



Jorig Limited v Samuel Kamau Kirika t/a Ark Associate (Civil Appeal 320 of 2018) [2024] KEHC 9242 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9242 (KLR)

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

CIVIL

CIVIL APPEAL 320 OF 2018

S MBUNGI, J

JULY 30, 2024

BETWEEN

JORIG LIMITED APPELLANT

AND

SAMUEL KAMAU KIRIKA T/A ARK ASSOCIATE RESPONDENT

(This appeal arises from the judgment of the then Senior Resident Magistrate, Honourable P. Muholi, in Nairobi Milimani CMCC No. 5630 of 2014 delivered on 6th July, 2018)

JUDGMENT

Introduction

1. This appeal arises from the judgment of the then Senior Resident Magistrate, Honourable P. Muholi, in Nairobi Milimani CMCC No. 5630 of 2014 delivered on 6th July, 2018.
2. By a plaint filed on 23rd September, 2014 the Appellant herein, Jorig Limited who was the Plaintiff in the lower court sought a sum of kshs.1,262,104.60/= being rent arrears against the Respondent and costs of the suit plus interest.
3. The Respondent entered appearance on 20th May, 2015 and filed a defence on 9th June, 2015 in the trial court. The Appellant filed a reply to defence dated 11th June, 2015.
4. The Appellant said he was the owner and landlord of the premises known as Roughton Court Plaza, Hurlingham, Main Office No. 15 while the Respondent was alleged tenant in the said premises. The Appellant allegedly leased the premises to the tenant for a term of 5 years from 1st January, 2008 at a monthly rent of kshs.25,000/= increasing by 10% per annum for the remainder of the term payable two months in advance. The rent deposit amounted to kshs.25,000/=.



5. The lease expired in the month of November 2012. The Appellant pleaded that on or around December, 2012, realized that the respondent herein had closed the office and vacated without informing the Appellant.
6. The Appellant pleaded that during the alleged tenancy period, the Respondent breached the lease terms by failing to pay rent on time and when the lease period expired, the rent arrears amounted to kshs.1,964,700/=. Service charge amounted to kshs.98,235/= and VAT amounted to kshs.330069.60/ =.
7. The Appellant stated that the Respondent had acknowledged being in rent arrears in a letter dated 17th January, 2014 addressed to the Appellant's advocate in which he attached a cheque No.00123 dated 20th January 2014 for kshs.50,000/= as further payment.
8. The Appellant further stated that the Respondent has since failed to make any further payment to clear the rent arrears outstanding amounting to kshs.1,262,104.60/ =.
9. The matter was heard on 26th February, 2018 where the Plaintiff's Director one John Richard Githere testified in court on behalf of the Plaintiff. Both the defendant or his advocate was absent on the said date. The case was heard and a judgment was delivered on 6th July 2018.
10. The learned trial Magistrate held that the Plaintiff had failed to establish the existence of a relationship between the parties. The suit against the Defendant was dismissed by the Honourable court.
11. Being aggrieved by the decision of the trial court, the Appellant filed this appeal on the following grounds of appeal.
 - a. That the learned trial Magistrate erred in law and fact in arriving at a finding that the Plaintiff/Appellant had not proved its case on a balance of probabilities and proceeded to dismiss the case.
 - b. The learned trial Magistrate erred in law and in fact when making a finding that the Plaintiff/Appellant had not produced the tenancy agreement whereas the Appellant had produced the necessary documents to depict the existence of the tenancy and the Defendant/Respondent had admitted that there was a tenancy agreement.
 - c. The learned trial Magistrate erred in law and in fact when making a finding that there was no proof of the relationship between the parties which was clear and unambiguous from the pleadings and documents produced in court.
 - d. The learned trial Magistrate erred in law and in fact that for no evidence was tendered in court by the Plaintiff/Appellant to prove the said tenancy while the Defendant/Respondent did not attend court to give evidence and the Plaintiff/Appellant's evidence was not controverted.
 - e. The learned trial Magistrate erred in law and in fact in failing to arrive at a finding that the Plaintiff/Appellant had proved his case on a balance of probabilities as the Defendant/Respondent did not give evidence.
 - f. The learned trial Magistrate erred in law and in fact in holding that the plaintiff /appellant should pay the costs whereas the defendant/respondent did not attend at the hearing.
 - g. The learned trial Magistrate erred in law and in fact in dismissing the Plaintiff /Appellant suit.
 - h. The learned trial Magistrate erred and misdirected himself in law and in fact in failing to take into account the evidence adduced, all the documents filed in court and relying solely on his own conjectures and hypotheses to arrive at the wrongful judgment.



