



REPUBLIC OF KENYA



KENYA LAW
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**Kaysar Investment Limited v Liu & another (Civil Appeal E274 of 2021)
[2023] KEHC 21464 (KLR) (Civ) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21464 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E274 OF 2021

AN ONGERI, J

AUGUST 16, 2023

BETWEEN

KAYSER INVESTMENT LIMITED APPELLANT

AND

YONG LIU 1ST RESPONDENT

LANZHOU RESTAURANT LIMITED 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. A. N. OGONDA
(SRM) in Milimani CMCC No. E315 of 2020 delivered on 30/4/2021))*

JUDGMENT

1. The appellant filed Milimani CMCC No E315 of 2020 seeking the following prayers;
 - i. Vacant possession of the suit premises
 - ii. Rent arrears in the sum of kshs 1,425,820.
 - iii. Damages for breach of contract amounting to kshs 4,350,000
 - iv. Cost of reinstating the suit of kshs 1,000,000
2. The suit was undefended. The appellant's evidence was that the appellant entered into a lease agreement dated 13/6/2017 for a period of 5 years and six months from 25/9/2017 in respect of shop no 26 located at Dragon village on LR no 1/229 along Argwings Kodhek road.
3. The lease was entered into by the 1st respondent on behalf of the 2nd respondent and the monthly rent was agreed as follows inclusive of VAT



1. 1st year ksh 110,000
 2. 2nd year ksh 118,250
 3. 3rd year ksh 127,120
 4. 4th year ksh 136,650
 5. 5th year ksh 146,400
 6. 6th year ksh 157,900
4. The appellants evidence was that the respondents defaulted from October 2018 and arrears of kshs 1,425,820 accrued.
 5. The trial court only awarded rent arrears of kshs 1,425,820 but declined to award the damages for breaching of contract and costs of reinstating the suit to its original state.
 6. The appellant has now appealed to this court on the following grounds;
 - i. That the learned trial magistrate erred in law and in fact in finding as she did, that the appellant was not entitled to the award of damages for breach of contract in the sum of Kshs 4,350,000/=
 - ii. That the learned trial magistrate erred in law and in fact in finding as she did, that the appellant is not entitled to Kshs 1,000,000/= being the costs of reinstating the appellant's premises to the original state.
 - iii. That the learned trial magistrate erred in law and in fact in finding as she did, that the appellant is not entitled to the award of exemplary damages.
 - iv. That the learned trial magistrate erred in law and in fact in finding as she did, that the appellant is not entitled to interest and costs thereof as pleaded in the appellant's plaint.
 - v. That the learned trial magistrate acted in error when she failed, as she did, to properly evaluate the evidence on record thus reaching an erroneous decision in its judgement.
 - vi. That the learned trial magistrate acted in error when she failed, as she did, to consider the appellant's submissions in entirety thus arriving at an erroneous decision on the damages payable, costs of reinstating the premises to the original state, exemplary damages and interest and costs thereof to the appellant by the respondents.
 - vii. The learned trial magistrate erred in law and in fact by basing her decision on irrelevant matters and failing to base her decision on the facts and evidence on record.
 7. The appellantsubmitted that he is aggrieved by the judgement of the trial magistrate for failure to grant the prayers for damages for breach of contract and costs of reinstating the suit premises to the original state.
 8. The appellant stated that they entered into a lease agreement dated 13/6/2017 for a period of 5 years and six months, commencing 25/9/2017 in respect of shop No 26 located at LR No 1/229 along Argwing Kodhek Road known as Dragon Village.
 9. The respondents defaulted in payment of rent from October 2018 and rent arrears accrued to Kshs 1,425,820/= as at June 2020.



10. The 1st respondent who was the primary contact of the 2nd Respondent went into hiding and the appellant filed the original suit seeking rent arrears, damages and breach of contract in the sum of Kshs 4,350,000/= and costs of Kshs 1,000,000/= for restoring the premises into its original state.
11. The trial court found that the appellant did not prove that he incurred Kshs 1,000,000/= for restoring the premises, and also found that the damages of Kshs 4,350,000/= were not proved.
12. The trial court only awarded the Kshs 1,425,820/= in respect of rent arrears.
13. The trial court did not award costs of the suit to the appellants.
14. The appellant submitted that the trial court did not appreciate the uncontroverted evidence adduced by PW1.
15. Further that the lease agreement was for a period of 5 years and 6 months. The appellant said he incurred losses of Kshs 4,350,000/= which the respondents would have paid under the lease until the expiry of the period in January 2023.
16. The appellant submitted that they provided rent arrears tabulation which the trial court did take into account and the same should be payable since the evidence was uncontroverted.
17. The appellant urged this court to award the Kshs 4,350,000. He relied on the authority of *Hydro Water Well(K) Ltd Vs Sechere & 2others (Sued in their representative capacity as the officers of Chai Kenya Society)* in civil suit No E212 of 2019 (2021)KEctc where the court states that the purpose of awarding the general damages is to place the claimant in the same position as if the contract had been performed with the guiding principle being restitution.
18. The appellant also relied on the case of *Jogoo Kimakia Bus Services Ltd Vs Electrocom International Ltd* (1992) eklR where it was held that the distinction between general damages and special damages is mainly a matter of pleading and evidence that general damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty.
19. The appellant also relied on the case of *Hermanus Giouanni Gnechi Ruscone* civil appeal No171 of 2009 where the court held that special damages are not the same as liquidated damages and that

