Shiloah Investment Limited v Evana Wafula t/a Fabulous Flowers (Civil Appeal E135 & E139 of 2023 (Consolidated)) [2024] KEHC 7597 (KLR) (25 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7597 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E135 & E139 OF 2023 (CONSOLIDATED)

RE ABURILI, J

JUNE 25, 2024

BETWEEN

SHILOAH INVESTMENT LIMITED .... APPELLANT

AND

EVANA WAFULA T/A FABULOUS FLOWERS .... RESPONDENT

(An appeal arising out of the Judgment & Decree of the Honourable B.M.A. Omollo in the Chief Magistrate's Court at Kisumu delivered on the 26th July 2023 in Kisumu CMCC No. 578 of 2019)

JUDGMENT

Introduction

1. Vide an amended plaint dated 13.5.2022, the Respondent herein who was the plaintiff in the lower court sought judgment for Kshs. 28,027 from the appellant being the amount due in respect of deposit paid for occupancy of shop number MAK 001-MP2. The respondent also sought costs of the suit together with interest on both amounts.

2. From the trial court record, it was the respondent's case that she and the appellant entered into a tenancy agreement on the 13.11.2017 over the suit premises at a fee of Kshs. 8,620.50 per week, that she deposited Kshs. 68,964 as security of the license fee and was a tenant for a period of one year during which time she paid rent.

3. The respondent further averred that upon the end of her tenancy he demanded for a refund of deposit of Kshs. 28,027 from the appellant and that on the 25.6.2019, the appellant issued her with a cheque for the full amount of deposit only to recall the same on the 28.6.2019 when it issued her with another cheque for Kshs. 21,027 which was less Kshs. 7,000 that the appellant purported was for the repair for the doors and lock adjustments.

4. The appellant filed its statement of defence dated 16th December 2019 denying the respondent's averments and placing him to strict proof. DW1, the appellant's Human Resource Manager testified that in addition to paying the rent according to the terms, the respondent was also supposed to reinstate the premises to its original condition.

5. DW1 admitted that they had given the respondent a cheque for Kshs. 28,027 which they later recalled and adjusted to Kshs. 21,027 taking into account the cost of the repair of the suit premises.

6. In its determination, the trial court found that contrary to the respondent's allegation that she had not been issued with a notice of the repairs undertaken by the appellant, the appellant had by a petty cash voucher dated 20.3.2019 informed her of the cost of repairs on the shop totalling Kshs. 7,000. The trial court thus awarded the respondent the remaining balance of Kshs. 21,027 as well as the costs of the suit with interest on both from the date of judgment until payment in full.

7. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 8th August 2023 raising the following grounds of appeal:

    1. The learned trial magistrate erred in law and fact by awarding interest on the decretal amount yet the same had been tendered/offered by the defendant; but the plaintiff refused the same.

    2. The learned magistrate erred in law and fact by awarding costs to the plaintiff whereas the defendant had proved that they offered the judgment amount before the suit began; which amount was rejected by the plaintiff.

    3. The learned magistrate erred in law and fact by awarding costs to the plaintiff yet the judgment amount was tendered in the defence and proved that it was rejected by the plaintiff.

    4. The learned magistrate erred in law and fact by applying that the costs followed the event; yet the defendant was successful in defending the suit for Kshs. 28,027 as it was vindicated in its action for deducting the Kshs. 7,000 used for repairs.

    5. The learned magistrate erred in law and fact by applying that the costs followed the event; yet the plaintiff was unsuccessful in proving that the amount due was Kshs. 28,027 but was instead awarded the initial amount offered by the defendant on 28.6.2019 before the institution of the suit on the 27.11.2019; this amount was also tendered on the 6.11.2019 by the defendant's advocate.

    6. The learned magistrate erred in law and fact by awarding costs yet the actions of the plaintiff is what necessitated the costs including costs by the defendant to defend the suit which costs by the judgment was unnecessary since both on 28.6.2019 and 6.11.2019 the defendant had offered the Kshs. 21,027; which amount if the plaintiff would have accepted, would have avoided the suit.

    7. The learned magistrate erred in law by not awarding costs of the suit to the defendant; where the defence was successful.

8. The respondent filed a cross-appeal dated 15th August 2023 vide HCCCA E139 of 2023, which appeal was consolidated with this appeal on 16/5/2024. The respondent's cross appeal raises the following grounds of appeal:

    1. That the learned trial magistrate erred in law and fact in awarding the plaintiff the remaining balance of Kshs. 21,027 instead of Kshs. 28,027 without taking into consideration that the

deduction of Kshs. 7,000 was done after the respondent ceased being a tenant and without notice to the respondent.

2. The learned trial magistrate erred in law and in fact in making a finding that the appellant was entitled to recover the cost of repair without taking the respondent's evidence that the respondent reinstated the premises to its original condition, inspection was done by the appellant's representative and the respondent allowed to leave the appellant's premises with the appellant's consent without notice of any deductions into consideration.

3. The learned trial magistrate erred in law and in fact by finding that the respondent was entitled to recover the cost of the repair, without taking into consideration that the said cost of repair was deducted way after the respondent had left the appellant's premises and without any notice to the respondent.

4. The learned trial magistrate erred in fact and in law in holding that the appellant through petty cash voucher dated 20.3.2019 informed the respondent of the cost of repairs on the shop up to a total sum of Kshs. 7,000 without taking into consideration the respondent's evidence that the said costs of repairs were not brought to the attention of the consent of the appellant after reinstating the premises to its original condition and allowed to peacefully vacate without any notice of further repairs.

