REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL CASE NO. 49 OF 2018

CAROLYNE CAREN AYIEKO...1ST APPELLANT

FRED M.O. KOMWONYO ....2ND APPELLANT

VERSUS

MICHAEL ODIT ONYANGO...RESPONDENT

[Being an appeal from the Judgment and decree of the Principal Magistrate's Court at

Winam in Civil Suit No. 227 of 2015 delivered by Hon. J. Mitey RM dated September 1, 2017]

RULING

The Appellants, **CAROLYNE CAREN AYIEKO** and **FRED M.O. KOMWONYO** have lodged this appeal based on the following issues;

*(a) **Although the Terms and Conditions of the Contract were explicit, the trial Court re-wrote the said Contract.***

*(b) **In failing to award costs to the Appellants, the Court proceeded on wrong principles of law.***

*(c) **The Court erred by awarding One Month's Rent in lieu of Notice, instead of the agreed Three Months Notice.***

*(d) **The Court should have awarded Special Damages as the same were specifically pleaded and then proved.***

*(e) **The trial Court erred by making findings on issues which were not canvassed by any of the parties.***

*(f) **The trial Court ought to have granted the Equitable Remedies to the Appellants.***

1. When canvassing the appeal the Appellants emphasized that courts ought not to re-write contracts for parties.

2. To my mind, it is well settled that courts ought not to interprete contracts in a manner that was inconsistent with the terms expressed by the parties through the terms and conditions spelt out in their contracts.

3. The Appellants cited the decision of the Court of Appeal in **NATIONAL BANK OF KENYA LIMITED Vs PIPE PLASTIC SAMKOLIT (K) LTD & ANOTHER, CIVIL APPEAL NO. 95 OF 1999**, wherein the Court said;

> ***"A court of law cannot re-write a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."***

4. Quoting from that same authority, the Respondent also agreed that a court of law cannot re-write a contract between the parties, as parties are bound by the terms of their contract.

5. Nonetheless, the Respondent expressed the view that when the court came to the conclusion that the contract was harsh, unconscionable and oppressive, it would exercise its equitable jurisdiction and set aside any such bargain.

6. It is common ground that pursuant to **Clause 3(b)** of the **Lease Agreement**, the Respondent, who was the tenant, could terminate the Lease by giving to the Lessor a **THREE MONTHS** Notice, or the tenant could pay the equivalent of **THREE MONTHS RENT**.

7. It was further common ground that pursuant to the Lease Agreement, the Notice of Termination of the Lease was to be given in writing.

8. The Respondent gave a Verbal Notice; and the said Notice was not for 3 months.

9. The Respondent has asked this Court to ask itself the question as to whether or not the Appellants were aware of the Respondent's intention to terminate the lease agreement.

10. If that were the sole issue for determination, I would definitely have said that there is no doubt of the fact that the Appellants became aware of the Respondent's intention to bring the lease to an end earlier than the duration the parties had agreed upon.

11. The Respondent went ahead to assert that provided the Appellants were aware of the intention to terminate the lease, the procedure used to communicate the Notice was immaterial.

12. With all due respect, I find that the Respondent was wrong in that respect. I so find because it was an express term of the lease agreement that the Notice be in writing.

13. If the Court ignored that term of the contract, and if the Court concluded that an Oral Notice was sufficient, that would constitute a complete variation of that aspect of the contract. The Court would have re-written that part of the contract.

14. The fact that the parties expressly stipulated that the Notice should be in writing, and that it should be for 3 Months, is not just an issue of form.

15. The learned trial magistrate expressed himself thus;

> ***"Although the agreement insist (sic!) on a written notice, it does not state that a verbal notice will not be treated as a notice nor does it expressly state that one must not give a verbal notice at all."***

16. I am afraid that I am unable to share the opinion expressed by the trial court. That is because when parties have expressly stipulated the agreed mode of giving Notice, they must be deemed to have excluded the application of any others.

17. It is true that as regards the rental charges, the parties had only specified the rent of Kshs 48,000/= per month, but had later agreed that an additional sum of Kshs 12,000/= was also payable monthly.

18. There was no written agreement reflecting the additional sum of Kshs 12,000/=. Therefore, as the learned trial magistrate held;

> ***"……it therefore reflects and implies on the conduct of the parties, that at some instance following the execution of the lease agreement they would verbally agree on further terms without necessarily putting it in writing,"***

19. Clearly, therefore, the sums payable on account of rent were varied by the parties through a means other than in writing.

20. However, there is no evidence to show that the parties had also agreed to vary the requirement for a written Notice of 3 Months.

21. Indeed, the Respondent did not even suggest that there had been such a variation.

22. I find that the parties did not vary the contractual clause on either the requirement that it be in writing, or the duration thereof.

