Zaburi Enterprises Company Limited v Chepkemoi (Civil Appeal 57 of 2020) [2022] KEHC 10160 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 10160 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 57 OF 2020

RN NYAKUNDI, J

JULY 29, 2022

BETWEEN

ZABURI ENTERPRISES COMPANY LIMITED ..... APPELLANT

AND

STACY CHEPKEMOI ..... RESPONDENT

JUDGMENT

1. What is before this court is an appeal against the entire judgment and decree of the trial court in Eldoret CMCC No. 1224 of 2017 dated and delivered on 27th February 2020. The respondent herein had filed a plaint on 9th November 2017 seeking general damages for breach of the lease agreement dated 10th May 2017 and special damages for material damages for damage to the plaintiff's property.

2. The appellant instituted this appeal vide a memorandum of appeal and an amended memorandum of appeal filed on 13th April 2021 and 14th June 2021 respectively. The appeal is based on the grounds that the trial court erred in finding that the appellant was in breach of the agreement dated 10th May 2017. Further, that the trial court erred in awarding special damages and finding that the respondent's property had been damaged. The appellant contended that the trial court erred by making findings on unpleaded issues and failed to address and award the appellant's counterclaim of kshs. 125,000/-.

3. The appellant filed its submissions on 14th June 2021. It is the appellant's case that from clause 3 and 5 of the contract it can be discerned that the respondent was to assume possession of the property on 1st July 2017 and that is the time she was expected to pay the outstanding sum of kshs. 125,000/-. the respondent violated clause 3 and 5 of the lease which triggered the appellant to issue the notices dated 28th September 2017 and 2nd October 2017.

4. Further, the appellant submitted that the trial magistrate misdirected himself in failing to find that the respondent breached the contract by failing to pay rent as was stipulated in the contract.

5. The appellant placed reliance in *James Thiong'o Githiri v Nduati Njuguna Ngugi* [2012] eKLR andKisii Civil Appeal No. 208 of 2001 – *Dorca Aketch Oduk v South Nyanza Sugar Co. Ltd* [2010] eKLR on the failure to specifically plead special damages. That the respondent failed to specifically plead the extent of special damages and itemize the law and therefore the trial magistrate erred in awarding kshs. 1,177,445.55.

6. The appellant filed a defence and counterclaim blaming the respondent for breach of the lease agreement and therefore sought a sum of kshs. 125,000/- being arrears in respect of rent as stipulated in the lease agreement. It is the appellant's case that the trial magistrate erred by failing to adjudicate and make a finding in respect of the counterclaim. He urged the court to set aside the trial court findings in their entirety.

7. The respondent filed submissions on 23rd December 2021. It is the respondents' case that from the pleadings of the case it is clear that a contract existed between the appellant and the respondent. further, that from the evidence tendered and the judgment dated 27th February 2030 it is clear that the defendant breached the suit lease agreement by re-entering the premises prior to the expiry of the lease term. As a result of unlawful and constructive eviction the court is urged to make a declaration that the defendant unlawfully re-entered the suit lease premises and dispossessing the respondent. the acts of the appellant to remove and cause damage on the plaintiff's lease property amounted to breach of lease agreement.

8. It is the respondent's case that the plaintiff pleaded and indicated the improvements done on the lease premises in paragraph 9 of the plaint. The issue of damages to the respondent's; ease installations were specifically pleaded in the plaint. The valuation report dated 5th October 2017 specifically proved the material damage occasioned by the appellant.

9. In buttressing the case against the appeal and the reliefs applied for by the respondent, she urged this court to rely on the precedent setting principles in *Peeraj General Trading & Another –v- Mumias Sugar Company Limited* Civil Suit NO.192 OF 2015, *Nkuene Dairy Farmers Co-operative Society Ltd –v- James Kimathi & Another* Civil Appeal No.154 of 2005, *Peter Kamau Gathoro –v- David Waweru Ng'anga* Civil Appeal NO.184 OF 2017, *Gusii Mwalimu Investment CO. Ltd –v- Muahimu Hotel Kisii Ltd* [1996] eKLR and *Mattarelo Ltd –v- Michael Bell & Ashburton Grove Limited* Civil Suit NO.39 OF 2015.

