



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. 10 OF 2017

THE CLERK OF THE NATIONAL ASSEMBLY

THE PARLIAMENT SERVICE COMMISSION.....APPELLANTS

VERSUS

KAUNDA ROBERT KEARI.....1ST RESPONDENT

HON. RICHARD NYAGAKA.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(Being an Appeal from the judgment of Hon. J.M. Njoroge, Chief Magistrate at Kisii made on 7th February 2017 in CMCC No. 483 of 2015)

BETWEEN

KAUNDA ROBERT KEARI.....PLAINTIFF

VERSUS

RICHARD NYAGAKA TONGL.....1ST DEFENDANT

THE CLERK OF THE NATIONAL ASSEMBLY

THE PARLIAMENTARY SERVICE COMMISSION....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1.This is an appeal by the Clerk of the National Assembly the Parliamentary Service Commission (the Appellant).The amended Memorandum of Appeal filed on the 11th October 2018 has 7 grounds as follows;

- i. That the trial Magistrate erred on finding that the Appellant is liable for the payment of the sum of Kshs. 561,000/- to the 1st Respondent being rent arrears plus any further costs.
- ii. That the trial Magistrate misdirected himself on the terms of the lease agreement between the 1st and 2nd Respondent which terms do not bind the Parliamentary Service Commission
- iii. That the trial Magistrate erred in law and in fact in failing to hold that there is no privity of contract between the Appellant and the 1st Respondent.
- iv. That the trial Magistrate erred in law and in fact by holding without specifying which parties, that the parties entered into a lease agreement between the landlord and authorised officer
- v. That the trial Magistrate erred in law and in fact by holding that there was constructive tenancy between the plaintiff/ 1st

Respondent and the Appellant/2nd Defendant.

vi. That the trial magistrate erred in law and in fact implying that there was agency relationship between the Appellant and the 2nd Respondent.

2. The 1st Respondent in a plaint dated the 23rd October 2015 sued the Appellant's, the 2nd and 3rd Respondents for accrued rents for the years 2013-2014, 2014-2015 and 2015-2016 at a scale of Kshs. 51,000/-. At paragraph 17 of the plaint the 1st Respondent avers that 2nd Respondent acted on behalf of the Appellant and 3rd Respondent who for the purpose of the transaction were disclosed Principal. At paragraph 18 the 1st Respondent avers that the 1st Appellant through its letter dated the 17th March 2014 and on diverse personal meetings between its officers and the 1st Respondent acceded to the lease in issue. At paragraph 19 the 1st Respondent avers that the Appellants were under a duty as the 1st Respondent's principal for purpose of the lease to either advise the 2nd Respondent to pay the due rents and or pay to the 1st Respondent the amount of rent due directly regardless of any disagreements between the 1st Respondent and the 2nd Respondent. The 1st Respondent sought judgment against the Appellants, 2nd and 3rd Respondents jointly and severally for; special damages which continued to accrue, general damages for breach of contract on the footing of aggravated damages, interest on the accrued and due rent at commercial rates 27% with effect from January 2013, until payment in full plus costs of the suit.

3. The Appellant filed a defence denying the 1st Respondents claim as laid out. At paragraph 11 the Appellant avers that any advice given to the Plaintiff with regard to the renting of constituency office space was only to the effect that the 1st Respondent follows the statutory procedure laid out under the Parliamentary Service (Constituency Offices) (Amendment) Regulations 2005.

4. In a judgment dated the 7/2/2017 Hon. J.M Njoroge CM the trial Magistrate held that *the parties entered into a lease agreement between the landlord and the authorised officer. That the 1st Respondent entered into occupation of the premises. That the Appellant admitted that the rent has not paid, and ought to be paid. That even if for instance the court has to envisage a situation where the agreement has to be approved. The above 3, grounds clearly leads to a presumption of constructive tenancy.* Judgment was entered against the defendants jointly and severally for the payment of accrued rent amounts of Kshs.51, 000/- plus costs and interest at cost rates.

5. As this is a first appeal, I am under a duty to evaluate the evidence before the trial court and reach my own conclusion-(**Selle vs Associated Boat Co. Ltd [1969] EA 123.**) In doing so, I must bear in mind that I have neither seen nor heard the witnesses.

6. At the hearing before the trial Magistrate the 1st Respondent produced the lease he had with the 1st Respondent and sought judgment on the agreed rent. The Appellant through their 1st witness Agnes Kamoni testified that the Constituency Development Fund manager fills the agreement with the landlord, the maximum rent was 35,000/- and that the procedure was not followed. That the Appellant challenged the agreement arguing it was not valid as the rules and procedure were not followed. The 2nd witness David Nyantari the constituency manager Nyaribari Chache testified that the MP was involved in the negotiations. That the 1st Respondent has not been paid due to the differences. There has been no payment and that he was instructed to call the landlord severally. During cross examination he testified that they receive funds from Parliamentary Service Commission (PSC), that the rent is with PSC and they should pay.