12. The Appellant in his appeal sought that: -
 - i. The appeal be allowed.
 - ii. The judgment in Nairobi civil suit no. 5630 of 2014 be set aside.
 - iii. The judgment be entered for the appellant.
 - iv. The appellant be awarded costs of the appeal
 - v. Costs and interest.
13. The Respondent did not file a response to the appeal though it is noteworthy that the respondent did not participate in the hearing before the lower court though he had filed a statement of defence.
14. This being a first appeal, this Court has the duty to analyse and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. 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. I have looked at the grounds of appeal, the judgment of the lower court, proceedings, pleadings and submissions filed by the appellant.
16. From the above to me the issues for determination are:
 - i. Was there a landlord tenant relationship between the appellant and the Respondent.
 - (ii) If it was there was the respondent in arrears and if so for how much.
 - (ii) Who is to bear the costs, both the lower court proceedings and the appellate proceedings

Determination

17. In dismissing the appellants suit the lower court observed

“in contractual matters, it is important to show that there was a relationship between the two parties. The Plaintiff in discharging its duty must show that the defendant was a tenant. That threshold has not been met in this case. There is no tenancy agreement setting out the terms of the engagement, there is not proof of the relationship between the parties.”
18. Lease agreement can be both in writing, oral or implied; Cause 852/2017 (ELR) Benjamin Joseph Omusamia claimant and Upperhill, Springs Restaurant (Respondent). Held – Part 4.
19. The trial court dismissed the appellants claim because the appellant did not produce or demonstrate existence a tenancy agreement setting out the terms of engagement
20. The trial court reasoned that there must be a tenancy agreement to show that there was landlord tenancy relationship between the appellant and the Respondent.
21. It is true that the Appellant never produced any written tenancy agreement, this failure is not a complete evidence that there was no landlord and tenancy relationship between the appellant and



- the Respondent for such a relationship can be inferred from the conduct of the parties 141 of 2019, County Government of Migori – Appellant versus Hope Self-help group – Respondent.
22. The Appellant produced two letters, one dated 9th January, 2014 ref: JKK/JRG/4936/2014, written by Kingori Kariuki and Company Advocates for the Appellant and addressed to Mr. Samwel Kamau Kirika, T/A Ark Associates. C/O M/S Kangethe and Associates - Nairobi and another one dated 17th January, 2014, written by Samwel K. Kirika, P.O. Box 40868-00100 Nairobi, Phone No. 0722-574906, addressed to Kingori Kairuki & Company Advocates. P.o. Box 46765-00100- Nairobi.
 23. The Appellant’s case was anchored on the two letters plus a statement titled Ark Associates showing a breakdown of how the Respondent allegedly paid the rent and how much he was owing.
 24. The statement shows that payments sometimes were allegedly made in cash and other times through cheques.
 25. The production of these three documents as exhibits to me, the plaintiff discharged his legal and evidential burden as required by Section 106 and 107 ...
 26. When a party discharges both legal and evidential burden, now the burden shifts to the party who would loose if no further evidence is adduced to rebut. In the case of *[Raila Amolo Odinga and another versus the Independent Electoral and Boundaries Commission and 2 others](#)*.
 27. The Respondent filed a statement of defence denying the appellants claim, the never appeared during the hearing before the Lower Court to substantiate the averments contained in the statements of defence, therefore those averments remained mere allegations and denials. In the case of *[Motex Knitwear Limited versus Gopitex Knitwear Mils Limited](#)* 2009 eKLR.
 28. Failure to substantiate the averments it meant that the respondent did not discharge his evidential burden. The Appellants evidence as tenant before the lower court remained unchallenged or un rebutted.
 29. Therefore, to me the trial court erred when the court did not appreciate the evidential value of the three documents produced as exhibits and the fact that the Defendant did not appear in court and lead evidence to contradict or rebut the evidence presented by the appellant. If the trial court had given due consideration to this it would have arrived into a different conclusion.
 30. It is trite law in civil cases the proof is on a balance of probabilities but not beyond reasonable doubt as in criminal cases.
 31. To me the production of the three documents referred to herein above by the appellant in absence of any other contradictory evidence they are enough to make the court infer an existence of landlord tenant relationship between the Appellant and the Respondent.
 32. I therefore find the appeal has merit, I do allow the appeal and allow prayer (a) and (b) sought by the Appellant in a Nairobi Civil Suit No. 5630 of 2014.
 33. On the issue of costs, cost follow event. Section 27 of the *[Civil Procedure Act](#)* provides subject to such conditions and limitations as may be prescribed and to the provisions of any Law for the time being in force the cost of and incidental to all suits shall be in discretion of the court judge and the court or judge shall have full power to determine by whom an doubt of what property and to what extend such costs are to be paid and to give all necessary direction for the purposes a fore said, and the fact that the court or judge has no jurisdiction to try the suit shall be bar to the exercise of those powers. The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum and such interest shall be added to the costs and shall be recoverable as such.



34. Therefore, the Appellant shall have the costs of the appeal and also the costs in the lower court.

35. Right of appeal within 30 days.

**DELIVERED, SIGNED AND DELIVERED IN KAKAMEGA ON THE 30TH DAY OF JULY, 2024
BY**

.....

HON MR. JUSTICE S. MBUNGI

JUDGE

In the Presence/Absence of;

Advocate- Mureithi – Present

Respondent /Advocate- Absent

Court Assistant – Elizabeth Angong'a- present

