



**Njoki v Maigwa & another (Environment and Land Appeal E021 of 2022)  
[2023] KEELC 20815 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20815 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E021 OF 2022  
LC KOMINGOI, J  
OCTOBER 12, 2023**

**BETWEEN**

**GERALD WARUI NJOKI ..... APPELLANT**

**AND**

**JOYCE NJERI MAIGWA ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL MBUGUA MBUTE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the judgement in the Chief Magistrate's Court at  
Kajiado ELC No. 24 of 2020 dated 26th April 2022 by Hon. B. Cheloti SRM)*

**JUDGMENT**

1. By a Memorandum of Appeal filed on 19<sup>th</sup> May 2022, the Appellant, who was the Plaintiff in Kajiado Chief Magistrates Court ELC No. 24 of 2020 has appealed against Hon. B. Cheloti's (SRM) entire judgment dated 26<sup>th</sup> April 2022 and sought to have the judgement set aside on grounds that:
  - i. The learned trial magistrate erred in law and in fact by failing to take into account the Appellant's submissions while considering her judgement;
  - ii. The learned trial magistrate erred in law by failing to take into account relevant facts and evidence adduced by the Appellant thereby made an award that was inordinately low in the circumstances.
  - iii. The learned trial magistrate erred in law and in fact in her award of the low nominal damage in light of the evidence on record.
  - iv. The learned trial magistrate erred in law and fact by failing to consider the loss suffered by the Appellant as a result of the breach of contract by the respondents.



- v. The learned trial magistrate erred in law and fact by failing to apply proper legal principles in her decision thus arriving at a bad decision.
2. The appeal was canvassed by way of written submissions.

### **The Appellants Submissions.**

3. Counsel for the Appellant in the submissions dated 6<sup>th</sup> June 2023 highlighted that the Appellant entered into a five (5) year lease agreement dated 12<sup>th</sup> November 2019 with the Respondents for construction of a shop space on Land Parcel No. Noonkopir Township/448 measuring 82ft by 27ft. The consideration was Kshs. 3,600,000 (equivalent to 2 years rent) whereby the Appellant was to pay a deposit of Kshs. 2,800,000 and thereafter make monthly payments of Kshs. 150,000 upon taking occupation of the premises until payment in full.
4. The construction was to begin immediately upon execution of the agreement and was to be ready on or before the 5<sup>th</sup> March 2020. However, by June 2020 the premises was yet to be constructed. And on 9<sup>th</sup> June 2020 without prior notice, the Respondents initiated execution of an agreement terminating the lease agreement stating that they would refund the Appellant the money advanced in three instalments but this was not adhered to.
5. Due to this the Appellant sued the Respondents for refund of his monies, general damages, costs for securing a loan facility inclusive of interests charged by the financier plus costs of the suit and interests.
6. The trial court heard and determined the matter and in its judgement dated 26<sup>th</sup> April 2022, awarded the Appellant nominal damages of Kshs. 20,000 as compensation for breach of contract together with interest until payment in full. It is on this premise that the Appellant filed the instant appeal.
7. The issues for determination outlined by Counsel for the Appellant were therefore: Whether there was breach of contract by the Respondents, through which the Appellant suffered loss; whether the money being Kshs. 2,800,000 was refunded to the Appellant as per the termination of the lease dated 9<sup>th</sup> June 2020 or there was further breach of subsequent contract; whether the award of Kshs. 20,000 as nominal damages was sufficient in light of the loss suffered by the Appellant.
8. Counsel submitted that it was undisputed that there was a valid contract which ought to have been rescinded with sufficient notice, She put forward the cases of; *Total Kenya Ltd v Joseph Ojiem* Nairobi HCCC No. 1243 of 1999; *James Gichuhi Mutero & Another v Lolldaiga Country Homes & Resort Ltd & Another* [2019] eKLR; *Attorney General of Belize et al v Belize Telecom Ltd & Another* (2009)1WLR 1980 at page 1993.
9. Counsel further submitted stated that following termination of the lease agreement on 9<sup>th</sup> June 2020, the Respondents were to refund the money in three instalments of Kshs. 500,000; Kshs. 1,000,000 and Kshs. 1,300,000 but only the first instalment of Kshs. 500,000 was paid on time. The rest of the payment was paid haphazardly in fourteen instalments as per the evidence adduced in the trial court as Exhibits 3 to 16 in total disregard of the agreement. Due to this delay in refund, the Appellant also delayed meeting his financial obligations with his financier thus incurring additional losses due to the interest accrued from the loan. Furthermore, the Respondents not only disregarded the payment plan, but also ignored Clause No. 5 of the termination agreement which stipulated that the Landlords would not continue with construction of the structure under the lease agreement until Kshs. 2,800,000 was refunded to the tenant.
10. As such, the nominal damages of Kshs. 20,000 awarded by the trial court were inordinately low arguing that damages should offer some satisfactory compensation to the injured party. She put forward the



cases of; *Hort Ltd v Attorney General* [2016] eKLR, *Storms v Hutchinson* [1905] AC 515, *Kanji Naran Patel v Noor Essa & Another* [1965] EA484, *James Gichubi Mutero & Another v Lolldaiga Country Homes & Resort Ltd & Another* [2019]eKLR and *Halsbury's Laws of England*, Third Edition Vol. II on the definition of nominal damages. Counsel also submitted that the Appellant suffered loss as he had legitimate expectation that the shop would commence business on or about 5<sup>th</sup> March 2020. As such the Appellant deserved an award of damages that was commensurate with the loss suffered.

