



**Salim & 3 others v Gitonga & another (Environment and Land Appeal  
E052 of 2022) [2024] KEELC 6348 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6348 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E052 OF 2022  
SM KIBUNJA, J  
OCTOBER 2, 2024**

**BETWEEN**

**FAIZ ALI SALIM ..... 1<sup>ST</sup> APPELLANT  
HAMIDA ALI SALIM ..... 2<sup>ND</sup> APPELLANT  
FATEH ALI SALIM ..... 3<sup>RD</sup> APPELLANT  
FARDIYA ALI SALIM ..... 4<sup>TH</sup> APPELLANT**

**AND**

**GEORGE GIKUNJU GITONGA ..... 1<sup>ST</sup> RESPONDENT  
PETER GITAHU MWAURA T/A MORDERN MONTESSORI  
COLLEGE ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal against the judgment of Hon. Nyariki J, S.R.M in CMCC No. E246 of 2021, Faiz Ali Salim and 3 others versus George Gikunju Gitonga and Anor, delivered on 8th November 2022))*

**JUDGMENT**

1. The appellant filed this appeal through the Memorandum of Appeal dated December 5, 2022 raising seven (7) grounds, inter alia that the respondents continued to occupy the appellants' premises after the expiry of the lease; that the learned trial magistrate erred in law and in fact in finding that the respondents were not obligated or liable to pay the appellants rent despite continuing to occupy the premises; that the learned trial magistrate erred in law and in fact in failing to appreciate that the respondents had admitted liability to pay rent for the seven months, and their failure to repair the premises, whose costs the appellant had proved through the receipts produced. The appellants therefore seeks for the judgement delivered by the trial court on 8<sup>th</sup> November 2022 to be set aside, and substituted with an order allowing their suit as prayed before the trial court. The appellant also filed the Record of Appeal dated 22<sup>nd</sup> January 2024.



2. The court gave directions on filing and exchanging submissions. The learned counsel for the appellants and respondents filed and exchanged their submissions dated the 19<sup>th</sup> March 2024 and 20<sup>th</sup> May 2024 respectively, which the court has considered.
3. That flowing from the grounds of appeal, the following are the issues for the determinations by the court:
  - a. Whether the respondents were obligated to pay rent for the period post the expiry of the lease.
  - b. Whether the appellants were liable to repair the subject premises upon expiry of the lease or refund the respondents for the costs of the said repair.
  - c. Who pays the costs.
4. The court has carefully considered the grounds on the memorandum of appeal, the record of appeal, submissions by the learned counsel, the superior courts' decisions cited thereon and come to the following determinations:
  - a. This being a first appeal, the court must evaluate afresh the evidence adduced before the lower court, and arrive at its independent conclusions, bearing in mind that it neither saw nor heard the witnesses testify, and make allowance for that. In the case of Mursal & Another versus Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) while citing with approval the case of Santosh Hazari versus. Purushottam Tiwari (Deceased) by L. Rs {2001} 3 SCC 179 held as follows:

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.”
  - b. From the pleadings filed before the trial court that are annexed in the record of appeal, the appellants filed the suit against the respondents vide a plaint dated 15<sup>th</sup> February 2021. It was the appellants' case that there existed a lease agreement dated 1<sup>st</sup> April 2015 between themselves and the respondents over Land Parcel No. Mombasa Block XXIV/61. It was averred that the said lease expired on 31<sup>st</sup> March 2020, but the respondents retained occupation of the suit property, until they vacated in October 2020. The appellants maintained that the respondents owed them rent arrears of Kshs 571,120/= for the period between expiry of the lease, and the time they vacated, as well as Kshs 82,250/= for the repair of the suit property to its original state. The appellants sought judgment against the respondents for:
    1. The payment of the rent arrears of Kshs 571,120/=.
    2. Special damages of Kshs 82,050/=.
    3. Costs of this suit.



4. Interest in (a),(b) above as from the date of filing of the suit and interest on prayer (c) from the date of judgment.
- c. The respondents filed a defence to the suit on 15<sup>th</sup> March 2021, on the 17<sup>th</sup> March 2024, inter alia admitting the existence of the lease agreement between themselves and the appellants. However, they maintained that the lease was to expire by effluxion of time on 31<sup>st</sup> March 2020. That before the said date, the lease frustrated by an act of God, when they were forced to close down the college they operated on the premises on 13<sup>th</sup> March 2020, due to Covid-19 pandemic. It was the respondents' case that there was a directive from the government directing all schools, and tertiary institutions to shut down, which led them to leave the suit property indefinitely. They argued that the only rent due and payable was that of March 2020, as thereafter the lease expired never to be renewed. That the demand of rent by the appellants was unjust enrichment. They relied on the doctrine of *re ipsa loquitur* and urged the court to dismiss the suit.
- d. In his judgement, the learned trial magistrate inter alia found that the lease agreement had a clause No. 5 which provided that the lease upon expiry, could only be renewed at the request of the lessee, 45 days before the termination of the lease. The learned trial magistrate went on to find that the lease had expired without a request for a renewal being made, and therefore, there was no lease agreement between the parties herein, upon which rent would have accrued. That the court would be rewriting one if it were to find that there was a lease agreement covering the months of March to October 2020. The learned magistrate dismissed the appellants' suit with cost, prompting this appeal.
- e. There is no dispute at all as to the existence and the validity of the lease signed between the appellants and respondents of 1<sup>st</sup> April 2015. The term of the lease was 5 years from 1<sup>st</sup> April 2015 to 31<sup>st</sup> March 2020. Since there is no dispute as to the legality of the lease signed by the parties, it was binding upon them, and in case of a dispute arising as in this case, the court's duty can only be to ensure compliance with the lease terms and conditions.
- f. On the question of the impact of the lapse/expiry of the lease on 31<sup>st</sup> March 2020, Clause 5 of the lease, that is at page 12 of the record of appeal provides as follows;

“.. This agreement is valid for a period of five years and is renewable at the request of the lessee addressed to the lessors in writing. This expression should be done 45 days prior to the termination of the lease. Failure to seek renewal of the lease on expiry, it may be assumed that the lessee does not need the premises any longer and the lessors may repossess or relocate it”.

From the above clause 5, the parties' pleadings and evidence, it is not in dispute that the lease expired on 31<sup>st</sup> March 2020. There is no doubt that the respondents did not issue any request for renewal of the lease to the appellants before it expired, and no new lease was entered between the parties after 31<sup>st</sup> March 2020. It is the finding of this court that Clause 5 above, contains an express assumption that where a request for renewal of lease is not received at least 45 days to the expiry date, it would be presumed the lessee was not interested in a renewal of the lease over the premises, and the lessors would be at liberty to repossess it. It is not contested that the respondents stopped operations on the subject premises following the Government Covid-19 pandemic closure orders of 13<sup>th</sup> March 2020, which was just a few days before the agreed expiry date of the lease. The lease was for a fixed term, and it expired by effluxion of time.



