



**Postal Corporation of Kenya v Trio Investors Limited (Civil Appeal 001 of 2021)
[2023] KEHC 21750 (KLR) (Commercial and Tax) (29 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL 001 OF 2021
DAS MAJANJA, J
AUGUST 29, 2023**

BETWEEN

POSTAL CORPORATION OF KENYA APPELLANT

AND

TRIO INVESTORS LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.L.L Gicheba, CM dated 22nd January 2021 at the Nairobi Magistrates Court, Milimani in Civil Case No. 2022 of 2019)

JUDGMENT

Introduction and Background

1. By a judgment dated January 22, 2021, the Subordinate Court allowed the Respondent's suit against the Appellant by ordering the latter to pay rent arrears of Kshs 5,391,648.86 and that it grants vacant possession to the Respondent within six months of the service of the judgment order and that in default, eviction orders were to issue. The Appellant is dissatisfied with this decision and has appealed against the same to the court through its Memorandum of Appeal dated June 18, 2021. The Appeal was canvassed by way of written submissions which are on record.
2. Before delving into the appeal and the parties' positions, a brief outline of the suit before the trial court is necessary. By a plaint dated March 26, 2019, the Respondent stated that in 1987, it entered into a Tenancy Agreement with the Appellant whereby the Respondent agreed to let and the Appellant agreed to lease the premises for a post office on the property known as LR No 209/3813 situated in South B, along Muchumbi Road in Nairobi.
3. The Respondent stated that the parties had been renewing and reviewing the terms of the Tenancy Agreement between them since then and on June 18, 2015 renewed the same from January 1,



2014 to the December 31, 2019. That it was an express term of the Tenancy Agreement that the Appellant would pay a monthly rent of Kshs 111,283.20 plus Value Added Tax in advance without any deductions whatsoever on or before the 1st day of each month.

4. The Respondent contended that the Appellant had fallen into rent arrears and had become a habitual defaulter of rent payment. It therefore prayed for Kshs 5,391,648.86 being rent arrears due and owing as at November 30, 2018, eviction of the Appellant from the premises, interest on the claimed amount and costs of the suit.
5. Despite the Appellant entering appearance in the suit, it failed to file a defence on time leading to the Subordinate Court entering interlocutory judgment against it on May 22, 2019. The court dismissed the Respondent's application to set aside the interlocutory judgment by the ruling dated November 15, 2019. The matter was fixed for formal proof thereafter.
6. At the formal proof hearing, the Respondent called its Finance Manager, Jackson Mwangi Njoroge (PW 1) as its witness. He admitted that the claimed amount was made up of both the principal and the penalty amounts and that the principal rent had been paid up to November 30, 2018. Although the Subordinate Court directed the parties to reconcile the accounts and come up with the penalties that are due, the record indicates that the Appellant was uncooperative and was not willing to negotiate on the reconciliation. After the parties filed written submissions, the Subordinate Court rendered its judgment on January 22, 2021.
7. The Subordinate Court considered whether the Appellant owed the amount of rent as claimed. It stated that the statement of arrears relied on by the Respondent was a mix-up of rent arrears and penalties and that it had proved its claim by this statement as the parties had been asked to reconcile the accounts but the Appellant had refused to take part in the reconciliation. Thus, the subordinate court stated that the said statement proved that the amount due is Kshs 5,391,648.86. Having found that the Appellant was in arrears and was not willing to pay, the Subordinate Court held that this was sufficient reason to order vacant possession. It thus issued an order for vacant possession within six months from the service of the order failing which an eviction order would issue.
8. As stated, the Appellant has appealed against this judgment by the subordinate court and the parties have filed written submissions in support of their respective positions on the appeal. I will refer to them in my analysis and determination below where necessary.

Analysis and Determination

9. Since this is a first appeal, the court is enjoined by the provisions of section 78 of the *Civil Procedure Act* to evaluate and examine the lower court record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co Ltd* (1968) EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

"[An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect..."

10. The Appellant submits that none of the issues framed by the trial court were satisfactorily dealt with. It thus frames the following issues for determination by this court and which I shall deal with accordingly. First, whether the Appellant was in arrears of rent for the sums pleaded in the Plaint. Second, whether



penalties for alleged late payment of rent were specifically pleaded and particularized in the Plaint and last, whether the amount pleaded was proved.

