Kiburu v Boma Mart Ltd & 2 others (Civil Appeal E628 of 2021)
[2024] KEHC 9986 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9986 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E628 OF 2021

S MBUNGI, J

JULY 30, 2024

BETWEEN

JOSEPH KIBURU ..... APPELLANT

AND

BOMA MART LTD ..... 1ST RESPONDENT

BEDAD KUBAI GATHUKU ..... 2ND RESPONDENT

IRENE WAIRIMU GICHUGA ..... 3RD RESPONDENT

(This appeal arises from the judgment of Hon. D.M Kivuti (Principal Magistrate) delivered on 10.9.2021 in the Chief Magistrates Court at Nairobi, Milimani commercial courts in Civil Suit No. 9519 of 2019)

JUDGMENT

1. This appeal arises from the judgment of Hon. D.M Kivuti (Principal Magistrate) delivered on 10th July, 2021 in the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts in Civil Suit No. 9519 of 2019.

2. The Appellant and the 1st Respondent had entered into a lease agreement dated 28th September 2016 where the Appellant leased part of his property known as LR. No. 11668/4 to the 1st respondent. The 2nd and 3rd Respondent were the guarantors of the 1st Respondent.

3. The Appellant and the 1st Respondent differed which made the 1st Respondent file suit No.9519 of 2019 seeking prayers: -

    a. An order of permanent injunction restraining the Defendants, their servants, agents and or employees, the auctioneer's employees or servants be restrained from levying distress

and effectuating any proclamation on the Plaintiff's goods, disturbing the Plaintiff's quiet possession and tenancy over LR No. 11668/4 Kiambu road being the main house and its compound thereof in any way whatsoever or in any manner howsoever.

b. An order to offset rent arrears owed and indemnify the remaining balance of kshs.753,000/ = to the Plaintiff.

c. A declaration that the distress for rent by the appellant is null and void and in breach of the lease agreement

d. Costs and interest of the suit at court's rate.

e. The Appellant proceeded to raise a defence and filed a counterclaim against the 1st, 2nd and 3rd Respondent. In the counterclaim, the appellant sought that: -

    a. The Respondents be found jointly and severally liable for kshs.1,628,000 plus interest at 2% per month from the dates of arrears of rent.

    b. All future rent that accrues until the tenant vacates the premises No.LR no. 11668/4

    c. An order that the 1st Defendant to the counter claim vacates the premises known as LR no. 11668/4 or be forcefully evicted therefrom.

    d. Costs of the suit and counter claim together with interest.

f. After considering the case of all parties in the primary suit and the counterclaim, it was the learned magistrates finding that the Plaintiff's case succeeded and the Appellant's counterclaim failed.

g. The Appellant being dissatisfied with the judgment lodged appeal against the whole judgment seeking the following orders: -

    i. The Appellants counterclaim suit in the subordinate court be allowed and judgment be and is hereby entered for the appellant in the sum of kshs.1,628,000 plus costs and interest as prayed in the counter claim

    ii. The Respondents suit in the subordinate court be dismissed with costs.

4. The Appellants grounds of appeal as filed in his memorandum of appeal are: -

    a. The existence of a lease agreement and terms thereof was not disputed.

    b. There was indeed rent arrears owed by the Respondents to the Appellant in the sum of Kshs. 1,628,000.

    c. According to the lease agreement any improvements to the leased premises by the tenant required express written authority by the landlord which was not given.

    d. Such improvement would become the property of the landlord without compensation from the landlord to the tenant.

5. The court directed the appeal be disposed off by way of written submissions. The appellant filed at the time of writing the judgment the respondent had not filed, therefore the judgment has been written without the benefit of the respondents' submissions.

6. I have looked at the record of appeal, the pleadings filed in the lower court, judgment and submissions filed by the Appellant.

7. The Appellant has set out two issues for determination:

   a. Whether the learned Magistrate erred in law and /or in fact in holding that the respondents were entitled to offset the alleged cost of improvements against the rent arrears.

   b. Whether the learned Magistrate erred in law and/or in fact in disallowing the appellants claim for rent arrears as raised in is counterclaim

Determination

8. This being the first appeal, it is the duty of the Honourabe court as the first appellant court, to re-examine, re-evaluate, and reconsider the evidence a fresh and make its own conclusion on it. This was the holding of the court of appeal in *Okeno v Republic* (1972) EA 32 as thus; An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. Republic*) (1957) EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala V. Republic* (1957) EA 570.) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See. *Peters v. Sunday Post*, (1958) EA 424)."

9. I have looked at the lower court judgment, the court listed the following issues for determination: -

   i. Whether there was in existence on valued tenancy agreement.

   ii. Whether the Plaintiff is in rent arrears.

   iii. Whether three was renovation carried out on the rental premise

   iv. Whether the renovation if any were authorized.

   v. Question of cost.

10. The trial court in its judgment answered issue one, issue two, issue three in affirmative

11. The question was whether the renovation were authorized by the appellant.

12. In the judgment the trial court pronounced itself as follows:

> "..... From the document exhibited in support of the claim it's .... obvious that ascertain renovation were carried out by the plaintiff on the rental premises the lease provided for consent prior to this engagement. I would look at the conduct of the parties in this agreement and without being seek to rewrite the parties our contract there is an overwhelming doctrine of conduct stopped that this court cannot ignore the improvement renovation was carried out with the knowledge of the landlord, there was no resistant and objection or exclusion by the landlord when the alternation. This alteration were being done the..... claimed as costs for renovation were not challenged in evidence. I therefore find that renovation was carried out the amount expended at the end of lease period are reversible from the landlord as the premises would be left intact upon surrender of the ... "

13. From the above pronouncement the trial court invoked the doctrine of conduct to oust clear and express provision of the lease agreement.