5. The learned trial magistrate erred in fact and in law in taking into consideration the appellant's evidence of petty cash voucher dated 20.3.2019 cumulating the cost of repairs on the shop up to a total sum of Kshs. 7,000 despite the absence of the maker of the said petty cash voucher (Sammy Akanywera) being a witness eligible for cross-examination.

9. The parties agreed to canvass the appeal and cross appeal by way of written submissions.

The Appellant's Submissions

10. The appellant submitted that the respondent was not successful in his suit as he did not recover what he sought in the suit and that his success if any would be of a technical nature only considering that what he did recover was never in contention as it had been offered by the appellant and he declined.

11. It was further submitted that by his conduct, the respondent was not entitled to benefit in terms of the award on costs as well as interest as the same would not have been due to him had he accepted the appellant's cheque.

The Respondent's Submissions

12. It was submitted that in filing the suit, the respondent was not in any way guilty of any misconduct and as such there was no reason why the court ought to have denied declined to award him the costs as provided for under section 27 of the *Civil Procedure Act*.

13. The respondent further submitted that it was in the discretion of the court to grant interest as provided for under Section 26 of the *Civil Procedure Act* and as reiterated in the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited (No.2) (1970) E.A, 469 at 475.

Analysis and Determination

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first

hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013]* eKLR, the court stated as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

15. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> "A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

16. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, I find the issues for this court's determination to be:

    Whether the trial court erred in awarding the respondent the sum of Kshs. 21,027 as refund for the deposit.

    Whether the trial court erred in awarding the respondent costs of the suit with interest from the date of judgment till payment in full.

17. This court has therefore dealt with the issues under the separate heads as herein below.

Whether the trial court erred in awarding the respondent the sum of Kshs. 21,027 as refund for the deposit.

18. It is undisputed that the parties entered into a tenancy agreement on the 13.11.2017 at the end of which the respondent demanded for a refund of his deposit of Kshs. 28,027 from the appellant. It is also undisputed that on the 25.6.2019, the appellant issued the respondent a cheque for the full amount of deposit only to recall the same and on the 28.6.2019, the appellant issued the respondent another cheque for Kshs. 21,027 which was less Kshs. 7,000 that the appellant claimed was for the repair for the doors and lock adjustments.

19. The respondent alleged that she undertook repairs on the suit premises and as such, she returned the issued cheque to the appellant in its original form and that therefore the appellant ought not to have deducted the Kshs. 7,000 that it did for repairs. The respondent failed to adduce any evidence of the said repairs and therefore the trial court was left to rely on her words only.

20. In contrast, the appellant produced a receipt of Kshs. 7,000 for monies paid to one Sammy Akanywera for replacement of broken glasses and door locks as well as the labour charges.

21. It is trite that he who alleges must prove. The Court of Appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004]* eKLR stated that the evidential burden that is cast upon any party is the burden of proving any particular fact which he desires the Court to believe in its existence. That is what Sections 109 and 112 of the *Evidence Act* encapsulates 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."

22. In the instant case, the burden of proof lay on the respondent to demonstrate that she incurred expenses in restoring the suit premises to its original position and that therefore she was entitled to a refund of the entire deposit at the end of the tenancy, which she failed to do so and as such, I opine that she was not entitled to the full deposit claimed but rather less Kshs. 7,000 as granted by the trial court.

23. I find no reason to interfere with the trial court's award of refund of deposit of Kshs. 21,027. For that reason, therefore, the cross appeal on this aspect of the decision of the trial court fails and is dismissed.

Whether the trial court erred in awarding the respondent costs of the suit with interest from the date of judgement till payment in full.

24. The appellant impugned the trial court's award of costs and interest to the respondent on account that the respondent did not succeed in his claim as pleaded and further that had the respondent accepted the cheque of Kshs. 21,072 that the appellant had offered, then there would be no need for the instant suit.

25. The general rule on costs is set out in section 27 of the *Civil Procedure Act* which provides that:

> "Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

26. From the above provisions, although costs follow the event, they are awarded at the discretion of the court, which discretion must be exercised judiciously and not capriciously. In the case of *Supermarine Handling Services Ltd vs Kenya Revenue Authority, Civil Appeal No. 85 of 2006*, the Court of Appeal explained the circumstances that would lead an appellate court to interfere with the trial court's exercise of discretion thus:

> "Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule...".

27. In the instant case, it is my opinion that the appellant has not demonstrated to this court that the trial magistrate in awarding costs exercised her discretion unjudicially or on wrong principles.

28. The mere fact that the respondent refused to accept the initial payment of Kshs. 21,072 being the award eventually granted by the court is not enough to deny her costs of the suit and interest as the respondent disputed the amount she was owed and thus had a right to approach court to resolve the same and only after the court pronounced itself on what was due to her did the issue of costs arise. Holding otherwise would be an affront to the right to ventilate her grievance before the court, which right is guaranteed under Article 50(1) of *the Constitution* as read with Article 48 on the right to access justice. This is not to say that parties should file frivolous claims into court. In this case, there is no evidence that the claim was frivolous as the respondent was awarded her claim less kshs 7,000.

29. Accordingly, I find that the appellant's appeal dated 8th August 2023 and the respondent's cross-appeal dated 15th August 2023 both lack merit and I proceed to dismiss them.

30. Each party will bear their own costs of this appeal and cross appeal as dismissed.

31. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JUNE, 2024.

R.E. ABURILI

....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR