Njeru v Kamau & another (Environment and Land Appeal 102 of 2021)
[2022] KEELC 15016 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15016 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 102 OF 2021

BM EBOSO, J

NOVEMBER 18, 2022

BETWEEN

EDITH MARIGU NJERU ..... APPELLANT

AND

JAMES MUNYUA KAMAU ..... 1ST RESPONDENT

PAUL WAITITU KAHUTHU ..... 2ND RESPONDENT

(Being an Appeal against the Judgment of Hon C. K Kisiangani (SRM) delivered in the Senior Principal Magistrate Court at Ruiru on 28/10/2021 in Ruiru MCLE No. 157 OF 2019)

JUDGMENT

Background

1. This appeal arose from the Judgment rendered on 28/10/2021 by Hon C K Kisiangani, SRM, in Ruiru SPMC E & L Case No 157 of 2019. James Munyua Kamau [the1st respondent in this appeal] was the plaintiff in the primary claim in the said suit. Edith Marigu Njeru [the appellant in this appeal] was the defendant in the primary claim and the plaintiff in the counterclaim in the suit. Paul Waititu Kahuthu was the 2nd defendant in the counterclaim. Before I delve into the key issues that fall for determination in the suit, I will outline a brief background to the appeal.

2. Vide a plaint dated 28/11/2019, the 1st respondent sued the appellant in Ruiru SPMC E & L Case No 157 of 2019. He sought a declaration that the appellant be deemed to have breached the lease agreement dated 2/12/2013 and the lease be deemed to have been terminated and the demised premises do revert to the 1st respondent; an order of eviction of the appellant from the suit premises; and costs of the suit. The case of the 1st respondent was that through a lease agreement dated 2/12/2013, he leased to the appellant a portion measuring 40x60 feet out of land parcel number Ruiru/Kiu 2/3667. The lease provided, inter alia: (i) the appellant would pay rent when due; and (ii) the appellant would not sublet the demised premises without the written consent of the 1st respondent.

3. The 1st respondent contended that, the appellant failed to pay rent and ran into rent arrears. Further, the appellant sublet the demised premises to a third party [the 2nd respondent] without his written consent. He further contended that the appellant had frustrated his efforts to regain full possession of the suit property. He added that he had been unable to recover the rent arrears because the value of the distrained goods was not enough to cater for the rent arrears.

4. The appellant filed a defence and a counter-claim dated 10/12/2019. The defence and counterclaim were amended on 2/3/2020. Her case was that the 2nd defendant joined her as a business partner and not as a subtenant. She denied owing the 1st respondent rent arrears. She contended that her continued stay in the premises was pursuant to the lease agreement dated 2/12/2013 which had not been terminated as required. She further contended that even if the lease was to be terminated, she would be entitled to demolish her structures form the demised premises.

5. The appellant further contended that in 2016, the 1st respondent enticed the 2nd respondent to enter into a lease with him in relation to a portion of the demised premises measuring 30x40 feet at a monthly rent of Kshs 20,000. She contended that in the circumstances, the only rent the 1st respondent was entitled to from her was Kshs 5,000 per month. She added that the 1st respondent owed her Kshs 105,700 on account of goods supplied to the 1st respondent. She contended that she was entitled to the value of the distrained goods together with costs awarded to her in the Business Premises Rent Tribunal.

6. Through the counterclaim, she sought the following reliefs against eh respondent: (i) a declaration that the rent due to the 1st respondent from her had been reduced by the rent paid to the 1st respondent by the 2nd respondent; (ii) special damages in the sum of Kshs 1,284,460 being costs of goods unlawfully sold by the 1st respondent; (iii) an order that the portion occupied by the 2nd respondent be valued and the value be credited to the appellant; (iv) costs of the suit; and (v) general damages. It is noted from the record of appeal that although the appellant was granted leave to further amend the amended counterclaim, she did not file a formal further amended counterclaim. What she presented as part of the record of appeal was the amended defence and counterclaim dated 2/3/2020 in which she had attempted to superimpose handwritten alterations that are not dated and do not make sense [See prayer (c) in the counterclaim].

