Refrigeration Components Limited v East African Cultural Trust & Afropress Ltd (Environment and Land Appeal E076 of 2021) [2022] KEELC 3316 (KLR) (9 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3316 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E076 OF 2021

EK WABWOTO, J

JUNE 9, 2022

BETWEEN

REFRIGERATION COMPONENTS LIMITED ..... APPELLANT

AND

EAST AFRICAN CULTURAL TRUST & AFROPRESS LTD ..... RESPONDENT

(Being an Appeal from the Judgment and Orders of the Honourable Chairman of the Business Premises Rent Tribunal Mr. Cyprian Mugambi Nguthari delivered on 10th September 2021 in the Business Premises Rent Tribunal Case No. 711 of 2021 Nairobi)

JUDGMENT

1. The Appeal arises from the decision of the Business Rent Tribunal (hereinafter referred to as the Tribunal). The Tribunal decision was rendered by Honourable Cyprian Mugambi Nguthari on 10th September 2021.

2. By a Memorandum of Appeal dated 17th September 2021, the Appellant appealed the Tribunals decision on the grounds that:-

    a) That the Learned Chairman of the Tribunal erred on fact and in law in not allowing the tenant reference/complaint.

    b) That the Learned Chairman of the Tribunal erred in law and in facts in reaching into a conclusion that the tenant was not entitled to deduct the amount of money (Kshs 4,296,101) it had utilized to bring back the Landlord's premises into usage when it is completely dilapidated.

    c) That the Learned Chairman of the Tribunal erred in law in not finding that the tenant had made a case against the Landlord for deducting the spent amount on repair.

d) That the Learned Chairman of the Tribunal was outrightly biased against the Appellant and thus occasioning a miscarriage of justice against the Appellant since the Landlord had left the premises dilapidated inorder to force the tenant vacate the premises without issuing termination notice.

e) That the Learned Chairman of the Tribunal erred in law and exercised his discretion unjudiciously and unjustly in not awarding costs to the tenant.

f) That the Learned Chairman of the Tribunal findings is contrary to the mischief that was meant to be cured within the meaning and provisions in the preamble of CAP 301 Laws of Kenya that is "to protect the tenants of such premises from eviction or from exploitation and for matters corrected therewith and incidental thereto"

3. Thus the Appellant sought the following orders: -

a) That the Appeal herein be allowed and the orders of the Tribunal made on 10th September 2021 be set aside and the tenants reference be allowed in terms of deducting the costs of repairs it incurred in the sum of Kshs 4,296,101/-

b) That the costs of the Appeal and the costs of the Tribunal be bore by the Respondent.

c) Any other relief as the court may deem fit and just to grant in the interest of justice.

4. A brief summary of the facts leading to the Appeal point out that the Appellant was a tenant to the Respondent in the suit premises. Sometimes in the year 2012, the Appellant undertook repairs on the premises since they had become inhabitable and which it valued at Kshs 3,268,868.37 following the consent recorded on 1st August 2016. The Respondent valued the costs at Kshs 2,841,467/-

5. In accessing the costs, the Tribunal settled on the mean of the two values being the sum of Kshs 3,055,167.50 and arrived at a finding that the Appellant was entitled to deduct the amount from the rent owed to the Respondent. The Respondent made a claim for alleged repairs on other areas of the premises which it alleged had been occasioned by damage by the Appellant when it was undertaking its repairs. The introduction of this claim was pursuant to an amendment application filed on 24th February 2017 which was allowed by the Tribunal on 9th March 2020.

6. In its Judgment delivered on 10th September 2021, the Tribunal made a finding on five issues. On the issue on the Respondent's claim that was brought by the amendment, the Tribunal held that the same was not time barred by the year 2017 when it was brought through the application for amendment and further that the issue of the repairs done on the premises and the claim by the Landlord on damages for the damaged floor and its repair thereof are so intertwined that it would not in the circumstances do justice to separate the two.

7. On whether or not there was consent to repair works, the Tribunal held that whereas there was no express consent by the Landlord allowing construction/repairs to be carried out, the conduct of the landlord throughout the proceedings implied that there was consent.

