# Argwings & another v Odundo (Civil Appeal E031 of 2022) [2023] KEHC 26983 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26983 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL E031 OF 2022**

**KW KIARIE, J**

**DECEMBER 20, 2023**

**BETWEEN**

**ODUL BERNARD ARGWINGS ...................................................... 1ST APPELLANT**

**LILIAN ODUOL .................................................................................. 2ND APPELLANT**

**AND**

**ANDREW ALBERT ATER ODUNDO ............................................. RESPONDENT**

***(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's CMCC No.76 of 2018 by Hon. T.M Olando–Principal Magistrate)***

## JUDGMENT

1. Odul Bernard Argwings and Lilian Oduol, the appellants herein, were the defendants in Homa Bay Chief Magistrate's CMCC No. 76 of 2018. The respondent had sued for a claim of payment of Kshs.7483.63 for a water bill and Kshs. 36,195.64 electricity bill incurred when the two used his premises without his consent. When the duo vacated, they left the uncleared bills. When the premises were inspected, after they had vacated, the quantity surveyors established the premises required to be repaired at the cost of Kshs. 1,296,773/= He was claiming this amount from them.

2. On April 28th, 2021, the learned trial delivered judgment in favour of the respondents.

3. The appellants were aggrieved by the said judgment and filed this appeal. They were represented by the firm of Aluoch Odera & Nyauke Advocates. The following grounds of appeal were raised:

    a. The learned trial magistrate erred in law and fact by finding that the plaintiff leased the premises to the 1st and 2nd appellants without any proof whatsoever of a sub-lease agreement between the 1st and 2nd appellants and any other person the respondent inclusive.

b. The learned magistrate erred in law and fact by concluding that the plaintiff's evidence was never challenged while the defendants relied on their pleadings and filed rival submissions.

c. The learned magistrate failed to consider the pleadings of the defendants.

d. There was nothing to link the 2nd and 3rd defendants/1st and 2nd appellants with the respondents.

e. There was no evidence of expenses awarded otherwise as allowed under the law.

4. The respondent opposed the appeal through the firm of M/S Wasuna & Company Advocates. They filed a cross-appeal based on the following grounds:

a. The learned magistrate erred in law and fact by failing to consider the merits of the appellant's plaint, the evidence adduced, and submissions filed therein in the suit and thus failed in his analysis thus arriving in a lopsided judgment which is devoid of the substance of law.

b. The learned magistrate erred in law and fact by failing, to consider key evidence, documentation, and facts as pleaded and proved by the appellant thus rendering judgment that is demeaning, unfair, and a mere skeleton of the evidence adduced, case law cited and basic reasoning that would give a justifiable and fair determination.

c. That learned magistrate erred in law and fact by failing to properly identify and apply doctrines of law in assessing as a whole the subject matter in question, evidence adduced, and the prayers being sought to come up with a sober qualified judgment.

d. The learned magistrate failed to consider the fact that the defendants never tabled any evidence in support of their case.

e. The learned magistrate failed to reconcile himself with tenets of tort law and the fact that the plaintiff had proven his case on a balance of probabilities.

5. As the first appellate court, it is my responsibility to carefully review all of the evidence presented and consider that I did not have the opportunity to observe the witnesses testify and their demeanor. I will follow the principles outlined in the *Selle v Associated Motor Boat Co. Ltd*. [1965] E.A. 123, which states that the first appellate court must examine and assess the evidence presented in the trial court, and then come to its conclusions on the matter.

6. The genesis of this case is a tenancy agreement entered into between the respondent and Isaack Odhiambo Abuya on August 23rd, 2013. The tenancy agreement was to take effect from September 1st, 2013 for 5 years. The tenancy agreement was to terminate in August 2018.

7. The respondent contended that before the expiry of the tenancy, Isaack Odhiambo Abuya sublet the premises to the appellants herein. He further said that the duo approached him on November 17th, 2016. They informed him that they were doing business on the premises and requested a lease in the name of Isaack Odhiambo Abuya but he declined. He subsequently demanded that they vacate the premises on or before July 31st, 2017.

8. When the duo vacated his premises, they left Kshs. 7,483.63 water bill and Kshs. 36, 195.64 electricity bill that were unpaid.

9. At the hearing, the respondent conceded that he had no contract of tenancy with the appellants. He also did not adduce any evidence apart from his averment that the two were in occupation of his

premises. The learned trial magistrate had no basis to make a finding against the appellants. Section 107 of the *Evidence Act* provides:

(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.

10. The respondent did not discharge this burden. The learned trial magistrate erred by shifting this blame to the appellants. This is what he stated:

> The evidence of the plaintiff that the premises had been damaged was not challenged by the defendants who did not tender their evidence, I thus find [sic] in favor of the plaintiff however I find the estimates to be high and I find that the tenant is only liable to pay for the interior repairs and not exterior repairs.

In the case of *Eastern Produce (K) Limited v John Lumumba Mukosero* [2008] eKLR Ibrahim J. observed:

> The fact that one party has filed a suit or made a claim by itself is not proof that there is a "prima facie case" which the Defendant must rebut. It is for the Plaintiff to prove liability. This onus of proof does not shift whatsoever. Once the trial is over, it is for the Court to apply the standard set by the law, the balance of probability after analyzing and assessing all the material and evidence on record.
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> The fact that the appellants did not rebut the claim by the respondent did not make them liable.

11. The cross-appeal does not make any sense. I am not sure what the respondent is complaining about. Whereas I agree that the learned trial magistrate did not address the facts correctly, there is no other conclusion he would have come to other than that the respondent did not prove his claim, had he done so.

12. The upshot of the foregoing is that the appeal is merited. The judgment of the trial magistrate is quashed and the subsequent orders are set aside. The cross-appeal is dismissed.

13. Costs in this court and the trial court are awarded to the appellants.

**DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**