



REPUBLIC OF KENYA



KENYA LAW
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**Mencia Management Limited v Mwangi (Civil Appeal 202 of 2018)
[2022] KEHC 14425 (KLR) (Civ) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 202 OF 2018

DAS MAJANJA, J

OCTOBER 21, 2022

BETWEEN

MENCIA MANAGEMENT LIMITED APPELLANT

AND

DAVID N MWANGI RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. D. W. Mburu, RM dated 31st October 2017 at the Magistrates Court at Milimani Commercial Courts, Nairobi in Civil Case No. 7163 of 2010)

JUDGMENT

Introduction and Background

1. What is before the court for determination is an appeal filed by the Appellant that is grounded in its Memorandum of Appeal dated 19th April 2018 where the Appellant seeks to overturn the judgment and decree of the Subordinate Court dated 31st October 2017 where the court entered judgment in favour of the Respondent for Kshs. 255,402.11, interest and costs.
2. The basic facts giving rise to the suit in the Subordinate Court and this appeal are common ground and can be gleaned from the record. On 6th June 2008, the Respondent contracted the Appellant to manage the Respondent's premises situated on LR No. 111/891, Komarock Estate, Nairobi ("the premises") where the Appellant was to inter alia ensure and coordinate the payment of rent and remit all rent collected from tenants on or before the 10th day of each month, ensure tenants pay all water and electricity bills together with shared services such as security, cleaning and maintenance of common areas, attend to tenants' complaints and generally represent the Respondent's interests.



3. By a Plaint dated 16th November 2010, the Respondent accused the Appellant of failing to perform the aforementioned duties and claimed that the Appellant had collected the sum of Kshs. 451,455.60 from tenants being rent, repair costs and water utility bills which it failed to remit to the Respondent and the Nairobi Water and Sewerage Company. The Respondent thus sought judgment against the Appellant for the Kshs. 451,455.60, interest and costs of the suit.
4. The Appellant filed a Defence and Counterclaim denying the Respondent's averments. It blamed the Respondent for not cooperating throughout the term of the agreement and owing it Kshs. 14,312.00 being two months' management fees and termination of the contract in lieu of notice and Kshs. 15,450.00 being the balance for security charges.
5. The matter was set down for hearing where the Respondent testified on his own behalf and the Appellant called two witnesses. After considering the pleadings and submissions filed by the parties, the learned magistrate delivered the judgment on 31st October 2017 where he framed eight issues for determination as follows: Whether the Appellant breached the management agreement and if so, whether the Respondent had the right to terminate it in the manner he did. Whether the Respondent was entitled to the rent not remitted to him by the Appellant. Whether the Respondent acted within the agreement by charging interest on late payments by the Appellant. Whether the Respondent was entitled to Kshs. 1050.00 on account of a dishonored cheque. Whether the Respondent was entitled to the 'VAT certificates' amount claimed. Whether the Respondent was entitled to the repair costs allegedly incurred. Whether the Respondent was entitled to the water bills allegedly incurred. Whether the Appellant was entitled to the reliefs in its Counterclaim.
6. On breach of the management agreement, the trial magistrate was satisfied from the evidence that the Appellant's conduct fell below the standard expected of it under the management agreement leading to breach of the terms thereof. As to whether the Respondent had the authority to terminate the management agreement without notice, the trial magistrate stated that the management agreement did not contemplate a situation where the contract would be terminated without the two months' notice or payment of two months' commission in lieu of notice. That since the acts of breach were neither spontaneous nor triggered by the Appellant's delay in remitting rent for May 2010, the Respondent could not terminate the agreement without a two-month notice or payment in lieu thereof.
7. On the Respondent's claim for rent not remitted by the Appellant, the trial magistrate found that the Respondent would be entitled to the gross amount of Kshs. 75,600.00 for the month of May 2010 and Kshs. 5,000 for the month of April 2010 as the Appellant did not rebut the allegation that there was such a shortfall. The trial magistrate accepted the Respondent's claim for rent for the period between July 2009 and February 2010 being Kshs. 56,000.00 and in sum held that the Respondent was entitled to a total of Kshs. 136,600.00 on account of rent not remitted to him. The trial magistrate rejected the Respondent's claim for interest on the ground that the parties' contract did not allow him to levy interest on late payment. On the claim for Kshs. 1050.00 based on a dishonoured cheque, the trial magistrate held that the Respondent was entitled to reimbursement as the Appellant did not controvert the fact that the Respondent incurred bank charges for cheque number 100683 on 3rd August 2009 for Kshs. 77,112.00 which was dishonoured.
8. On the claim for VAT certificates, the trial magistrate held that the Respondent was not entitled to payment of monies that the Appellant claimed were paid to the Kenya Revenue Authority (KRA) and that VAT certificates are given by KRA and not individuals. That while it would have been incumbent upon the Appellant to collect the same from KRA, it would be improper for the court to order the Appellant to 'refund' monies already paid to KRA.



