that the amount sought for loss of income and good will ought to be proved and particulars given. They quoted the case of



Mombasa 552/2010 Multiserve Oasis Co. Ltd vs. The Kenya Ports Authority (2020) eKLR and Civil Appeal No. 4 of 2021 Johnson Mugwe Wanganga v Joseph Nyganga Karingi (2014) eKLR. They went on to discuss facts and evidence as summarized above.

17. This being a first appeal, this court is obliged to re-assess, re-evaluate and re-examine the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified and therefore giving an allowance to that-see *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
18. I have considered the pleadings and the evidence adduced before the trial court and the submissions in this appeal. Although the appellant filed the appeal on nine (9) grounds, the main issues for determination are;
 - a. What was the effect of the interlocutory judgment entered on 12/04/2019?
 - b. Whether the judgment of the trial court was against the evidence before it.

What was the effect of the interlocutory judgment entered on 12/04/2019 (Ground 1).

19. From the record, it is emerges that the Respondent filed its initial statement of defence on 29/01/2020 and subsequently its amended defence and counter-claim on 31/11/2020. This is after the Appellant had requested for an interlocutory judgment in terms of Order 10 Rule 5,8,9 & 10 of the Civil Procedure Rules whereby the trial court had on 12/04/2019 entered the same as prayed. Thereafter, the parties complied with order 11 and the matter proceeded for hearing. The Appellant now faults the trial court for dismissing its suit in its entirety despite the interlocutory judgment. The Appellant argues that the trial court was only left to consider the other prayers in the plaint save for the prayer on special damages for Kshs.13,000,000/=
20. The relevant provision of law with respect to judgments entered in default of appearance or in default of filing defence is found in Order 10 of the Civil Procedure Rules. From the onset, this Court has to make a distinction between judgments based on claims for liquidated sums and claims for pecuniary damages. The provisions on these items are Order 10 Rule 4 and Order 10 Rule 6 of the Civil Procedure Rules which provide as follows: -

Judgment upon a liquidated demand [Order 10 Rule 4]

- (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail to so appear, the Court shall on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.

Interlocutory Judgment [Order 10 Rule 6]

Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

21. Therefore, when there is some other aspect of the claim besides the claim for pecuniary damages, as was in this case, the Court will have to consider such a claim on merit and satisfy itself that the same has been proven through 'formal proof' proceedings before proceeding to assess damages. (see *Mwatsahu*



vs Maro, Civil Case No. 74 of 1996 (1967) EA 42. In essence, therefore, a party is not absolved from proving the claimed pecuniary damages simply because such a judgment has been entered.

22. Further, with special damages, the rule is strict in that the Court will consider the nature of the acts complained of. Therefore, the claim must be specific and strictly proven. The court bears the duty to discern the damages pleaded and proceed to consider that the same has been proved, strict proof, not based on estimates. The Court of Appeal in *David Bagine v Martin Bundi* {1997} eKLR held:

“It has been held time and again by this court that special damages must be pleaded and strictly proved. Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to write down the particulars, and so to speak, should 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 protect.” (*Bonharm Carter v Hyde Park Hotel Limited* {1948} 64 TLR 177). (*Ouma v Nairobi City Council* {1976} KLR 304).

23. Further, the Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 stated that: “The law on damages stipulates various types of damages... Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
24. Therefore, the Appellant was obligated to adhere to all rules of evidence and procedure by presenting sufficient evidence to support their claim for special damages, which would then be heard and determined on its merits. Failure to meet the required standard of proof would result in the dismissal of the case for lack of merit and insufficient proof of any factual or legal issues.
25. I therefore agree with the trial court that the Appellant ought to have produced its audited books of accounts to show the gross profit or revenue of the business to enable the court to ascertain the claim.

Whether the judgment of the trial court was against the evidence before it (Ground 2-10).

26. The appellant on ground 2 argues that the trial court ignored the fact that the Respondent unlawfully terminated the license agreement and confiscated its properties without any justifiable cause. It was a term of the license agreement that;
- a. The agreement was to terminate automatically upon expiry of the term.
 - b. Either party may terminate the license at the beginning of the third term of the school year by giving one full term notice to the other or in the case of license by notice of by payment of license fee in lieu of notice.
 - c. The licensee may terminate this license at any time without notice for breach of any covenant.

From the evidence presented, it is clear that the license agreement was set to expire in June 2016. The testimony indicates that the parties engaged in discussions on various occasions in July and August of that year. However, no documentary evidence was tendered in Court to detail the content of these discussions. Based on the oral testimonies, it appears that the parties deliberated on new extension terms, but the subsequent events suggest that no agreement was reached.