“the respondent was required to call evidence to show a contract existed between him and the appellant, the specific terms of that contract and in the event of a breach, how much was due to him arising from that breach”.
20. On the issue of award of Kshs 1,000,000 for restoring the premise to its original state, the appellant submitted that the respondents were obligated to restore the premises back to its original state.
21. The appellant submitted that the Kshs 1,000,000 was a reasonable estimate for such undertaking, taking into account the location of the suit property and the extent of the fixtures and fittings generally used in the restaurant establishment.
22. On the issue of exemplary damages, the appellant relied on the case of *Rookes Vs Barnard & Others* 1944 AC 1/79 where it was held that the same are awarded where there is oppressive, arbitrary or unconstitutional action by the servants of the Government and secondly where the defendant’s conduct was calculated to procure him some benefit, not necessarily financial at the expense of the plaintiff.
23. The appellant submitted that the respondent’s action of going into hiding caused the appellant loss in terms of rental income



24. On the issue of costs and interest, the appellant relied on the case of *Jefford Vs Gee* (1970) All ER 1202 and *Prem Lata Vs Peter Muia Mbiyu* (1965) EA 592
25. The courts held twice in the two cases that where the plaintiff has been kept out of money which ought to have been paid to him, he is entitled to interest as compensation for the deprivation .
26. This being a first appeal, the duty of the first appellate court is to evaluate the evidence before the trial court and to arrive at its own conclusion whether to support the findings of the trial court.
27. The issues for determination are as follows;
- i. Whether the appellant is entitled to damages of kshs 4,350,000 for breach of contract
 - ii. Whether the appellant is entitled to 1,000,000 being the cost of reinstating the suit premises to its original state.
 - iii. Whether the Appellant is entitled to vacant possession.
 - iv. Whether the appellant is entitled to costs of (i) and (ii) above.
28. On the issue as to whether the appellant is entitled to general damages for breaching of contract, I have perused the lease agreement and paragraph 13 which provides for breach of contract states as follows:
- “If the rent or part thereof shall remain unpaid for seven days after becoming payable whether lawfully demanded or not, or if any time thereafter the lessee is in breach of any of the covenants or conditions referred to in the standard form of lease, it will be lawful for the lessor to re-enter the premises and thereupon the lease shall be terminated absolutely”.
29. I find that the lease agreement provided for termination in breach of covenant. The lessee was in breach by failure to pay rent and the lessor had a right to terminate the lease and re-enter the premises.
30. I find that the parties did not agree that the rent for the period of the lease be payable in the event of breach of the contract.
31. I find that the trial magistrate was right in refusing to grant the general damages of Kshs 4,350,000 being the rent for the entire period of the lease since the same was not captured in the lease agreement.
32. The court will not seek re-write the contract for the parties: see *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another* [2002] EA 503. Where the court said as follows;
- “...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud, or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.”
33. The duty of the court is to implement the lawful intentions of the parties.
34. I find that the claim for breach of contract of Kshs 4,350,000 has no merit.
35. On the issue of whether the applicant is entitled to Kshs 1,000,000 for reinstating the premises to the original state, I find that there is evidence that the respondent was using the premises for a restaurant.
36. Since the 1st respondent went into hiding and did not restore the premises to their original state, the appellant is entitled to the costs of putting the premises back to the state they would have been had the respondent lawfully restored the same before vacation.



- 37. I grant the applicant Kshs 1,000,000/= for purposes of restoring the suit premises.
- 38. On the issue as to whether the Appellant is entitled to vacant possession, the terms of the agreement provide for the same.
- 39. I find that the Appellant did not raise the said issue in their grounds of appeal and submissions and the same seems to have been abandoned.
- 40. I allow the appeal partially and grant the Appellant Kshs 1,000,000 for restoration of the premises.
- 41. On the issue of costs and interest, I find that it is trite law that costs follow the event.
- 42. I grant the appellant costs of the suit and the appeal and interest at court rates from the date of filing the original suit until payment in full.
- 43. Judgment be and is hereby entered in favor of the Appellant against Respondent in the sum of Kshs 2,425,820/= together with costs of both the original suit and this appeal and interest at court rates from the date of filing suit until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF AUGUST, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

-for the Appellant
- for the 1st Respondent
- for the 2nd Respondent

