Chege t/a Trendz Bar & Restaurant v Mwatha (Environment and Land Appeal E003 of 2023) [2025] KEELC 3564 (KLR) (7 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3564 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ENVIRONMENT AND LAND APPEAL E003 OF 2023

LN MBUGUA, J

MAY 7, 2025

BETWEEN

MICHAEL MWANGI CHEGE T/A TRENDZ BAR & RESTAURANT ..... APPELLANT

AND

MICHAEL KIRERU MWATHA ..... RESPONDENT

(Judgment (Being an appeal from the judgement of the Chief Magistrates court at Nanyuki- Hon Ben Mararo delivered on 21.2.2023 in CMCC No. E005 of 2020))

JUDGMENT

1. The appellant herein was the plaintiff before the trial court where it instituted proceedings vide a plaint dated 17.12.2020. It contends that the respondent (formerly the defendant) leased to the plaintiff a vacant plot on parcel Nanyuki/Municipality Block 9/1XX and 9/1XX pursuant to a lease dated 18.6.2019 for a period of 5 years. However, the plaintiff was illegally evicted on 29.9.2020.

2. The appellant therefore sought the following orders;

    a) A permanent order of injunction restraining the defendant by himself, his agents, servants and/or in any way dealing with all those parcels of land known as Title numbers Nanyuki/ Municipality Block 9/1XX and Nanyuki/Municipality Block 9/1XX and the commercial structures and establishments erected thereon known as Trendz Bar and Restaurant during pendency of the lease.

    b) A permanent order of injunction restraining the defendant by himself, his agents, servants and/or representatives from denying the plaintiff/applicant access to all those parcels of land known as title numbers Nanyuki/Municipality Block 9/1XX and Nanyuki/Municipality Block 9/1XX and the commercial structures and establishments erected thereon known as Trendz Bar & Restaurant during pendency of the lease.

c) An order directing the Officer Commanding Station, Nanyuki Police Station to ensure the above orders are enforced.

d) Costs of this suit".

3. The respondent filed a defence and counterclaim dated 11.1.2022 denying the claim of the appellant averring that upon signing of the lease agreement, the appellant paid upfront one year and three months rent, and on expiry, he never paid any more rent and owes the respondent the sum of Ksh. 972 932.

4. The respondent therefore made a counterclaim for;

a) An order dismissing the plaintiff's suit.

b) Payment of Kenya Shillings Nine Hundred and Seventy Thousand Nine Hundred and Thirty Two (Kshs. 972,932) as accumulated unpaid rent and arrears together with Kenya shillings Ninety Six Thousand Two Hundred and Eighty Nine (Kshs. 96,289) as unpaid water bills.

c) Costs of the suit.

d) Interest on (a) and (b) above at court rates.

e) Any other relief the court may deem fit".

5. The matter proceeded for hearing and in a judgment delivered on 21.2.2023, the trial court gave the following orders;

a) The Plaintiffs suit by way of plaint dated 17th day of December, 2020 is hereby dismissed.

b) An order is hereby issued that the plaintiff to pay the defendant a total sum of Kshs. 972,932= as accumulated rent and arrears together with Kshs. 96,289/= as unpaid water bills.

c) The defendant shall have the cost of the suit.

d) The defendant is also entitled to interest on (a) and (b) above at court's rates".

6. Aggrieved by the aforesaid decision, the appellant filed his memorandum of appeal dated 20.3.2023 raising eight (8) grounds of appeal. In summary, the appellant contends that the levying of distress and the issuance of the termination notice were illegal as no notice for termination was issued and that accounts were not rendered. Further, the hearing proceeded exparte to their detriment, thus the trial magistrate erred in upholding the claim of the respondent while dismissing the appellants' claim.

7. The appellant therefore prays for judgment in the following terms;

a) That this appeal be allowed.

b) That the judgment and decree of the Chief Magistrates Court at Nanyuki made and/or delivered on 21st February 2023 be set aside and substituted with an order setting aside the ex-parte proceedings.

c) That the matter before the Chief Magistrates Court at Nanyuki CMCCE005/2020 be heard denovo.

d) That the costs of this Appeal and costs in the lower court be awarded to the appellant.

8. On 24.4.2024, the court gave directions for the appeal to be heard through written submissions. The submissions of the appellant are dated 23.9.2024 where it is argued that the trial court ignored

the justice of the day in dismissing their application dated 12.9.2024 seeking to set aside the exparte proceedings, yet the failure to attend court was occasioned by their previous advocates. To this end, the case of JTM V RGA (Civil case 43 of 2016 (2022)KEHC 15385 (KLR) was cited.

