Gichuru v Kenya Railways Corporation & another (Environment and Land Appeal 39 of 2023) [2023] KEELC 22182 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22182 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT AND LAND APPEAL 39 OF 2023

YM ANGIMA, J

DECEMBER 14, 2023

BETWEEN

MICHAEL GITHAIGA GICHURU ..... APPELLANT

AND

KENYA RAILWAYS CORPORATION ..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL ..... 2ND RESPONDENT

(An appeal against the judgment and decree of Hon. S.O. Mogute (PM) dated 10.01.2023 in Nyahururu CM ELC No. 56 of 2021)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. S.O. Mogute (PM) dated January 10, 2023 in Nyahururu CM ELC No 56 of 2021 *Michael Githaiga Gichuru v Kenya Railways Corporation & the hon Attorney General*. By the said judgment, the trial court dismissed the appellant's suit against the respondents with costs.

B. Background

2. The record shows that *vide* a plaint dated July 12, 2021 the appellant sued the respondents seeking the following reliefs:

    a. Special damages of Kes 8,965,677.00.

    b. General damages for breach of agreement to lease.

    c. Costs of the suit and interest thereon.

3. The appellant pleaded that at all material times he was the 1st respondent's tenant on Plot No. LT/WST/OJR/STN/3 (the suit property) pursuant to an "agreement to lease" dated November 1, 2017. It was pleaded that the annual rent was agreed at Kes 12,000/= whereas the term of the lease was nine (9) years.

4. The appellant further pleaded that upon taking possession of the suit property it undertook comprehensive developments thereon with the approval of the 1st respondent at a cost of Kes 5,255,677.00. The said developments consisted of residential and commercial structures for letting out to tenants. It was further pleaded that some of the structures were actually let out to various tenants who were paying a cumulative monthly rent of Kes 52,000/=.

5. It was the appellant's case that in breach of the terms of the said agreement to lease the 1st respondent had on February 16, 2021 without notice demolished his said structures and evicted him from the suit property as a consequence whereof he had suffered massive financial losses as set out in paragraph 15 of the plaint. The set out particulars of special damages as follows:

    a. Loss of earnings from rent - Kes 3,600,000/=

    b. Cost of building the structures - Kes 5,255,677/=

    c. Rent payable under the agreement – Kes 70,000/=

    Total - Kes 8,965,677/=

6. It was the appellant's case that he was not in rent arrears at the material time and that there was no lawful justification whatsoever for the demolition and eviction. He pleaded that despite service of a demand and notice of intention to sue, the Respondents had failed to make good his claim hence the suit.

7. The record shows that the 1st respondent filed a defence dated August 2, 2021 denying the appellant's claim in its entirety. It denied that the appellant was at all material times its tenant on the suit property and put him to strict proof. It was further denied that there existed any lease between the parties. The 1st respondent denied knowledge of the appellant's developments of the suit property. In particular, it pleaded that no application for approval was ever made by the appellant and that it never granted any approval of any development plans. It also denied any role in the demolition complained about and put the appellant to strict proof thereof.

8. The 1st respondent pleaded that it was a stranger to any leases the appellant may have had with third parties. It denied that the appellant had suffered any loss or damage. It denied the particulars of special damages pleaded and particularized in the plaint and put the appellant to strict proof thereof.

9. The 1st respondent further denied service of a demand and notice of intention to sue and put the appellant to strict proof thereof. It, therefore, prayed for dismissal of the appellant's suit with costs.

10. The material on record shows that the 2nd respondent also entered appearance and filed a defence dated August 12, 2021 denying the appellant's claim in its entirety. The gist of the 2nd respondent's defence was that there was no cause of action pleaded against him in the plaint hence he had been improperly joined in the proceedings. The attorney general denied knowledge or participation in any of the matters pleaded in the suit hence he prayed for dismissal of the appellant's suit with costs.

