Ebrahim & another v Idime Enterprises (Environment and Land Appeal 3 of 2022) [2022] KEELC 2748 (KLR) (17 May 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 3 OF 2022

NA MATHEKA, J

MAY 17, 2022

BETWEEN

MOHAMEDALI A. EBRAHIM ..... 1ST APPELLANT

OMAR A. EBRAHIM ..... 2ND APPELLANT

AND

IDIME ENTERPRISES ..... RESPONDENT

JUDGMENT

1. The appellants Mohamed Ali A Ebrahim and Omar A. Ebrahim being dissatisfied with the judgment of the Honourable Julius Nang'ea delivered at Mombasa on the July 16, 2013 appeal to this court against the whole judgment on the following grounds: -

    1. The Learned Judge erred in Law and fact in failing to appreciate that pursuant to section 112 of the *evidence Act* (cap 80) Laws of Kenya it was the onus of the respondent to prove or disprove the fact that it had properly remitted rent to the appellant.

    2. The learned magistrate erred in law in failing to appreciate the evidential burden of proof which was on the respondent and the standard of proof thereof.

    3. The learned magistrate erred in fact and law in failing to appreciate that accounts on rent received vis-a-vis rent remitted was with the executive knowledge of the respondent hence it was the onus of the respondent to prove that it had remitted all rents for all months during the subsistence of the Agency between the appellant and the respondent.

    4. The learned magistrate erred in fact and law in failing to appreciate that the respondent failed to remit to the appellant rents for various months since the subsistence of the Agency agreement between the appellant and the respondent

5. The learned magistrate erred in fact and Law in failing to consider and take into account that the respondent, who is the agent of the appellants, failed to properly account for the rent collected vis-a-vis the rent remitted.

6. The learned magistrate erred in fact and law in failing to appreciate and take into account that the respondent failed to remit rent for the months of May 2013 to December 2013; and the appellants had proved their case for non-receipt of rent for the aforesaid months.

7. The learned magistrate erred in fact and law in failing to appreciate and take into account that the respondent failed to remit the rents for the Redempta Kakuta and neither sufficiently accounted for the same on a balance of probabilities.

8. The learned magistrate erred in law in failing to appreciate that the respondent was the agent of the Appellants hence had a fiduciary duty to the appellants to account for rent collected on their behalf vis-a-vis the rents remitted.

9. The learned magistrate failed to appreciate and take into consideration the Total evidence on record.

10. The learned magistrate failed to appreciate and to take into consideration the Appellants Submissions.

2. The appellants pray for orders that: -

   a. That the appeal be allowed.

   b. That the Suit before the trial court be allowed.

   c. Costs of this appeal and the suit at the trial court be paid by the respondent.

3. The appellants submitted that respondent failed to make remittances of rent as was obligated under the agreement and the burden of proof as to how much was collected and paid to them was upon the respondent as per section 112 of the *Evidence Act*. That a fiduciary relation existed between the parties and the defendant was to render a true and accurate account. That the respondent attempted to show remittances from 2007 which showed gaps in payment but failed to account for it. That non remittances of rent from some tenants came to an aggregate of Kshs 1,493,070 as per their supplementary record of appeal. They relied in the cases of *Kenya Akiba Micro Financing Limited vs Ezekiel Chebii & 14 others* (2012) and *Serraco Limited vs Attorney General* (2016) eKLR.

4. The respondent's submitted that the claim was a liquated claim. It is settled law that he who alleges must proof. This being a case for special damages, the law imposes a strict evidential duty on the appellant to prove the special damages. That no bank statement, bank deposit slips were produced by the appellant in the lower court to show how much was received by the respondent. The alleged tenants were not called to testify despite the appellant being aware that it is only the tenants who had special knowledge of the amounts if any paid to the respondent. That the appellants did not make any application or request of particulars against the respondent and did not issue the respondent with any notice to produce. As to whether there is any amount owing from the respondent to the appellant they submit that the respondent does not owe any money to the appellants because no amount was established by way of evidence as owing from the respondent to the appellants. To the contrary the respondent gave evidence that it had paid all the rent due to the appellant Landlord. The evidence is contained in the Witness Statement of Elias Mughanga filed on March 23, 2019. That the statement gives a detailed account of the monies paid to the appellants. this evidence is corroborated by exhibits being copies of the cheques which were cleared and paid to the appellant.

5. This court has considered this appeal and submissions therein. The respondents raised a preliminary objection that the appeal was filed out of time contrary to section 79G of the *Civil Procedure Act* as leave of the court was not obtained and that notice of change of advocate after judgement was never sought contrary to order 9 rule 9 of the *Civil Procedure Rules*. Article 159 of *the Constitution* states that the courts should administer substantive justice and determine case without undue regard to technicalities of procedure. I wish to rely sections 1A and 1B of the *Civil Procedure Act* on the overriding principles otherwise known as the "Oxygen Principle."