14. Regarding the issue of improvements to the suit premises, clause 3(q)of the lease agreement provides that the tenant (The 1st respondent herein shall:

> " not make without the previous written consent of the landlord first had and obtained any alterations or additions in or to the said premises. If the landlord shall grant its consent then the following provisions shall apply:
>
> i. .....
>
> ii. .....
>
> iii. all alterations, installations or improvements carried out in, upon or to the said premises shall unless the landlord elects otherwise (which election shall be made by giving notice in writing to the tenant thirty (30) days prior to the expiration of the term or sooner determination) become the property of the landlord at the end of the term hereby created or sooner determination thereof and the landlord shall not be liable to pay the tenant any compensation thereof;"

15. From the evidence on record, there is no evidence adduced by the respondent to show that such consent was sought from the Appellant by the 1st respondent and granted by the Appellant.

16. The Appellant cited court of appeal decision in *National Bank of Kenya Ltd v PipeplasticSamkolit (K) Ltd & Another* (2001) eKLR, where it was stated that:

> " A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not theremotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shar JA in the case of *Fina Bank Limited v Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported): "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

17. Therefore, the Appellant and the 1st Respondent are bound by the terms of the lease agreement they entered into on the 28th September, 2016. This was a written lease agreement so neither oral or implied agreement by conduct could alter the terms of the written agreement .....

18. From the above it is clear that the trial court erred when it invoked the doctrine of conduct to alter clear terms of the lease agreement. The 1st Respondent was in breach of the lease agreement when he did the renovation without the written consent of the appellant.

19. Since the 1st Respondent did the alterations/improvements without the consent of the appellant the only logical thing is for the 1st Respondent to remove the improvements and restore the premises to the condition it was before he occupied and be open to be sued for breach of contract by the appellant.

20. Further, the 1st Respondent did not strictly prove the amount spent for the improvements for the claim is specific in nature. I find guidance in the case cited by the appellant in the case of *Aliff Construction*

Company Limited v County Government of Tana River & another (2019) eKLR, the court of appeal held that:

> " As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. See Sections 107 & 108 of the evidence act. In other words, the well- known aphorism, 'he who asserts must prove.' See *Jennifer Nyambura Kamau v. Humphrey Mbaka Nandi* (2013) eKLR .....it is instructive to note that in as much as the 1st Respondent did not participate in the hearing; the Appellant was still required to meet the burden of proof. Did the appellant discharge the burden? We do not think so."

The court proceeded to stat that:

> " Secondly, like the learned judge, we find that the appellant's claim was in the nature of special damages which should not only be pleaded but also strictly proved. The mere production of receipts without trying or connecting them to a claim of special damages is not enough. Proof of special damages must be clear. In this case, the appellant did produce several documents the bulk of which related to salary vouchers and car hire payments. How those documents related to unpaid extra work, we do not know.... furthermore, the schedules prepared by the Appellant's director setting out the amount of money owing cannot, in our minds, be sufficient to strictly prove the claim. There is no independent evidence with regard to the same. In our view, the claim of special damages was not established."

21. The trial court found that indeed there was rent arrears owed by the 1st Respondent, the appellant in the sum of kshs.1,628,000/= has claimed in the counter claim but proceeded to order that the rent arears be offset with the cost of improvement made by the 1st respondent on the premises.

22. The lease agreement never provided for the offsetting of the costs of the improvements with rent due to the Appellant, therefore the trial court erred by arriving to such a decision.

23. The Appellant was entitled to be paid the rent arrears as claimed in the counter claim.

24. The 2nd and 3rd Respondent were the guarantors of the 1st Respondent they executed a guarantee as follows: -

> " .... jointly and severally agree with and guarantee to the landlord that at all material times so long as the term hereby granted is vested in the tenant, the tenant will pay the rent herein reserved and all other sums hereby covenanted....and that the Guarantors and each of them will pay and make good to the landlord all losses costs and expenses sustained by the landlord through the default of the tenant..." This made them equally liable for any rent unpaid.

25. Having found that the trial court was wrong in invoking the doctrine of conduct to make a finding that the Appellant had by conduct consented to the improvements made by the1st respondent on the lease premises a conclusion which led to an order of offsetting rent arrears with the costs of the improvements. It means that the Appellant counter claim suit in the lower court was improperly dismissed.

26. In the upshot above, I find that the appellant appeal succeeds. The appeal is allowed and judgment of the lower court is set aside and a judgment is entered in favour of the Appellant as prayed for in the counter claim together with costs and interest. The Appellant shall also have the costs of this appeal.

27. Right of appeal 30 days.

DELIVERED, SIGNED AND DATED THE 30TH JULY, 2024 AT KAKAMEGA HIGH COURT

HON. JUSTICE S. MBUNGI

JUDGE OF THE HIGH COURT

In the presence/absence of:-

The Appellant/Advocate- Advocate Odek- present

1st Respondent/Advocate- Absent

2nd Respondent/Advocate- Absent

3rd Respondent/Advocate – Absent

Court Clerk- Elizabeth Angong'a