



**Nderitu v Real Management Services (2002) Ltd & another (Civil Appeal E926 of 2022) [2024] KEHC 12254 (KLR) (Civ) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12254 (KLR)

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

**CIVIL**

**CIVIL APPEAL E926 OF 2022**

**MA OTIENO, J**

**SEPTEMBER 26, 2024**

**BETWEEN**

**NANCY NJERI NDERITU ..... APPELLANT**

**AND**

**REAL MANAGEMENT SERVICES (2002) LTD ..... 1<sup>ST</sup> RESPONDENT**

**HEBROS AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

*(Being a partial appeal from the judgement of the Honourable Hon. S.A. Opande, PM delivered on 11th October 2022 in Milimani CMCC No. E1998 of 2021)*

**JUDGMENT**

1. This is an Appeal from the lower court's judgment of 11<sup>th</sup> October 2021 in the Nairobi CMCC No. E1998 of 2021 in which the trial magistrate dismissed the Appellant's prayer for special damages of Kshs. 1,763,400 plus costs and interest against the Respondents.
2. The genesis of the claim before the trial court was a tenancy relationship between the Appellant and the 1<sup>st</sup> Respondent over shop No. 2 on LR No. 209/1418/1 in Ngara, Nairobi. The appellant claimed that upon taking possession of the unit, she made improvements thereon of Kshs. 1,763,400/= in form of fixtures and fittings. That sometime in 2020, the Appellant fell into rent arrears leading the 1<sup>st</sup> Respondent's instructions to the 2<sup>nd</sup> Respondent, an auctioneering firm, to attach and sell the Appellants goods in distress for rent. However, in the process executing their instructions, the 2<sup>nd</sup> Respondent proceeded to attach the fixtures and fittings (which included gypsum walls and decorative gypsum ceiling) were not part of the movable goods expressly listed in the proclamation notice of 6<sup>th</sup> October 2020 which the 2<sup>nd</sup> Respondent had served on the Appellant.



3. The suit was opposed by the Respondents vide their statement of defence and Counterclaim dated 5<sup>th</sup> April 2021 where they generally denied the Appellant's allegations against them and further counterclaimed from the Appellant, a sum of Kshs. 544,203/= for outstanding rent, Kshs. 64,000/= for repair and reinstatement costs, Kshs. 64,430.62/= as outstanding electricity bill and Kshs. 3,629.20/= being outstanding water bill.
4. On 11<sup>th</sup> October 2022, after hearing the parties, the trial court delivered its judgment dismissing the Appellant's claim against the Respondents on the basis that the receipts presented by the Appellant in proving her case could not form the basis of the claim since the receipts were not electronic tax register (ETR) generated.

### **The Appeal**

5. Aggrieved by the portion of trial court's judgment dismissing her claim, the Appellant vide her memorandum of appeal dated 10<sup>th</sup> November 2022 lodged an appeal to this court raising four grounds of appeal against the judgment that; -
  - i. The learned Magistrate erred in law by failing to consider the evidence tendered in court in support of the Plaintiff's case hence arriving at an erroneous finding.
  - ii. The Learned Magistrate erred in fact in failing to consider admitted facts that the Plaintiff made improvements in the premises which were carted away by the defendants and never returned.
  - iii. The learned Magistrate misdirected by dismissing the Plaintiff's case on a technical extraneous issue of receipts despite the Defendant admitting that the improvements were made on the premises by the Plaintiff.
  - iv. The learned Magistrate erred in law in failing to find that the Plaintiff has satisfied its standard of proof on a balance of probabilities.
6. The Appellant therefore prayed that: -
  - a. The appeal be allowed
  - b. The judgment of the lower court delivered on the 11<sup>th</sup> October 2022, be set aside partially with regards to dismissal of the Plaintiff's suit.
  - c. The Plaintiff's suit be allowed as prayed in the Plaint dated 22<sup>nd</sup> March 2021.
  - d. The costs before the appeal
  - e. Any other further order the court may think just and fair in the circumstances of the case.
7. From a careful review of the grounds of appeal as presented by the Appellant in this appeal for determination is whether the trial court erred in its appreciation of the evidence submitted by the Appellant in proving her against the Respondents at trial.

