



REPUBLIC OF KENYA



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**Sagoo v Njoroge (Civil Appeal E114 of 2022)
[2024] KEHC 15282 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E114 OF 2022
PN GICHOHI, J
NOVEMBER 27, 2024**

BETWEEN

HARJIT SINGH SAGOO APPELLANT

AND

NANCY WAMAITHA NJOROGE RESPONDENT

*(An appeal from the judgment by Hon. Nancy Makau (SRM)
delivered on 28th July, 2022 in Nakuru CMCC No. 694 of 2017)*

JUDGMENT

Background

1. Vide a plaint dated 10th July 2017, the Respondent herein sued the Appellant seeking judgment against the Appellant for special damages of Kshs 633,885/95/= costs of the suit and interest. That claim was made up of:
 1. One month rent in lieu of notice - Kshs. 45,000/-
 2. Rental arrears - Kshs. 135,000/-
 3. Cost of repairs - Kshs. 438,537/-
 4. Electricity bill - Kshs. 13,433.95/-
 5. Water bill of Kshs. 1,915/-
2. She pleaded that as the registered proprietor of Plot No. 451/1385 Milimani Estate Tiriki Avenue, she entered into a tenancy agreement with the Appellant on 21st June 2011 for a monthly rent of Kshs. 45,000/-. Further, the terms of that tenancy were that the Appellant was to: -Pay a refundable deposit of Kshs. 45,000/-.-Be surcharged 10% for rent paid after the 5th day of each month. Pay electricity and



water bills arising from occupation of the said premises each month. Keep the premises and fixtures therein clean and in good condition during the tenancy and hand over the property and fixtures at expiry of the tenancy period. Pay replacement or make good repair or restore all such fittings as shall be broken, lost or damaged or destroyed during the tenancy and to replace any keys or appropriate locks which are lost, broken, damaged or destroyed.

3. She claimed that the Appellant remained in occupation of the suit premises until sometime in May 2013 when he vacated without notice and in breach of the tenancy agreement leaving behind arrears on rent, electricity and water bill arrears. That he also left the premises in ruined condition which called for repairs.
4. The Appellant filed his statement of defence dated 14th August 2017 denying the whole claim and further denied that the Respondent was the registered proprietor of Plot No. 451/1385 Milimani Estate Tiriki Avenue.
5. He averred that prior to his moving to the main house, he was a tenant in the guest wing while the main house had been in the occupation of the Respondent's tenant by the name Mr. Darbar for close to twenty years.
6. He pleaded that when the said Mr. Darbar vacated the main house, the Respondent requested the Appellant to move to the main house and vacate the guest wing as she intended to rent out the main house together with the guest wing.
7. The Appellant further pleaded that the main house was in a state of disrepair, but he agreed to move in pursuant to the Respondent's assurances that she would repair the same. That upon moving in, he found that the house needed major repairs which the Respondent failed to fix as promised.
8. He therefore averred that he stayed in the main house for two years and no repairs were done despite paying all rent and having no rents arrears. He pleaded that no quantification statement report was done to establish the breakages in the house before he moved in and therefore, the Respondent's claim was malicious and did not disclose any cause of action. He urged that the claim be struck out and/ or dismissed with costs.
9. The Appellant and the Respondent were sole witnesses in the case and hearing the parties, the trial court rendered its judgment on 28th July, 2022 as follows: -
 1. Liability 100% against the defendant for breach of contract.
 2. Damages worth 633,885.95 awarded to the plaintiff.
 3. Plus, costs of this suit together with interest.
10. Aggrieved by the decision on both liability and quantum, the Appellant filed a Memorandum of Appeal dated 18/08/2022 on Eleven (11) grounds which are condensed as follows: -
 1. The learned Magistrate erred in law and fact in finding that the Appellant was liable at 100% for breach of contract against the Respondent.
 2. The learned Magistrate erred in law and in fact in finding that the Appellant was liable for damage in the house when there was evidence that the Respondent had a tenant who had lived in the house for 20 years prior to the Appellant taking occupation and that no assessment or inspection was done after the said tenant vacated the house and before the Appellant moved in.
 3. The learned Magistrate erred in law and fact in finding that the Appellant was liable for repairs when there was clear evidence that he was not responsible for repairs.



4. The learned Magistrate erred in awarding special damages which had not been specifically proved as required by law.
 5. The learned Magistrate erred in law and in fact in failing to consider the Appellant's evidence and submissions.
11. The Appellant therefore prayed that: -
1. The appeal be allowed.
 2. The trial court's judgment be set aside or quashed in whole.
 3. The Court be pleased to re-evaluate the damages awarded and reduce the same.
 4. The Order by the trial court as to interest and costs be set aside.
 5. The cost of the Appeal and in the trial court be awarded to the Appellant.