23. I note that the learned trial magistrate made the following finding that the Oral Notice which was given by the Respondent, and which was (according to the trial Court), for 2 Months;

> ***"……. did not therefore meet the requirement of three Months as provided in the parties agreement."***

24. The Respondent neither pleaded nor proved that the terms of the contract on Termination Notice were procured by coercion, or fraud or undue influence. Therefore, there was no basis, in law, for the variation of the contract as the trial court did or at all.

25. I appreciate that the tenant may have been generally reliable, in terms of remitting rental payments as and when they fell due.

26. I also appreciate the fact that the decision to terminate the lease agreement was forced upon the tenant by virtue of the fact that his employer had transferred him back to Nairobi, from Kisumu.

27. It is therefore understandable why the tenant felt that the landlord was treating him harshly, by insisting on a 3 Months Notice, when the tenant had no option but to relocate to Nairobi.

28. Notwithstanding the said circumstances, I find that, in law, they did not constitute a justifiable reason for the tenant's failure to comply with the agreed terms of the lease agreement.

29. The Appellants were therefore entitled to the sum of Kshs 144,000/=, being the equivalent of **THREE MONTHS RENT** in lieu of Notice.

Electricity Bill

The Appellants did not provide proof that they paid the sum of Kshs 2,330/=.

30. On the other hand, the Respondent produced a receipt proving that they paid Kshs 1,280/= on account of the electricity bill.

31. In the event, the Appellants were not entitled to the sum allegedly paid by them on account of the electricity bill.

Labour Charges for Carpentry Work

32. According to **Fredrick Oula Atwenga (DW2)**, he runs a shop which sells paints and electrical appliances. The shop is called **KAWAKA ELECTRICALS.**

33. During cross-examination he said that he had given his quotation for paints and electrical gadgets.

34. He later delivered and installed the electrical gadgets.

35. He said nothing about carpentry work. Yet the receipt for *"Labour for Carpentry Works"* was on the letter-head of **KAWAKA ELECTRICALS LTD.**

36. I find that piece of evidence to be suspect, and therefore the same is rejected.

Agent Costs of Inspection

The sum claimed is Kshs 3,000/=.

37. A receipt for that sum was issued by **KAWAKA ELECTRICALS LIMITED**, and it was said to be in respect of Inspection Fee and Labour for Electrical Work.

38. There was no provision in the contract for a fee to be paid in respect to Inspection.

39. The landlord had reserved a right to conduct Inspection, but had not indicated that such inspection would be paid for by the tenant.

40. In any event, the tenant also had his own representative during the inspection in issue. Therefore, I find no basis for requiring the tenant to pay the fee charged by the landlord's representative.

41. Accordingly, the trial court cannot be faulted for rejecting that claim

Purchase of Door Locks and Consumables

The 2nd Appellant produced receipts for Kshs 1,650/= for one door lock, and for Kshs 900/= for 3 drawer locks.

42. Considering that when special damages are being claimed, they must be specifically pleaded and then proved, I find that the generalized phrase;

> ***"Consumables"*** is not at all specific.

43. Therefore, the only sum which was specifically pleaded by the Appellants, and which was thereafter proved is Kshs 1,650/= in respect to the one door lock.

44. In the result, the claim for Kshs 2,040/= was rightly rejected by the trial court.

Refund of Rent Deposit

45. The Appellants' witness, **DW2**, confirmed that he together with the tenant's representative took notes during the Inspection.

46. In his evidence, the tenant's representative was given notes similar to the one that **DW2** wrote down.

47. As only one set of notes was produced in evidence, I find that the note produced by **PW2** was the check-list and the estimates agreed upon between the parties' representatives.

48. The tenant remitted to the landlord, the agreed sums.

49. Therefore, the landlord was not right to have sought more money from the tenant.

50. In the result, the tenant was entitled to a refund of his Deposit of Kshs 96,000/=.

Costs

51. Both parties are right to say that costs follow the event, ordinarily.

52. In this case, the Plaintiff's claim is successful and the Defendants' Counter-claim is largely successful.

53. In the circumstances, justice demands that each party pays his own costs of the suit. Thus the learned trial magistrate was right to have ordered each party to pay his own costs.

54. In respect to the appeal, the same is largely successful. Accordingly, I award to the Appellants 75% of the Costs of the Appeal.

55. For the avoidance of any doubt, the Respondent's award of Kshs 96,000/= is upheld; and the Appellants are awarded Kshs 144,000/=.

56. By offsetting the sums payable against each, I find that the Respondent is liable to pay to the Appellants the sum of Kshs 48,000/=.

57. The said sum will attract interest at Court rates from the date of this judgment.

58. It is so ordered.

DATED, SIGNED and DELIVERED at KISUMU This **26th** day of **March** 2019

FRED A. OCHIENG

JUDGE