7. Parties filed written submissions. The Appellant submitted that since the process of acquiring the rental space was flawed from the beginning, that the lease signed between the landlord and the Constituency office manager was not approved by the Commission as the amount agreed on by the parties was above the approved PSC rate. It was also submitted that the Appellant was not privy to the said lease agreement and that the trial court erred in implying a contractual obligation between the Appellant and the 1st Respondent. That PSC serves a facilitative role within the confines of the law and is not a party in the alleged lease. That Regulation 8 of the Parliamentary Service (Constituency Office Regulations) 2005 is clear on whom the parties of the lease agreement are, it provides;

“The constituency office manager, where necessary, shall sign a lease agreement with the landlord or agent before occupying the office and shall be responsible for the accuracy of all information contained in the leases agreement”

8. It was submitted that the doctrine of privity of contract is that a contract cannot confer rights or impose obligations on strangers to it, that is the persons who are not parties to it, for this argument the Appellant relied on the case of **Agriculture Finance Corporation vs. Lengetia Ltd (1985) KLR** and **Civil Appeal No. 59 of 2014 Parliamentary Service Commission vs. George Okoth Owour & 2 Others**, in both cases the Court of Appeal pointed out that under the doctrine of privity of contract a person cannot be bound by a contract which he is not a party to. Lastly it was submitted that the trial court's order amount to compelling the Commission to paying amounts that were against the law and thereby setting a dangerous precedent that Members of Parliament may enter into lease agreements that exceed the amount set by the PSC, that the amount of Kshs. 51,000/- was unlawful. That if this court orders PSC to pay the amount over and above what is set by the Commission it would be contrary to the PSC (Constituencies Offices) Regulations 2005 and the payment would amount to imprudent use of public funds.

9. In addition to the written Mr. Mwendwa submitted as follows; that parties are bound by their pleadings, that paragraph 6 of the plaint does not state when the lease was to commence nor does it show when it was leased nor does the 1st Respondent state when he leased the premises. That the appellant denied the entire claim in its defence and put the 1st Respondent to strict proof. The evidence adduced and the pleading are contrary. That no original documents are produced, the Respondent relied on copies, no title was produced, the court relied on hearsay evidence and that there was no case before the trial magistrate.

10. The 1st Respondent submitted that the trial Magistrate properly exercised his mind to the evidence adduced and the applicable law in finding in favour of the 1st Respondent as against the appellant and 2nd Respondent. On the issue of whether the appellant was privy to the lease between the 1st and 2nd Respondent, it was submitted that PSC is a party to the lease agreement as the lease is signed by authorised officer in terms of Regulation 8 of the PSC Regulations 2005. That Agnes Kamoni in her evidence indicated that where the procedure is not

followed the manager is supposed to sign as the accounting officer and that she admitted that the regulations do not talk about a maximum amount, that the constituency development fund manager signed the agreement as an accounting officer which makes the lease agreement binding on PSC and that the disbursement of rent is the PSC prerogative. That the evidence of David Nyantari the manager was that in the normal course of business its office receives funds from PSC and not an individual and that it is the PSC's mandate to pay for the rent arrears. That the 2nd Respondent was an agent of the Appellant and as such a contract existed between the principal (the Appellant) and the Agent (1st Respondent). For this argument the 1st Respondent relied in case of **Mayfair Holdings Ltd vs. Ahmed (1990)eKLR** and the case of **Garnac Grain co. Inc. vs. Faure & Fair Dough Ltd and Bunge Corporation [1967] 2 ALL E.R.353**. It was submitted further the 2nd Respondent whilst acting under the authority (either implied or express) of the PSC procured or caused to be procured from the 1st Respondent premises for its offices for which in law they are required to pay for. That the trial magistrate applied its mind correctly by finding that the Appellant was liable to pay the sum of Kshs. 51,000/- as monthly rent arrears for the entire period which rent remained accrued for a period of 32 months. Mr. Begi submitted that the appellant's submissions in court were not in the amended memorandum of appeal.

11. The issues for determination can be summed up as follows:

- i. Was there a lease between the 1st and 2nd Respondent?
- ii. Was there privity of contract or an implied contract between the Appellant and the 1st Respondent, the Appellant being the principal and 1st Respondent the agent.

The 1st Respondent from the exhibits produced complied with the requirements to look for a premises to lease. The premises the 1st Respondent settled for was L.R. No. Nyaribari Chache/ B/B/Boburia/7589- Kisii County. By a letter dated the 24th April 2014 the District Valuation Officer gave details of the premises, it comprised of nine offices on three floors and with a lettable area of 170.295 m² at Kshs.51000/- per month. On the 25th April 2014 the 1st Respondent wrote to the 2nd Respondent acknowledging receipt of his (2nd Respondent's) letter dated 25th April 2014 together with the enclosure of the rental assessment for office space of national assembly Nyaribari Chache constituency. In his letter the 1st Respondent sought to have the rent paid quarterly. He also sought to have a formal lease prepared. A lease document was prepared dated 25th April 2014. The front part of it shows it was sent to Parliamentary Service Commission on 25th April 2014. The lease term was from 2014- 2019, the agreed rent was 51,000/-. The lease was signed by Richard Ratemo the Constituency manager. This evidence shows that there was a lease between the 1st and 2nd Respondent. The 2nd Respondent's witness did acknowledge that the said lease was sent to them, but they sent it back. In her statement dated the 13th September 2016 Agnes Kamoni stated as follows in the following paragraphs;

“2. The Parliamentary service Commission is established under Article 127 of the Constitution providing such services as are necessary for the effective and efficient functioning of Parliament which includes providing Members of Parliament with Constituency Offices.

iii. The Parliamentary Service Commission(Constituency Offices) Regulations 2005 provide for the procedures of initiating opening of Constituency Offices and the Regulations set conditions for payment of rent for Constituency Offices that must be complied with prior to disbursement of funds.

iv. That the Chief Constituency Liaison Officer has a duty to assist Members of Parliament to ensure compliance with the Parliamentary Service Commission (Constituency Offices) Regulations, 2005.

v. That on the 31st of July 2014 the Clerk of the Senate and the Secretary to the Commission received a letter from the Ministry of Lands, Housing and Urban Development(Housing Directorate) where the Principal Secretary forwarded four copies of proposed lease agreements signed by a landlord for signature.

vi. That the Clerk responded on the 13th of August 2014 and advised that the lessor therein liaises with the lessee for proper documentation that aligns with the Parliamentary Service Commission policy.

It is evident that there was a lease between the 1st Respondent and the 2nd Respondent. Further Dw2 informed the court that they occupied the premises. I therefore find the Magistrate did not err in finding that there was a lease between the 1st and 2nd Respondent. The manager complied with the provisions of Regulation 8.The Appellant cannot run away from this fact. They knew that the MP of Nyaribari Chache Constituency had an office within the county which was rented. Their defence that lease was not approved by them cannot stand; there was occupation of the premises. I find further that Agnes's evidence clearly shows that the office of the Appellant is the principal of the 2nd Respondent. Her evidence was that the PSC was established to provide such services as are necessary for the effective and efficient functioning of Parliament which includes providing Member of Parliament with Constituency Offices, which the subject of the suit that was in the lower court and this appeal. From the evidence of Dw2 who admitted that they occupied the premises and that the previous constituency manager signed the lease I find that the Appellant had a duty to pay rent, there was an implied contract between the Appellant and the 1st Respondent, the Appellant being the principal of the 2nd Respondent. The Appellant had the task to ensure that services were provided for the effective and efficient functioning of the Member of Parliament Constituency Offices.

12. The Parliamentary Service (Constituency Offices) Regulations 2005, under Part 11- Office Rental/ Construction provides what the Clerk of National Assembly is to do upon gazattement of an elected Member of Parliament, it provides for the initiating opening of office, custody of lease agreement, restriction to where to open the office, the signage, maximum space, signing of the lease agreement, ensuring security, reporting complaints on misuse of office and construction of a constituency office. Part V deals with Handing Over Offices. At paragraph 33 it states that, “The Commission shall pay all expenses including rent, telephone, power and lightning, water and other incidental costs

relating to a constituency office for a one month after a Member vacates his seat. The lease the subject of this appeal was signed by the constituency manager, it was a valid lease. The only issue that I note was not agreed was the amount of rent to be paid. The Commission was very categorical that rent for Constituency Offices in the County was Kshs.35000/- this being the maximum figure. The letter dated 28th March 2013 states that, “*Rent to be increased by 40% translating to Kshs.42, 000/= in cities (Nairobi, Mombasa and Kisumu) and Kshs.35, 000 in towns and other counties.*” From the letter dated 15th February 2015 the Personal assistant to the 2nd Respondent whilst giving a notice mentioned the maximum rent of Kshs.35,000/=, which as per his letter the 1st Respondent decline to accept and insisted on a higher rent. I note that a deposit was paid for 3 months Kshs. 90,000/- yet the lease was for 51,000/-. The sum of Kshs.51, 000/= was way beyond the authorized amount of Kshs. 35000/- . The constituency manager had a duty to ensure that the rent to be paid was within the amount provided by the PSC. My view therefore is that the rent payable to the 1st Respondent by the Respondents is Kshs. 35000/-. I therefore set aside the judgment of Kshs. 51,000/- and enter judgment for the 1st Respondent in the sum of Kshs. 35000/- per month for the accrued rent for the period they were in occupation. Each party to bear their costs in this appeal.

Dated signed and delivered at Kisii on the 27th day of February 2019.

R.E.OUGO

JUDGE

In the presence of;

Mr. Mwenda h/b for M/s Susan Mukindia For the Appellant

Mr. Begi For the 1st Respondent

2nd and 3rd Respondent Absent

Rael Court clerk