Centre Park Plaza Limited v Chimphondah Media House Limited (Environment and Land Appeal 8 of 2022) [2023] KEELC 17888 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17888 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 8 OF 2022

EK WABWOTO, J

MAY 25, 2023

BETWEEN

CENTRE PARK PLAZA LIMITED ..... APPELLANT

AND

CHIMPHONDAH MEDIA HOUSE LIMITED ..... RESPONDENT

JUDGMENT

1. This is an appeal against the judgment and orders of the Small Claims Court at Nairobi delivered by Hon. Keyne G. Odhiambo on 27th January 2022 in which the Learned Magistrate dismissed the Appellant (the claimant) claim for rent of August and September 2021 and directed the Appellant to set off Kshs 437,655/- from the Respondent's security deposit and refund Kshs 137,527.18 to the Respondent.

2. The Appellant being dissatisfied with the outcome filed this appeal through Memorandum of Appeal dated 25th February 2022. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal: -

    i. The Learned Adjudicator/Magistrate erred in law in applying the principle that prevents unscrupulous persons from temporizing their loss for as long as possible to derive maximum benefit which is not applicable in this case.

    ii. The Learned Adjudicator/Magistrate erred in law in failing to consider the purpose and the principles applicable to the security deposit paid by a tenant; being to ensure that the tenant (Respondent) has fully fulfilled his/her/its contractual obligations but it is not for the Appellant to apply the same in undertaking the repairs.

    iii. The Learned Adjudicator/Magistrate erred in law in failing to find that the failure by the Appellant to apply the security deposit to undertake the repairs, until the Respondent authorized the same on 31st August 2021, did not amount to unjust enrichment.

iv. The Learned Adjudicator/Magistrate erred in law in failing to find that although the Respondent handed over the key to the premises on 31st of July 2021, the Respondent had not handed over the legal possession of the premises to the claimant as it had not fully discharged its contractual obligations.

v. The Learned Adjudicator/Magistrate erred in law in dismissing the Claimant's claim and allowing the Respondent's counterclaim despite having found that the Claimant made the deliberate effort of constantly engaging the Respondent to have premises redecorated and it was only until the evening of 31st August 2021 that the Respondent authorized the Claimant to proceed with the repairs and have it deducted from the security deposit.

vi. The Learned Adjudicator/Magistrate erred in law in finding that the Appellant could have mitigated his lossess arising from the Respondent's failure to carry out the repairs by using the security deposit and failed to consider the principles applicable in a rental security deposit.

vii. The Learned Adjudicator/Magistrate erred in law in failing to find that the lossess and damage caused by the Respondent to the Appellant was a foreseeable loss by the Respondent.

viii. The Learned Adjudicator/Magistrate erred in law by failing to find and order that the Respondent should compensate the Appellant the loss and damage suffered equivalent to the rent payable for the months of August and September 2021.

3. On the basis of those grounds, the Appellant sought the following orders: -

a) That this Appeal be allowed.

b) That this Honourable Court do set aside the entire judgment and decree delivered on 27th January 2022 in Nairobi Small Claims Court Case No SCCOM/E372 of 2021 and be substituted with the orders sought in the statement of claim dated 15th October 2021 filed in the trial court inter alia:

(i) Judgment be entered against the Respondent for the sum of Kshs 372,166.82

(ii) Cost of the suit in the trial court.

c. Costs of this appeal to be borne by the Respondent.

4. The Appeal was canvassed through written submissions. The Appellant filed its written submissions dated 22nd February 2023 through Thiong'o Law Advocates while the Respondent filed its written submissions dated 23rd March 2023 through the law firm of Marende and Nyaundi Advocates.

The Appellant's submissions

5. The Appellant began his submissions by outlining the facts of the case that were presented before the Small Claims Court. It was submitted that on or about 16th October 2020, the Respondent agreed to rent an office space from the Appellant. The Respondent thus paid a deposit in the sum of USD 5,263.16/- and a further sum of USD 1,032.30/- which was the rent for the month of October 2020.

6. It was submitted that the Respondent fell into arrears and this prompted the Appellant to issue a notice to vacate the premises to the Respondent and on the night of 7th June 2021, the Respondent attempted to vacate the premises by removing goods from the premises without clearance from the Appellant's Management thus posing security hazard.

7. According to the Appellant, it then exercised its right of distress of rent and subsequently on 9th June 2021, the Respondent cleared the outstanding rent arrears and the Respondent further committed to carry out the redecoration works and handover the premises in its original condition by 31st July 2021. However, on 31st July 2021, the repairs had not been done and that the Respondent handed over the keys to the premises to the Appellant.

8. The Appellant argued that the Respondent was aware in the event that the repairs spill over to the month of August 2021, the Respondent would have to pay the rent for the month of August. On 26th August 2021, the Respondent together with their Advocates visited the premises and with the Appellant's representatives and all the parties confirmed that the repairs had not been done.

9. It was also contended that the Appellant too proceeded to undertake the repairs after the Respondent had authorized them to do so through a letter dated 30th August 2021.