Analysis and Decision

10. It is no doubt the appellant is aggrieved with the decision making process and final outcome by the learned trial magistrate on the suited issues. According to the evidence read alongside the memorandum of appeal the convergence issues revolve around the following:

    a. Whether the trial court erred in finding that the appellant breached the lease agreement

    b. Whether the trial court erred in awarding special damages

    c. Whether the trial court failed to address the appellant's counterclaim

Whether the trial court erred in Finding that the Appellant Breached the Lease Agreement

11. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

> " ...this 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..."

Analysis

12. Pursuant to the written agreement between the parties the respondent was to be put into possession of the subject premises on the conditions set in the agreement. One such condition was payment of ksh 100,000/= upon endorsement of the agreement which was duly executed by the respondent. The balance of ksh 125,000/= was due and payable upon start of business. To that extent there was an enforceable agreement for the lease to take effect between the two parties. It is apparent that the respondent moved into the premises and took possession. The evidence of ksh 100,000/= a mobilization of furniture and other accessory goes towards taking vacant possession as stipulated in the tenancy agreement. In the context of this contract a valid tenancy had been put in place between the appellant and the respondent in the eyes of the law and equity at the very least could only be said to have come to the aid of the parties in ensuring compliancy with the covenant. In the aforesaid agreement the stipulation of payment of rent balance was more of consistent with clause No 3 to the effect that upon the starting of the business. It the case of *Steadman –v- Steadman* (1994) 2 All ER 977 the court held "That alleged acts of bad performance had to be considered with the surrounding circumstances and if they pointed on a balance of probabilities to some contracts between the parties and either showed the nature of or were consistent with the written agreement alleged, then there was sufficient part performance of the agreement. The principle underlying the doctrine of part performance is that should one party to an agreement stand by and allow the other party to incur expense or which prejudices his or her position on the faith of the agreement being varied, he or she will not then be allowed to turn around and assert the agreement is unenforceable."

13. My reading of the impugned agreement does connote some of the essential terms that go into actualization of the contractual relationship between the appellant and the respondent. That is the existence of a rentable premises, determinate term of the lease, rent payable and any other secondary expenses or implied terms to the agreement. In the case at bar the lease agreement dated 10/5/2017 had incorporated a fixed period to terminate the tenancy automatically on 31/12/2017 subject only to a renewal cause upon expiry of the agreed period. Therefore, for the appellant I had option to elect to terminate the lease before the end of the period unless it is shown that the respondent breached a condition precedent provided for in the lease agreement or the lease contained a forfeiture clause. Unfortunately, this lease agreement was never left to run its full course, although the parties entered into a lease agreement without taking into account the express provisions of the *Landlord and Tenant (shops), Hotels and Catering Establishment Act* Cap 301 of the Laws of Kenya. They are deemed to be bound by this statute. It is the law with an interpretative discipline between the Landlord and Tenant relationship in Kenya. Recognizing the potential for conflict between the twin parties, the scope of the statute should be as much as possible be the mirror in drafting the terms of the lease agreement.

In the due process clause context at the very least the appellant had a legal duty to comply with the provisions of Section 4(1) of the Act in drafting the head of terms to the agreement. The age-long-maxim ignorance of the law is no defence cannot justify the respondent reliance on the provisions of Cap 301 of the Laws of Kenya. In addressing these issues on notice the court in *Manaver N Alibhai T/A Diani Boutique –v- South Coast Fitness and Sport Centre Ltd* CA NO.203 of 1994 held that "The Act lays down clearly and in details, the procedure for termination of a controlled tenancy. Section 4(1) of the Act in very clear language that a controlled tenancy shall not determinate shall not terminate or be terminated and no term or condition in or right or service enjoyed by the tenant of any such tenancy shall be altered, otherwise then with accordance specified provisions of the act. These provisions including the giving of a notice on the prescribed form, the notice shall not take effect earlier that two months from the date of receipt thereof by the tenant. The notice must also specify the ground upon which termination is sought. The prescribed notice in form A also requires the Landlord to ask the Tenants to notify him in writing whether or not the tenant agrees to comply with the notice." See also the principles in *Lall –v- Jeypee Investment Ltd* Nairobi HCCA NO.120 OF 1971(1974 EA 512).