8. On estimating the cost of the repairs, the Tribunal adopting the mean of the two reports and held that Kshs 3,055,167.75 as the cost of the repairs incurred by the Tenant.

9. On whether or not the Tenant was entitled to recover the cost of the repairs from the rent due to the Landlord, the Tribunal held that the amount of money that the Tenant was entitled to defray from the rent owing to the Landlord was Kshs 1,797,934 which was derived from the difference of cost of the tenant's repairs Kshs 3,055,167 less Kshs 1,257,233 being costs of restoration of the damaged part given by the Landlord's Consultants.

10. Counsel agreed to canvass the Appeal by way of written submissions which were duly filed. The Appellant filed their written submissions dated 31st March 2022 through M/S Kimani and Muriithi Advocates while the Respondent filed their written submissions dated 5th April 2022 and 13th April 2022 through M/S Mereka & Co. Advocates.

11. In their written submissions, Counsel for the Appellant proposed to argue all the grounds of appeal together since they were all intertwined.

12. Counsel submitted that the Tribunal erred in allowing the sum of Kshs 1,257,233/- as compensation for damage to the Respondents since the Respondent had not proved the said loss having been occasioned by the Appellant.

13. Counsel argued that the alleged damage on the premises at the time when the repairs were being done by the Appellant occurred in the year 2012 and as such the Tribunal erred in allowing an amendment to introduce the claim beyond the 6 years period which claim was time barred by the *limitation of Actions Act*. For these reasons the Appellant urged the court to allow the Appeal and set aside the order of the Tribunal and the reference be allowed as prayed.

14. The Respondent's Counsel submitted by responding to each ground of appeal as was stated in the Appellant's Memorandum of Appeal. Counsel submitted that the Tribunal did not error in fact and in law in not allowing the reference.

15. It was also submitted that the Tribunal did not err in law and in fact in reaching into a conclusion that the Tenant was not entitled to deduct the amount of money Kshs 4,296,101/- that they had utilized to bring back the Landlord's premises into usage when it was completely dilapidated.

16. It was further submitted that the Tribunal had on several instances accommodated the Tenant to an extent that any issue of bias ought to have been raised by the Landlord.

17. On the issue of costs, it was argued that the same was discretional and in the instant case, the Tribunal cannot be faulted for directing each party to bear its own costs of the reference.

18. It was also contended that the Appellant had abandoned its ground of appeal and raised other new issues. Counsel pointed out to the court that the issue of limitation was not a ground of Appeal and hence the same ought to be ignored.

19. I have considered the reference before the Tribunal, the evidence tendered before it, the Judgment of the Tribunal, the grounds of Appeal in this Appeal and the viral submissions filed in respect to this Appeal. I have also considered the relevant statutes and jurisprudence on the key issues in this Appeal.

20. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In *China Zhingxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR it was stated as follows:

> "The appropriate standard of review established in these cases can be stated in three complementary principles:

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."

21. The High Court in the *China Zhongxing Construction Company Ltd* case (supra) cited the Court of Appeal for *East Africa in Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:-

> "It is a 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 has 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 that 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. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1), [1947] A.C. 484."

22. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.

23. In my humble view, the following issues stand out as key issues for determination which can dispose of the Appeal. These are: -

i. Whether the Tribunal erred in allowing the Respondent counterclaim for the amount of Kshs 1,257,233 despite the same being time barred under the *limitation of Actions Act*;

ii. Whether the Tribunal erred in law and fact in holding that the Tenant was not entitled to deduct the amount of Kshs 4,296,101/- it had utilized to bring back the Landlord's premises into usage when it was completely dilapidated;

iii. Whether the Tribunal was biased against the Appellant thus occasioning a miscarriage of justice and whether the Tribunal erred in not awarding costs.

24. I will analyze all the issues as they appear sequentially. On whether or not the Respondent's claim was time barred, Counsel for the Respondent pointed out to the court that the same was not among the initial grounds of appeal and that the Appellant had raised it in their written submissions. As such, it was submitted that the Appellant was bound to prosecute its appeal by confining themselves to their grounds of Appeal.