Appellant's Submissions

12. These are dated 04/03/2024 and on liability, the Appellant submitted that there was no denial that a lease agreement existed between the parties herein. However, he submitted that the particular tenancy being referred to between the parties herein lasted for only two (2) years.
13. He further submitted that there was no dispute that prior to this tenancy, there was another tenancy whom the Appellant is privy to and which tenancy lasted for 20 years.
14. It was his submissions that on cross examination, the Respondent stated that she did not get a Quantity Surveyor to check the house after Mr. Darbar left reason being that there was no need to do so since there was an agreement between the Appellant and the Respondent that any time the Appellant would want to repair the house, he would inform the Respondent to ensure that it was done.
15. It was further submitted that as per the Appellant's testimony, no inspection was ever done before he moved in and no repairs were ever done by the Respondent which forced the Appellant to move out after getting a better place.
16. The Appellant further submitted that the suit property never even belonged to the Respondent and that despite the registered owner of the property being alive, he neither testified in court nor authorised the Respondent to institute the suit on his behalf. That indeed, the Respondent admitted having no Power of Attorney to institute the suit. That the Respondent seemed unsure of who exactly she was suing as she stated that the defendant was one Raul.
17. It was his further submissions that the tenancy agreement between the parties is not in dispute but in dispute is the issue of the cost of repairs as admittedly, the repairs required from the previous tenancy were never assessed. He therefore submitted that there was nothing on which the Respondent could rely on to assess how much damage, if any, was actually caused by current tenant.
18. On special damages, the Appellant submitted that contrary to the Respondent's allegation that no notice was issued, the Appellant testified as having called the Respondent informing her of his intention to vacate, and that no evidence was tendered to the contrary.
19. He submitted that the undertaking to pay rent arrears (PMFI-2) was dated the 4th May, 2013 when the Respondent was aware that the Appellant had left with a notice, hence the reason she did not claim the rent in lieu of notice therein.



20. Further, he submitted that by stating that the deposit of Kshs. 45,000/- was to be considered in clearing the rental arrears, it was an indicator that the Respondent was well aware that the tenancy had been terminated as there cannot be settling the deposit unless the tenancy is coming to an end.
21. The Appellant therefore submitted that since the Respondent's testimony was quite contradictory to the facts, rent in lieu of notice was not specifically proved which means the award should fail.
22. On the outstanding rental arrears pleaded as Kshs. 135,000/-, it was submitted that as per the Appellant's averment, there were indeed outstanding rental arrears when he left the house but the said arrears were cleared after the two parties entered into the gentlemen agreement dated 4th May, 2013. That no receipts were issued as was common practice for the Respondent not to issue receipts even in prior rental payments.
23. It was his submissions that if indeed there were outstanding rental arrears, the Respondent would not have taken 4 years to bring them up in this case. He therefore submitted that the trial magistrate erred in law by granting the said sum which had not been well articulated or proved.
24. On the cost of repairs being Kshs. 438,537/-, it was submitted that the Respondent merely produced an estimate cost by the Quantity Surveyor on proposed repairs to the house but no evidence was ever tendered to depict that any repairs were ever conducted or the amount of money spent on the said repairs, if any.
25. He further submitted that at trial, the Respondent did not attribute the alleged damages to the Appellant's stay notwithstanding the Respondent's admission that a previous tenant one Mr. Dabar had lived in the same premises for over 15 years prior to the Appellant and no repairs or assessment by a quantity surveyor was done after he left. He therefore submitted that the said sum was not proved.
26. On Kshs.13,433.95/- pleaded as outstanding electricity bills and Kshs. 1,915/- for outstanding water bills, it was submitted that the Respondent only produced a statement referring to some water bills for a Mr. M.S. Raol but who was not a party to the suit. That further, the statement did not show the title number of the land parcel and that the electricity bill did not show whom it belonged to. It was therefore submitted that there was no proof that the said statements were with regards to outstanding bills for the property that the Appellant had leased out.
27. Citing the case of Kenya Women Microfinance Ltd v Martha Wangari Kamau [2021] eKLR, it was submitted that none of the special damages pleaded were actually proved and therefore, the Respondent ought not have been awarded the same.
28. Lastly, it was submitted that though the Appellant's submissions referred the principles regarding special damages, the trial court disregarded them while arriving at its decision. He therefore prayed that the Appeal be allowed.

