



**Nungari v Greign Estates Limited & another (Environment and Land Appeal E058 of 2020) [2023] KEELC 16137 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16137 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E058 OF 2020**

**AA OMOLLO, J  
MARCH 16, 2023**

**BETWEEN**

**JUDY PURITY NUNGARI ..... APPELLANT**

**AND**

**GREIGN ESTATES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ARISE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgement of the Hon. A.M Obura  
(Mrs)Senior Principal Magistrate delivered on 16th March 2018)*

**JUDGMENT**

**Introduction**

1. The Appellant filed a civil suit *vide* Nairobi Chief Magistrate's Civil Case No 1876 of 2017 against the Respondents herein. The suit proceeded to formal proof and the trial magistrate after consideration of the facts presented by the Appellant, dismissed the case for lack of merit. The Appellant was not happy with the decision dismissing her claim and proceeded to file a notice of motion dated June 29, 2020 seeking for leave to lodge an appeal out of time which leave was granted.
2. The Appellant's outlined the grounds for the appeal in the memorandum of appeal as follows;
  1. The Hon Magistrate erred in law and fact in finding in her judgement that the suit filed by the appellant lacked merit.
  2. The Hon Magistrate erred in law and fact in misdirecting herself that the appellant did not prove her case based on the principle of balance of probability which in fact tilted in her favour.
  3. The Hon Magistrate erred in law and fact in failing to appreciate and appearing to ignore the mental anguish caused to the appellant by the respondent's illegal action of invading her



privacy and ultimately throwing her out of their home with her child and the irreparable loss of property.

4. The Hon Magistrate erred in law and fact in failing to find the respondents culpable and legally liable for their illegal actions which were ably tabulated by the appellant in her suit and viva voce evidence.
  5. The Hon Magistrate erred in law and fact in failing to pursue the responsibility bestowed upon the court of having the respondents severally and jointly found guilty and liable of performing an illegal eviction upon the appellant and hence acting in a manner that is contrary to the provisions of the law upon which eviction was carried out.
  6. The Hon Magistrate erred in law and fact in failing to take into proper account the appellant's personal evidence in the absence of any dissenting evidence or defense from the respondents.
  7. The Hon Magistrate erred in law and fact in pursuing the case before her in a manner that reflected her prejudice to the appellant and seemingly holding brief for the respondents who did not see the need to file a defense nor appear at any time during the hearing of the suit despite being properly served and them filing a memorandum of appearance.
  8. The Hon Magistrate erred in law and fact in failing to appreciate that all the appellant's household goods, documents, her and the minor's personal effects had been confiscated and/or carted away by the respondents and she could not access them for production in court for documental proof.
  9. The Hon Magistrate erred in law and fact in failing to take into consideration that the court had entered an interlocutory judgement against the respondents and that the court's duty after such a judicial action was only to assess compensation in favour of the appellant and not engage in a divergent hearing meant to prejudice the appellant in favour of the absent respondents.
  10. The Hon Magistrate erred in laws and fact for failing to canvas the issues before the court to the direction of an illegal eviction that was performed by persons who were neither auctioneers nor by law authorized to act as such.
  11. The Hon Magistrate erred in law and fact in wholly basing her judgment on the *evidence act* and failing to take consideration of the Auctioneer's act which in fact and law the arguments herein would have found preference and a legal base.
  12. The Hon Magistrate erred in law and fact in casually dismissing the appellant's suit without taking into consideration of the irreparable loss of personal documents, household goods and irreplaceable items that the appellant would end up losing and being laid to waste unless protected by the court.
3. The Appellant sought for the following prayers;
- a. The appeal filed herein be allowed and the judgement of the lower court be set aside
  - b. The respondents be held and found liable of illegally evicting the appellant from her dwelling house and consequently ordered to compensate the appellant in damages.
  - c. The respondents be ordered to pay and/or compensate the appellant for all the lost household goods pursuant to the illegal eviction.
  - d. Costs of this appeal.



4. The appeal was served upon the Respondents who did not make appearance during directions on how to prosecute the appeal. The Appellant filed her submissions dated November 28, 2022 outlining the background of the case. She submitted that she was a tenant of the 2<sup>nd</sup> Respondent and paid rent to the 1<sup>st</sup> Respondent who was an agent of the 2<sup>nd</sup> Respondent. She stated that on January 21, 2017 she was illegally evicted from the premises by the Respondents. The Appellant avers that during eviction undertaken in her absence, she lost her household goods, personal items and documents.
5. The Appellant submitted further that the Magistrate erred in law and fact by failing to hold the respondents severally liable for performing an illegal eviction without obtaining any court order or the order of the Rent Restrictions Tribunal or issuing notices for distress. That the dismissal did not take into account that the orders issued by the trial court on May 19, 2017 for the Respondents to release her personal documents had not been complied with.
6. The Appellant also submitted that the Magistrate erred in law and fact by not putting into consideration the value of irreparable items that she ended up losing by failure of the Respondents to comply with the orders dated May 19, 2017. Despite the existence of those orders, the trial court dismissed her case after failing to directly assess her compensation and engaging in divergent hearing meant to prejudice her in favour of the absent Respondents who had been duly served but failed to file a defence.
7. The Appellant contended that the Hon Magistrate erred in law and fact by failing to canvas the issues before the court on the illegal eviction performed by persons who are not auctioneers or authorized by law. That the trial court erred in basing her whole judgement on the failure of the Appellant to produce evidence, not appreciating that she was ambushed and everything in her house seized including documents she may have wanted to present as evidence. She argued that the witnesses she could have called were fellow tenants who for the fear of being evicted could not testify against Respondents.