14. The law is very clear that for a contract to be binding the essentials of offer, acceptance, consideration and intention of the parties to be bound with the terms to give rise to a legal relationship must be construed from the written agreement. In this case the tenant acted in good faith, she was a purchaser for value, she acquired a legal right in the premises but undoubtedly she had no notice of termination in the form prescribed under Section 4(1) of the Operative Act. This is what the learned author *Chitty on Contracts Vol 1 28th edition 2-145 to 2-148* alluded to in the following statement "In deciding issues of contractual intention, the courts normally apply an objective test. The objective test in other words merely prevents a party from relying upon his uncommunicated belief as to the binding force of the agreement."

15. In the instant appeal the lease was for a fixed term. It is at least worth noting that the relevant purpose was to give effect to the tenant secured rights consistent with the lease agreement. But what followed was a prompt Landlord notice of seven days' termination in a manner which denied her re-entry into the premises. There was no phrase subject to termination by the Landlord in the lease agreement. The need to terminate a fixed term tenancy earlier than stipulated in the agreement was unlawful and in breach of the terms mutually agreed at execution of the lease. The fixed term tenancy could at the relevant moment in time be brought to an end by the appellant under the terms of the tenancy agreement. In my judgment the Landlord failed to observe the conditions of tenancy and for the present purposes he evicted the tenant and in that exercise there was termination by forfeiture. On a fair consideration of this matter the respondent was yet to commence and actualize her business model by way of moving in on a large scale to admit customers in the bar and restaurant business. The tenant in question was brought to an end prematurely on 26th September 2017 before expiry of the period intended in the agreement. It appears that the appellant intention was to get full possession of the premises that's why he gave his notice to the tenant to exist before she could even realize her return for investment. In my view, I agree with the learned trial magistrate that the quit notice was unconscionable and in conflict with the express provisions of Section 4(1) of Cap 301 of the Act. The surrounding circumstances show that the right to exclusive possession of the premises by the appellant before the expiry of the lease agreement was frustrated by virtue of the legal notice. There was absolutely no legal basis of terminating the tenancy for saying that the respondent was in default of paying ksh 35,000/= that breach if it was not a condition precedent to terminate the lease. In a modern society a move in by the landlord without giving adequate notice to the tenant, execute an eviction without a court order or within the laid down legal framework is unconscionable. There is no clause in the lease agreement which entitled the appellant to terminate the lease on or before 31/12/2017. There is something basically unjust, basically unreasonable and therefore basically not legal about the conduct

of the appellant in a modern society to move in to the property without giving adequate notice to the tenant. So far as the evidence before the trial court is concerned one can read malice in the manner the property in situ the premises was charted a way and damages without sufficient cause. It is clear that too little was intended in this lease agreement. There it therefore sufficient grounds for suspicion that the appellant action to terminate the lease without due process is untenable to justify any remedy prayed for in the memorandum of appeal.

15. I am in agreement with the decision of the trial court that the appellant breached the lease agreement.

Whether the trial court erred in awarding special damages

16. In the case of *Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another* [2011] JELR 48225 (SC) (SC 221/2005 (16/2/2011), Mahmud Mohammed, JSC. delivering the judgment of the supreme court of Nigeria stated:

> " I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award." Further in Hahn v Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

17. It is clear that there was damage to the respondents' property during the illegal eviction that was done on 2nd October 2017. I find no reason to disturb the award for special damages as the respondent pleaded the same in paragraph 10 of the plaint and produced a valuation report in court which was never contested during cross examination.

18. It is trite that special damages must be specifically pleaded and proven. The respondent in its claim indicated that the total value was to be indicated in the assessor's report and I therefore find that the same was specifically pleaded and proven.

Whether the court failed to address the appellants' counterclaim

19. I note that the counterclaim was received under protest as it was filed and served out of time. That notwithstanding, the counterclaim was based on the breach that the appellant alleges was on the part of the respondent. Having established that none of the particulars of breach were proven, it is my view that the issues raised in the counterclaim were settled by the trial court.

20. In the premises the appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 29TH DAY OF JULY, 2022.

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R. NYAKUNDI

JUDGE