



Permanent Fold Ltd v Zhong Wu E-Commerce Kenya Co. Ltd (Environment and Land Appeal E063 of 2023) [2023] KEELC 21687 (KLR) (20 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21687 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E063 OF 2023**

JA MOGENI, J

NOVEMBER 20, 2023

BETWEEN

PERMANENT FOLD LTD APPELLANT

AND

ZHONG WU E-COMMERCE KENYA CO. LTD RESPONDENT

(Appeal arises from the decision of the learned Vice Chairman of the Business Tribunal in BPRT Nairobi No E1066 of 2022)

JUDGMENT

1. This appeal arises from the decision of the learned Vice Chairman of the Business Tribunal in BPRT Nairobi no E1066 of 2022. The Appellant raised the following as its grounds of appeal in its Memorandum of Appeal:
 1. That the Honorable Tribunal erred both in law and in fact in directing that the Appellant to pay the Rent arrears of ksh 33,000,000 by 15th June 2023 and be at liberty to terminate the Tenancy by 5th June 2023.
 2. That the Honorable Tribunal erred both in law and in fact by directing that the respondent be at liberty to terminate the appellant's tenancy by 15th June 2023 for non-payment of Rent arrears of ksh 33,000,000 which the Tribunal never conducted a hearing for the parties
 3. That the Honorable Tribunal erred both in law and in fact in valuating rent at ksh 2.2 million per month without due consideration of the valuation in report filed by the Appellant and mandatory provisions of the [Landlord and Tenant \(shops hotels and catering establishments\) Act](#) cap 301 Laws of Kenya
 4. That the Honorable Tribunal erred in law and in fact in issuing an order in respect of rent arrears without conducting a hearing



5. That this Honorable Court erred both in law and in fact and failing to hear the Appellant's Reference under section 6 of the *Landlord and Tenant (shops, hotels and catering establishments) Act* cap 301 Laws of Kenya in respect to termination of the Tenancy and Rent arrears.
2. The appellant prays for judgment as follows:
 - a. That the Orders of the Honorable Business Premises Rent Tribunal of 2nd June 2023 be set aside the reference of 15th November 2021
 - b. That an order do issue directing that the Honorable Tribunal do re-evaluate the rent payable of the premises within the parameters of the law and more specifically the *Landlord and Tenant (shops, hotels and catering and establishments) Act* cap 301 Laws of Kenya.
 - c. That this Honorable Court do proceed to re-evaluate the Rent payable based on the evaluation report and include the report of a rent inspector pursuant to the Relevant provisions of the *Landlord and Tenant (shops, hotels and catering and establishment) Act* cap 301Laws of Kenya
 - d. That any other Order the Court may deem fit to issue.
3. The appellant was at all material times a tenant of the respondent on the premises known as LR no 31194 (hereinafter referred to only as "the suit property"). The appellant and the and respondent entered into an agreement for sub-lease for the demised premises where the appellant ran hotel known as Coloho Hotel on 10/02/2022 for a term of 5 years from 1/02/2022.
4. The sublease did not however run its full course the tenant failed to pay the full deposit, rent, therefore vide a letter dated 12/11/2022 and pursuant to clause 7.1 of the schedule the respondent terminated the agreement and reserved the right to claim arrear and interest thereon accruing from the sub-lease.
5. The appellant filed a Notice of Motion Application dated 15/11/2022 where the tenant obtained orders restraining the respondent from interfering with quiet enjoyment of the demised premises and was also allowed to liquidate the October to December quarter 2022 rent by monthly instalments of ksh 500,000 till full payment. The Tribunal also gave orders for reassessment of the current rent based on the value of the rental premises.
6. I note that The tribunal heard the appellant's reference and delivered a decision on 02/06/2023 in it dismissing the Reference dated 15/11/2022 and directing the appellant to pay ksh 2,200,000 rent and if this did not happen the respondent was at liberty to distress.
7. The Tribunal also ordered that the arrears of ksh 33,225,573 should be paid as rent arrears on or before 15/06/2023.
8. It is against that decision that the appellant preferred the present appeal. In its Memorandum of Appeal dated 9/06/2023, the appellant challenged the decision of the tribunal on (1) to (5) the grounds stated above stated at paragraph 1.
9. The appeal was heard by way of written submissions. The appellant did not file any written submissions while the respondent filed its submissions on 6/10/2023. I have considered the record of the tribunal, the Memorandum of Appeal and the submissions by the Respondent's advocates. The respondent exercised his right of forfeiture pursuant to clause 7.1 of the schedule to the sub-lease agreement vide a letter dated 12/11/2022.