6. Section 1A provides that the overriding objective of the Act and rules made thereunder is to facilitate just, expeditious, proportionate and affordable resolution of the civil disputes. In doing so, the court should, in the exercise of its powers under the Act or in interpreting any of its provisions, give effect to the overriding objective. Sub section (3) places a duty on the parties to civil proceedings or their advocates to assist the court in furthering the overriding objective and to comply with the directions and orders of the court. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & others* (2013) eKLR, the Court of Appeal stated with regard to the application of the overriding objective principle:

7. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder...The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it... the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness...[T]he "O2" principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court process. (See the case of *Kenya Commercial Bank v Kenya Planters Co-operative Union* Nai Civil Application No 85 of 2010 (UR) 62 of 2010)."

8. I find that the circumstances of this appeal warrants the application of article 159 of *the Constitution* in order to achieve the overriding objective principle which is to enable the court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it and I will proceed to consider the appeal. This being a first appeal, this court has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. In the case of *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR, the Court of Appeal held that;

9. This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 allowances in this respect."

10. The plaintiffs gave evidence and produced the agency agreement dated October 8, 2004between them and the defendant /respondent. In his evidence in chief, theplaintiffs produced five exhibits. PEx1 was the agency agreement dated October 8, 2004, PEx2 being demand letter dated December 8, 2012, PEx3 being demand letter dated 28th December 2012, PEx4 being another demand letter dated May 14, 2014 and PEx5 being various letters sent to the tenants. The agreement produced did not have particulars of the tenants and/or the amount of rent to be paid. None of the exhibits shows how Kshs.2,634,000 claimed by the appellant in the plaint was arrived at. The tenants were not called to testify on what amount they had paid to the respondent so as to justify the alleged short fall between

the amount actual remitted by the tenants to the respondent and the amounts paid by the respondent to the appellant Landlord. The appellant did not produce his own accounts to demonstrate the alleged short fall of Kshs.2,634,000. It is in evidence that some tenants never paid rent. The Plaintiff testified that he directly received rent from two tenants.

11. The defendant called one witness Elias Maghanga who testified that the agency agreement of October 8, 2004existed. As an agent his duty was to send the rent which was paid by tenants. That about Kshs. 110,955 was collected per month from the tenants. The respondent had paid the appellant all the monies due either by cheque or by cash. DW1 stated that the respondent paid all the rent collected less 10% commission and that an excess of Kshs. 3 million had been paid to the plaintiff. The plaint is for a liquidated claim of Kshs.2,634,070 as shown in paragraph 7 and 8 of theplaint. The damages are also referred to as special damages. It is settled law that special damages must be specifically pleaded and strictly proved. In *Provincial Insurance Co EA Ltd vs Mordekai Mwanga Nandwa*, (KSM Civil Appeal No 179 of 1995) the court stated:

> It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.

12. In a similar case, the Court of Appeal stated in *Capital Fish Limited v Kenya Power and Lighting Company Limited* (2016) eKLR;

> The appellant apart from listing the alleged loss and damage, it did not... lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages."

13. In *Ryce Motors Limited & another v Elias Muroki* (1996) eKLR, the Court of Appeal addressing the case of putting forward pieces of paper to prove loss where the respondent claimed his matatu earned income, it stated:

> "These pieces of paper do not show at all if the alleged accounts were in respect of 'the matatu', or the two matatus owned by the plaintiff, or included the business of the plaintiff as a shop-keeper. The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs 2,830,500 for special damages and we set aside the award in its entirety."

14. It is clear from the appellants' evidence on record that they were 13 tenants and they are claiming rent for the period mainly from May 2012 to December 2013 as per PW1's evidence. They confirm that one tenant did not pay rent for one year. That they were not seeking arrears as per the plaint. I find that it was upto the Appellants to proof how much was due and for which period to enable this court to determine the matter.

15. In *Mbogo & another v Shah* (1968) EA 93, the Court, (Sir Newbold, P) stated at page 96:

> "A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong

decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice."

16. In the case of *Nkube v Nyamiro* (1983) KLR 403, the same court stated that;

> "A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

17. The trial court in the instant case stated that;

> "It is clear from the foregoing observations that the plaintiff's claim lacks in certainty and specificity. This prejudiced the defendant as it could not understand the case it had to meet. Be that as it may, the defendant has endeavored to produce various vouchers, cheques and bank statements tending to show that he surrendered the rent collections to the plaintiff"

18. I agree with the trial Magistrate that from the evidence on record the said special damages have not been specifically proved. It is not clear how much accrued if at all and when it accrued. How many tenants occupied the premises at any given time and if they actually paid the rent due. The respondent maintain that they paid theappellant all the monies due either by cheque or by cash and that the respondent paid all the rent collected less 10% commission. For these reasons I find this appeal is not merited and I dismiss it with costs.

19. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF MAY 2022.

N.A. MATHEKA

JUDGE