7. Upon conclusion of trial, the trial magistrate rendered a Judgment dated 28/10/2021 in which she identified the following as the key issues that fell for determination in the suit: (i) Whether the appellant had breached the lease between her and the 1st respondent; (ii) Whether the lease still subsisted; (iii) Whether the appellant was in rent arrears; (iv) Whether the 1st respondent was entitled to the prayers sought; and (v) Who was to bear costs of the suit.

8. The trial magistrate found that the appellant had failed to pay rent as stipulated in the lease agreement. She further found that the lease had been terminated through execution of the orders of the Business Premises Tribunal consequent upon which the 1st respondent entered into a lease with the 2nd respondent. She further found that the appellant was in rent arears. She granted the 1st respondent an eviction order but allowed the appellant a period of three months within which to vacate the premises. Each party was to bear their respective costs of the suit.

9. Aggrieved by the judgement, the appellant brought this appeal, advancing the following verbatim grounds:

    1. The Learned Magistrate erred in law and in fact in dismissing the appellant's counterclaim to the 1st Respondent's when there was overwhelming evidence in support of the Appellant' s counterclaim.

2. The Learned Magistrate erred in law and in fact in concluding that there was no lease agreement between the Appellant and the 1st respondent, when in deed there was as the appellant's purported eviction, on the order of the Business Premises Tribunal was reversed by the same Business Premises Tribunal.

3. The Learned Magistrate erred in law and in fact in when she contradicted herself in the Judgment in that on one hand she stated that there was no lease between the appellant and the suit 1st respondent while on the other hand she gave the appellant three months to vacate the suit premises.

4. The Learned Magistrate erred in law and in fact in treating the appellant as a trespasser when the appellant has never been evicted from the suit premises and when the Appellant's tenancy with the 1st Respondent has never been terminated.

5. The Learned Magistrate erred in law and in fact in accepting the testimony of the 2nd respondent over who built the structure on the portion occupied by both the appellant and 2nd respondent when evidence showed that the building was exclusively put up by the Appellant.

6. The Learned Magistrate erred in law and in fact when upon determining that the appellant had been evicted from the suit premises, she did not order that the appellant either removes the building material she used to put the building on the suit premises or that the said building be valued and the said valuation be credited to the Appellant and the appellant be paid before vacating the remises or be taken as rent.

7. The Learned Magistrate erred in law and in fact in accepting that there was a lawful tenancy between the 1st Respondent and the 2nd Respondent when the subsistence of the suit premises could not allow the 2nd Respondent to enter into another lease agreement for half the portion.

8. The Learned Magistrate erred in law and in fact in determining the suit on considerations not otherwise not known to law.

9. The Learned Magistrate disregarded decisions by the High Court that any eviction orders granted ex parte and without jurisdiction are fraudulent, illegal, null and void.

10. The Learned Magistrate erred in law and in fact in holding that the Appellant was in rent arrears from 2014 yet there was evidence on record showing that on 14th September 2016, the 1st Respondent owed her Kshs. 105,000/= on account of timber supplied that was supposed to be offset from the rent payable.

11. The Learned Magistrate erred in law and in fact in failing to hold that since any arrears owed by the Appellant if at all on account of rent were disputed, the 1st Respondent ought to have done a reconciliation of accounts before purporting to issue instruction's to auctioneers for distress for rent hence the distress was illegal, null and void.

12. The Learned Magistrate erred in law and in fact in failing to find that since the lease agreement dated 2nd December 2013 did not have a termination clause, the 1st Respondent's suit sought to exercise his right of forfeiture of the lease under section 73(2)(b) of the *Land Act* yet he had failed to issue requisite notices under Section 75 of the *Land Act* thereby leaving the suit ipso jure defective.

13. The Learned Magistrate erred in law and in fact in not concluding that since the 1st Respondent took the 2nd Respondent as a tenant for half of the premises and the rent charged for the half is equal to rent the Appellant was required to pay for the whole premises, there was no rent due from the Appellant for half of the portion she is occupying.

Submissions

10. The appeal was canvassed through written submissions dated 25/4/2022, filed by M/s Masore Nyangau & Co Advocates. Counsel for the appellant faulted the trial court for finding that she was in rent arrears. Counsel contended that there was no evidence to support the finding. Counsel further faulted the trial court for finding that the lease had been terminated through the execution of the order of the Business Premises Rent Tribunal and contended that the finding was an error because the said order was subsequently vacated for lack of jurisdiction.

