



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 549 OF 2014

SAMIMA INVESTMENTS LIMITED.....APPELLANT

VERSUS

SECURITY SEVEN LIMITED.....RESPONDENT

**(Being an Appeal from the whole judgment of the Chief Magistrate's Court at Milimani
Commercial Courts,**

**Nairobi delivered at Nairobi on 14th November, 2014 by Hon. A Loroto H.R. in CMCC No. 548 of
2011)**

JUDGMENT

The appellant was the plaintiff in the lower court against the defendant in a claim for Kshs. 558,695/94 plus interest and costs. This claim was said to have been made up of rent arrears, utility bills, storage costs, tribunal costs, auctioneers fees and advertisement costs. This claim arose from a tenancy agreement based on a lease dated 22nd March, 2004 with a reserved monthly rent of Kshs. 35,000/= excluding utilities. The lease agreement also provided an annual increment of 5% per annum. Other conditions were than on expiry of the tenancy the respondent was to deliver or yield the premises in good and tenantable condition.

The claim was denied by the respondent and after a full trial the lower court in a judgment delivered on 14th November, 2014 dismissed the appellant's claim with costs to the respondent. The appellant was aggrieved by the said decision and lodged the present appeal.

As the first appellate court it is my duty to evaluate the evidence adduced before the lower court and come to independent conclusions. The thrust of the appeal as captured in the memorandum of appeal dated 8th and filed on 9th December, 2014 is that the appellant did not waive its right to 5% annual increment by conduct and therefore the trial court was wrong in finding so.

The lower court was also faulted for failing to find that the terms of the lease agreement could not be varied or waived by conduct of the parties. The lower court, it is stated, failed to find that rent arrears were due and payable which was admitted by the respondent, and therefore the appellant was entitled to judgment on account of admission.

The appellant further alleged that the claim in respect of costs of repair redecorations, water bill, electricity, storage fees, auctioneers and **Mburu vs. Consolidated Bank** newspaper advertisement costs had been proved. The documents produced were ignored by the trial court and the testimony of the appellant's witness was not considered. On those grounds, the appellant prayed for the appeal to be allowed. Both parties have filed their respective submissions which I have noted.

The trial court was quite detailed in its judgment leading to the dismissal of the appellant's suit. The analysis relating to the issues raised in the pleadings in my view left no doubt that the trial court appreciated the nature of the dispute and cannot be faulted for arriving at the conclusion that it did. The court was emphatic when it stated as follows,

“I am convinced that the parties altered the terms of the contract under the engagement by virtue of conduct. The defendant paid the same rent for the five years of the lease period without any demand of the 5% annual increment.....

The plaintiff was therefore estopped from denying that it had altered the terms of the lease for which the defendant acted upon with respect of payment of rent.”

There was no default clause for not paying 5% escalated rent. Several decided cases have addressed the question of waiver and estoppel – **John of Kenya (2018) eKLR, D& C Builders vs. Sidney Rees (1966)2 QB 617.**

Waiver may be by express address or conduct. In the case of **Banning Vs. Wright (1972) 2 ALL, ER 987 at Pg 998** the court stated as follows,

“The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to stipulation in a contract or over statutory provision may waive it and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes, a person’s actions can be interpreted as a waiver – waiver by conduct”.

In the case of **Sita Steel Rolling Mills Ltd vs. Jubilee Insurance Company Limited (2007) e KLR** the court stated as follows,

“A waiver may arise where a person pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right”.

In this case, the absence of any demand, where every right existed in the agreement and over time would make any party to assume waiver. It would be unconscionable to demand or pay or for the court to countenance such a position. The appellant sat on it rights which rights in knew of and cannot wake up after the expiration of a legally binding agreement to claim that the benefits under the said agreement still accrue.

On the subject of admission the appellant had the duty to establish that the admission was express, unconditional and unequivocal. I have seen no such admission either in the correspondence presented or evidence adduced. I am unable therefore to uphold such a submission by the appellant.

Some of the submissions by the appellant should have been made during the trial and have no place in this appeal. It must be emphasised that parties may not litigate their cases afresh on appeal as this is not a new trial.

The issue of utility bills and other expenses was also addressed by the trial court. If the Tribunal proceedings were determined by consent, and each party ordered to pay their own costs there is no way the appellant can demand such costs from the respondent.

The opportunity to remove the respondent’s goods in the premises was denied by the appellant. No storage charges can be attributed to the respondent in such circumstances. The reason for non-payment of the water bill has been captured well in the proceedings, and so is the payment of any pending electricity bill. The trial court rightly concluded that the auctioneer did not testify and no proof of the sum claimed was offered by the appellant. Equally the appellant cannot claim advertising costs for the respondent in terms of looking for a tenant for its own premises.

I am unable in the circumstances to fault the trial court for the decisions reached in its judgment. It follows therefore that the appeal should be and is hereby dismissed with costs to the respondent.

The lower court cannot be faulted for arriving at the conclusion that it did and I am persuaded that his appeal must fail. The same is hereby dismissed with cots to the respondent.

Dated, signed and delivered at Nairobi this 26th Day of September, 2019.

A. MBOGHOLI MSAGHA

JUDGE