C. Trial Court's Decision

11. The record shows that the suit partly proceeded before Hon. S.N. Mwangi (SRM) and was later on concluded before Hon. S.O. Mogute (PM). The record shows that upon a full hearing of the suit, the trial court held that the appellant had failed to prove his claim against the respondents on a balance of probabilities. In particular, the trial court held that there was no evidence on record to show that the appellant had accepted the 1st respondent's letter of offer dated October 2, 2017; that the appellant was merely a licencee on the suit property as their was no binding lease between the parties; that adequate notice had been given through a newspaper advertisement; and that there was no evidence to show that the appellant's developments were duly approved. As a consequence, the trial court dismissed the appellant's suit with costs to the respondents.

D. Grounds of Appeal

12. Being aggrieved by the said judgment and decree, the appellant filed a memorandum of appeal dated January 23, 2023 raising the following 10 grounds of appeal:

    a. That the learned magistrate erred in and law fact in failing to consider the evidence of the plaintiff's witnesses on the existence of a tenancy agreement between the 1st respondent and the appellant coupled with the assertion that the 1st respondent did not approve the construction on the land.

    b. That the learned magistrate erred in law and fact in failing to appreciate that the appellant was within his right to try to mitigate the losses by salvaging some of his property after a threat to demolish within 2 hours had been issued by the 1st respondent and the loss was attributable to the 1st respondent.

    c. That the learned magistrate erred in law and fact in failing to appreciate that the looting by the members of the public was as a direct result of the breach of the tenancy agreement by the 1st respondent and that they should be held fully liable for the same.

    d. That the learned magistrate did not adjudicate the dispute impartially and was influenced by extraneous matters hence the erroneous decision.

    e. That the learned magistrate erred in law and in fact for ignoring the appellant's written submissions sent to court on November 25, 2022 and forwarded to counsel for the respondent indicating they were never filed despite the advocate indicating they were sent when the matter was mentioned for submissions on December 6, 2022.

    f. That the learned magistrate erred in fact and in law in failing to conduct an independent hearing of the dispute by relying completely on the evidence and submissions of the respondents only.

    g. That the learned trial magistrate erred in fact and in law by failing to consider the appellant's submissions and thereby ignoring relevant guiding facts to reach a fair and reasoned determination and thereby dismissed the appellant's suit without justification.

h. That the learned trial magistrate erred in fact and in law by applying wrong and inapplicable principles of law in a tenancy case and which did not form any basis to warrant his determination.

i. That the learned trial magistrate erred in fact and in law by arriving at an erroneous decision not supported by the law or facts.

j. That the learned trial magistrate erred in fact and in law by awarding costs to the Respondents which were clearly unjustified and underserved.

13. As a result, the appellant sought the following reliefs in the appeal:

a. That the appeal be allowed.

b. That the judgment of the trial court be set aside or varied and substituted with another finding.

c. That the appellant be awarded costs of the appeal and the suit before the trial court.

d. That such further relief as the court may deem just.

E. Directions on Submissions

14. When the appeal was listed for directions, it was directed that the appeal shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the appellant's submissions were filed on or about September 20, 2023 whereas the 2nd respondent's submissions were filed on or about September 22, 2023. However, the 1st respondent's submissions were not on record by the time of preparation of the judgment even though they were on record by the time of delivery of the judgment.

F. Issues for Determination

15. Although the appellant raised 10 grounds in his memorandum of appeal, the court is of the opinion that the same may be summarized into the following 5 issues:

a. Whether the trial court erred in law and fact in holding there was no lease between the appellant and the 1st respondent.

b. Whether the trial court erred in law and fact in holding that the appellant's structures were not approved.

c. Whether the trial court erred in law and fact in holding that the appellant was given adequate notice to vacate the suit property.

d. Whether the trial court erred in law and fact in holding that the Appellant had failed to prove his claim to the required standard.

e. Who shall bear costs of the appeal and the proceedings before the trial court.

