



Matex Hospital Supplies Limited v Kenya Ports Authority (Civil Appeal E056 of 2021) [2023] KEHC 21319 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E056 OF 2021**

**OA SEWE, J
JULY 27, 2023**

BETWEEN

MATEX HOSPITAL SUPPLIES LIMITED APPELLANT

AND

KENYA PORTS AUTHORITY RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Makori, Chief Magistrate, delivered on 29th March 2021 in Mombasa CMCC No. 19 of 2017)

JUDGMENT

- (1) This appeal arises from the judgment and decree passed in Mombasa Chief Magistrate's Civil Case No. 19 of 2017: *Matex Hospital Supplies Limited v Kenya Ports Authority*. The appellant's cause of action was that the respondent, its employees/agents and or servants had broken into its shop and unlawfully took away goods worth Kshs. 11,308,000/= whose particulars were set out at paragraph 7 of the Plaintiff. Accordingly, the appellant prayed for special damages of Kshs. 11,308,000/= being the value of the goods, together with costs of the suit and interest.
- (2) The respondent denied the appellant's claim in its Defence and Counterclaim filed on 6th October 2014. It averred that the appellant was a lessee of its premises; and that upon expiry of the lease, the appellant was in arrears of Kshs. 94,954.10 being rent for the period April 2009 to March 2010. It further averred that it no longer owned the premises, having transferred the same to Kenya Ports Authority Retirement Pension Scheme. It denied the allegation that the shop was broken into or goods stolen therefrom, and put the appellant to strict proof thereof. At paragraph 9 of its Defence and Counterclaim, the respondent averred that there was a prior suit over the same subject matter, being, Nairobi Milimani HCCC No. 811 of 2006: *David Mbuvi and Catherine Kanini Mbeba t/a Grafitti Creations v Kenya Ports Authority*, which was struck out on 7th February 2014; and therefore that this suit was an attempt to re-litigate the same issues. The respondent also prayed for Kshs. 94,954.10 aforementioned by way of a Counterclaim.



- (3) The record of the lower court shows that, upon hearing the parties, the learned magistrate found no merit in the appellant's suit. He accordingly dismissed it with costs on 29th March 2021. The lower court found as a fact that there was no landlord tenant relationship between the parties, the tenancy having expired with no renewal. The learned magistrate further found that the plaintiff relied on invoices for goods bought long before the suit was filed; and therefore that the appellant's claim for special damages of Kshs. 11,308,000/= had not been specifically proved. In the same vein, the court was not convinced as to the validity of the respondent's claim; granted its own admission that ownership of the property had been transferred to Kenya Ports Authority Pension Scheme. Thus, the Counterclaim was accordingly dismissed with costs.
- (4) Being dissatisfied with the judgment of the lower court in its entirety, the appellant filed this appeal on the following grounds:
- (a) That the honourable magistrate erred in fact and in law by failing to consider the testimony of the appellant's witness which was in support of its case as pleaded in the Plaint.
 - (b) That the honourable magistrate erred in law and in fact in dismissing the appellant's case without properly evaluating the evidence of the appellant's witnesses given in support of the case and as a result arrived at the wrong conclusion.
 - (c) That the honourable magistrate erred in law and in fact by failing to consider that the respondent did not call any evidence to rebut the plaintiff's evidence.
 - (d) That the honourable magistrate erred in fact and in law by failing to exhaustively consider the submissions of the appellant in support of its case.
 - (e) That the trial court erred in law and in fact by failing to award special damages and costs to the appellant despite the fact that they were pleaded and proved at the hearing.
 - (f) That the trial magistrate erred in law and in fact by failing to consider the circumstances of the matter and the fact that here was obvious forcible eviction of the appellant by the third party who confirmed as much at the hearing.
 - (g) That the trial magistrate erred in law and in fact by failing to appreciate the fact that the evidence tendered by the third party, Lustman and Co. Ltd, was not evidence for the defendant.
- (5) Consequently, the appellant prayed for judgment against the respondent as follows:
- (a) That the appeal be allowed as prayed.
 - (b) That the judgment of the Chief Magistrate in Civil Suit No. 19 of 2017 be set aside.
 - (c) That judgment be entered for the appellant against the respondent for special damages as prayed for in the Plaint plus costs and interest.
 - (d) Costs of the appeal be awarded to the appellant.
- (6) The appeal was urged by way of written submissions pursuant to the directions given herein on 20th April 2022. Hence, Mr. Oddiaga for the appellant relied on his written submissions filed on 20th May 2022. He cited *Peters v Sunday Post Ltd* [1958] EA 424; *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR for the guiding principles as to the role of the first appellate court and urged the Court to find that the learned magistrate erred in law and in fact by failing to



consider the evidence tendered by the appellant's witnesses. In his view, the appellant's evidence was uncontroverted, granted that no evidence was adduced by the respondent.