9. The trial magistrate also allowed the Respondent's claim for Kshs. 16,730 on account of repair costs incurred by the Respondent after being satisfied that the invoice produced by the Respondent was not rebutted by the Appellant. On the claim for water bills, the trial magistrate blamed both parties for being negligent and for failing to arrest the water situation in the premises early enough. Consequently, he allowed the Respondent to recover Kshs. 130,784.11 which was half the amount incurred on water bills.
10. As regards the Counterclaim, the trial magistrate held that in as much as he had found that the Respondent could not terminate the contract in the manner he did, general damages should not be granted where termination of the contract was preceded by Appellant's breach of agreement. The court agreed with the Appellant that it was entitled to payment in lieu of notice and hence awarded Kshs. 14,312.00 being two months' management fees.
11. On the claim for security charges, the trial magistrate held that the Respondent did not dispute the existence of a contractual relationship with a security company, Aqua Security Services Limited, neither did he dispute that there was an unpaid amount as alleged by the Appellant. That from the evidence, the Appellant did not act beyond the terms of the contract and as such allowed the claim for Kshs. 15,450.00.
12. In the foregoing, the Subordinate Court entered judgment in favour of the Respondent for the net sum of Kshs. 255,402.11 together with interest at court rates and costs of the suit. It is this decision that forms the substance of the instant appeal which has been canvassed by way of written submissions.

Analysis and Determination

13. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the [Civil Procedure Act](#) to evaluate and examine the Subordinate Court record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well explained in *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

[An appellate 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...

14. The Appellant's appeal mainly attacks the Subordinate Court's award on the rent arrears, water bills and repair costs and the court's duty is to evaluate the evidence that was presented by the parties before the trial court and determine whether the trial court correctly analysed and appreciated the same and arrived at the correct conclusion.
15. The Appellant was to ensure and coordinate the prompt collection of, inter alia, rent and service charge and remit to the Respondent full payment of all rent collected net of the Appellant's remuneration on or before the 10th day of each month. In its evidence, the Appellant's witness DW 1 admitted that he had collected rent of Kshs. 35,500.00 in May 2010 but had not remitted the same to the Respondent. He further stated that some tenants had not paid rent but admitted that it was the Appellant's duty and responsibility to follow up with tenants for the unpaid rent and recover all rent arrears in collaboration with the Respondent. He further admitted that it was the Appellant's responsibility to ensure that



tenants pay for water and electricity bills. He stated that he was not aware that the Respondent did any repairs on 21st June 2010.

16. From the evidence, I do not find any fault in the trial magistrate's conclusion that the Appellant indeed failed to collect or collected and failed to remit rent to the Respondent as required by the parties' agreement. The Appellant admitted not remitting Kshs. 75,600.00 being the rent for the month of May 2010. The Appellant did not also rebut the claim that there was a balance of Kshs. 5,000.00 not remitted from the month of April 2010. The Respondent claimed unpaid rent amounting to Kshs. 56,000.00 for the months between July 2009 and February 2010 for Flat 4A. The trial magistrate found that the house was closed but went ahead to award the rent arrears. Since the house was closed for that period the court could not award that amount. While the court came to the correct conclusion on the amount of rent collected but not remitted, the sum of Kshs. 136,000.00 ought to be reduced by Kshs. 56,000.00 making a total of Kshs. 80,000.00 due to the Respondent.
17. On the water bills, as I have stated, the same was also the responsibility of the Appellant to ensure that tenants pay for the same. The parties did not deny that the veracity of some of the water bills could not be accurately ascertained due to illegal water connections and mismanagement of the water meters. Regardless, the Appellant did not also deny that it failed to ensure that tenants pay for their water bills as required by the management agreement. I cannot fault the learned magistrate for finding a compromise on the water bills situation and ordering both parties to shoulder the same equally as they were all to blame.
18. The Appellant also faulted the learned magistrate for awarding the Respondent repair costs of Kshs. 16,730.00 when there was no evidence for the same. I agree with the Appellant that an invoice is not proof of repair. It is only a demand for payment and does not confirm that repairs were done (see *Total (Kenya) Limited v Janevams Limited* [2015] eKLR). Further, I note that the Respondent's claim as pleaded was for, "repair costs not remitted to the Plaintiff though remitted to the Defendant by tenants." This claim is for repair costs after a tenant had vacated the premises. It is outside the pleadings and is ought to have been disallowed. The sum of Kshs. 16,730.00 is therefore disallowed.

Disposition

19. The appeal succeeds to a limited extent as I have set out above and is allowed to the extent that the sum of Kshs. 255,402.11 awarded by the trial court shall be reduced by Kshs. 72,730.00. Since the appeal has succeeded in part the Appellant shall be awarded costs.
20. I therefore order as follows:
 - a. The Judgment of the subordinated court is substituted with a judgment for the Respondent against the Appellant for Kshs. 182,672.11 with interest thereon from the date of filing suit until payment in full with costs of the suit.
 - b. The Appellant is awarded costs of the appeal assessed at Kshs. 35,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2022.

J. SERGON (DR)

JUDGE



.....instructed by Nchoe, Jaoko and Company Advocates for the Appellant.

.....instructed by Mwaniki Kariuki and Company Advocates for the Respondent.