Respondent's Submissions

29. They are dated 9/04/2024. The Respondent started by emphasising the Court's role in this appeal and the well settled principles as to when an appellate court can interfere with award of damages by the trial court.
30. On loss of one month rent in lieu of notice, the Respondent submitted that having contributed to his own breach of contract, the Appellant is deserving of the remedy of Notice Pay used by the trial court as stated in clause 4 (iii) of the tenancy agreement.



31. It was submitted that no written notice was issued by the tenant to that effect, and the Appellant did not produce the call log showing that he called the landlord and communicated the same to her and therefore, the failure was a cardinal breach of contractual obligation on the part of the Appellant.
32. On rental arrears, it was submitted that it is a well-established principle that the issues for determination in a suit must emanate from pleadings by parties and consequently, the trial court may only pronounce judgment on the issues arising from pleadings or such issues as the parties may frame for determination.
33. Flowing from that, it was submitted that the Appellant admits to have been in rent arrears but he did not prove payment of those arrears by either quoting the cheque number or presenting a copy thereof. The Respondent therefore submitted that the award was merited.
34. On costs of repairs, it was submitted that clearly, the parties herein had a new tenancy relationship after the previous tenant Mr Dakar left. That the tenancy agreement dated 21/6/2011 was legally binding upon the parties herein and therefore, the issue of how long the previous tenant lived in the house is no longer relevant.
35. It was further submitted that the Appellant had a chance to view the house and he give an okay to rent it as was. That since the Appellant had already taken possession of the house before agreeing with the Respondent, it meant he was pleased with the state of the house and therefore, the Respondent did not have to get a quantity surveyor to check the house after previous tenant left.
36. It was the Respondent's submissions that had the Appellant been dissatisfied with the state of the house, he would either not have rented the same or he would have insisted that the same be repaired before taking occupation.
37. That further, the parties herein had an agreement that any time the Appellant needed repairs to be done, he was to notify the Respondent but there was no evidence that the Appellant notified the Respondent and that the Respondent refused to repair.
38. It was the Respondent's submissions that the Appellant left the premises with several breakages in the house and that the house was not painted. That the Respondent produced a cost estimate of what she incurred and that though the Appellant rebutted the same, he did not produce evidence to support his claim that the damages were from before he entered the house.
39. The Respondent further submitted that the trial court evaluated the case, the Appellant's evidence, his submissions together with the authorities cited therein before relying on the principle of mitigation of loss and therefore, the award was properly made.
40. Regarding Electricity and Water bill, Costs of the suit and interest, the Respondent cited several cases including Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited [2014] eKLR. She submitted that the trial court was not supposed to rewrite another tenancy contract by bringing out issues of the former tenant since the Respondent herein was particular in respect of the tenant she was suing and that the tenant was the appellant herein.
41. Arguing that the trial court only interpreted the agreement placed before it and which both parties agreed that they were subjected to, the Respondent urged this Court too makes the same finding as the tenancy agreement was very clear noting the settled legal position on freedom of contract.
42. The Respondent maintained that the trial court was right in allowing respondent claim for special damages as the same was pleaded, particularized and proved through the documents produced thus complying with settled law that such damages must be specifically pleaded and strictly proved.



43. Citing the case of *Otieno-Omuqa & Ouma Advocates v CFC Stanbic Bank Limited* [2015] eKLR where an award of Kshs. 6,000,000/- was made, the Respondent submitted that the award of Kshs 633,885/95 was reasonable, was neither inordinately high nor excessive and was based on the evidence on record, the law and the doctrine of equity. She therefore urged this Court to dismiss the appeal with costs.

Determination

44. From the material before this Court, it is clear that this appeal is on both liability and special damages.
45. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions bearing in mind that it did not have an opportunity to see or hear the witnesses testify - see *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
46. The Respondent's testimony was that the suit property was registered in the name the Respondent's husband Josiah Njoroge Njuguna but he had he had authorised her to lease it out.
47. It was her testimony that she had a tenant by the name Darbar who had lived in the suit property for 15 years and was to relocate to India. They had made arrangement to pick keys from him but when he did not call, the Respondent decided to go to the house only to find the Appellant in the house. She checked the house and it was ok.
48. The Appellant was a stranger to her. She asked him what he was doing there and he replied that he used to live at the servant's quarters and had taken over the house. She told him that she wanted to increase the rent and had to do a lease agreement between her and the Appellant which she did on and he signed the same. The rent was to agree at Kshs. 45,000/- per month. He stayed there from 2012 to 2013.
49. In this case, there was agreement entered between the parties herein. The effect of an agreement entered between parties was emphasised by the Court of Appeal in *Margaret Njeri Muiruri* (supra) where it held: -