- (7) Counsel relied on *North End Trading Company Limited v City of Nairobi* [2019] eKLR and *Motex Knitwear Limited v Gopitex Knitwear Mills Limited*, Nairobi (Milimani) HCCC No. 834 of 2002 for the proposition that, where a defendant does not adduce evidence, the plaintiff's evidence stands unchallenged and the claims made by the defendant by way of defence and counterclaim remain unsubstantiated. He urged the Court to disregard the evidence adduced by the third party, Lustman Company Ltd, as no claim was laid against it either by the appellant or the respondent. For this argument, Mr. Oddiaga relied on *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] eKLR. He accordingly urged the Court to allow the appeal.
- (8) On behalf of the respondent, Mr. Wafula filed his written submissions on 16th June 2022. He submitted that the appellant is a total stranger to the respondent, since the respondent's tenant was Matex Commercial Supplies Limited; a distinct and separate legal entity from the appellant. He relied on *Petra Development Services Limited v Evergreen Marine (Singapore) PTE Ltd* and added that, the appellant is a stranger to the contract between Matex Commercial Supplies Limited and the respondent, and therefore could not enforce the terms of the contract against the respondent. For this proposition, Mr. Wafula quoted in extenso from *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another* [2015] eKLR; and pointed out that, in any case, the tenancy agreement lapsed in March 2011.
- (9) It was further the submission of Mr. Wafula that, since the appellant was admittedly in occupation of the suit premises after the expiry of the lease, it is a trespasser for purposes of Section 3 of the *Trespass Act*; and therefore is barred by the doctrine of *ex turpi causa non oritur actio* from seeking the assistance of the Court. Counsel cited *Standard Chartered Bank Kenya Limited v Intercom Services & 4 Others*, Civil Appeal No. 37 of 2003 for this proposition. Moreover, Mr. Wafula pointed out that the property had changed hands from the respondent to Kenya Ports Authority Retirement Pension Scheme with effect from 1st November 2012; and therefore the claim against the respondent lacked basis. Accordingly, Mr. Wafula urged for the dismissal of the appeal with costs.
- (10) This being a first appeal, it is the duty of this Court to re-evaluate the evidence that was presented before the lower court and make its own conclusions thereon; while bearing in mind that it did not have the benefit of seeing or hearing the witnesses. (see *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*, *supra*). I have accordingly perused and considered the record of the lower court and noted that, on behalf of the appellant, its managing director, Nelly Syombua Ndeto testified before the lower court on 22nd September 2020. She adopted her witness statement dated 21st July 2014 in which she stated that she was working at her other office at Mirage Plaza on Mombasa Road when her manager, Mr. Charles Nzau reported to her that their KPA office had been broken into and their stock were in the process of being carted away. She stated that this was the second time within the same month that the same people broke into their premises and took away their goods. PW1 told the lower court that she rushed to the scene and tried to intervene but was ignored by the people. She therefore reported the matter to Akira Police Post for action.
- (11) PW1 further stated that, while at Akira Police Station she got to learn that the suit premises had changed hands from the respondent to the Kenya Ports Authority Staff Pension Scheme. She furnished the lower court with a list of the stolen items which, in her estimation, were valued at Kshs. 11,308,000/= . She produced several documents in support of the plaintiff's claim and explained that the appellant is the successor of Matex Commercial Supplies Ltd. Thus, PW1 complained that the appellant was illegally evicted from the suit premises and their property stolen in the process.