### **The Respondent's Submissions.**

11. Counsel for the Respondent in the submissions dated 31<sup>st</sup> May submitted that the issues for determination were: whether there was breach of contract by the Respondents; whether the award given by the trial court was inordinately low to warrant appeal.
12. Counsel acknowledged that the agreement entered into between the parties dated 12<sup>th</sup> November 2019 was vitiated by the termination of agreement dated 9<sup>th</sup> June 2020 which was executed by the parties willingly. He submitted that the Appellant did not meet the threshold in proving how the Respondents' actions occasioned breach of the said contract as per the precincts of Section 107, 108 and 109 of the *Evidence Act* and cited the following cases *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR; *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* (2015) eKLR and *Dare v Pulham* (1982) 148, CLR 658 At 664.
13. Counsel submitted that the alleged breach of agreement by not abiding to the payment schedule was not captured in the contract and as such could not be implied to have been in the contract. Counsel went on to state that as at the end of March 2021 the Respondents had refunded the Appellant Kshs. 2,500,000 and the remaining Kshs. 300,000 was paid out in June 2021 and that the nominal award granted by the trial court was as interest on the outstanding Kshs. 300,000 which was unpaid by the Respondents by the date of default which was March 2021.
14. On whether the award given was low, counsel submitted that in the amended plaint, the Appellant had asked the trial court to compel the Respondents to pay Kshs. 567,135.23 which was the cost of securing the loan and interest charged. Counsel submitted that the Appellant neither proved to the trial court that the loan facility taken was for the sole benefit of the Respondents nor was the Respondent privy to the contract. He put forward the case of *Aineah Likuyani Njirah v Aga Khan Health Services* [2013] eKLR where the court held that the people who actually negotiated the contract (who are privy to it) are entitled to enforce its terms... And the trial court articulated this clearly in its decision which should not be disturbed.
15. Counsel also submitted that the Appellant did not incur any loss that would occasion an award of general damages because there was neither a business nor flow of income affected. He finally submitted that the Appellant had not demonstrated sufficient grounds to have the Lower Court decision varied.

### **Analysis and determination**

16. I have considered the Grounds of Appeal the Record of Appeal, the rival submissions and the authorities cited finds that the issues for determination are:
  - i. Whether there was breach of contract by the Respondents;
  - ii. Whether the nominal damages of Kshs. 20,000 awarded by the trial court was inordinately low and should be varied.



17. This being a first appeal, the Court ought to reconsider the evidence of the trial court, re-evaluate it and make its own conclusions as was stated by the Court of Appeal in *Ratilal Gova Sumaria & another v Allied Industries Limited* [2007] eKLR.

“ ... This being a first appeal we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor heard the witnesses ...”

18. Similarly in *South Nyanza Sugar Company Ltd v. Leornard O. Arera* (2020) eKLR Mrima J observed thus;

“As the first appellate court it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Another v. Associated Motor Boat Co. Ltd.*”

19. It is clear that the dispute herein arose after the parties terminated the lease agreement dated 12<sup>th</sup> November 2019 through the termination of lease agreement dated 9<sup>th</sup> June 2020 in respect to construction of a shop space on land parcel NoonKopir Township/448. There is no dispute that there was an agreement and a payment of Kshs. 2,800,000 made by the Appellant which was later refunded by Respondents after rescission of the contract. The issue in dispute is whether the Respondents breached terms of the termination agreement and whether the award granted by the trial court was sufficient to compensate the injured party.

20. The Appellant argued that the lease termination agreement stipulated that the refund of Kshs. 2,800,000 would be paid up in three instalments, but the Respondents paid it in fourteen instalments which was a breach of terms. This court has reviewed the said contract and Page 1 of the said termination of lease agreement dated 9<sup>th</sup> June 2020 stipulates:

It Is Hereby Agreed As Follows:

1. Commencement of the lease dated 12<sup>th</sup> November 2019

That the estimated time for construction and completion and thereafter assumption of occupation of the premises has lapsed hence rendering the lease inoperative for not commencing.

2. Refund of the money advanced

The tenant having paid the sum of Kshs. 2,800,000 thus far to the landlords, is desirous of having the money refunded.

Which money shall be refunded through ...

