



**Opiyo v Guserwa (Environment and Land Appeal 7 of 2019)  
[2023] KEELC 18590 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18590 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 7 OF 2019**

**AA OMOLLO, J**

**JULY 6, 2023**

**BETWEEN**

**MAJOR GENERAL(RTD) PAUL J OPIYO ..... APPELLANT**

**AND**

**JUDITH A GUSERWA ..... RESPONDENT**

*(Being an appeal from the judgement of the Honourable D.O Mbeja Senior Resident Magistrate in Nairobi CMCC No.1572 of 2010 Judith A.Guserwa Vs Major General (Rtd)J.Opiyo)*

**JUDGMENT**

1. The Appellant in this matter filed a Memorandum of Appeal dated 1<sup>st</sup> August 2018 and an undated amended memorandum of appeal praying that the appeal be allowed, the judgement delivered on 12<sup>th</sup> February 2018 be set aside and CMCC No 1572 of 2010 be dismissed with costs and that pursuant to Order 42 Rule 32 Civil Procedure Rules it be decreed/ordered that the sum of Kenya Shillings Eight Hundred Thousand (Kshs 800,000/-) only with interest at Court Rates from the 16<sup>th</sup> August 201 till payment in full which the appellant paid on the execution of the judgement in CMCC No 1572 of 2010 Judith Guserwa v Gen (RTD) Paul j.Oiyo be paid by the Respondent.
2. The Appellant based the appeal on the ground that the learned trial magistrate misdirected himself in failing to consider, take into account and address the fundamental issue of fact and law emerging out of paragraph 7 of the defence namely that the Plaintiff did not disclose a cause of action and that it offended the provisions of Section 3(3) of the Law of Contract Act as amended by Act No 21 of 1990 and Act No 2 of 2002.
3. The Appellant filed closing submissions dated 22<sup>nd</sup> March 2023 while the Respondent filed submissions dated 29<sup>th</sup> March 2022 respectively.



4. The Appellant submitted that the Respondent has not shaken his submission on Section 3(3) of the *Law of Contract*, a text which has been given judicial interpretation in the cases of *Wagiciengo v Gerrard* 1982(KLR) 336, *Wagiciengo v Gerrard* 1988(KLR) 406, *Silverbird Kenya Limited v The Junction Limited & 3 others* (2013) eKLR among others.
5. The Appellant also stated that the decisions cited by the Respondent in support of his case did not put the context of provisions of Section 3(3) of the *Law of Contract Act* and that the Respondent filed a suit notwithstanding that Section 3(3) of Contract Act said that she could not do it and also the Appellant was never the tenant of the Respondent because the landlord/tenant relationship was between the Respondent as landlady and the Department of Defence as the tenant and the Appellant was merely an occupant as an employee of the Department of Defences.
6. The Appellant also submitted that the trial court in its judgement failed to frame any issues for its determination contrary to Order 15 Rules 1&2 of the Civil Procedure Rules and that it does not show any discourse towards the provisions of Section 3 (3) of the *Law of Contract Act*.
7. The Respondent submitted that from the evidence on record it is not disputed that the Appellant stayed in the suit property for free for 1 year therefore should pay rent accrued together with the utility bills. He added that recovery of the rent arrears due to him should not be frustrated by allegations of non-existence of a signed Lease Agreement.
8. The Respondent submitted that the Trial Magistrate made a proper analysis by finding;
 

“ Guided by the evidence so far on record, I am satisfied that the Plaintiff has established a prima facie case against the defendant on a balance probability all the circumstances of this case considered. The probative value of the evidence so far adduced by Plaintiff is credible. I am satisfied that there is a clear intention to create legal relations by the parties herein which crystalized and that the Plaintiff is entitled to the reliefs claimed in the Plaint. In the result Judgement is entered in favour of the Plaintiff against the Defendant as sought in the Plaint plus costs and interest at Court rates from the date of filing suit all circumstances considered.”
9. In support of his case, the Respondent cited the case of *Canarian Holdings Ltd v Mohamed Said Abdulrehman* ELCC No 300 of 2018 where the court held that the Landlord was entitled to the rent that was being withheld by the Tenant under the principle of forfeiture and Civil Appeal No 182 of 2019 *Jitendrakumar C.Patel & another v MJC & another* where the court of Appeal substituted a dismissal order with a judgement in favour of the Appellant for Rent arrears, Utility bills as the Respondents who were the tenants had failed to pay the same.