- (12) The appellant also called its manager, Charles Nzau Ndeto as PW2. He likewise told the lower court that, on the 15th August 2013 at around 4.00 p.m. he received a report that their KPA office had been broken into and hospital equipment and other products removed therefrom. He proceeded to the scene and sought to know why the equipment and products were being removed; and was informed that the instructions had been given by the owners of the premises. He then reported the matter to the managing director, PW1, who in turn reported the incident to Akira Police Post.
- (13) On behalf of the respondent, Mr. Cyrus Mwanji (DW1), the property manager of Lustman & Company Ltd, testified on 23rd November 2020. His evidence was that their company was contracted to manage the properties belonging to the respondent; and that the appellant was not known to them as their 3-year lease of the respondent's premises by Matex Commercial Supplies Ltd had lapsed on 31st December 2011. He therefore denied that there was any illegal eviction of the appellant in the first place. The respondent also called another of its employees, Sylvenus Mwachesia Choroko (DW2), to testify on its behalf. DW2 was one of the people who were deployed to clean the suit premises which, according to his evidence, were then vacant. He testified that while they were thus cleaning, they were arrested and taken to Akira Police Post and placed in cells. He denied having carried away any equipment or products from the suit premises.
- (14) From the foregoing, there appears to be no dispute that there existed a tenancy agreement between the respondent and Matex Commercial Supplies Ltd in respect of the suit premises, more particularly described in the pleadings and proceedings of the lower court as Shop Number 3 at Belle-vue Estate, Nairobi. It is common ground that PW1 signed the Letter of Offer dated 8th June 1999 on behalf of Matex Commercial Supplies Ltd; and that the lease lapsed, by effluxion of time on or about 31st December 2011. The property thereafter changed hands from the respondent to Kenya Ports Authority Staff Pension Scheme.
- (15) It is also common ground that, for the reason that Matex Commercial Supplies Ltd did not yield vacant possession after the lease lapsed, Kenya Ports Authority Staff Pension Scheme organized for the cleaning of the suit premises; whereupon PW1 lodged a complaint with the police that led to the arrest of DW2 along with another agent of the property owner. The appellant had alleged that its goods were unlawfully removed from the suit premises; an allegation that was denied by the respondent. Thus, the appellant instituted the lower court suit claiming Kshs. 11,308,000/= being the value of the goods.
- (16) In the premises, having carefully considered the evidence presented before the lower court and the written submissions made herein by learned counsel, the issues for determination are:
- (a) Whether there was privity of contract between the appellant and the respondent; and if so,
 - (b) Whether the learned magistrate erred in dismissing the appellant's suit.
- (17) As pointed out hereinabove, there is no dispute that in the Letter of Offer dated 8th June 1999 in respect of the suit property was made by the respondent to Matex Commercial Supplies Ltd. Credible evidence was adduced before the lower court to show that the lease was renewed from time to time in the names of Matex Commercial Suppliers Ltd; and that rent was paid by and receipts issued to the said company. The documents at pages 150 to 168 of the Record of Appeal are explicit on this. In particular, the respondent's letter dated 2nd March 2010 confirms that, as of that date, the tenant in Shop No. 3 was Matex Commercial Supplies Ltd and that it was in arrears of rent to the tune of Kshs. 94,954/=, and was therefore in contravention of a vital term of the lease. Accordingly, the respondent thereby issued a notice that unless the amount was paid, it would have no option but to repossess the premises and institute legal action in recovery of the sums outstanding. It is also common ground that the lease expired on 31st December 2011.



- (18) The managers of the property, Lustman & Co. (90) Limited, joined the lower court suit as the third party. On their behalf evidence was adduced before the lower court by Silas Mwangi (DW1) and Sylvénous Mwachesia Choroko (DW2). DW1 adopted his witness statement dated 19th November 2020 in which he denied that they had a tenant in the premises by the name Matex Hospital Supplies Ltd. He was categorical that, when the third party took over the management of the property the tenant was Matex Cargo Forwarders Ltd. He further testified that thereafter the property changed hands from KPA to KPA Retirement Pension Scheme from 1st November 2012 after the lease had long expired.
- (19) In the premises, the burden of proof was on the appellant to prove that it had a valid lease with the respondent after 31st December 2011 for Section 107 of the *Evidence Act* is explicit 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.”
- (20) Likewise, 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.
- (21) Accordingly, in *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* [2004] eKLR the Court of Appeal held: -
- “...we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail...”
- (22) Although PW1 made assertions to the effect that the appellant, Matex Hospital Supplies Ltd, is the successor of Matex Commercial Supplies Ltd, no documentary proof of such a change duly approved by the Registrar of Companies was availed before the lower court. In the absence of such proof, it follows that there is no nexus or privity of contract between the appellant and the respondent in respect of the subject property. The Court of Appeal had occasion, in *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR, to discuss the doctrine of privity of contract at length and pronounced itself thus:
- “...In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In



Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd [1915] AC 847, Lord Haldane, LC rendered the principles thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *Agricultural Finance Corporation V Lendetia Ltd* (supra), *Kenya National Capitalcorporation Ltd V Albert Mario Cordeiro & Another* (supra) and *William Muthee Muthami V Bank Of Baroda*, (supra). Thus in *Agricultural Finance Corporation V Lendetia Ltd* (supra), quoting with approval from Halsbury’s Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

“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.”

(23) In the premises, I find no reason to fault the lower court for coming to the conclusion that there was no privity of contract, a vital component of the appellant’s claim, between the appellant and the respondent. I likewise find no basis for the appellant’s argument that the lower court failed to consider the testimonies of the appellant’s witnesses; or that the respondent did not call any evidence in support of its case; seeing as two defence witnesses testified herein in favour of the defence case.

(24) In the result, I find no merit in the appeal. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF JULY 2023

OLGA SEWE

JUDGE

