



Ideal Locations Limited v Guaranty Trust Bank (Kenya) Limited (Environment and Land Appeal 49 of 2021) [2023] KEELC 16505 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16505 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 49 OF 2021
NA MATHEKA, J
MARCH 22, 2023**

BETWEEN

IDEAL LOCATIONS LIMITED APPELLANT

AND

GUARANTY TRUST BANK (KENYA) LIMITED RESPONDENT

JUDGMENT

- 1 The appellant, being dissatisfied with the judgement of the honourable ML Nabibya Principal Magistrate rendered at Mombasa on the July 22, 2021 appeals to this honorable court against the whole judgement on the following grounds;
1. The learned magistrate erred in law and fact in failing to appreciate that the appellant produced as an exhibit, a bundle of audit reports which determined the service charge deficits which were claimed by the appellant in the suit at the trial court; and instead made a finding that the audit reports were never produced during trial.
 2. The learned magistrate erred in law and fact in making a finding that service charge deficit ought to have been demanded by the appellant at the time of termination of the lease by failing to appreciate that the lease expressly provided that service charge deficits were payable by the respondent upon demand by the appellant and not upon a specific period of time.
 3. The learned magistrate erred in law and fact in failing to apply and interpret the terms of the subject lease in the suit which led her to arrive at a erred finding.
 4. The learned magistrate erred in law and fact in failing to consider that no service charge deficit had ever been demanded and therefore not paid by the respondent during the subsistence of the subject lease.



5. The learned magistrate erred in law and fact in failing to consider the submissions of the plaintiff in subject suit.

They pray for orders that;

- a. The decision of the trial court be set aside and substituted with an order allowing the suit as prayed with costs to the appellant.
- b. Costs of this appeal be awarded to the appellants.
- c. In the alternative, this honourable court does order that evidence in respect of the audit reports produced and marked as Pexhio be taken into account and considered in the judgement of the trial court and this appeal thereafter be allowed as prayed.
- d. This honourable court be pleased to grant any further orders that it may deem just and fit to be issued.

2 This court has considered the appeal and submissions therein. This is an appeal from a judgement ruling delivered on 22nd July 2021 by Principal Magistrate Hon ML Nabibya Mombasa CMCC No 1872 of 2018 Ideal Locations Limited v Guaranty Trust Bank (Kenya) Limited. It is the Appellant's case that the trial court failed to consider that the audited reports were produced as exhibits and demonstrated that the respondent had outstanding service charges, despite the termination of the lease. The appellant argued that the lease provided that the service charge deficits were payable upon demand and not limited to a specific time including the determination of the lease.

3 In the plaint dated September 11, 2018, the appellant averred that there were outstanding service charge arrears that the respondent owed emanating from the lease dated September 13, 2011. The appellant maintained that though the lease expired on 31st September 2017, the said arrears were from the audited accounts as required by clause 2.2 of the 5th schedule of the lease. The appellant sought the following prayer;

1. The court does order the defendant to pay the plaintiff service charge deficit of Kshs 756,953.70.
2. Costs of the suit.
3. Interest on prayers (1) from the date of filing this suit at court rates and on prayer (2) from the date of judgment at court rates until payment in full.
4. Further or other relief as this honorable court may deem fit and expedient to grant.

4 In her judgement dated July 22, 2021 the trial magistrate, found that though the appellant had claimed deficit in payment of the service charge for the years the lease existed the court was unable to concisely determine the amount to be correct as per the audit. For the reason that the appellant had not presented the audited report as required in the lease agreement. The learned magistrate further held that the demand for arrears should have been made every succeeding year and the yearly audit should have indicated the amount owing. Further the demand for each year owing should have been served upon the defendant for every year in default. The learned magistrate dismissed the suit for not providing specific audited deficits payable by the defendant.



- 5 At the hearing of the appeal, parties opted to canvass it by way of written submissions. In *Okulu Gondii v South Nyanza Sugar Co. Ltd* (2018) eKLR, the Court held that;

This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the lower court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 allowances in this respect. See *Selle and Another v Associated Motor Boat Company Limited and others* [1968] EA 123 and *Williamson Diamonds Ltd. V. Brown* [1970] E.A.L.R.”