25. Counsel for the Respondent referred to the case of O*tieno Ragot and Co. Advocates v National Bank of Kenya* C.A. No 60 and 62 of 2017 at Kisumu, where the court of Appeal while quoting the case of *Kibos Sugar & Allied Industries Limited and Another v Benson Ambuti Adega & 6 others* Civil Appeal No 153 of 2019 held that additional evidence on appeal can only be adduced by leave of the court. I am

bound by the said authority and it is the finding of this court that the Appellant having filed its grounds of Appeal as outlined in its memorandum of Appeal dated 17th September 2021 cannot purport to introduce the issue of limitation at the submissions stage.

26. On whether the Tribunal erred in law and fact in holding that the tenant was not entitled to deduct the amount of Kshs 4,296,101/- it had utilized to bring back the Landlord's premises into usage when it was dilapidated, Counsel for the Appellant submitted that the Tribunal had reached a finding that the premises were in a bad condition and which required the Appellant to repair. This proved that the Respondent had neglected the premises and that could have led to the damaged roof and side occupied by the Respondent. It was further submitted that there was direct link between the Respondent's allegations of damage and the repairs undertaken by the Appellant and as such the Tribunal should not have held that the Tenant is not entitled to deduct the sum of Kshs 4,296,101/- being the cost of repairs estimated by Paragon Property valuers from the rent due.

27. Counsel for the Respondent countered the said position by submitting that the Appellant had made a case against the Landlord for deduction of Kshs 3,268,868/- which the Tribunal adjusted to Kshs 3,055,165.50 after taking a mid figure in the two valuations. In respect to this particular issues, I have perused the record of Appeal and note that at page 16 of the Supplementary record of Appeal, two reports were availed to the Tribunal one from the tenant and one from the Landlord on the cost of repairs, the tenant report was filed by Mark & Ashton and concluded the cost of repairs of Kshs 3,268,868 while the Landlords report was prepared by Archbil Consultants which costed the repair works at Kshs 2,841,467/- and thus arrived at a mean figure of Kshs 3,055,167.5. It is also clear at page 17 of the Supplementary record of Appeal that the Consultants bill for restoration of the damaged parts of the premises which the Tenant did not carry out any repair amounted to Kshs 1,257,233 and the same was never challenged by the Tenant.

28. It was therefore found that the amount owed to the tenant for the cost of repairs will be reduced by the estimated cost of repairs for the damages occasioned by the tenant's contractors which is Kshs (3,055,167-1,257,233) = Kshs 1,797,934

    In view of the foregoing it is the finding of this court that the Tribunal did not err when it held that the only amount to be defrayed from the rent due was Kshs 1,797,934 and not Kshs 4,296,101/-. I see no reason for interfering with that decision.

29. The Appellant also stated in its Memorandum of Appeal that the Tribunal was biased against them thus occasioning a miscarriage of justice. The Respondent in opposing the Appeal submitted that there was no instance where the Tribunal was biased against the Appellant. I have equally perused the entire record together with the Judgment delivered by the Tribunal and I am unable to find any evidence showing any aspect of the alleged bias to the Appellant and as such I am unable to make a finding on this ground of Appeal as it is not substantiated.

30. On the last ground of Appeal, the Appellant submitted that the Tribunal erred in not awarding them costs. On this issue, I am guided by the fact that while costs follow the event, the same is the discretion of the court. In the case of *United India Insurance Co. Ltd v East African Undermites [Kenya] Ltd* [1985] EA 898 where the court of Appeal held that the court will not interfere with the decision of a Judge appealed from simply on the ground that its members sitting at first instance and exercising their discretion would or might have given different weight to that given by the Judge to the various factors in the case.

31. In the end, I find that this appeal is not merited and the same is dismissed. On the issue of costs of the appeal, I direct that each party to equally bear their own costs of this Appeal.

32. Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF JUNE 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Mwihaki holding brief for Mr. Muriithi for Appellant.

Mr. Muchiri holding brief for Mr. Mereka for Respondent.

Court Assistant; Caroline Nafuna

E. K. WABWOTO

JUDGE