10. The Appellant argued that the repairs spilled over to the month of September 2021 and denied them the opportunity to let out the premises. Therefore, the Appellant sought for the following reliefs: -

    i. Repairs of the premises – Kshs 192,665/-

    ii. Auctioneers costs – Kshs 115,000/-

    iii. Legal recovery costs Kshs 130,000/-

    iv. Rent for August 2021 – USD 2320 X 109.85 – Kshs 254,852/-

    v. Rent for September 2021 - USD 2320 X 109.85 = Kshs 254,852/-

    vi. Total amount demand by the Appellant – Kshs 947,359/-

    vii. Set off with security deposit held by the Appellant of USD 5,236.16 X 109.85 = Kshs 575,192.18

    viii. Net outstanding claim Kshs 947,359 – 575,192.18 = Kshs 372,166.82/-

11. It was also stated that the Respondent admitted that it would pay the costs of repairs but denied being liable to pay a refund of Kshs 140,503.126 after deducting the admitted costs from the security deposit.

12. It was submitted that the handing over the keys to the Respondent on 31st July 2021 did not amount to handing over legal possession. Reliance was made to *Halsbury Laws of England*, 4th Edition at paragraph 1111 on definition of possession and the case of *WJ Blakeman Ltd v Associated Hotel Management Services Ltd* [1985] eKLR.

13. The Appellant contended that the Respondent was liable to pay for rent until the time the Respondent authorized the Appellant to undertake the repairs.

14. On the issue of the security deposit, it was submitted that the same was to be retained and refunded only when the Respondent had repaired and handed over the premises in a proper condition. Emphasis was made in the letter of offer dated 16th October 2020. On this breath, reference was made to the case of *Raza Properties Limited v Panafcon Engineering Ltd* [2006] eKLR, *Kenya Commercial Bank v Pickwell Properties* [2020] eKLR and *Victoria Laundry v Neman* [1949]2 KB 528

15. The Appellant concluded its submissions by urging the court to grant the orders sought in its Memorandum of Appeal.

The Respondent's written submissions

16. The Respondent filed its written submissions dated 23rd March 2023. The Respondent outlined the following issues for consideration by the court:

    i. Whether the Appellant proved its case on a balance of probabilities.

    ii. What are the principles applicable to the security deposit in a tenancy agreement.

    iii. Whether the Respondent's counterclaim was merited.

    iv. What orders should this Honourable court issue.

17. Counsel submitted that the Appellant had failed to demonstrate to the trial court that the Respondent after vacating the premises on 9th June 2021 and subsequently handing over keys to the premises on 31st July 2021 had intention to exercise any claim or control over and use of the premises thereafter. It was argued that the Respondent's act of giving vacant possession and handing over of the keys to the premises meant that the Appellant had full control of the premises since there was no fixtures or properties of any kind belonging to the Respondent in the Appellant's premises in the month of August and September 2021. Reliance was placed on the Court of Appeal Case of *Abdul Gayor Yusuf Hasham v National Hospital Insurance Fund* [2010] eKLR.

18. On what are the principles applicable to the security deposit in a tenancy agreement, it was submitted that the principle applicable to the security deposit paid by the tenant (now the Respondent) can only be traced back to the tenancy agreement signed by the parties. In the instant appeal, the only written document available binding upon the parties being the letter of offer dated 16th October 2020. Reference was made to clause 6 of the letter of offer dated 16th October 2020 which provided for payment of security deposit equivalent to 3 months license fee of USD 5,263.16/-. The clause stated;

> " This deposit will be retained by the Licensor as security due for performance by the Tenant of his obligations under the licence. The deposit is refundable without interest to the licencee after the expiry of licence and retirement of the premises to the licenser in proper condition and in accordance with the covenants contained in the licence. Upon increase in licence fee, the licencee, shall top up such deposit to an amount equivalent to the licence fee payable for three (3) months."

19. It was argued that once the Respondent met its obligations under the tenancy then the security deposit was refundable. The Respondent argued that they had paid all the rent arrears on 9th June 2021 after which they vacated the premises on the same day and handed over the keys to the appellant on 31st July 2021.

20. It was further submitted that the security deposit was meant to meet the redecoration costs in the event that the Respondent fails to meet the said costs. Therefore, the remaining balance was to be refunded to the Respondent. Counsel submitted that the trial Magistrate correctly applied the principle of security deposit and rightfully allowed the Respondent's counter-claim. The court was urged to uphold the decision of the Learned trial magistrate, and dismiss the appeal with costs.

Analysis and Determination

21. I have considered the entire record of the trial court. I have also considered the parties respective submissions in this appeal.

22. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal as set out in the case of *China 2 hingxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion.

23. The High Court in the *China Zhongxing Construction Company Ltd* case (*supra*) cited the Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt v Thomas (1)*, [1947] A.C. 484."

24. In my view, the following issues stand out as key issues for determination which can dispose of the Appeal. These are: -

    i. Whether the trial court correctly applied the principles applicable to the security deposit in a tenancy agreement.

    ii. Whether the Appellant had proved its case before the trial court to the required standard.

    iii. Whether the Appellant is entitled to the reliefs sought herein.