27. This is evident from the emails dated 03/07/2017, 06/07/2017, and 07/07/2017, in which the Appellant requested the signed minutes of meetings held on 27/07/2016 and 03/08/2016, asserting that the parties had agreed on a monthly rent of Kshs. 80,000/=. However, the Respondent maintained that the agreed rent was Kshs. 100,000/=. Subsequently, one of the Respondent’s representatives sent an email expressing frustration with the Appellant and indicating their intention to terminate the



- agreement. In that email, the Respondent stated that the Appellant had refused to meet them, leaving their affairs in abeyance. In response, the Appellant later sent an email stating that he was traveling and would be unavailable for a meeting.
28. The Respondent subsequently sent an email to the Appellant on 02/05/2017, terminating the license agreement effective August 2017. The stated reason for termination was the Appellant's failure to sign a formal license agreement, despite repeated requests over a period of two months. Notably, the Appellant denied receiving this email. The Respondents further asserted that they later issued a letter of termination dated 08/05/2017 and attempted to serve it physically through their messenger and Administrator. However, the Appellant allegedly refused to accept the letter, prompting the Respondent to send it via registered post. To support this claim, they produced a messenger's delivery book and a registered post receipt.
 29. At this juncture, it is key to note that it was a term of the license agreement that notices were to be served through the registered posts, last known physical address, or at the premises/canteen. No evidence was produced by the Appellant to show that it changed its provided registered post details, and further from the evidence on record, I confirm it is the very e-mail address that parties herein were communicating through, that the Respondent used to notify the Appellant of the said termination. Considering the evidence, it is my view that the license agreement was properly terminated by notice.
 30. On grounds 3, 4, and 5, the Appellant contends that the trial court erred in concluding that the Respondent had wrongfully confiscated its equipment. However, since the license agreement was properly terminated and the Appellant had ceased operating the canteen, it was their responsibility to collect their equipment. Upon reviewing the evidence, it is apparent that the Appellant did not demonstrate any efforts made to retrieve the equipment or how such efforts were obstructed by the Respondent. No demand letter requesting the release of the equipment was presented to the Court as proof of wrongful retention. Additionally, the Appellant failed to provide a machinery and equipment valuation report to substantiate the claimed value of the items. The burden of proof lay with the Appellant to establish that the Respondent had retained the listed items, especially since the Respondent, in rebuttal, stated that the only uncollected equipment included a chiller, a chips cutter, and a pizza jiko and that they were amenable to their collection on request.
 31. The Appellant in ground 6 of the appeal further faults the trial court for ignoring the assertion that rent kept varying and that the Respondent withheld minutes that would have proved this allegation. From the impugned judgment, I note that the trial court did note that Appellant initially paid Kshs. 100,000/= which was reviewed upwards to Kshs. 110,000/= as a result of a term of the agreement. The trial court also noted that the Appellant insisted on paying rent of Kshs. 80,000/= claiming that the parties had agreed on payment of the same.
 32. The Appellant claims that the minutes of the meetings held on 27/07/2016 and 03/08/2016, which were allegedly withheld by the Respondent, contained the agreement setting the rent at Kshs. 80,000/= . However, the evidence on record indicates that the Respondent forwarded these minutes to the Appellant, though they were purportedly unsigned. The Appellant argued that despite their requests for the signed minutes, they were never provided. Notably, the unsigned minutes were not submitted as evidence to support this claim. Additionally, the Appellant did not issue a notice to produce the said minutes, which could have strengthened their case.
 33. Lastly, the Appellant argued that the trial court erred in allowing the respondents counter-claim against the weight of the available evidence. The Respondent in its counter-claim, sought for unpaid dues being rent arrears, electricity, and water bills. In support of their case, they produced a statement of accounts as at 05/09/2017, e-mailed to the Appellant on 06/09/2017 for the claimed arrears. The



Appellant in rebuttal denied being in arrears and argued that they were up to date on all payments. They argued that the rent payable was an all-inclusive amount and they were therefore not liable to further charges. However, from the license agreement, it is a term that the rent amount is not inclusive of water, electricity, garbage, etc. In the absence of receipts in payment of the said water and electricity bills, it is a clear indication that the Appellant was in arrears.

34. Further, having confirmed that the Appellant was in occupation of the canteen on the claimed months, it was incumbent upon them to rebut the Respondent's statement of accounts by providing proof of rent payment for the said months. In *Samson and Maitai and another VS African Safari Club Limited and Another* 2010 eKLR the court had this to say on proof; "Proof refers to evidence which satisfies the court as to the truth or falsify of a fact..... the burden of proof lies on a party who asserts the truth of an issue in dispute."
35. It is my view that the Appellant failed to discharge both its legal burden of proof and evidentiary burden in accordance with Sections 107(1), 109, and 112 of the *Evidence Act*, Cap 80 Laws of Kenya. See the case of *Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

"As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

36. In the circumstances, I cannot fault the trial court for the decision reached in its judgment. It follows, therefore, that the appeal should be and is hereby dismissed with costs to the respondent. The same is hereby dismissed with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY 2025.

R. OUGO

JUDGE

In the presence of:

Mr. Isindu - For the Appellant

Miss Akong'a - For the Respondent

Wilkister - C/A