11. Counsel submitted that the 1st respondent acquiesced to the subletting of the demised premises when he started collecting rent directly from the 2nd respondent, hence the appellant could not be said to be in breach by dint of bringing the 2nd respondent into the suit premises.

12. The two respondents filed written submissions dated 10/6/2022, through M/s Wanjohi & Wawuda Advocates. Counsel for the respondents identified the following as the three issues that fell for determination in the appeal: (i) Whether the appellant breached the lease agreement dated 2/12/2013; (ii) Whether there was a valid lease between the appellant and the 1st respondent; and (iii) Whether the trial court rightly dismissed the appellant's counterclaim.

13. On whether the appellant breached the lease, counsel for the respondents submitted that the appellant breached the lease by failing to pay rent as agreed and by subletting the demised premises without the express written permission of the 1st respondent. On whether there was a valid lease between the appellant and the 1st respondent, counsel submitted that the appellant had conceded that at the time the order of the Tribunal was executed, she was no longer in the demised premises. Counsel added that the appellant returned into part of the premises after the case in the Tribunal was struck out. Counsel argued that the fact that the appellant was not paying any form of rent was evidence that the lease had ceased to subsist.

14. On whether the trial court was right in dismissing the appellant's counterclaim, counsel submitted that the appellant failed to discharge her burden of proof in relation to the counterclaim.

Analysis and Determination

15. I have read the entire record of appeal and I have considered the grounds of appeal and the parties' rival submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties to this appeal did not agree on a common set of issues to be determined in the appeal. Having taken into account the grounds of appeal and the parties' respective submissions, the following are, in my view, the five key issues that fall for determination in this appeal: (i) Whether the trial court erred in finding that the appellant breached the lease agreement dated 2/12/2013; (ii) Whether the trial court erred in finding that the lease between the appellant and the 1st respondent dated 2/12/2013 had ceased to subsist; (iii) Whether the trial court erred in finding that the 1st respondent was entitled to an eviction order against the appellant; (iv) Whether the trial court erred in rejecting the appellant's counter-claim; and (v) What order should be made in relation to costs of this appeal. Before I dispose the above issues, I will briefly outline the principle that guides this court when exercising jurisdiction as a first appellate court.

16. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of Susan Munyi v Keshar Shiani (2013)eKLR as follows:-

> " As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."

17. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.

18. The first issue is whether the trial court erred in finding that the appellant breached the lease agreement dated 2/12/2013. The relationship between the appellant and the 1st respondent was anchored on the lease agreement dated 2/12/2013. The lease was for 10 years, commencing on 2/12/2013. The demised land was a portion of land parcel number Ruiru/Kiu Block 2/3667. The leased portion measured 40x60 feet. The agreed rent was Kshs 15,000 per month for the first three years; Kshs 18,000 per month for the fourth and fifth years; and Kshs 25,000 per month for the remainder of the period. Clause (vii) barred the appellant against subletting or assigning the lease without the written consent of the 1st respondent.

19. The 1st respondent contended before the trial court that the appellant breached the lease in that she failed to pay the agreed rent and she sublet the demised premises without his written consent. Was his contention proved? None other than the appellant confirmed to the trial court that she defaulted to pay rent. In her testimony, she stated thus:

> " When I received a demand letter, I went to PK Njoroge. We agreed that Kshs 65,000 was in arrears up to June."
>
> [See page 270 of the Record of Appeal]

20. That is not all. She had earlier testified as follows:

> " In 2017 the business was down so I could not pay rent well" [See page 2699]

21. Further, the appellant testified before the trial court that she allowed the 2nd respondent into the demised premises. She testified thus:

> " When I started struggling, I told plaintiff that I wanted to being a partner he agreed. I agreed with him to pay rent of Kshs 20,000 and a good will of Kshs 250,000. The name of the business was Velma Limited. It was changed when Paul came in but after 3-4 months, he said he wanted to be separate. We then removed the name Velma. We signed sublease agreement in June and July and backdated it. When Paul joined, he used to give me the rent up to July 2016. From July 2016, we went to the plaintiff when Paul said he wanted

to be independent. Paul started paying rent to plaintiff directly. Plaintiff was happy." [The testimony is reproduced verbatim]

22. On his part, the 2nd respondent testified that the appellant sublet to him the demised premises through a formal sub-lease executed on 14/3/2016. He produced the sub-lease as an exhibit.