10. In its ruling dated 3/03/2023 the Chairman stated at paragraph 23 stated

“The Tenant, however, remained in the premises and continued to pay rent for the demised premises. The Landlord received the said rent marking a continuing tenancy relationship by implication”
11. Under Section 7(1)(b) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 Laws of Kenya (hereinafter referred to as “the Act”) allows a landlord to terminate a tenancy where:

“...a tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable.”
12. From my understanding of this section, a landlord can issue a notice of termination under the section where a tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or where the tenant has persistently delayed in paying rent which has become due or payable. It follows therefore that what the tribunal was to decide was whether the respondent had established that the appellant had defaulted in paying rent for two months after such rent had become due or payable or that the appellant had persistently delayed in paying rent. The tribunal’s findings on both issues were in the affirmative.
13. Now, since this is the first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the tribunal. The Court in the case of *Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co Ltd* [2004] 2 KLR 269 and *Selle v Associated Motor Boat Co Ltd* [1968] EA 123 addressed itself on the duty of the first appellate court.
14. It is also well established that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. There are also the cases of *Peter v Sunday Post Ltd* [1958] EA 424 and *Makube v Nyamuro*[1983] KLR 403 that expound on the issue of first appellate court. After carefully reviewing the evidence that was placed before the tribunal, I am unable to disturb the findings of the tribunal on the issues that were before it for determination.
15. The Tribunal ruled that the appellant should settle the outstanding rent arrears but the appellant failed to do so instead he chose to seek a stay for the order of the Tribunal. The appellant is seeking to have the Order of the Tribunal dated 02/06/2023 set aside and to have the reference dated 15/11/2022 heard.
16. My reading of the Order by Hon Mugambi dated 02/06/2023 is clear that the reference was dismissed. A matter cannot be dismissed if it was heard. Further I note that the Tribunal in the ruling of 3/3/2023 by hon Muma Vice Chairman of the Tribunal he states that the Appellant/Tenant had sought a reassessment of the rent currently payable based on the value of the rental premises. This means that the issue of reassessment of rent was considered by the Tribunal already.
17. Now this court hearing the application for appeal must however be cautious before interfering with the trial Court’s findings of fact and should not do so unless it is patently clear the findings were based on no evidence at all, or on a misapprehension of the evidence or if it is demonstrated that the Court



acted on wrong Principles in reaching the findings. In the case of *Kiruga v Kiruga & Another* (1988) KLR 348 the Court held that:-

“ An Appeal Court cannot properly substitute its own factual findings for that of a trial Court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong”

18. Upon evaluation of the evidence I do not find any basis upon which I could possibly fault the learned Chairman of the Tribunal. There was clearly no evidence to support the appellant’s claim that the reference was not heard as stated. The ruling of the Tribunal dated 02/06/2023 clearly states that the reference dated 15/11/2022 was dismissed this being the case the appellant had not reference pending before the Tribunal.
19. The appellant did not obtain a stay against the orders issued through the ruling requiring that he pays rent of ksh 2,200,000 and that the respondent was at liberty to distress. Further the areas of ksh 33,225,575 was also ordered.
20. The appellant did not show any efforts made to implement the orders made such as the payment of ksh 500,000 per month until payment of rent arrears and payment of the service charges which then would enable him to stake a claim to the tenancy and continue occupying the premises.
21. The undeniable fact was that at the time the Landlord served the Tenant /Appellant the Notice to Terminate the Tenancy, the tenant had not paid rent for a period exceeding two months. As a matter of fact, the re-assessment of rent that the appellant is seeking was done when the valuers of both parties presented their reports and testified on 12/05/2023 and they were cross-examined. It is therefore undeniable that the rent reassessment was done and the rent arrears owed should have been paid as was ordered.
22. The net result is that find no merit in the appellant’s appeal and the same is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER 2023.

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MOGENI J

JUDGE

In the virtual presence of:

Mr Makori for the Respondent

No appearance for the Appellant

Caroline Sagina : Court Assistant

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MOGENI J

JUDGE