### **Submissions**

8. At the hearing of the appeal, the parties took directions to have the same canvassed by way of written submissions. The Appellant filed her submissions dated 8<sup>th</sup> April 2024 whilst the Respondents filed theirs dated 5<sup>th</sup> June 2024.
9. The Appellant in support of the appeal submitted that the trial court erred in its conclusion that the receipts adduced in evidence by the Appellant in support of her case against the Respondents were



not admissible in evidence since they receipts were not Electronic Tax Register (ETR) generated as provided under the *Value Added Tax Act*, 2013 Laws of Kenya. According to the Appellant, there exists no requirement in law that a receipt must have a VAT element or that they must be ETR generated to be admissible in evidence.

10. The Appellant asserted that the quotation dated 15<sup>th</sup> February 2018 from the contractor, Pro Concepts Studio, indicating a scope of works as Kshs. 1,763,400/= and the three Payment receipts for Kshs. 529,020/=, Kshs. 352,680/=, and Kshs. 881,700/= in respect thereof from the said contractor submitted in support of her claim meets sufficiently demonstrated the economic injury suffered as per the decision in *Hydro Water Well (K) Limited v Sechere & 2 others* (Sued in their representative capacity as the officers of Chae Kenya Society) (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR)).
11. It was further the Appellant's submissions that she had at trial, sufficiently proved her case against the Respondents that the attachment and subsequent removal of the fixtures was unlawful since the fixtures were not part of the items that were proclaimed as per the proclamation notice dated 6<sup>th</sup> October 2020 from the 2<sup>nd</sup> Respondent, which the Appellant produced in evidence. The Appellant placed reliance on the case of *Kanyungu Njogu Vs Daniel Kimani Maingi* [2000] eKLR as to the burden and standard of proof.
12. The Respondents on the other hand supported the trial court's findings and reiterated their submissions at trial. While admitting that the 2<sup>nd</sup> Respondent through the instructions of the 1<sup>st</sup> Respondent proceeded and attached the Appellant's goods in the process of distress for rent, the Respondents denied that they irregularly and illegally damaged the plaintiff's fixtures and partitions which were not distrainable as had been claimed by the Appellant in the suit before the trial court.
13. It was further the Respondents' case that the Appellant did not prove in evidence before the trial court that there were fixtures in the shop and that those fixtures were actually attached, removed or destroyed by the 2<sup>nd</sup> Respondent as was alleged in the plaint. The Respondents dismissed the allegations by the Appellant that fixtures were removed by the Respondents as mere heresy which is not admissible in evidence. Reliance was placed on the case of *Patel v. Comptroller of Customs* (1965) 3 AII ER 593 in that regard. The Respondents further submitted that in any event, the Appellant did not adduce any evidence at trial that she had communicated to the landlord, in the course of the tenancy, that there were any improvements she had done to the premises as per clause 3(g) of the tenancy agreement. The Respondents also reiterated their submissions and supported the trial court's finding that the receipts submitted by the Appellant in support of their claim were not ETR generated as required under the VAT Act and are therefore not admissible in evidence.
14. Finally, the Respondents closed their submissions by citing the case of *Samuel Kipkorir Ngeno & Another –versus- Local Authorities Pension Trust (Registered Trustees) And Another* (2013) eKLR and stating that the Appellant having defaulted in her obligation under the tenancy agreement as to the payment of rent when due, is not deserving the court's protection. Consequently, the Respondents prayed that this appeal be dismissed with costs in their favour.

### **Analysis and determination**

15. This being a first appeal, this court is obligated to re-assess, re-evaluate and re-examine the evidence which was adduced in the subordinate court both on points of law and facts and come up with its own findings and conclusions. [See: Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424]. In so doing this court must take into account that it had no opportunity to hear and see witnesses testify first hand and therefore must make an allowance for that. (See: *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968 (E.A. 123)).



16. Having considered and analyzed the pleadings and the evidence adduced before the trial court by the parties herein, as well as parties' respective submissions in this appeal, it is my view that the main issue for determination is whether the Appellant proved its case against the Respondents on balance of probability at trial. I will also address the issue of whether the trial court erred in finding that the receipts submitted by the Appellant at trial were not admissible in evidence, the same having not been ETR generated.
17. The standard of proof required in civil cases is on a balance of probability. Section 107 of the [Evidence Act](#), Chapter 80 of the Laws of Kenya, is explicit that the burden of proof is on he who alleges. The provision states that: -
- “ 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
18. Further, Section 108 of the [Evidence Act](#) provides that:
- “The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”
19. The burden and standard of proof in civil cases was discussed in the case of Ignatius Makau Mutisya Vs Reuben Musyoki Muli [2015] eKLR where the court, while quoting Lord Denning in Miller –vs.- Minister Of Pensions [1947]2 All ER 372, stated as follows; -
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”
20. Similarly, in Mbuthia Macharia vs Annah Mutua & Another [2017] eKLR the court stated as follows on the incidence of the legal and evidentiary burden of proof and the shifting thereof; -
- “The legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.....”
21. From the above, it is evident that the Appellant, being the plaintiff in the lower court, had the initial legal and evidentiary burden to prove her case on a balance of probability against the Respondents. It is only after the Appellant discharged that burden that the evidentiary burden was expected to move to the Respondents to adduce evidence in rebuttal. In [Golden Cara Investments Limited v Commissioner](#)



*of Domestic Taxes (Tax Appeal E078 of 2023)* [2024] KEHC 5570 (KLR), Majanja J. stated that the burden of proof is like a pendulum and that the onus of proof may shift based on the stage of the proceedings and actions taken by the parties. He stated as

“This “pendulum of proof” swings at least twice and at most thrice; the first is when the Commissioner asserts its position and the tax payer is expected to disprove this position. Once the taxpayer states its position, the pendulum swings to the Commissioner who then reviews the position taken by the taxpayer. If it is determined that the position taken by the taxpayer is devoid of evidence or that the evidence is insufficient, incompetent and irrelevant, then the pendulum swings back to the taxpayer to prove that the Commissioner was wrong in its position and overall findings.”

22. The Appellant case in the lower court was that the 2<sup>nd</sup> Respondent in the course of executing the 1<sup>st</sup> Respondent’s instructions, maliciously demolished and damaged the Appellant’s private property – fixtures and fittings, being the improvements, the Appellant had made to the demised premises pursuant to clauses 3(g) and 3(i) of the lease agreement.
23. The main issue taken by the Appellant in this appeal is that the trial court erred in its finding that the receipts produced by the Appellant in support of her claim were not ETR generated and were therefore not admissible in support of the claim. I have reviewed the proceedings, the receipts in question as well as the applicable law and note that the finding by the trial court is not supported in law. Under Section 5 of the Value Added Tax (VAT) Act, VAT can only be charged by registered persons and therefore if a trader is not registered, no VAT is chargeable and consequently no ETR receipt can be generated and or issued by such a trader. The section provides that; -

“5. Charge to tax

- (1) A tax, to be known as value added tax, shall be charged in accordance with the provisions of this Act on—
  - (a) a taxable supply made by a registered person in Kenya;
  - (b) the importation of taxable goods; and (c) a supply of imported taxable services.
- (2) The rate of tax shall be—
  - (a) in the case of a zero-rated supply, zero per cent; or
  - (b) in any other case, sixteen per cent of the taxable value of the taxable supply, the value of imported taxable goods or the value of a supply of imported taxable services.
- (3) Tax on a taxable supply shall be a liability of the registered person making the supply and, subject to the provisions of this Act relating to accounting and payment, shall become due at the time of the supply
- (4) The amount of tax payable on a taxable supply, if any, shall be recoverable by the registered person from the receiver of the supply, in addition to the consideration. [emphasis mine]



24. Further, section 34 of the VAT Act stipulates that the threshold for VAT registration as a supply of five million or more in any period of twelve months. The section provides as follows; -

“ 34. Application for registration

(1) A person who in the course of a business—

(a) has made taxable supplies or expects to make taxable supplies, the value of which is five million shillings or more in any period of twelve months; or

(b) is about to commence making taxable supplies the value of which is reasonably expected to exceed five million shillings in any period of twelve months, shall be liable for registration under this Act and shall, within thirty days of becoming so liable, apply to the Commissioner for registration in the prescribed form. [emphasis mine]

25. From the above, it is clear that not all traders are in law authorized to charge VAT. To levy VAT, a taxpayer must be one who meets the monetary threshold under section 34 of the Act and has applied and obtained registration under the Act.

26. In the instant case, there was nothing on record to show that the Appellant’s interior designers (Pro-Concept Studio) who issued the receipts were in fact registered for VAT under the VAT Act. Consequently, it was therefore an error in law on the part of the trial court to reject the receipts solely on the basis that the receipts were not ETR generated.

27. Further, the charging and accounting for VAT by registered taxpayers is a complex process which in my view should not be a precondition for accepting receipts in evidence in ordinary civil proceedings. The position may obviously be different when it comes to tax disputes where there the law is clear that only ETR generated receipts are admissible.

28. However, to be successful in her claim against the Respondents, the Appellant needed to prove that she had actually installed the fixtures and fittings to the subject premises as envisaged under Clause 3(g) and 3(i) of the Lease Agreement and that those fixtures and fittings were unlawfully removed by the Respondents.

29. As to whether the fittings and fixtures were actually installed by the Appellant in improvement of the demised premises, I note from the proceedings that Mr. Boyani Kamau who is the 1<sup>st</sup> Respondent’s maintenance manager, testified for the Respondents as RW1 and admitted on cross-examination that he had visited the premises prior to the distress and established that the Appellant had indeed made the improvements as alleged. Consequently, this being an admitted fact, it shall be deemed to have been satisfactorily proved by the Appellant.

30. Regarding the Appellant’s allegation that the 2<sup>nd</sup> Respondent unlawfully removed the fixtures and fittings, the Appellant in evidence her evidence produced a proclamation notice dated 6<sup>th</sup> October 2020 from the 2<sup>nd</sup> Respondent indicating that the fixtures and fittings were not part of the items that had been proclaimed and could not therefore be attached.

31. The Respondents, while admitting that the fixtures and fittings had not been proclaimed, denied ever attaching the same. The Respondents further argued that the Appellant had not sufficiently proved that the fixtures and fittings were indeed removed by the 2<sup>nd</sup> Respondent as alleged.



32. I have reviewed the evidence adduced by the Appellant in support of her allegation that the Respondents unlawfully removed the fixtures and fittings and note that there is nothing on record to support the Appellant's case that the fixtures and fittings were unlawfully removed and or attached by the Respondents. Both the proclamation notice dated 6<sup>th</sup> October 2020 and the schedule of movable property attached as per the attachment notice of 27<sup>th</sup> October 2020 produced in evidence by the Appellant have nothing in them supporting the Appellant's claim. There is no material produced in evidence showing that fixtures and fittings which included gypsum ceiling, electrical works and plumbing works as per the quotation dated 15<sup>th</sup> February 2016 from the Appellant's interior designers, Pro-Concept Studio, were actually removed and attached by the 2<sup>nd</sup> Respondent.
33. From the foregoing and looking at the totality of the evidence in this matter, this court agrees and upholds the Appellant's position that the trial court committed an error of law in rejecting the receipts on account that they were not ETR generated. The Appeal therefore succeeds in that regard.
34. However, in view of the fact that the Appellant failed to sufficiently demonstrate by way of evidence that the 2<sup>nd</sup> Respondent actually removed the fixtures and fittings as alleged in the Plaint dated 15<sup>th</sup> October 2020, I still dismiss the Appellant's claim.
35. This Appeal having partially succeeded, I hereby direct that each party to bear their own costs of this appeal.
36. It so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024**

**ADO MOSES**

**JUDGE**

In the presence of: -

C/A – Moses

Gichuki Nderitu.....for Appellant

N/A.....for Respondent.