9. It was further argued that the trial court misconstrued the nature of the claim of the appellant in holding that the claim had been overtaken by the events, yet their claim was for the breach of the lease agreement. It was argued that the trial court failed to take into account that the appellant is the one who had put up the commercial structures on the suit premises at his own costs, thereby sanitized the illegal actions of the respondent in evicting the appellant. This far, the case of Heptulla v Noormohamed (1984) Eklr was cited where the Court of Appeal held that "Ex Turpi causa non oritur action" is a legal maxim founded in good sense and express clear and well recognized principle that no court ought to enforce an illegal contract.

10. The appellant contends that it was wrong for the trial court to hold that notices had been served upon the appellant, yet only the demand notice of 23.6.2020 was served.

11. It was further submitted that the trial court did not deal with the issue of the burden of proof properly, since even in absence of a defence to the counterclaim, the respondent was required to proof its case but he didn't. On this point, the case of Karugi & Another v Kabiya & 3 Others (1983) Eklr was cited.

12. It was also submitted that no accounts were rendered by the auctioneers in tandem with the provisions of Rule 18 of the auctioneers rule, as only Kshs. 73 550 was apparently recovered.

13. Finally, the appellant submitted that the judgment of the trial court did not embrace the spirit of substantive justice and fair hearing as enshrined under Article 159 (2) (d) of *the Constitution* as well as Section 1A, 1B and 3A of the *Civil Procedure Act*.

14. The respondent' s submissions are dated 29.10.2024 where he avers that the appellant had failed to pay rent in terms of the lease agreement prompting the respondent to file a miscellaneous cause no 11 of 2020 in which orders for a break in were issued. That thereafter, the appellant filed the suit before the trial court with an application seeking restraining orders against the respondent which application was dismissed. That thereafter, the appellant did not turn up for the hearing, thus the defence chose to proceed with the hearing. It is argued that the trial court acted fairly in dismissing the appellant's application to arrest the delivery of the judgment. To this end, reference was made to the cases of Patel v E.A. Cargo Holdings Services Ltd (1974) EA 75 and Mbogo & Another v Shah (1968) EA 93.

15. It was further submitted that by the time the judgment was delivered, the suit premises had been rented out to other tenants, hence the trial court was right in stating that the claim of the plaintiff had been overtaken by events, adding that the suit premises already had structures as at the time of the lease agreement.

16. It was further argued that the issue of the auctioneers not rendering accounts was an afterthought as it was not raised in the pleadings.

17. The respondent contends that to date, the appellant owes him Ksh 1 million in unpaid rent.

Analysis and Determination.

18. The duty of the 1st appellate court was explained in the case of Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123, where it was observed thus:-

> " 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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

19. The case before the trial court proceeded exparte with only the defendant, Michael Kireru Mwatha (now the respondent) testifying as PW1 on 28.6.2022. He adopted his witness statement dated 17.1.2022 as his evidence and he produced the documents in his list as exhibits 1-21. His evidence was that they entered into a lease agreement dated 18.6.2019 where he leased out his property Nanyuki Municipality Block 9/100 & 101 to the appellant for a period of 5 years and the rent was to be paid quarterly.

20. That previously, the premises had been leased out to Lilian Wanjiru and Winfred Njeri Gichuki, who are the once who brought the plaintiff who even accepted to pay their arrears of rent amounting to Ksh 441 500, but he only paid Ksh 50 000 leaving a balance of Ksh 391 500.

21. Pw1 further stated that the appellant paid rent for only the 1st year, thereby breaching the agreement and prompted pw1 to initiate the proceedings for levying distress. Still he didn't recover the rent owed which amounts to Ksh 972932, plus an outstanding water bill of Ksh. 96 289.

22. Having looked at the evidence on record and the submissions proffered herein, I find that the issues falling for determination are; whether the proceedings before the lower court including the delivery of the judgment were conducted fairly and whether the aforementioned judgment should be set aside on the basis that the eviction was illegal, that it was against public policy, that the burden of proof had not been discharged by the respondent and that the auctioneers did not render an account.

23. On whether the trial was fair, I find that indeed the hearing before the trial court proceeded exparte. However, as rightly noted by the trial court in a ruling delivered on 22.11.2022, the appellant was represented in court on 18.1.2022, when appellants counsel sought leave to amend their plaint and a mention date was set on 1.3.2022. The appellants however did not file an amended plaint or a defence to the counter claim. They also did not turn up for hearing on 28.6.2022, yet the date had been served.

24. No sufficient explanation was proffered by the appellant before the trial court as to why the plaintiff failed to turn up for hearing. The appellant was apparently alleging that a Mr. Ivan Rono who had conduct of the matter had been appointed to the bench, but again as noted by the trial court, the counsel who appeared on 18. 1. 2022 was Mr. Kipkirui. It is also worthy to not that the firm of Naikuni Ngaah & Mihencha advocates are the ones who were on record for the appellant and not a particular advocate. The appellant did not give any details of how he communicated with the said firm so as to keep abreast of his case.