G. Applicable legal principles

16. As a first appellate court, this court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The

principles which guide a first appellate court were summarized in the case of *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 at p126 as follows:

> " ...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 that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

17. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> " ...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

18. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in *Watt v Thomas* [1947] AC 424 at page 429 – 430 as follows:

> " My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of court, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

19. In the case of *Kapsiran Clan v Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:

    a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

a. Whether the trial court erred in law and fact in holding that there was no lease between the Appellant and the 1st Respondent

20. The court has considered the appellant's submissions and material on record on this issue. The trial court was faulted for holding that there was no evidence of the existence of a lease between the parties since no such lease document was produced at the trial and there was no evidence of the appellant's acceptance of the letter of offer dated October 2, 2017. The appellant relied upon the doctrine of estoppel and contended that the 1st respondent had by its conduct treated him as a tenant and accepted his rent as such. It was further submitted that the principle of waiver applied since 1st respondent had approved his development plans and allowed him to construct his structures on the suit property.

21. The court has noted from the appellant's pleadings and evidence that the doctrines of estoppel and waiver were not part of his case. Those doctrines were never pleaded in either his plaint or his reply to defence. His case all along was that he had a valid lease agreement with the 1st respondent. The issues of estoppel and waiver were raised as an afterthought after the appellant realized that in fact no lease was ever signed and registered over the suit property. In the event, the trial court cannot be faulted for finding that there was no evidence of a valid 9-year lease between the appellant and the 1st respondent.

22. The court has noted, however, that the trial court found that the appellant took possession of the suit property with the permission of the 1st respondent as a licensee. The court is of the opinion that a licence may not be the correct description of the relationship between the parties. There is evidence on record to demonstrate that the appellant used to pay rent on a quarterly basis to the 1st respondent and that he was not in arrears at the material time. What appears from the record is that by its conduct, the 1st respondent treated the appellant as a rent paying tenant hence the nature of the relationship was in the nature of a periodic tenancy from quarter to quarter and not a 9-year lease as contended by the Appellant. The legal consequence of such a tenancy shall be considered later in the judgment.

b.Whether the trial court erred in law and fact in holding that the Appellant's structures were not approved

23. The court has considered the material and submissions on record on this issue. The appellant contended that the trial court erred in holding that his structures were not approved. The appellant submitted that he produced copies of the building plans duly stamped by the 1st respondent and approved by the County Government of Nyandarua. The 1st respondent had in its defence pleaded that the appellant never sought and never obtained any approval of his development plans. Although no formal lease was signed between the parties, it is evident from the letter of offer dated October 2, 2017 that the appellant was required to obtain approval of his building plans from both the 1st respondent and the planning authority under the physical planning laws then in force.

24. It is evident from the material on record that although the appellant applied for approval of his building plans from the County Government of Nyandarua in 2018 and paid the relevant application fee, there is no evidence to demonstrate that such approval was in fact granted. The mere fact that various departments of the County Government had no objection to the approval does not necessarily mean that they were ultimately approved. The court has no means of knowing the internal workings of the County Government of Nyandarua on approval of building plans. It has no means of knowing how the plans are circulated internally and how many departments are required to endorse them before they are approved. The court is, however, aware that upon completion of all internal processes, the County Government would normally communicate the granting of development permission and the conditions attached thereto in writing addressed to the applicant. There is no such letter of approval on record hence the court is unable to agree with the Appellant that he demonstrated evidence of approval of his building plans at the trial.

25. The court also finds no credible evidence of approval of the building plans by the 1st respondent. There was no evidence of submission of the plans to the 1st respondent and there was no evidence of any request of approval by the appellant. There was also no letter of approval from the respondent of the building plans. The appellant merely produced a copy of the plans purportedly stamped by a stamp of the 1st respondent bearing various signatures as evidence of approval. The court has no way of verifying the authenticity of the stamp appended to the plans. It was upon the appellant to apply for approval and obtain the same in writing as contemplated in the letter of offer. As a consequence, the court finds no fault on the part of the trial court in holding that there was no evidence of approval of the appellant's building plans.

(c)Whether the trial court erred in law and in fact in holding that the Appellant was given adequate notice to vacate the suit property

26. The appellant contended that as a tenant of the 1st respondent it was not in illegal occupation of the suit property and that the newspaper notice of September, 2019 only required him to be up to date in rent payments. It was submitted that the notice to vacate was only directed to those people who were illegally in occupation of the 1st respondent's land. The 1st respondent's contention was that it was intending to reclaim all railways land which had been illegally alienated or illegally occupied hence it issued a general notice to that effect through a publication in the dailies. It was the 1st respondent's case that in the case of the suit property it was not involved in the actual demolition since upon arrival of its agents at the site they found that members of the public had already demolished the illegal structures.