23. No evidence was tendered by the appellant to demonstrate that she obtained prior written consent before entering into a sublease with Paul Waititu Kahuthu [the 2nd respondent]. The totality of the foregoing is that the 1st respondent sufficiently proved that the appellant breached the lease agreement dated 2/12/2013. The trial court was therefore justified in making a finding to that effect. I have no basis to fault the trial court on that. Consequently, my finding on the first issue is that the trial court did not err in finding that the appellant beached the lease agreement dated 2/12/2013.

24. The second issue is whether the trial court erred in finding that the lease between the appellant and the 1st respondent had ceased to subsist. As observed above, the material lease was dated 2/12/2013 and was for a portion measuring 40x60 feet out of land parcel number Ruiru/Kiu Block 2/3667. Evidence was tendered before the trial court to the effect that the appellant fell into rent arrears. In the appellant's own testimony, she decided to sublet part of the demised premises to the 2nd respondent. The appellant received goodwill of Kshs 250,000 from the 2nd respondent to enable her clear rent arrears owed to the 1st respondent. In addition, she continued to receive rent from the 2nd respondent. She did not, however, discharge her rent obligations to the 1st respondent. Consequently, the appellant obtained eviction orders from the Tribunal and executed them. Upon executing the orders, he entered into a lease agreement with the 2nd respondent. The 2nd respondent testified that he decided to enter into a direct relationship with the 1st respondent due to the appellant's failure to remit rent to the 1st respondent despite receiving rent from him.

25. It is clear from the totality of the evidence placed before the trial court that the 40x60 feet premises that had been leased to the appellant were no longer available because one half of it had been leased to the 2nd respondent through an agreement dated 3/4/2018. Further, there was evidence that the appellant had been evicted from the premises pursuant to an order of the Business Premises Rent Tribunal. There was no evidence placed before the trial court to suggest that the appellant and the 1st respondent subsequently entered into a new lease relating to the remaining half of the original demised premises. Further, the appellant herself testified that she was aware of the subsequent tenancy relationship between the two respondents. It is therefore clear that the lease dated 2/12/2013 which related go a portion of Ruiru/Kiu block 2/3667, measuring 40x60 feet had ceased to subsist. There was therefore no error on part of the trial court in coming to that finding.

26. The third issue is whether the trial court erred in finding that the 1st respondent was entitled to an eviction order against the appellant. In my view, in the absence of evidence of a subsisting tenancy relationship relating to the remainder of the original demised premises, the appellant had no right to continue occupying the premises without paying rent. This court finds no error in the trial court's finding on this issue. I now turn to the question as to whether the trial court erred in rejecting the appellant's counterclaim.

27. First, there was evidence that the appellant was in rent arrears at the time the 1st respondent instructed auctioneers to levy distress. Second, questions relating to the actual value of distrained goods could only be answered effectively by the auctioneer. The appellant elected not to join the auctioneer as a party to the counterclaim. Thirdly, if the 1st respondent owed the appellant money over goods supplied, that was a different cause of action that could not be adjudicated on the platform of a land case, more so in the absence of a plea for set-off.

28. On costs awarded in the case in the Tribunal, the suit before the trial court was not the proper forum for recovery of the costs. Having been awarded costs by the Tribunal, what the appellant needed to do was to enforce the award; he did not have to vex the trial court with a fresh claim relating to costs that had already been awarded.

29. On the handwritten and unsigned claim for value of the structures on the suit property, the only obligation which the parties to the agreement contemplated was contained in clause (vii) of the lease agreement. This was the obligation of the appellant to bear the costs of demolishing or moving any structures erected on the demised premises. There was no obligation contemplated in relation to the structures. I do not therefore find any basis for faulting the trial court on its finding on this issue.

30. The result is that this court does not find merit in this appeal. The appeal is rejected.

31. In the absence of special circumstances, the principle in section 27 of the *Civil Procedure Act* will apply, meaning that the appellant will bear the 1st respondents costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF NOVEMBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Kasabuli for the Appellant

Mr Githae for the Respondent

Court Assistant: Ms Osodo