25. In Mwangi Gachiengu & 2 Others –Vs- Mwaura Githuku & Another–(2019)eKLR Angote J stated thus:

> "It is trite law that a matter once filed in court does not belong to the advocate but to the litigant. It is the responsibility of the litigant to be in constant touch with his advocate on the position of the matter".

26. It is quite apparent that after the appellant failed to get the injunctive orders sought in their application dated 11.12.2020 vide the ruling delivered on 2.2.2021, it went into slumber making no effort to prosecute the matter. For instance, after the delivery of the ruling on 2.2.2021, it is the respondent who moved the court for a mention date on 30.9.2021 when the date of 23.11.2021 was given. Come the date of 23.11.2021 and the appellants were still absent. The matter was then given a date of 18.1.2022. This time round, the appellants counsel appeared seeking leave to file an amended plaint. There after,

the appellant only made its presence when the matter was pending delivery of judgment. For a party who had approached the court with a certificate of urgency as at the time the suit was filed, its conduct in the trial was lax, and it cannot now turn around to claim that the trial was unfair. This far, I find that the trial magistrate did not err in failing to set aside the exparte proceedings of 28.6.2022.

27. On eviction, I find that from the documents availed by the respondent, he had duly issued a demand notice to the appellant on 23.6.2020 stating that the arrears stood at Ksh. 1, 013 150. The response given thereof by the appellant vide their letter dated 26.6.2020 was that they had sent Ksh.50 000 via mpesa on 22.6.2020 averring that the times were hard and they would offset the amounts due in the next financial years. That is however not what the lease agreement stipulated. This state of affairs was well captured in the judgment of the trial court.

28. The courts have often stated that every failure to perform a primary obligation is a breach of contract as was stated in Mwangi v Kiiru [1987] eKLR (in reference to Lord Diplock in the case of Photo Production v Securicor Ltd (1980) AC). Further, it is trite law that courts do not rewrite contracts for the parties, See- Thugi River Estate Limited & Another vs Citi Bank N.A. Limited (2014) eKLR, as well as National Bank of Kenya Ltd ... V Pipe Plastic Sakolit (k) Ltd(2002)EA 503 (2011)eklr. I therefore come to the conclusion that the eviction was proper. And as the said eviction had taken place way back on 29.9.2020 (as per the plaint), then the trial court made a proper finding that the prayers sought by the appellant (permanent injunction restraining the respondent from dealing with the suit land) had been overtaken by the events.

29. I also find that the documents availed by the respondent coupled with his evidence had met the threshold of the burden of proof on a balance of probabilities. To this end, the respondent had availed the contract document (the lease) detailing how the rent was to be paid, and the appellant is the one who breached the terms of the said lease.

30. On the claim by the appellant that it had put up commercial structures on the suit premises, I find that the appellant did not make a specific claim in its pleadings regarding structures. Needless to state that paragraph 1 (e) of the lease agreement made provision for the appellant to erect structures "PROVIDED THAT such structures shall at the expiry or sooner determination of the term hereby created not be removed from the premises but shall be left intact to the lessors property". I have already stated that the court cannot rewrite contracts for parties, thus the court cannot venture into the issue relating to the structures put up by the respondent.

31. As in the case of the structures, the appellant did not make a claim regarding the accounts. It is trite law that issues for determination arise from pleadings. In Galaxy Paints Company Ltd V Falcon Guards Ltd [2000] KECA 215 (KLR), the Court of Appeal stated as follows;

> "It is trite law, and the provisions of O.XIV of the Civil Procedure Rules, are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination.

32. In Gandy v. Caspair [1956]EACA 139 it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come

within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record. Similarly in Fernandes v. People Newspapers Ltd [1972] EA 63, Law Ag V.P. stated that;

> " A civil case is decided on issues arising out of the pleadings."

33. In the case of Kiplagat Korir v. Dennis Kipngeno Mutai (2006) eKLR, the court while dealing with a question of jurisdiction raised in the appeal stated as follows;

> " In any event, this court would be placed in an awkward situation were it to uphold the argument of the appellant where it has been called upon to decide on an issue which is raised for the first time on appeal. If this court were to make a determination on the issue of jurisdiction on this appeal as urged by the appellant, this court would not be sitting on appeal, but be acting as a court of first instance. This is because the issue of jurisdiction was not raised before the trial resident magistrate's court".

34. Similarly, this court declines to deal with issues which were not made a subject of contest before the trial court.

35. In the end, I find that this appeal is not merited, the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 7TH DAY OF MAY 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE