Geoloy Investments Limited v Kenya Shell Limited (Environment and Land Appeal 15 of 2022) [2023] KEELC 16074 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16074 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 15 OF 2022

AA OMOLLO, J

MARCH 2, 2023

(FORMERLY HCCA 372 OF 2015)

BETWEEN

GEOLOY INVESTMENTS LIMITED ..... APPLICANT

AND

KENYA SHELL LIMITED ..... RESPONDENT

JUDGMENT

1. The Appellant was sued in Nairobi Milimani CMCC No. 13107 of 2006 and being dissatisfied with the entire judgment delivered on July 7, 2015 brought this appeal. The Appellant raised six grounds of appeal as follows;

    a. The learned trial magistrate erred in law and fact by finding that the Respondent had proved its case against the Appellant.

    b. The learned trial Magistrate erred in law and fact by setting off the Appellant's counter claim against the Respondent's claim in total disregard of the overwhelming evidence adduced by the Appellant.

    c. The learned trial Magistrate erred in law by failing to observe glaring inconsistencies in the Respondent's evidence.

    d. The learned trial magistrate's judgment was against the weight of the evidence adduced by the Appellant.

    e. The learned trial magistrate erred in law by deliberately misdirecting herself on the doctrine of privity of contract.

f. The learned trial magistrate erred in law and fact by failing to take into account the Appellant's written submissions and cited authorities.

2. The Appellant urged the court to find in its favour and enter judgment as follows;

i. Judgment entered in CMCC No. 13107 of 2006 Kenya Shell Limited versus Geology Investments Limited be set aside.

ii. This court finds that the Appellant proved its case against the Respondent and dismiss the Respondent's claim against the Appellant.

iii. The Respondent pays the costs of the case in the trial court and of this appeal together with interest.

iv. Any other Orders that this Honourable Court deems fit to grant.

3. The Respondent who was the plaintiff in the suit below cross-appealed raising the following grounds;

i. The learned Magistrate erred in law and in fact in finding that the Respondent had proved its case against the Appellant.

ii. The learned magistrate erred in law and in fact in finding that the Respondent owed the Appellant agency fees, rent, land rent and rates for the year 2002 and 2003 when in fact;

a. The Reseller Agreement and Consignment Stock Agency Agreement between the parties was terminated on 2nd July, 2003 and no agency fees was due for the period claimed.

b. No rent was due to the Respondent because the Respondent had paid Tropicana Agricultural Contractors Limited, rent for the full term of the lease hence the amounts were due to the Respondent.

c. The payment of land rent and rates was the landlords' obligation. Upon the purchase of the property, the Appellant became the successor in title to the Property previously owned by Tropicana Agricultural Contractors Limited and inherited all the obligations and liabilities as the Respondent's landlord.

iii. The learned magistrate erred in law and in fact in setting off the Respondent pays the Appellant the sum of Kshs.234,00/= being the balance of the amount set off against each other with costs and interest when in fact;

a. The Respondent had proved its claim on account of the termination of the Reseller Agreement.

b. The court had held that the Appellant had denied the Respondent vacant possession and caused it loss.

iv. The learned magistrate having found that the Appellant was in breach of the Lease Agreement by denying the Respondent vacant possession of the suit premises.

v. The learned Magistrate erred in law and in fact by finding that the Respondent was not entitled to costs as a result of its failure to issue any demand and intention to sue before action when the demand was produced as evidence in court.

4. The Respondent urged the Court to allow their cross-appeal and enter judgement in their favour in the following terms;

a. The judgment entered in Chief Magistrates' Court Civil Case Number 13107 of 2006 in favour of the Appellant be varied and/or be set aside.

b. The Appellant's counterclaim be dismissed with costs to the Respondent.

c. Judgment be entered for the Respondent against the Appellant as prayed for in plaint together with costs and interest.

d. The Respondent be awarded the costs of this appeal.

5. The following is a brief presentation of the background to the dispute. Vide a plaint dated November 17, 2006, the Respondent pleaded that the Appellant was in breach of a reseller agreement executed between them on May 15, 2002. The Respondent stated that according to the reseller agreement, the Respondent was registered as a lessee over the property L.R No. 209/1925 and that nothing in the reseller agreement conferred any interest in the land on the Appellant, or any right of exclusive possession or occupation of premises.

6. The Respondent had pleaded that the reseller agreement was for a period of two years and it provided for a termination clause by either party giving a 90 days' notice in writing. Further, on termination the Appellant was required to vacate the premises, return or dispose the Respondents samples and advertising materials as advised and cease to sell, distribute and promote the Respondent's products.

7. The Respondents stated that they duly served the notice and expected compliance with the termination by July 2, 2003. Since the Appellant did not comply, the brought this suit where they sought for the following reliefs;

a. Payment of Kshs.1,765,890.

b. Interest on (a) from 3rd July 2003 until payment in full.

c. In the alternative, an order compelling the Defendant to deliver up the leased property to the Plaintiff.

d. A declaration that there is an enforceable covenant to renew the lease.

e. Costs and interests therein.

8. The Appellant denied the claim and filed a statement of defence and counter-claim dated March 26, 2007. They pleaded that upon terminations of the reseller agreement, the Respondent did not remove the stock of bitumen nor did it send its personnel or agent to take custody, protect and or secure, issue and or handle the produce as per the agreement. That the Appellant continued to perform the said work.

9. The Appellant pleaded that the Respondent dismantled their plant, machinery as well as all other equipment and moved out of the suit premises which action according to the Appellant amounted to a termination of the lease agreement between the plaintiff and M/s Tropicana Agricultural Contractors Limited as the use of the premises for the purposes of a reseller depot was rendered wholly impractical. In response to paragraph 12 and 13 of the plaint, the Appellant had stated that upon purchasing the suit property, and after termination of the lease agreement as indicated in paragraph 7 above, the landlord/tenant relationship between the Respondent and M/s Tropicana Agricultural Contractors Limited ended and no obligations could arise there from.

10. The Appellant counter-claimed against the Respondent and averred that the terms of the Consignment Stock Agency Agreement provided that the Respondent was to pay the Defendant a

monthly commission for its services payable at the end of the month. That at the time of terminating the reseller agreement, the Respondent did not take stock of bitumen still held by the Appellant so they continued to perform their obligations under the CSA agreement and issue invoices. The Appellant claimed that the Respondent failed to settle the invoices.

11. The Appellant further claimed that the Respondent continued residency in the suit premises without pay land rates and rents for the year 2003. The Appellant gave the total sum of money owed to them by the Respondents at Kshs. 2,035,367.25 and prayed for judgment to be entered in their favour in the following terms:

    a. The Plaintiff's suit be dismissed with costs.

    b. Judgment be entered in the Defendant's favour for the sum of Kshs.2,035,367.25 since July 18, 2005 until payment in full.

    c. Costs of this suit plus interest at court rates.

    d. Any other or further relief that this Honourable Court may deem fit to grant.

12. The learned trial magistrate after hearing the evidence from both parties rendered her judgment on the July 7, 2015. The learned magistrate raised seven issues which she answered in her determination of the dispute. She found in summary thus;

    i. The Appellant on acquiring the suit property had acquired both the rights and liability appurtenant thereto. That the Appellants failure to vacate denied the Respondent vacant possession and occasioned it loss.

    ii. That the Respondent had obligation to pay land rates and rents under clause 1(b) of the lease agreement but rent was paid upto April, 2002.

    iii. That the Appellant issued demand notices to the Respondent in December, 2003 and it was therefore entitled to costs.

    iv. She found that both parties had proved their respective claim. Therefore, the Respondent was to pay the balance after set off being Kshs.234,110 which amount attracted interest at court rates.

13. The parties agreed to prosecute this appeal by way of filing of written submissions. The Appellant vide its submissions filed on March 10, 2020 submitted that it was not a party to the lease dated May 6, 1998 in respect of property LR No. 209/12925 hence it was not bound by the terms thereof. They urged this court to find so based on the common law doctrine of privity of contract. To further buttress this argument, the Appellant cited the holding in Savings and Loan (K) Ltd Vs. Kanyenje Karangata Gakombe & Another (2015) eKLR that,

    > " In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.

14. The Appellant continued to submit that the learned trial magistrate erred in law in finding them to have breached the lease on account that clause 6 of the sale agreement stipulated that the land was sold subject to the lease in favour of the Respondent. The Appellant submits that on July 3, 2003 and October 27, 2003, the Respondent dismantled and removed its plant machinery and equipment which conduct amounted to termination of the lease between Respondent and Tropicana Agricultural

Contractors Ltd hence the use of the premises as a reseller deport rendered impractical. The Appellant denied preventing the Respondent from using the premises.

15. The Appellant stated that in spite of the termination of the CSA, they continued to perform the following obligations;

    a. Maintaining, storing, handling stocks and supply to the respondents' customers.

    b. Ensuring 24-hour security of bitumen at the depot.

    c. Maintaining god standards, practice and rules.

    d. Insuring bitumen against all risks.

    e. Indemnifying the respondent against any claims.

16. The Appellant concluded their submissions by stating that the Respondent owes them agency fee. They urged the court to enter judgment in their favour for payment of the sum of Kshs. 2,035,367.25 and dismiss the Respondent's cross-appeal. The Appellant prayed for costs of this appeal.