27. As indicated before, the appellant had not illegally acquired or occupied the 1st respondent's land. He had not encroached on the railway reserve without the 1st respondent's permission. He was in occupation of the suit property with the full consent of the 1st respondent as a tenant in the premises. The court agrees with the appellant that it was only the third sub-heading of the notice entitled "Tenants of the Corporation" which applied to him. He was not required by the notice to demolish his structures and to vacate the suit property. He had a running periodic tenancy with respect to the suit property which had not been lawfully terminated.

28. The court is thus of the opinion that the trial court erred in law and in fact in holding that the 1st respondent's notice to illegal occupiers and trespassers to vacate its land applied to the appellant as well. As a result, the trial court arrived at an erroneous decision on the issue of vacation of the Appellant from the suit property.

(d) Whether the trial court erred in law and fact in holding that the Appellant had failed to prove his claim to the required standard

29. The court has considered the material and submissions on record. The court has found that the trial court was right in holding that there was no 9-year lease between the appellant and the 1st respondent. The court has also found that the trial court was correct in holding that there was no evidence of approval of the appellant's structures on the suit property. The court has, however, found that the trial court erred in holding that the newspaper publications of September, 2019 gave the appellant adequate notice to vacate the suit property. The court has found that the appellant was a rent paying tenant of the 1st respondent under a periodic tenancy which ran from one quarter to another hence entitled a notice of termination equivalent to one quarter (i.e. 3 months). There is no evidence on record to demonstrate that the appellant was issued with such notice or that he was notified that the suit property was required for railways purposes. In fact, the 1st respondent's letter of offer dated October 2, 2017 indicated that a notice of 90 days would be issued in case the suit property was required for railways purposes.

30. The court's finding on this issue, however, has no bearing on the 1st respondent's right to demolish or remove any structures which may have been built on the suit property without approved building plans or without its approval. The 1st respondent may still have been entitled to remove such structures but without evicting the appellant whose periodic tenancy had not been terminated in the manner contemplated by the law. The court has already found that there was no evidence before the trial court to demonstrate approval of the appellant's structures.

31. The court finds unsatisfactory evidence on record on who actually undertook demolition of the appellant's structures on the suit property. In his plaint and evidence at the trial, the appellant maintained that the demolition was undertaken by 1st respondent through its agents and servants. He even called one other witness to support his evidence. The 1st respondent's evidence was to the effect that although it intended to demolish the structures, it found upon arrival on site that the structures had already been demolished by members of the public. The 1st respondent's evidence was really incredible. One wonders how ordinary members of the public would have known which structures belonged to illegal occupiers and which ones belonged to tenants of the corporation. Again, how would the general public have known which structures were approved and which ones were put up without approval from the relevant authorities? And how would members of the public have known which day was scheduled for demolition at Ol Joro Orok so that they may assist in the demolition? The 1st respondent's evidence on this issue was simply hard to believe.

32. The appellant, however, created a new twist to the entire matter in his memorandum of appeal in which he stated as follows:

> " That the learned magistrate erred in law in failing to appreciate that the appellant was within his right to try to mitigate the losses by salvaging some of his property after a threat to demolish within 2 hours had been issued by the 1st respondent and the loss was attributable to the 1st respondent."

33. The court is thus of the opinion that the appellant was not candid and forthright in his pleadings and evidence before the trial court. The above ground of appeal is a clear indication that the demolition of his structures was not undertaken by the 1st respondent or by members of the public but by the appellant himself. His reason for doing so appears to have been his desire to salvage his building materials and to mitigate his losses since he had about 2 – 3 hours before the 1st respondent's

demolitions could begin. That appears to have been a reasonable and prudent thing to do in the circumstances but the appellant was not candid and honest enough to state so at the trial of the suit.

34. Be that as it may, the court is of the opinion that it doesn't really matter who undertook the actual demolition of the structures because they were constructed without the requisite approvals from either the 1st respondent or the planning authority hence they were liable for demolition anyway. The appellant was not entitled to be compensated for those structures since they were put up without the requisite approvals. The court is thus of the view that the appellant was not entitled to special damages of Kes 5,255,677/= being the cost of constructing those structures. He was also not entitled to payment of the sum of Kes 3,640,000/= on account of lost rent earnings from those structures. In any event, there was no evidence at the trial to demonstrate that the appellant actually spent Kes 5,255,677/= for the construction of the structures on the suit property. That figure was simply plucked from the appellant's bills of quantities which were merely proposals for construction of those structures.

35. It is evident from the judgment of the trial court that it found that there was no cause of action against the 2nd respondent and that the Attorney General had been improperly joined in the proceedings. The appellant did not contest that finding in his memorandum of appeal. The court finds and holds that the trial court was correct in that holding since there were no adverse allegations made against the Attorney General in the plaint and there were no remedies sought against him.

36. The court is of the opinion that even though the appellant had failed to prove that he had a valid 9-year lease over the suit property and although he had also failed to demonstrate that his structures thereon were duly approved, he was, nevertheless, entitled to a notice of termination of his periodic tenancy if the 1st respondent intended to repossess the suit property for railway development purposes. He was not a trespasser on the suit property and the newspaper publication by the 1st respondent did not require him to vacate the suit property. He was only required to be up to date in his rental payments and there is some evidence on record to demonstrate that he was not in rent arrears at the material time.

37. So, what is the appellant's remedy for the 1st respondent's failure to issue the requisite notice of termination of tenancy? In cases of periodic tenancy, the requisite notice period is determined with reference to the intervals within which rent is paid by the tenant. In case rent is paid on a monthly period then a notice of one month would be sufficient notice. If rent is payable on a quarterly basis, as was the case here, then the notice period would be 3 months.

38. In terms of the measure of damages payable for failure to give notice, the court is of the opinion that the appellant would be entitled to equivalent of 3 months rent for that is the period with reference to which notice should have been given. The evidence on record shows that the quarterly rent which the appellant used to pay to the 1st respondent was Kes 12,000/=. That is the amount of damages the appellant would be entitled to due to the 1st respondent's failure to issue the requisite notice of termination of the periodic tenancy. The appellant is not entitled to the special damages sought in the plaint for reasons given earlier in the judgment. The appellant's appeal shall, therefore, succeed to the limited extent stated herein.

d.Who shall bear costs of the appeal

39. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court has considered the fact that the appellant has partly succeeded and partly failed in his appeal. The court has also taken into account that the appellant was not entirely candid and honest in

his pleadings and evidence before the trial court. In the premises, the court is of the opinion that the appellant and the 1st respondent should bear their own costs of both the appeal and the proceedings before the trial court. However, since the Attorney General was improperly joined in the proceedings, the appellant shall pay the 2nd respondent's costs of both the appeal and the suit before the trial court.

I. Conclusion and Disposal Orders

40. The upshot of the foregoing is that the appellant's appeal partly succeeds and partly fails as detailed in the judgment. As a result, the court makes the following orders for disposal of the appeal:

    a. The judgment and decree of the trial court dated January 10, 2023 in Nyahururu MC ELC 56 of 2021 is hereby set aside and substituted with the following orders:

        (i) The appellant's claim for special damages in the sum of Kes 8,968,677/= be and is hereby dismissed in its entirety.

        (ii) The appellant is hereby awarded damages of Kes 12,000/= against the 1st respondent being the quarterly rent which was payable under the periodic tenancy.

        (iii) The suit against the 2nd respondent is hereby dismissed with costs.

        (iv) The appellant and the 1st respondent shall bear their own costs of the suit.

    b. Save as aforesaid, the appellant's appeal is hereby dismissed.

    c. The appellant and the 1st respondent shall bear their own costs of the appeal.

    d. The appellant shall bear the 2nd respondent's costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 14TH DAY OF DECEMBER, 2023.

<u>In the presence of</u>:

Mr. Ngotho for the Appellant

Mr. Ndegwa for the 1st Respondent

Ms. Nyambura for the Attorney General for the 2nd Respondent

C/A - Carol

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Y . M. ANGIMA

JUDGE