



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mdandando t/a Maendeleo Imani Hotel v Hare (Civil Appeal  
71 of 2021) [2022] KEHC 17171 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 17171 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 71 OF 2021  
SM GITHINJI, J  
OCTOBER 26, 2022**

**BETWEEN**

**HARE GIDEON MDANDANDO T/A MAENDELEO IMANI  
HOTEL ..... APPELLANT**

**AND**

**JOSEPH TSOHARE HARE ..... RESPONDENT**

*(Being an appeal from the judgement of the Honourable Ms.N.C  
Adalo - Senior Resident Magistrate at Mariakani made on 6th  
July 2021 in Mariakani SRMCC Civil Case No. 119 of 2020)*

**JUDGMENT**

1. This appeal is brought by the appellant against the judgment delivered by the Senior Resident Magistrate Hon N. C Adalo in SRMCC No 119 of 2020 whereby she dismissed the plaintiff's case in its entirety with costs to the defendant.
2. Being aggrieved by the finding the appellant preferred an appeal anchored on the following grounds:
  1. That the trial magistrate erred in law and fact in her failure to take into consideration the evidence, witness and exhibits brought by the appellant/claimant.
  2. That the trial magistrate erred in law and fact in her failure to appreciate evidence tendered thereby reaching a wrong conclusion.
  3. That the trial magistrate erred in law and fact in her failure to appreciate that the appellant's claim was based on the respondent not having any color of right to demand rent and a liquidated claim for refund of the sums remitted to the respondent.
  4. That the trial magistrate erred in law and fact in her failure to make a finding on disputed facts in the entirety of the dispute such as whether the subject matter premises was constructed



prior to the respondent purchase or not, and whether the subject matter premises sits on a road reserve or not, and whether the respondent had any color of right to claim rent and thereby reaching a wrong conclusion.

5. That the trial magistrate erred in law and fact in her failure to appreciate that the respondent claim also sought for eviction orders as well.
6. That the trial magistrate erred in law and fact by dismissing the respondent's counterclaim without any costs to the appellant.
7. That the trial magistrate erred in law and fact in dismissing the appellant's claim with costs despite dismissing the counterclaim.
8. That the trial magistrate erred in law and fact by failing to find that the appellant only paid rent upon the respondent assertion that his plot which he had purchased extended to the subject matter hotel and making a finding that appellant paid the sums of rent on his own volition.
9. That the trial magistrate erred in law and fact by finding that despite appellant's case being uncontroverted the appellant did not prove his claim.
10. That the trial magistrate erred in law and fact by failing to appreciate the appellant's submissions in the entirety.

### **Background**

2. The respondent filed a suit on September 14, 2020 *vide* a plaint dated 10<sup>th</sup> September 2020 seeking against the defendant a sum of Kshs 87,700 with interest at 12% per annum from April 1, 2020 and costs of the suit.
3. His case is that he is the proprietor of a hotel and/or food establishment known as Maendeleo Imani Hotel. He was informed by the defendant in the year 2007 that he owned the parcel of land the hotel sits on and was therefore required to make monthly rent requirements of Kshs 500 which was later increased to Kshs 800.
4. He averred that in the year 2019, the hotel was flagged down as he was informed by county government officials from Mariakani that the same sits on a road reserve.
5. His claim therefore is that the defendant had no right to demand for rent and should refund the sum of Kshs 87,700 paid to him.

### **Evidence at Trial**

6. At the trial, the plaintiff offered evidence in support of his case. The defendant also testified upon the close of the plaintiff's case and called one witness.
7. PW1 Hare Gideon Mdandando under oath adopted his written statement dated September 10, 2020 and produced as exhibits documents as per list of documents dated September 14, 2020.
8. He testified that when he built the hotel, behind the hotel was Mbaji Ganze Tetu's house and he completed the construction and opened the hotel before Mbaji died. He added that Ganze Tetu never asked for any rent money from him but later when he died, Joseph Tsohare told him he had bought the plot and that he was required to pay rent and also agreed to issue receipts.



9. It is his testimony that in 2019, officers from county went asking for a license and also asked who his landlord was and he informed them that it was Joseph Tsohare. He was further informed that the hotel was on a road reserve.
10. On cross examination, he stated that he was aware that the plot stands on a road reserve even before he built it. Further that he did not discuss the ownership of the plot with the defendant but he kept paying rent.
11. DW1- Joseph Tsohare adopted his written statement dated May 5, 2021 and produced as exhibits documents as per the list of documents dated May 6, 2021.
12. He added that the stated plot was sold to him by Ganze Mrisa Mbaji in 1988 but later the transaction was reduced to an agreement.
13. He testified that the plaintiff (who is his nephew) approached him and said that he wanted to build a kiosk and showed him where he would construct and pay monthly rent at Kshs 500 later increased to Kshs 800 and receipts were issued after payment.
14. DW2- Tsuma Vungu Bae adopted his written statement and added that he is the village elder.
15. He testified that he has lived in Uwanja wa Ndege for over 50 years and knows the plot in dispute. He stated that the same is owned by Joseph Tsohare having bought it from Ganze Mrisa. He added that he was aware that the plaintiff was paying rent as agreed between the plaintiff and the defendant until in 2018 when there was a dispute which he was called to resolve as a village elder.

### **Analysis and Determination**

16. The appeal was canvassed by way of written submissions.
17. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come up with its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of witnessing the demeanor of the witnesses during the trial. This duty was well stated in *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular, this 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 (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).”

18. The Court of Appeal for East Africa took the same position 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.”

19. The discretion of this court to interfere with the determination of the trial court also exercising its discretion should be exercised within the confines of the principles set out by Sir Clement De Lestang, VP in *Mbogo v Shah* 1968 EA 93, where he held as follows: -

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”

20. I have perused the grounds of appeal by the appellant as well as the submissions by the parties and the issues arising for determination are;

1. Whether the appeal is merited?
2. Who shall bear the costs of the appeal?

21. It is undisputed by the parties that the appellant paid for rent to the respondent in the term hereinabove discussed. From the evidence on record, it is vivid that there was a dispute between the appellant and the respondent regarding payment of rent which was resolved by a village elder.

22. The appellant pleaded fraud against the defendant. The burden of proof was on the appellant to show that the defendant had committed fraud. From the evidence on record and proceedings at the trial court, the appellant admitted that at the time he built the hotel he knew that the plot was on a road reserve. In my view, if having this knowledge he went ahead to pay rent, then the same was out of choice and no fraud on part of the respondent.

23. I agree with the trial court that there was no evidence to support the claim on fraud. I therefore uphold the decision and dismiss the plaintiff's claim in its entirety.

The appeal stands and dismissed for want of merit.

There are no orders as to costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

Mrs Muronji for the Respondent

Ms Katana holding brief for Mr Munyanya for the Appellant