### **Analysis**

8. This is being the first appellate court, it is expected to re-evaluate and analyse evidence (if any) adduced before the trial court guided by the decision in *Selle & Another Vs Associated motor Boat Co Ltd & Others* (1968) EA 123 where the court stated as follows:-

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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 thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
9. I have perused the Plaint filed by the Appellant before the trial court which sought two main reliefs stated hereunder;
  - i. An order that the Defendant acted contrary to the law in forcefully and illegally evicting the plaintiff from her dwelling house in Arise Apartments House B3, Kasarani Nairobi, harassing her, exposing her to ridicule to other tenants and neighbours, invading her personal privacy, treating her in an inhuman manner and they be ordered to pay her for general damages.
  - ii. An order that the Defendants jointly and severally do pay for and compensate the plaintiff fully for her loss of household goods, personal effects, documents and all other items removed from her dwelling house at Arise Apartments, House B3, Kasarani Nairobi.



10. In her evidence before the subordinate court, the Appellant explained that she did not produce a copy of the tenancy agreement because she was not given any. She produced an invoice marked as “JPN1” and electricity bill to prove that she was a tenant of the 2<sup>nd</sup> Respondent. She stated that the Respondents locked her premises on January 26, 2016 while she was away visiting her mother and later carted away her goods on January 31, 2016. The Appellant averred that she reported the matter to the OCS Kasarani Police Station who informed her they were unaware of any court order. She added that the Respondents failed to comply with a court order which directed them to return her documents.
11. The Appellant gave the estimated value of her goods carted away at Kshs 1,973M and added that she had suffered loss and ridicule due to the illegal eviction. After considering the evidence presented, the trial court held that the onus was on the Appellant to prove that indeed she was not in arrears of rent; and that the alleged eviction was unlawful and illegal. The trial court also found that Appellant failed to present relevant evidence before it to satisfy that she owned the items on the list of confiscated items filed in court. The trial magistrate in arriving at her decision relied on the provisions of section 107 of the Evidence Act provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of a fact which he asserts must prove that those facts exist?”
12. The Court of Appeal in *Kneller & Hancox Ag JJA in Makube v Nyamuro* [1983] eKLR stated as follows:-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
13. After considering the pleadings filed, the proceedings and judgement of the subordinate court as well as the grounds raised in this appeal, I frame two questions for determination:
  - a. Whether or not the Appellant demonstrated that she was illegally distressed for rent and unlawfully evicted from her house.
  - b. Whether she was entitled to any compensation and therefore the trial magistrate erred in dismissing her claim
  - c. Is she entitled to costs of this appeal?
14. The case before the lower court was undefended. In reference to the illegal distress, the Appellant pleaded in paragraph 11 of the plaint thus:

The defendants in total disregard of the law and acting most callous and inhuman did again invade the plaintiffs dwelling house on January 31, 2017 and in the company of their servants, employees, assigns and or goons broke open the front door in her absence illegally entered and or trespassed into their house, haphazardly manhandled all her household goods and property and threw them out in the open in total disregard to their safety.
15. Besides pleading that her things were thrown out, the Appellant did not produce any evidence even in pictures of the household goods that were thrown out or distrained. Further, the Appellant stated that the actions of the Respondents were illegal since they had been restrained vide a court order dated April 20, 2016 issued in Children’s Court case no 533 of 2013. The trial magistrate observed that this court was not produced in evidence so it was not possible to ascertain whether it had been extended taking note that the distress complained of took place some seven (7) months from the date of the order. The



magistrate also noted that the Appellant failed to produce receipts to prove that she was consistently paying rent and was not in arrears.

16. The Court of Appeal in the case of *CYO Owayo v George Hannington Zephania Adudat/A Aduda Auctioneers & another* [2000] eKLR held that;

“ An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings.

The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrears; or for a claim or debt which is not rent; as a payment for the hire of chartels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise ..... a distress levied or proceeded with contrary to the law of Distress.....”