- g. The respondents were under no obligation to serve a notice of renewal, or termination of the lease upon the appellants. All the appellants ought to have done, is repossess the suit premises at the expiry of the lease, which they did not. It is apparent however that the respondents did not had over vacant possession of the premises upon expiry of the lease on 31<sup>st</sup> March 2020. They did so on 31<sup>st</sup> October 2020, and it cannot be gainsaid to hold that they continued in occupation of the leased premises until the date of handing over. Conversely, the appellants did not repossess the suit premises upon the expiry of the lease on 31<sup>st</sup> March 2020. They waited until the 31<sup>st</sup> October 2020, when the respondents vacated the suit property.
- h. It has not been contested that the appellants had written a demand letter to the respondents on 13<sup>th</sup> August 2020 for rental arrears of Kshs 428,340/-. That while that claim has been contested by the respondents on the basis that there was no lease in existence upon which to base the demand for rent, it is apparent the respondents did not state that they had yield vacant possession of the premises on 31<sup>st</sup> March 2020. Indeed, they had through their advocates' letter dated the 26<sup>th</sup> October 2020, indicated they shall be yielding vacant possession of the demised premises on or before 31<sup>st</sup> October 2020. The contents of the respondents' letter dated 26<sup>th</sup> October 2020 is evidence enough that they were still in possession of the subject premises, and that they undertook to vacate by 31<sup>st</sup> October 2020. The question that arises then is whether the appellant was wrong in law to expect rent payment for the period the respondents continued in possession of the demised premises after 31<sup>st</sup> March 2020?
- i. The appellants have submitted that the provision of section 57(1)(c) of the *Land Act* No. 6 of 2012 kicked in after the expiry of the lease on 31<sup>st</sup> March 2020, to make the respondents periodic tenants for the period they continued in occupation of the subject premises. Though there is no evidence tendered to show or suggest that the respondents' college continued in operation on the subject premises after the Covid-19 Government closure order of 13<sup>th</sup> March 2020, the court has noted that the respondents had through their letter dated 19<sup>th</sup> August 2020, that is at page 14 of the record of appeal, acknowledged being in rent arrears post expiry of the lease. Under the said letter, the respondents sought for time to reopen the college, and to come up with proposals on how to settle the rent arrears. This clearly shows that the respondents appreciated they were bound to pay rent for the period they continued to be in occupation of the subject premises, post expiry of the lease. Where there is no dispute over the terms in a lease, the court's duty is only to enforce what the parties had agreed between themselves, and not to rewrite the agreement for them. The respondents are indeed duty bound to pay rent for the post expiry months they continued occupying the premises.
- j. The situation would have been different had the respondents rendered vacant possession of the demised premises back to the appellants upon expiry of the lease, and the appellants declined or neglected to retake possession. The appellants were therefore entitled to be paid rent, in the same rate as in the expired lease, for the period the respondents continued in occupation of the demised premises after 31<sup>st</sup> March 2020, with their consent.
- k. Clause 1(n) of the lease agreement provided for the respondents to at termination, deliver up the premises to the appellants in a "condition and decoration as is now, properly secured and cleansed and repainted as is now with all locks keys before yielding the premises." The appellants have shown that they proceeded to carry out repairs and repainting the premises after the respondents yielded vacant possession. The 1<sup>st</sup> respondent testified as DW1 and in his cross examination, that is at page 63 of the record of appeal, admitted that no repairs were done on the premises when handing it over. The amount claimed by the appellants for repairs



is Kshs.82,050/-, and all the respondents seem to say is that the appellants did not come to court in clean hands, as they are still holding their deposit amount paid under the lease, and had neither reimbursed it, nor accounted to them how they utilized it. The respondents have not disputed their obligation under the lease to do the repairs, or the amount claimed for repair. From the foregoing, the appellants have shown that the learned trial magistrate misdirected himself in failing to find for the appellants on the rent arrears and repair costs reimbursement.

1. In terms of section 27 of the [Civil Procedure Act](#) Chapter 21 of Laws of Kenya, that costs follow the event unless where for good cause it is otherwise ordered. In this appeal, the respondents should meet the appellants' costs.
5. In conclusion, the court finds and orders as follows:
  - a. That the appeal has merit and is hereby allowed.
  - b. The learned trial magistrate judgment delivered on November 22, 2022 is hereby set aside, and in its place judgement be and is entered in favour of the appellants against the respondents as prayed in the plaint dated 15<sup>th</sup> February 2021.
  - c. The respondents to pay the appellants' costs, in the appeal.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2<sup>ND</sup> DAY OF OCTOBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Appellants : Mr. Hassan

Respondents : Mr Ngure.

Leakey– Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