“It is not for the Court to rewrite a contract for the parties. As this Court held in *National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd*. Civil Appeal No. 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”

50. The agreement was produced as exhibit before the trial court and it is not disputed. It is also an undisputed fact that the Respondent's husband was not party to the suit and that the Respondent had no power of attorney to from him.
51. It is clear before the trial court and this appeal, that the Appellant has consistently admitted the tenancy agreement between him and the Respondent. Having admitted it, then he is bound by the terms and the court cannot rewrite it for the parties and he cannot turn around to question ownership of the property.
52. There is no dispute between the parties herein that no repairs were made after the first tenant left. The Respondent maintained that the house was in good order and hence no repairs were necessary.
53. Having moved in with no such assessment done and with both parties admitting that there was a gentleman agreement that he was to call the Respondent if he needed to have any repairs done, and having also admitted that he left the house for another in the neighborhood before any assessment was done, then the burden of proof was on the Appellant to show that he did not cause damage in the period that he was in the house and that he left the house in the condition he had taken it.



54. He did not discharge that burden and therefore, he was wholly liable for the damages on the house. As a consequence, the Respondent specifically pleaded that she repaired the said damage at a cost of Kshs. 438,537/-. She went ahead and proved it. That award is upheld.
55. Regarding electricity of Kshs.13,433.95/- pleaded, the Respondent produced exhibit 5 for June 2013 for Account No. 460994-1. In cross examination, the Respondent stated: -
- “Electricity bill is in the name of the Defendant. The bill does not show the name and it has an account number and I do not know under whose name it is. He is the one who gave me an account number through my agent... Raul is the Defendant.”
56. Regarding Kshs. 1,915/- for outstanding water bill, the Respondent produced a statement for account Mr. M.S. Raol. In cross examination, she told the court: - “I know they are water number / Account as defendant gave the account and my agent paid to Kenya power and Nakuru Water and concluded payment.”
57. On the other hand, the Appellant stated in cross examination: - “We cleared our water and electricity bills. They were done with my father and he passed on.”
58. Bills are paid through account numbers and therefore, the argument by the Appellant that the bills produced do not have the title number of the property cannot hold. As the occupier of the said house and consumer of that utility, it was up to the Appellant to show that he paid the bills and when he did so in compliance with the tenancy agreement but he did not. The Respondent’s claim on the said bills was therefore proved as required by law. It is upheld.
59. As regards rental arrears of Kshs. 135,000/-, the Appellant stated in cross examination: -
- “I was paying rent on monthly basis no receipt was even given out. One or two months, we were in default and it was cleared. I am sorry I can’t remember but my dad was handling the issue. We did sit and did some calculations on outstanding rent...Note dated 4/5/2013 and the debits is a client done on arrears and he had already moved out ...The arrears were 225, 000/-. I cleared all the money by cheque. And not by cash. Unfortunately, I was not issued with a receipt. It shows I am on arrears for a long time. We informed her when I left. The rent was outstanding and I paid.”
60. The above is a clear admission that he was in rent arrear but there is no proof that he cleared it. Had he cleared it through a cheque as he claimed, it would have been effortless to prove it but he failed. The claim for Kshs. 135,000/- is therefore upheld.
61. On one month rent in lieu of notice, the tenancy agreement provided for a deposit for one-month deposit of Kshs. 45,000/- which was refundable. However, when the Respondent found the Appellant leaving, they entered into a gentleman agreement on the outstanding rent arrears being a sum of Kshs. 225, 000/=.
62. There was however no reference by either party as to what happened to the rent deposit of Kshs. 45,000/=. It was only mentioned by the Appellant in his submissions. Since the burden of proof lay on the Respondent on the issue but she failed to justify it, it can well be concluded that Respondent utilized it in lieu of notice and therefore, that sum is not awardable.
63. Regarding the Respondent’s argument that the sum of Kshs. 633,885/95 was reasonable, was neither inordinately high nor excessive, this Court must emphasise that the claim was for special damages and



therefore, the decision in Otieno-Omuqa & Ouma Advocates (supra) does not apply here as the award of Kshs. 6,000,000/= therein was compensation in general damages.

64. In conclusion, the appeal is determined as follows: -

1. Liability is upheld.
2. The award of Kshs. 633,885/95 be and is hereby set aside and substituted with an award of Kshs. 588,885/95.
3. Each party to bear its costs of this appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF NOVEMBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of

Ms Kimuge for Appellants

Ms Kiprop for Ndenda for Respondent

Ruto Court Assistant