17. Applying the principles set out by the Court of Appeal in the case cited herein above, the Appellant’s averment for illegal distress needed to be demonstrated, first that the person who carried out the alleged distress was not authorized. She told court that the exercise took place in her absence and she received information from neighbours. None of the neighbours was called to corroborate the information making the Appellant’s averments based on hearsay evidence. Secondly, the trial court found and rightly so that the Appellant did not present any evidence that she was not in arrears of rent as at the date of the alleged illegal distress. From her own evidence that she had obtained restraining orders against the Respondents as early as April 2016 goes to show that the issue her defaulting in her rent started much earlier than January 31, 2016.
18. The question of whether the distress was contrary to court orders were left hanging as the copy of the order issued in Children’s court case no 533 of 2016 nor proceedings in that file were produced. In any event, the question of disobedience should have been addressed in that case (through contempt of court proceedings). I am therefore not satisfied that the Appellant proved the illegality of the distress so I find no basis to fault the trial court.
19. The second issue raised is whether the eviction of the Appellant was illegal. Kasango J in *Said Majid Said vs James Titus Kisia* (2015) eKLR stated thus;

In my view the landlord entered into the purported leases with other person there by dispossessing the tenant of his leased shops and the landlord will have to bear the consequences of his actions. Above all we are all living under a new Constitutional dispensation by virtue of The Constitution of Kenya 2010. What used to receive a blind eye in the past cannot now be allowed. I have in mind the National Values set out in Article 10; and the inherent right to have ones dignity respected under Article 28. Those values in Article 10 bind all persons, such as the landlord in this case and so does Article 28. To arbitrarily take the tenant’s shops is failure of the landlord to respect the tenant’s dignity. That cannot be countenanced. For that reason the tenant does succeed in the prayers in his Chamber Summons. (underline mine for emphasis).

20. It is my considered opinion that the law allowed the Respondents to levy for distress for rent arrears but not to use the distress to evict the tenant from the suit premises. The trial magistrate is faulted that although the issue of eviction was raised by the Appellant. She did not give it attention. I am persuaded to find that the Appellant is entitled to compensation for the illegal eviction. In *Caledonia Supermarket*



*Ltd vs Kenya National Examinations Council* [2000] 2EA 351, the Court of Appeal held that in order to terminate a controlled tenancy, the landlord had to comply with section 4 of the *Landlord and Tenant (Shops, Hotels & Catering Establishments) Act*. The court also considered that even if the tenant had lost its status as a protected tenant, the landlord (the council) was still obliged to give notice to the appellant. The court expressed itself as follows:

“But even assuming for the sake of argument only that the appellant had lost its status of a protected tenant...then even in that situation the council was obliged by law to issue a proper notice of termination in accordance with section 106 of the Law of property Act of 1882.”

21. In *Gusii Mwalimu Investment Co Ltd vs Muahimu Hotel Kisii Ltd*, [1996] eKLR the Court of Appeal while addressing the right of a landlord to re-entry had this to say: -

“To obtain possession by carrying out illegal distress is per se wrong. ...if what the landlord did in the case is allowed to happen we will reach a situation where the landlord will simply walk into the diminished premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is a trite law that unless a tenant consents or agrees to give possessions, the landlord has to obtain all orders from a competent court or statutory tribunal (as appreciate) to obtain an order for possession”.

22. In the absence of a court order, I find that the Defendant acted in total disregard of the Law when it unlawfully locked up the Plaintiff's premise thereby depriving the plaintiff of his possession. I am inclined to agree with the Plaintiff that it was actually constructively evicted from the suit premises. Since the proprietors of the suit premises did not obtain a court order for possession nor serve any notice for vacant possession, the Plaintiff's eviction from the suit premises was illegal, unlawful and thus tortious.

23. One of the doctrines of equity states that equity suffers no wrong without a remedy. Consequently, the dignity and rights of the Appellant having been violated through the unlawful eviction, she ought to be compensated. In *Mattarella Limited v Michael Bell & another* [2018] eKLR the Court awarded the Plaintiff damages in the sum of Kshs 200,000/= and held as follows:

“While the defendants were not specifically levying distress for rent, what they sought to do and actually did was to take possession by use of the law of the jungle. That must be, as has always been, frowned upon by the courts. Not only frowned upon but equally remedied by award of damages so that everybody seeking to live within the territory of Kenya, a county whose citizens have chosen to be led by the rule of law, gets to know, if one be otherwise under some illusion, that arbitrariness and or just impunity is not a virtue but a vice. Vice cannot be countenanced but must be curtailed and discouraged. I am saying all the foregoing because I have come to the conclusion that a violation of a right, due process and the law invite a reprieve or remedy to the violated.”

24. In light of the foregoing analysis, the orders of dismissal of the Appellant's case is set aside and instead I enter judgement in her favour and proceed to award the Appellant Kshs 200,000 for general damages under the head of illegal eviction from Arise Apartments, House B, Kasarani Nairobi. The Appellant is also awarded costs of this appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH 2023**

**A. OMOLLO**



**JUDGE**

**In the presence of;**

Judy Purity Nungari the Appellant in person

No appearance for Respondent

Court Assistant - Catherine