## Analysis

10. The Respondent filed a suit against the appellant in the trial court seeking to be paid for the rent arrears owed to her and a judgement was issued to her favour. The Appellant being dissatisfied by the said judgement filed this appeal seeking to have the orders overturned on the ground that the trial court erred in failing to address that that the Plaint did not disclose a cause of action and that it offended the provisions of Section 3(3) of the *Law of Contract Act*.
11. The Respondent contended that the trial court made a proper analysis and judgement because the appellant stayed in the suit premises rent free and so she is entitled to the rent owed.
12. An appellate court will only interfere with a decision of a trial court if the said decision is not supported by evidence or is premised on wrong principles of the law. This was emphasized in *Abok James Odera*



*t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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”

13. Further, Court of Appeal in *Kneller & Hancox Ag JJA in Makube v Nyamuro*[1983] eKLR stated as follows:-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

14. The Respondent adduced evidence to the effect that the lease between her and the department of Defence was terminated on 31<sup>st</sup> of March 2008 and that the Appellant agreed to pay rent at Kshs 115000 effective 1<sup>st</sup> April 2008. The Appellant denies such arrangement and denies the existence of any contractual relations between him and the Respondent. The issue for determination by this court is whether or not a landlord/tenancy relationship was created between the parties. Several letters were produced in support of the Respondent’s claim was a letter dated 20<sup>th</sup> March 2008 from DoD addressed to the Respondent referenced expiry of lease House on LR No 12219/8.

15. The letter informed the Respondent that the DoD, the Appellant’s employer had no intention of renewing the lease and stated that the house would be handed back on Thursday 27<sup>th</sup> March, 2008. The Letter was copied to DHQ WKS, WESTCOM (Attn Maj. Gen. Opiyo). The Appellant denied being aware of the existence of this letter until this suit was filed but stated in paragraph 3 of his witness statement thus;

“while on medical leave recovering from a road traffic accident, he received the letter dated 20<sup>th</sup> communicating the decision not to renew the lease. That on receipt of his copy, he requested the Respondent to communicate when she had taken possession to enable him look for alternative accommodation”

16. There was also produced a certificate of transfer of interest from the Ministry of Housing. The party handing over is indicated as DoD whose officers are given as J.K Ngeno (S/B) and Major AM Mugwimi at 13.15 hours on 27<sup>th</sup> March 2008. The witness for the Landlady during the hand-over exercise is given as Boaz Alulu. The Respondent in her witness statement at paragraph 4 stated that the hand-over was also done in the presence of the Appellant’s wife called Benardelle. This piece of evidence was not challenged during cross-examination.

17. The letter from DoD was clear that the lease was ending on 31<sup>st</sup> March 2008. The next correspondence is the Respondent’s letter dated 12<sup>th</sup> May 2008 demanding rent for the period April –June 2008 pursuant to a mutual discussion that had taken place between the Appellant and herself. From the evidence adduced, it appears the Appellant continued to stay in the suit premises until April 2009 without paying any rent. He is using the provisions of section 3(3) of the Contract Act to deny liability to pay the accrued rent.

18. It is my considered opinion that once the Respondent tendered evidence to show that the Appellant was aware of the termination lease, demanded for the rent immediately after the lease expired (vide the



letter dated 12<sup>th</sup> May 2008) and also showed that the appellant continued to remain in occupation. The burden of proof shifted on the Appellant to demonstrate that his continued stay in the suit premises was with consent of his employer for the employer to have remained liable to pay the accrued rent. His assertion that he was waiting for the Respondent to inform him when she wanted the house back does not have any founding in law with knowledge that the DoD had handed over the house to the Respondent.

19. Once the lease was terminated, the Appellant's continued stay on the suit premises was at his own risk regarding the ensuing consequences regardless of the absence of a written contract. The Respondent was entitled to a remedy of mesne profits by virtue of the Appellant's continued occupation of the suit premises. As regards the claim for payment of the utility bills, the Respondent provided evidence that the same remained unpaid. The Appellant in cross-exam stated that he used to pay his electricity but he did not produce any evidence of such payment before the trial court.
20. In light of the foregoing analysis, this court is not persuaded to interfere with the trial court's decision because no evidence has been provided to prove that the Magistrate's court erred in fact and law as alleged. There is no evidence that the trial court applied the wrong principles of law in reaching the conclusions and findings made.
21. Consequently, I hold that this appeal has no merit and accordingly dismiss it with costs to the Respondent.

**JUDGEMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JULY 2023**

**A. OMOLLO**

**JUDGE**