It Is Hereby Further Agreed That:

3. The landlords shall refund the sum of Kenya Shillings two million eight hundred thousand (Kshs. 2,800,000) to the tenant herein as follows:
  - i. Kshs. 500,000 upon the execution of this agreement;
  - ii. Kshs. 1,000,000 on or about December 2020
  - iii. Kshs. 1,300,000 on or about March 2021



4. The landlords may exercise their right to pay up the whole sum of money at once any time before March 2021
  5. The landlords will not continue with construction of the structure under lease agreement under Kenya Shillings Two million eight hundred thousand (Kshs. 2,800,000) is fully refunded to the tenant.
21. One of the grounds of appeal was that the learned trial magistrate failed to consider the loss suffered by the Appellant as a result of the breach of contract by the Respondents. Hon. B. Cheloti in the judgement dated 28<sup>th</sup> April 2022 held:

“ 18. It is trite law that parties are bound to the terms of their agreement and courts cannot be used to re-write contracts. From the foregoing, I find the Defendants have since refunded the Plaintiff the Kshs. 2,800,000 as stipulated in the termination of lease agreement dated 9<sup>th</sup> June 2020. The agreement did not provide for penalty for late payment of the refund. This notwithstanding, court notes that the last instalment was paid vide bank deposit slip dated 17<sup>th</sup> June 2021. It is not enough for the Defendants to argue that the Plaintiff came to court before March 2021 being the date agreed for refund of the last instalment. The fact still remains that the last instalment was paid in June 2021 and not March 2021 as stipulated in the agreement dated. In this regard, I am of the opinion that the Defendant were in breach of the said agreement. The Plaintiff is therefore entitled to compensation in form damages”.

22. From the foregoing excerpt of the impugned judgement, it is clear that the Learned Trial Magistrate acknowledged that there was breach of contractual terms and considered the loss suffered when the Respondents did not abide by the agreement. As such, I have unequivocally no reason to differ with the learned trial magistrate’s reasoning, analysis and conclusion reached as above.

In *Ephantus Mwangi & Another v. Duncan Mwangi Wambugu* [1984] eKLR Hancox JA (as he then was) put it thus:

“ A Court of Appeal will not normally interfere with a finding of fact by the 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 the findings he did...”

23. Similarly, “... contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court’s role is to interpret the contract as written and not rewrite it because...” This was the holding in *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* [2018] eKLR.

24. Another issue for determination is whether the nominal damages awarded by the trial court were nominally low and did not take into consideration the loss incurred by the Appellant. The trial court had this to say on this issue:

“ 18. ... I find that the Plaintiff did not specifically prove the loss he incurred arising from the breach of contract. In this regard, courts awards Kshs. 20,000 being nominal damages as compensation for breach of contract. (Ref. *Peter Umbuku Mukaya v Henry Sitati Mmbasu* [2018] eKLR).



19. The Plaintiff applied for a loan facility to finance the leasing of the Defendants' premises. I find the Defendant were neither privy nor parties to the loan facility between the Plaintiff and the financing institution. To this extent, the Defendants cannot be compelled to pay the cost of securing the loan and all interests charged by the bank..."

25. On the issue of privity of the loan taken, this court upholds the decision and reasoning of the Learned Trial Magistrate.

In the case of *Aneah Likuyani Njirah v. Aga Khan Health Services* (2013)eKLR the Court of Appeal thus;

"4 privity of contract is a long – established part of the law of contract, in the earlier part of the last century, it was identified by Viscont Haldane LC as one of the fundamental principles of the English Contract Law. See *Dulp Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.* The essence of the privity rule is that only the person who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him."

I agree with the Respondents submissions that they (Respondents) were not privy to the loan facility and cannot be expected to enforce any of it's provisions in paying for the cost of securing it and on the interest incurred. I agree with the Learned trial magistrate's finding that the loan should not be a basis for calculating quantum in the award of general damages.

26. On what nominal damages entail and how courts should arrive at the award, the Court of Appeal in *Jogoo Kimakia Bus Services Limited v Electrocom International Limited* [1992] eKLR stated:

In *'Medina' and the 'Mediana'* [1900] AC 113, 116 Earl of Halsbury LC as he then was defined nominal damages:-

"... Nominal damages' is a technical phrase which means that you have negated anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

27. I have looked at the termination of lease agreement dated 9<sup>th</sup> June 2020 and I agree with the Learned Trial Magistrate that the same did not provide a penalty for late payment of the refund.

28. In conclusion I find that the Learned Trial Magistrate did not err in awarding Kshs.20,000 as normal damages., I see no reason interfere with the award.

29. I find no merit in this Appeal and the same is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12<sup>TH</sup> DAY OF OCTOBER 2023.**

**L. KOMINGOI**



**JUDGE.**

In The Presence Of:

Ms. Waithira Kamiti for the Appellant.

N/A for the Respondents.

Court Assistant – Mutisya.