Issue No I

Whether the trial court correctly applied the principles applicable to the security deposit in a tenancy agreement.

25. The Appellant was aggrieved by Judgment of the trial court particularly on the principles applicable on the issue of security deposit held by the Landlord on whether the same can be applied to undertake the repairs where a tenant has insisted on doing the repairs by herself.

26. The trial court in its judgment delivered on 27th January 2022 held that:

> "The Policy consideration underpinning this principle is to prevent unscrupulous persons from temporizing their loss for as long as possible to derive maximum benefit. Such conduct is not only unjust but stealth and veiled greed; it is this conduct the principle of mitigation of loss seeks to restrain for the sake of fairness, and justice. (See *David Murithi Githaiga v CFC Stanbic Bank Limited* [2019] eKLR)
>
> In this case, the claimant had the respondent's security deposit of USD 5,263.160. The essence of having a security deposit is to cushion the owner of the premises against any damage caused by the tenant. The claimant realized that the premises had not been

repaired as required on 31/7/2021. They embarked on a series of communication with the respondent on the repairs to be carried out. The respondent did not respond to the letters until the 26th of August 2021, when he stated that the repairs were done. On 31/8/2021, the respondent authorized the claimant to redo the repair works.

Once the claimant communicated to the respondent on 31/7/2021 about the repairs and there was no response, the claimant had the option of utilizing the deposit to conduct the alleged repairs instead of prolonging the inquiries over the repairs. By this, the claimant would have mitigated his losses by having the house ready for occupation in the month of August and September 2021.

The claim for rent for August and September was therefore not justified since the claimant would have proceeded to utilize the deposit and remit the balance to the respondent when she failed to carry out the repairs in good time. The court, therefore, finds that the claim for rent for August and September is unmerited, and it amounts to unjust enrichment on the part of the claimant."

27. The appellant urged the court to make reference to letter of offer dated 16th October 2020. Clause 6 of the said letter of offer provided as follows; -

> " this deposit will be retained by the Licensor as security due for performance by the tenant of his obligations under the licence. The deposit is refundable without interest to the licencee after the expiry of the license and retirement of the premises to the Licensor in proper condition and in accordance with the covenants contained in the licence. Upon increase in licence fee, the Licencee, shall top up such deposit to an amount equivalent to the licence fee payable for three (3) months."

28. Security deposit is meant to protect the landlord in situations where a tenant fails to perform his or her obligation and is refundable upon termination of tenancy. In the instant case, the Respondent who was a tenant at the Defendant's premises, met its obligations under the tenancy then the security deposit was to be refunded. In the circumstances the Learned trial magistrate correctly applied the applicable principles in respect to security deposit and the Appellant's contention faulting the same are misplaced.

Issue No II

Whether the Appellant had proved its case to the required standard.

29. The Respondent submitted that the Appellant had failed to demonstrate to the trial court that the Respondent after vacating the premises on 9th June 2021 and subsequently handing over keys to the premises on 31st July 2021 had intention to exercise any claim or control over and use of the premises thereafter.

30. The Respondent further made reference to the Court of Appeal case of *Abdul Gayur Yusuf Hasham v National Hospital Insurance Fund* [2020] eKLR where the court opined as follows;

> " Once the premises were vacated the Respondent ceased to be in exclusive possession of them to the exclusion of anyone else or the Appellant owner. The Appellants right in this scenarios was to take over his premises immediately the notice expired renovate and lease them to another party or use them as he determines."

31. I would adopt the said position herein in determining this issue. The Appellant's contention that the Respondent was still in actual occupation of the suit premises even after handing over the keys since it

had committed to undertake the repairs itself is misconceived and not applicable. In the circumstances, it is the finding of this court that the Appellant failed to prove its case to the required standard during trial.

Issue No III

Whether the Appellant is entitled to the reliefs sought herein.

32. In its Memorandum of Appeal dated 25th February 2022, the Appellant sought for several reliefs. It sought for orders to set aside the judgment of the small claims court and substitute the same with the orders that judgment be entered against the Respondent for the sum of Kshs 372,166.82/- and costs of the Appeal.

33. Having carefully considered the evidence that was adduced at the trial court, it is the finding of this court that the Appellant failed to prove its case to the required standard. The Learned Magistrate properly arrived at the decision that the Appellant had not proven its case to the required standard.

34. On the reliefs sought in the appeal, having made a finding that the Learned Magistrate properly arrived at the decision that the Appellant had not proven its case to the required standard, I see no basis in interfering with the same.

35. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, I find no fault with the decision of the trial court. Consequently, the appeal herein is not merited and the same is for dismissal.

Final orders

36. For the foregoing reasons, I make the following disposal orders: -

    a) That the appeal is hereby dismissed.

    b) Each party to bear own costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH MAY 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Ms. Keya for the Appellant.

Mr. Ngeno for the Respondent.

Court Assistant – Caroline Nafuna.

E.K. WABWOTO

JUDGE