- 6 In the instance case, PW1 was Talasam Mohamed, the appellant’s property Manager, in his examination in chief he relied on his statement dated September 11, 2018 as well as producing the list of documents marked PEX 1-11. I have presumed the list of documents dated September 11, 2018 and I do note that the Audit reports from PKF Kenya are No 11 on the list. These audited reports relate to the Ideal Locations Limited Service Charge Account for the year 2012, 2013, 2014, 2015, 2016 and 2017. It is therefore clear that the said audit reports were produced before court and the trial court erred in law and in fact by failing to consider the same was part of the evidence produced. The trial magistrate ought to have considered the said audited reports in making her judgement.

- 7 The 5th Schedule of the lease provided for the payment of the service charge, where the appellant was obligated to, prepare certified audited accounts showing the estimate payments made versus the actual expenditure incurred. Where the appellant determined through audited accounts that there is a deficit, the same would be demanded against the next quarterly payment of the service charge. On December 8, 2017, the appellant issued the respondent with an invoice for their share of service charge deficit to the tune of Kshs 756,953.70, which has been pleaded in the plaint.

- 8 The appellant’s prayer for Kshs 756,953.70 amounts to a claim for special damages. It is trite law that a claim for special damages must not only be specifically pleaded but also be strictly proved with as much certainty and particularity as the circumstances allow. The Court of Appeal in *Herbert Hahn v Amrik Singh* (1985) eKLR held that;

Special damages which must be not only claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. This has been adumbrated by Bowen LJ in *Ratcliffe v Evans* (1892), 2 QB 524, 532, 533, Lord Macnaghten in *Stroms Bruks Aktic Bolag v John & Peter Hutchinson*, [1905] AC 515, 525, 526, Lutta JA in *Kampala City Council v Nakaye*, [1972] EA 446, 447 and Chesoni J, in *Ouma v Nairobi City Council*, [1976] KLR 297, 304.”

- 9 Back to the audited reports that form page 19 – 74 of the record of appeal, relate to the service charge account for the appellant for the years 2012 to 2017 and they are generally similar save for the different figures mention therein. On page 22 of the record of appeal, is the audited financial statement for the year ending 2012 which clearly states that it is in respect to service charge contributions by tenants towards the upkeep of the suit property Plot No MN/1/16088. The same has been repeated in the audited financial statements for the year ending June 30, 2013, July 30, 2014, June 30, 2015, June 30, 2016 and June 30, 2017. From perusing the said audited reports, the court can clearly establish that the appellant hired PKF Accountants and RMS Eastern Africa Accountants to prepare audited reports



for all the lessees who had leased units in the suit property. The appellant did not create individual accounts for each of the lessee in order to ascertain what each of the individual lessee owed in case of a deficit. In the audited report for the year ending June 30, 2016, on page 64 of the record of appeal, RSM accountants, indicated that the reports were to assist the appellant report to its tenants and not suitable for any other purpose.

- 10 A claim for special damages is in the nature of restitution and its meant to restore the appellant to the position they would have been, had the respondent paid the amount sought. The audited reports placed before the trial court did not show the specific amount that the respondent was in arrears for each of the financial years. The reports were in general terms for the service charge account managed by the appellant for all the tenants who leased different units at the suit property. The appellant was therefore obligated to take a further step and separate each of their tenants on the suit property and prepare individual accounts for the service charge deficit. This would ensure that there is fair computation of the service charge deficit, which would have been arrived at by multiplying the service costs per month per lettable square foot by the area occupied for the period of tenancy in accordance with each of the tenants' lease agreement.
- 11 What the appellant did was put forward audited financial reports before the trial court without demonstrating the specific amount that was due from the respondent. All the appellant demonstrated through the audited reports was that in some years, the service charge account was in default. This did not discharge the legal burden placed on them to strictly prove their special damages claim of Kshs 756,953.70. The court cannot make its own assessment of what it conceives the appellant was entitled to. The appellant is required to present hard facts before court to establish the amount claimed for, and only then can the court determine whether they had strictly proved the particularized claim.
- 13 Time and time again, courts have held that a claim for each particular type of special damages must be pleaded and proved with as much certainty and particularity as the circumstances allow. I am satisfied that the trial magistrate did not err in law or in facts for dismissing the appellant's suit for failing to provide specific audited deficits payable by the respondent. I find that this appeal lacks merit and is dismissed with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

