



**Registered Trustees of the National Union of Kenya Muslim Coast Province
Trust Fund v Francis Albert Gachoka t/a Rifkins Business College (Civil Appeal
268 of 2017) [2023] KEHC 27605 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 27605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 268 OF 2017
F WANGARI, J
NOVEMBER 24, 2023**

BETWEEN

**THE REGISTERED TRUSTEES OF THE NATIONAL UNION OF KENYA
MUSLIM COAST PROVINCE TRUST FUND APPELLANT**

AND

**FRANCIS ALBERT GACHOKA T/A RIFKINS BUSINESS
COLLEGE RESPONDENT**

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 29th July 2017 by Hon. E. Mutunga, SRM in Mombasa CMCC No. 159 of 2014.
2. The Appellant filed this Appeal and preferred the following grounds in the Memorandum of Appeal.
 - a. The Trial Court erred in law and fact in finding that the Appellant was in breach of contract.
 - b. The Trial Court erred in law and fact in awarding special damages without basis and proof.
 - c. The Trial Court erred in law and fact in misinterpreting the tenure of justice to the Appellant.
 - d. The Trial Court erred in law and fact in failing to appreciate the evidence tendered by the parties in court.

Evidence

3. The Plaintiff's case was that sometimes in year 2010, he leased premises in order to operate the business of a college. Disputes ensured over the leasehold particularly payable of rent after the Defendant increase monthly rent from Kshs. 50,000/= to Kshs. 100,000/ in breach of the contract.



4. The Defendant called no witnesses. However, its case was that there was no agreement that would be inferred from the correspondences and letter produced by the Plaintiff.
5. It was the case if the Defendant that the amount of Kshs. 710,000 was paid to it pursuant to the order of the BPRT.

Analysis

6. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the Appeal. I would have reproduced the submissions and authorities cited but need not reproduce them. The issue that falls for this Court's determination is whether the Trial Court erred in the award of damages for breach of contract.
7. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy.
8. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.
9. In the case of *Selle & Another v Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
10. I note from the pleadings, proceedings and evidence produced at the Trial Court that the Respondent did not plead for general and special damages in respect of breach of contract. This gives me the impression in agreement with the Appellant that the court proceeded on misapprehension of the law and evidence.
11. Faced with similar circumstances, the court in *John Kisaka Masoni v Nzoia Sugar Co. Limited* [2016] eKLR stated as follows:

“The Claimant prayed for several remedies during the hearing including some that were not pleaded in the plaint. Obviously those prayers that were not contained in the plaint cannot be considered by the court. The only prayers in the plaint which the court has considered are for general damages for unlawful dismissal, costs and interest.”
12. What the Plaintiff prayed for was an injunction to stop distress for rent by the Appellant and specific performance by the Appellant for fulfill its obligations in respect of the commercial lease.



13. A party ought to lead evidence based on his pleadings and ought not to wander away from his pleadings. The Court of Appeal in *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015] eKLR rendered itself as follows:-

“A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob’s precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The common law Library No. 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

14. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on ground on which his evidence has been improperly excluded. (See *Esso Petroleum C. Ltd v Southport Corporation* [1956] AC 218 at 238.)

15. In *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others*; Civil Appeal No. 219 of 2013 (2014) eKLR, G. B. M. Kariuki J, P. O Kiage J and K. M’noti J held as follows:-

“... The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

16. The court of Appeal proceeded while quoting with approval an excerpt from an article by Sir Jack Jacob entitled “*The present Importance of pleadings*” restated that:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and



neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

17. The same position was adopted by the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* (1998) MWSC 3. In *MNM v DNMK & 13 others* [2017] eKLR it was held that

“Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in *Chalicha FCS Ltd v. Odhiambo & 9 Others* [1987] KLR 182, the Court held that:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

Later in *Kenya Commercial Bank Ltd v Sheikh Osman Mohammed*, CA No. 179 of 2010 the Court expressed itself thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See *Odd Jobs v. Mubea* [1970] EA 476). However, that was clearly not the case in this appeal.”

18. The purport and tenure of pleadings was also sounded by the Supreme Court in *Raila Amolo Odinga & Another v IEBC & 2 Others* 92017) eKLR where it expressed itself as follows:-

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

19. Applying the above principles from the Supreme Court and the Court of Appeal, in the aforementioned authorities, I am of the considered view that a party is bound by his pleadings. I am consequently unable to agree with the trial court that the Plaintiff proved his case on a balance of probabilities. There was misapprehension of the facts and evidence. The evidence laid did not drive at proving general and special damages as awarded. The case was about an injunction and specific performance.

20. The court is tasked to find whether an injunction was appropriate as prayed: the principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African*



Industries v Trufoods [1972] EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In [*Nguruman Limited v Jan Bonde Nielsen & 2 Others*](#) [2014] eKLR the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v. Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

21. The Court of Appeal in the case of [*Nguruman Limited v Jan Bonde Nielsen & 2 others*](#) [2014] eKLR further opined that:

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

22. The injunction sought by the Plaintiff was in the nature of a prohibitory injunction to forbid a foreseeable harm- distress for rent. In the locus classicus case of [*Kamau Mucuba v The Ripples Ltd.*](#)



Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35 the Court of Appeal expressed itself as hereunder:

“Whereas a prohibitory injunction requires abstention from acting, ...Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained...A court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and that is a higher standard than is required for prohibitory injunction.”

23. I have said enough to show that a prohibitory injunction could not issue in favour of tenant as a permanent relief at the end of trial for the simple reasons that the rented premises were property of the owner and the existence of the tenancy was premised on the terms therein and would not be in perpetuity. The prayer therefore could not succeed.

24. As to specific performance, the Respondent submitted that it had a valid contract with the Appellant and that it had fulfilled its obligations under the said contract. In *Gurder Singh Birdi & Marinder Singh Ghorta v Abubakar Madhubuti*, Civil Appeal No. 165 of 1996, it was held that the underlying principle in granting the equitable relief of specific performance is that,

“the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”

25. Further, in *Thrift Homes Ltd v Kenya Investment Ltd* 2015 eKLR, the court stated that:

“specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”.

26. No material was placed before the court in evidence to show that damages would not sufficiently compensate the Respondent if the Appellant was not compelled to fulfil the obligations under the commercial lease.

Determination

27. In the upshot, the Judgement and Decree of the Trial Court is hereby set aside and substitute it with an Order dismissing the Plaintiff's suit with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023.

.....

F. WANGARI

JUDGE

In the presence of: -



Asewe Advocate h/b for Takkah Advocate for the Appellant
Wanyama Advocate h/b for Matheka Advocate for the Respondent
Balire, Court Assistant