17. The Respondent's submission dated April 27, 2020, discussed three issues they framed. In regard to clause 6 of the sale agreement between the Appellant and Tropicana Agricultural Contractors Ltd, the Respondent submitted that courts are mandated to enforce the intention of parties' and cited the case of Michira Vs. Gezima Power Mills Ltd (2004) eKLR where the court of Appeal held thus;

> "If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties."

18. The Respondent submits that the Appellant has erroneously invoked the doctrine of privity of contract as the present dispute is in relation to an interest over land. They argue that existing encumbrances move with the land to the successor in title and can be enforced by and against persons other than the original parties. To support this argument, the Respondent cited the decision in Spencer Vs. Clark (1558 – 1774) ALL E.R 68 which held that anyone who buys either a lease or the reversion takes the benefits and burdens of the covenants in the lease.

19. On the issue of costs demanded by the Appellant this was the Respondent's reply;

    i. The Respondent actually issued a demand upon the Appellant by a letter dated February 27, 2006 which was part of the documents filed in the Lower Court and admitted as evidence, at page 71 of the Appellant's bundle of documents filed in the Lower Court.

       See page 107 of the record of appeal.

    ii. The mere issuance of a demand does not entitle a party to costs, and the failure to issue a demand does not necessarily disentitle a party from recovering costs, even though these are factors that the courts may consider when exercising the discretion whether to award costs.

20. In their submissions, the Respondent's denied that the dismantling of its plant, machinery or any other equipment amounted to vacating the property and that no evidence was led to prove the allegation. On a without prejudice, the Respondent stated that because of admission of their equipment's which remained, means they were in a position to continue operating its business on the suit property.

21. The Respondent submitted that the termination of the reseller agreement on July 2, 2003 effectively terminated the Consignment Stock Agency agreement. That the terms of the CSA did not require the

Respondent to remove its bitumen from the suit premises nor did it require the Appellant to retain and continue marketing the Respondent's stock without its express authorisation. That the invoices issued to the Respondent by the Appellant were of no legal effect.

22. On the amounts demanded for rates and rents, the Respondent submits that under clause (b) of the lease, all demand for rents and rates were to be forwarded within 14 days of such sums becoming due. Hence, the Appellant having failed to make the demands within the time approved, they are estopped from claiming payment of the same. The Respondent added that after the termination of the reseller agreement, some negotiations and reconciliation accounts took place and the Respondent made some payments on without prejudice as agency fee that were due. That the Appellant did not deny receiving any such payments.

23. In conclusion, the Respondent submitted that the trial magistrate erred in ordering for a set off because a set off is different from a counter-claim. The Respondent urged the court to dismiss the appeal as filed by the Appellant and to allow their cross-appeal.

24. This is a first appeal, the court is mandated in law to re-evaluate the facts and the law in reaching its conclusions but being alive to the fact that it did not have the opportunity of seeing and hearing the witnesses. I have perused through the record of appeal and analysed the submissions rendered in support of the appeal and cross-appeal and those offered in opposition thereto. In order to determine the dispute, I frame the following three issues: -

    i. Whether or not the Appellant was bound by the terms of the lease agreement dated 6th May, 1998.

    ii. Whether or not the Appellant was entitled to payment for invoices sent after the termination of the Reseller agreement.

    iii. Whether or not the trial magistrate erred in making an order for set-off.

    iv. Who bears the costs of this appeal?

25. From the evidence adduced, there is no dispute that the Respondent had a 10-year lease over the suit premises. There is also no dispute that the Respondent had paid rent in advance for the duration of the lease. Based on its leasehold interest, the Respondent and the Appellant entered into a reseller agreement dated May 15, 2002 for a period of two years with an option to renew.

26. However, on October 4, 2002, the Appellant purchased the suit promises from the lessor (Tropicana Ltd). The Appellant submitted that since it was not party to the lease agreement executed on May 6, 1998, it (the Appellant) could not be bound by its terms post the sale and transfer of the suit property. The Appellant referred this court to the case of Savings & Loan (K) Ltd Vs. Kanyenje supra which held that a contract cannot be enforced against 3rd parties. In arguing that the Appellant was bound by the terms of their lease, the Respondent referred this court to clause 6 of the sale agreement between the Appellant and Tropicana Ltd.

27. The trial magistrate made reference to the said clause 6 in reaching a finding that it made the Appellant liable to the terms of the lease. The said clause 6 provided thus, "the said property is sold subject to the lease registered as No. I.R 70789/3 and to the acts, conditions covenants, stipulations, easements and reservations subject to which the same is presently held by the vendor but otherwise free from all mortgages and changes."

28. This provision in the contract of sale between the Appellant and Tropicana was clear that the Appellant was ready and willing to buy the suit premises with the lease dated May 6, 1998 registered on its title as

an encumbrance registered as I.R. No 70789/3. Although the Appellant deny that they were bound with the terms of lease of May 1998 on account of their not being party to the agreement, the said lease was made an encumbrance to the suit title. The law on effect of encumbrances is found at section 25(1) of the *Land Registration Act* (equivalent to section 28 the Registered *Land Act* of Cap 300 (repealed) which was the applicable law at the time of the sale transaction. The said section provides that the rights held by a proprietor are subject to;

a. The leases, subject to and other encumbrances and to conditions and restrictions if any shown in the register.

   Section 25 (2) states that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person in subject to as a trustee.

29. The Appellant entered into the agreement for sale of the suit premises aware of the lease agreement in favour of the Respondents, first by the fact of executing the reseller agreement and secondly by virtue of entry of the lease in the register of the suit title. The Appellant did not insist on the vendor (Tropicana Ltd.) removing the encumbrance (lease) before the transfer and registration was effected on its favour. The contents of the lease as applied to be effected was not because the Appellant was privy to the agreement but on the premise that they purchased the property subject to the lease as an encumbrance on the title. They became bound by the obligations contained in that lease. Therefore, I find no error in the trial magistrate's finding that the Respondent was entitled to the rent for the remainder of the lease even after the property changed hands.

30. The Appellant argued further that the actions of removal of plant machinery and equipment on July 3, 2003 and October 27, 2003 resulted into a termination of the lease as the premises could no longer be used as a reseller depot. It is my opinion that this is not the correct position as the lease agreement provided the mode of termination which included serving a ninety (90) day written notice on either party. One of grounds the lessee would terminate the agreement included the occurrence of an event that would make it impossible to continue use of the premises for the purpose of a reseller depot. The Appellant having undertaken the obligations under the lease did not serve any notice of termination as provided under the lease. Instead they are inviting the court to terminate for their inaction. In any event, the termination if not on the basis of breach could not disentitle the Respondent from refund of rents already paid for the unutilised period of the lease.

31. The second issue is whether or not the Appellant is entitled to sums due in land rates, rents and for invoices of services rendered past the termination of the reseller and CSA agreements. The Respondent argued that the Appellant's witness admitted that although they continued to sell the Respondent's products, it was not as a reseller. The Respondent argues that they were not under obligation to honour the invoices because they were of no legal effect. The lease agreement required the Respondent to pay rents and rates due during the duration of the lease under clause 1(b) of the lease registered on the title which provided thus, "To pay rates and annual rents that may be property levied, imposed or charged by the government or local authority in respect of the premises provided that all demands and notices are forwarded by the Lessor to the Lessee within 14 days of such sums becoming due."

32. The rents and rates were thus exclusive of the rent payable to the Lessor as stated in the lease agreement. The reason provided by the Respondent for disputing the finding by the trial magistrate under this head is that the demand notices were not forwarded to them within 14 days. However, Respondent did not point this court to any provision in the lease that where the demand was not forwarded, the Respondent would be exempted from paying the rates/rents to the local authority/government. I find this argument escapist and without any legal foundation to exempt the Respondent from their obligation under the lease.

33. With regard to the invoices, I do uphold the finding of the trial magistrate that the Respondent continued to benefit from the Appellant's handling of bitumen and stock that remained at the suit property. The Respondents acknowledged receipt of notices from the Appellant dated 1st and December 11, 2003 to pay. Further, the Respondent did not deny receiving monies from such sales undertaken by the Appellant whether as a reseller or otherwise so they cannot deny knowledge services rendered.

34. Did the trial magistrate err in entering judgment as a set off? I do not think so. Hon. Chesang (Mrs) stated thus in her conclusion;

> " I therefore find that Both Plaintiff and the Defendant have proved their claim against each other. That being the case, the plaintiff will pay to the Defendant Kshs.234110 being the balance of the amount set off against each other's claim."

35. Having found as I also hereby do that the Respondent was entitled to be refunded a sum of Kshs.1,765,890 and the Appellant entitled to the sum claimed of kshs.2,035,367.25. It did not matter the language if the magistrate said the Appellant pay the Respondent Kshs.1,765,890 and the Respondent pay Kshs.2,035,367.25. There was always going to be some cancellation of the debt due to either party with a difference of Kshs. 234,110 over and above the monies owed to the Appellant.

36. In conclusion, I find no error in the judgment rendered by the learned magistrate rendered on July 7, 2015 and choose not to interfere with it. Consequently, this court does dismiss both the appeal and the cross-appeal as lacking in merit. Each party shall bear the burden of their legal costs.

Dated and Delivered at Nairobi this 2nd Day of March, 2023

A. OMOLLO

JUDGE