



Baharini Plaza Limited v Mutuku t/a Diani Data Tours & Travel Centre (Civil Appeal E105 of 2023) [2024] KEHC 13286 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E105 OF 2023
JK NG'ARNG'AR, J
OCTOBER 30, 2024**

BETWEEN

BAHARINI PLAZA LIMITED APPELLANT

AND

**BRUCE MUTIE MUTUKU T/A DIANI DATA TOURS & TRAVEL
CENTRE RESPONDENT**

*(Being an appeal against the Judgment of Hon. Sandra Ogot (PM)
delivered on 17th April 2023 in Msambweni Magistrate's Court Civil
Suit No. E105 of 2021, Baharini Plaza Limited v Bruce Mutie Mutuku)*

JUDGMENT

1. The background of the appeal through an Amended Complaint dated 18th August 2022 is that at all material times, the Appellant was the manager of the premises known as Baharini Plaza Limited. That the Respondent entered into a lease agreement dated 12th June 2009 with Ashburton Groove Ltd for lease over the said premises at a monthly rent of Kshs. 30,000 plus service charge and VAT payable in advance. That pursuant to the lease, the Respondent took possession of the premises and put up his tours and travel business. That it was the express and/or implied term of the contract that service charge payable on a monthly basis to Baharini Plaza Limited is Kshs. 4,500 exclusive of VAT which would be reviewed from time to time by the manager, that the lessee was to pay the service charge as demanded by the manager and the electricity bills and also to settle all accruing bills relating to the leased premises punctually and to provide proof of all payments prior to claiming a refund for the deposit upon termination, and that in default of payment of the amounts as and when they fell due, the Respondent would be liable to pay interest thereon at commercial rates.
2. That the Appellant's principal claim against the Defendant was for the unpaid sum of Kshs. 334,738 being the service charge payable on the premises which had accrued on diverse dates between December 2015 to date and Kshs. 231,000 being the service charge offset by the Landlord (Ashburton Grove



Limited) to the manager/Plaintiff herein on two different times being Kshs. 188,900 and Kshs. 42,100 totalling to Kshs. 565,738.00. The Appellant prayed for judgment to be entered against the Respondent for the sum of Kshs. 565,738.00, interest at commercial rates prevailing from time to time from the respective due dates until payment in full, costs of the suit and interest thereon at court rates, and such other or further relief that this court may deem just to grant.

3. The suit was heard in the trial court and judgment delivered on 17th April 2023 where the court found that there was no contract written or oral between the Appellant and the Respondent and that then there could be no breach of the same by the Respondent as against the Appellant. On whether the Plaintiff was entitled to be compensated for the loss and damage suffered, the court ordered that as he was paying rent and service charge to his agent, then a claim could be made to the agent for the accrued service charge owed to the Plaintiff. The suit was therefore dismissed with costs.
4. Being dissatisfied, the Appellant appealed against the judgment through the Memorandum of Appeal dated 5th May 2023 on grounds that the learned trial magistrate erred both in fact and in law in ignoring and/or failing to consider the Appellant's evidence adduced, submissions and the authorities cited properly on record, without legal reason and authority which led to gross miscarriage of justice, that the learned trial magistrate erred in law in excluding imperative evidence tendered in court contrary to the procedural requirement that facts in issue to be determined by all evidence before her in its entirety, that the learned trial magistrate considered irrelevant factors that were never pleaded and/or were farfetched in making her decision, that the learned trial magistrate erred in law and in fact in misapprehending facts tendered before her, that the learned trial magistrate erred in determining the matter in favour of the Respondent, despite the Appellant producing in court overwhelming evidence that the Respondent was and is still indebted to the Appellant, occasioning substantial loss to the Appellant, that the learned trial magistrate erred in not holding that the Appellant had strictly proven its claim on a balance of probabilities, that the trial magistrate erred in her evaluation and analysis of the evidence adduced and in not appreciating the weight of the Appellant's testimony properly, equitably judiciously and sufficiently or at all and further erred in drawing the inference she did, adverse to the Appellant's case, and that the trial magistrate ought in all the circumstances to have allowed the Appellant's case.
5. The Appellant prayed for orders that this appeal be allowed, that the judgment and decree of the trial magistrate issued on 17th April 2023 and 25th April 2023 respectively be reversed and set aside, that an order be made allowing the Appellant's case with costs, and that the costs of this appeal be awarded to the Appellant.
6. The appeal was canvassed by way of written submissions. The Appellant filed submissions dated 22nd February 2024 and the Respondent filed submissions dated 16th April 2024 which have been considered by this court.
7. The role of the first appellate court to re-examine and re-evaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co.* (1968) EA 123 as follows: -

“ ... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
8. I have considered the Record of Appeal dated 8th June 2023 and submissions by the parties. The issues for determination are whether the appeal is merited for grant of the orders sought who should bear costs.



9. This court has perused the pleadings and evidence on record and established that the Appellant pleaded that the Respondent entered into a lease agreement dated 12th June 2009 with Ashburton Grove Ltd for the shop unit 14 Baharini Plaza at a monthly rent of Kshs. 30,000 plus service charge and VAT payable in advance. It is not in dispute that the Respondent took possession of the premises and put up his tours and travel business. The Appellant's claim is that the Respondent fell in arrears in payment of the service charge which had accrued on diverse dates between December 2015 to date and that the said service charge ought to have been paid to the Appellant.
10. The Appellant availed evidence to show that the Respondent was in arrears of service charge. However, the question that this court begs to ask is whether the Appellant was entitled to file the suit herein to recover the service charge in arrears considering the lease agreement was between the Respondent and Ashburton Grove Ltd.
11. It is trite law that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. The court in *Agricultural Finance Corporation v Lengetia Ltd* (1985) KLR 765 quoting with approval from *Halsbury's Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA stated that: -
- “As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”
12. The court in *Mark Otanga Otiende v Dennis Oduor Aduol* (2021) eKLR further held that: -
- “It is therefore clear that no court of law can rewrite a contract for parties and imply parties that were never privy to a contract. The law is flawless that necessary parties before the court are the ones that confer jurisdiction to the courts to determine a dispute and when proper parties are not before the court, the court lacks jurisdiction to hear and determine a dispute. See *Football Kenya Federation v Kenya Premier League Ltd* [2015] eKLR. Proper parties before a court of law are those to whom rights and obligations accrue as may be decided by the court. The above rule of law, though breeding hardships and inconveniences remain unmitigated. It has been so uniformly pronounced that despite its logical imperfection and actual inconvenience, this court is not about to disturb it with a view to upsetting the status quo as it has not been moved to do so, with sufficient material, in light of its universal application by the courts globally. In other words, there must be a suable party before a court, as it is that suable party who is essential to the jurisdiction whether by compulsory or by voluntary submission ...”
13. From the foregoing, it is clear that Ashburton Grove Ltd ought to have been the proper party to file the suit. The trial court was therefore in serious error when it failed to first inquire into the locus standi of the Appellant to sue on a contract which he was not party to. It is on this basis that the Appellant's grounds of appeal fail.
14. In the upshot, I find that this appeal lacks merit and is dismissed. Costs to the Respondent.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF OCTOBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Wakio Advocate for the Appellant (holding brief)

Otieno Advocate for the Respondent (holding brief)

Court Assistant – Mr. Samuel Shitemi