11. The Appellant submits that having established that PW 1 admitted that the rent arrears and penalties were mixed up in the Statement and that the principal rent arrears, which amount the witness could not recall, had been paid in full at an undisclosed date, the Appellant submits that the singular issue for determination by this Court is whether the amount awarded by the trial court being Kshs 5,391,648.86 was specifically proved. The Appellant urges the court to find and hold that the claim for what was termed as rent arrears in the sum of Kshs 5,391,648.86 as at November 30, 2018 was specifically pleaded in the plaint and that it was therefore in the form of special damages and as such it was not proved as required by law.
12. The Respondent opposes the appeal. It submits that the Kshs 5,391,648.86 claimed was the contractual penalty interest and admits that the principal rent amount had been paid. It adds that the adverse inference drawn against the Appellant by the trial magistrate for frustrating the rent reconciliation exercise that was ordered by the court at the end of the formal proof hearing cannot be faulted and that the waiver by the Appellant to participate in the rent reconciliation exercise was not the conduct of a party that seriously disputed the claim leveled against it and was indeed an admission of the veracity of the Respondent's claim.
13. Having examined the record, I note that in its plaint, the Respondent stated that its claim against the Appellant was, "for recovery of rent arrears of Kshs 5,391,648.86 as at November 30, 2018....". PW 1, in his testimony on behalf of the Respondent, admitted that the said amount sought comprised of both rent arrears and contractual penalty interest and that the Appellant had paid the principal rent arrears. The Respondent also admitted it had not amended its pleadings to capture this point. While the Respondent now submits that what it claimed was the contractual penalty interest, its plaint states otherwise.
14. Based on the Plaint and the Respondent's admission, I agree with the Appellant's submission that parties are bound by their pleadings and a court can only pronounce itself on matters that have been pleaded (see *Johnson Mugwe Wanganga v Joseph Nyaga Karingi* NYR CA Civil Appeal No 4 of 2011 [2014] eKLR). The Respondent pleaded that the sum of Kshs 5,391,648.86 was rent arrears and not contractual penalty interest. The moment it admitted that the Appellant paid the rent arrears, the Respondent could not make the claim for penalty arrears and interest as this was outside what was pleaded and an amendment was necessary to include any additional claim. This is consistent with the principle that claims in the nature of special damages must not only be pleaded but also proved with particularity (see *Hahn v Singh* [1985] KLR 716, *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No 192 of 92 (UR) and *Charles C Sande v Kenya Co-operative Creameries Ltd* NRB CA Civil Appeal No 154 of 1992 (UR)).
15. While I agree with the Respondent that once interlocutory judgment has been entered the question of liability becomes a foregone conclusion, this did not absolve it from proving the extent of liability for the trial court to assess the amount due to it based on the evidence. In *Kirugi and Another v Kabiya and 3 others* [1987] KLR 347, the Court of Appeal held that, "The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof". Failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard. The interlocutory judgment only precludes the other party from putting forth its defence.
16. As a result of the interlocutory judgment, the reconciliation exercise ordered by the trial court was gratuitous. The Appellant was not obliged to help the Respondent prove its case and the trial court erred in aiding the Respondent by forcing the Appellant into a negotiation and reconciliation exercise



that the Appellant was unwilling to participate in and rightly so as the court had already entered interlocutory judgment. In any case, since the Respondent had already admitted that all the rent had been paid, the reconciliation exercise would not affect the proceedings unless the interlocutory judgment was set aside and the Respondent allowed to amend the Plaintiff to make additional claims.

17. For the reasons I have set out, I find that the trial court erred in its decision as the Respondent failed to prove its case in accordance with its pleading to the required standard. It neither pleaded nor proved the penalty interest it sought from the Appellant as its claim as pleaded was for rent arrears only which the Respondent admitted had been fully paid by the Appellant.

Disposition

18. The appeal is allowed. The judgment of the Subordinate Court dated January 22, 2021 is set aside and substituted with a judgment dismissing the suit with costs to the Appellant. The Respondent shall pay the costs of the appeal assessed at Kshs 60,000.00.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY AUGUST 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Wachira instructed by Kipkenda and Company Advocates for the Appellant.

Mr Gachugi instructed by Hiram Christopher Advocates LLP for the Respondent.

