Al-Yusra Restaurant Limited v Kenya Railways Corporation & another (Commercial Case E094 of 2023) [2025] KEHC 1031 (KLR) (Commercial and Tax) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1031 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E094 OF 2023

MN MWANGI, J

FEBRUARY 21, 2025

BETWEEN

AL-YUSRA RESTAURANT LIMITED ..... APPELLANT

AND

KENYA RAILWAYS CORPORATION ..... 1ST RESPONDENT

POWER GENERAL CONTRACTORS LIMITED ..... 2ND RESPONDENT

(Being an Appeal from the judgment of Hon. P. K. Rotich (PM) delivered on 17th April 2023, in Nairobi Milimani Principal Magistrate's MCCOMMSU No. E829 of 2021)

JUDGMENT

1. The plaintiff (appellant) filed a suit against the defendants (respondents) in the lower Court vide a plaint dated 3rd June 2021 seeking judgment for payment of Kshs.11,426,600/=, interest on the said sum from the date of the Agreement, and a declaration that the respondents were in breach of contract, which breach entitled the appellant to be compensated, and costs of the suit.

2. The appellant's suit was that it purchased a 1,100 sq. ft. restaurant space at the Mombasa SGR Terminus from the 2nd respondent vide an Agreement for sale dated 3rd December 2018. The appellant contended that the 2nd respondent had leased the said space from the 1st respondent for six (6) years, thus upon purchase, it took over the remainder of the lease term. It asserted that the 1st respondent was duly notified of the transfer and acknowledged it, then the appellant paid a total of Kshs.6,326,600/= for the said space which comprised Kshs.5,561,000/= to the 2nd respondent as the purchase price and Kshs.765,600/= to the 1st respondent as rent. The appellant stated that it sought approval for construction from the 1st respondent, which was granted in September 2019.

3. The appellant contended that in October 2019, its contractor was denied access to the site by the 1st respondent's agents, forcing it to store construction materials in a rented warehouse at Kshs.100,000/= per month from December 2019 onwards. The appellant asserted that despite repeated attempts to resolve the issue, it was never granted possession of the leased space, which constituted a breach of contract by the respondents.

4. In opposition to the suit, the 1st respondent filed a statement of defence dated 20th August 2021 where it denied all the averments contained in the appellant's plaint. The 1st respondent stated that it entered into a lease Agreement with the 2nd respondent and approved the change of business name from Paul Caffé to Al-Yusra Restaurant Limited. It further stated that it also approved the building plans and permitted the commencement of the construction in accordance with the approved plans. The 1st respondent denied that there was a lease Agreement between it and the appellant and contended that even if there was, it was not a valid contract.

5. In a judgment delivered on 17th April 2023, the Trial Court entered judgment in favor of the appellant against the 2nd respondent for Kshs.5,561,000/=, costs of the suit, and interest at Court rates from the date of judgment.

6. Aggrieved by the said judgment, the appellant filed a Memorandum of Appeal dated 15th May 2023 which was subsequently amended on 28th August 2023 raising the following grounds of appeal -

    i. The learned Magistrate erred in law and fact in arriving at an erroneous finding that the 2nd respondent did not have any interest in the rentable restaurant space capable of being passed to the appellant;

    ii. The learned Magistrate erred in law and fact by failing to appreciate that by dint of the 1st respondent acknowledging rent paid to it by the appellant, a contractual arrangement was created binding the appellant and the 1st respondent;

        (ii)A. The learned Magistrate erred in law and fact by failing to appreciate that in the absence of an Agreement in writing or lease, the appellant became a periodic tenant by dint of rent paid and received acknowledged (sic) by the 1st respondent. As such, the appellant was/is entitled to remedies sought in the plaint;

        (ii)B. The learned Magistrate erred in law and fact by failing to appreciate that the factor of the 1st appellant accepting and or acknowledging Kshs.765,600/= from the appellant on account of rent for the space purchased, the appellant did an act in furtherance of the contract albeit in the absence of written lease (sic);

    iii. The learned Magistrate erred in law and fact in failing to award and or order the 1st respondent to refund the Kshs.765, 600/= paid to and acknowledged by the 1st respondent as rent for the restaurant business space that had been purchased by the appellant;

    iv. The learned Magistrate erred in law and fact by erroneously failing to make a finding that by dint of the actions of the 1st respondent's agents of denying the appellant access to the rentable restaurant business space, the appellant suffered loss and damages quantified as hereunder (sic);

        i. Kshs.3,500,000/= same being deposit paid to the appellant's contractor; and

        ii. Kshs.1,600,000/= same being storage charges for the appellant's fabricated materials from the month of December 2019 to March 2021.

i. The learned Magistrate erred in law and fact by erroneously failing to make a finding that by dint of the 1st respondent acknowledging rent, approving change of name and the architectural drawings from the appellant, their (sic) existed an implied contractual arrangements (sic) of a lessor/lessee between the appellant and the 1st respondent.

7. The appellant's prayer is for the instant appeal to be allowed with costs, for the appellant's suit in the lower Court to be allowed with costs and the judgment in respect to the appellant and the 1st respondent delivered by the learned Magistrate on 17th April 2023 and the consequential orders therefrom, to be set aside or vacated.

8. The appeal herein was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of Mahmoud Gitau Jillo, LLP Advocates on 8th May 2024, whereas the 1st respondent's submissions were filed on 1st July 2024 by the law firm of Ochieng Achach & Kaino Advocates. I note from the record that the 2nd respondent did not participate in these proceedings and understandably so since this appeal was against the 1st respondent.

9. Mr. Nyanyuki, learned Counsel for the appellant cited the case of Shah v Shah [1988] KLR and submitted that the intention of the parties was clear that the 2nd respondent transferred ownership of the restaurant space to the appellant for consideration, and the 1st respondent acknowledged this transfer by accepting rent of Kshs.765,600/= without objection. He contended that having accepted payment, the 1st respondent is estopped from denying the appellant's valid interest in the space. Counsel cited Section 57(1) of the *Land Act* and Section 2 of the *Land Registration Act*, as well as the case of Cornella Nabangala Nabwana v Edward Vitalis Akuku & 2 others [2017] eKLR, and argued that in the absence of a written Agreement or lease, the appellant became a periodic tenant due to the rent paid and received by the 1st respondent.

10. He referred to the case of Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR, and asserted that since the appellant was denied possession of the restaurant space, the Court should order the 1st respondent to refund the Kshs.765,600/= rent paid on 12th April 2019. Mr. Nyanyuki contended that the appellant suffered loss due to the 1st respondent's failure to grant it possession of the restaurant space despite the existing Agreement and approvals. He cited the case of Hahn v Singh Civ App 42 of 83 and submitted that the appellant had proved its case on a balance of probabilities, which called for the Court to grant the orders sought in the plaint dated 3rd June 2021.

11. Mr. Achach, learned Counsel for the 1st respondent cited Section 44 of the *Land Registration Act* and argued that the 1st respondent as the registered owner of the restaurant space, was not a party to the Agreement between the appellant and the 2nd respondent. He submitted that since no lease Agreement existed between the 1st & 2nd respondents, there was no legal interest to transfer to the appellant. He referred to the case of Silverbird Kenya Limited v Junction Limited & 3 others [2013] eKLR, and stated that the only document linking the 1st & 2nd respondents was an offer letter dated 11th June 2018, which would lapse after fourteen (14) days if full payment was not made.

12. Mr. Achach referred to the provisions of Section 3(3) of the *Law of Contract Act* and asserted that the letter dated 11th June 2018 did not meet the legal threshold to constitute a binding Agreement. He contended that the arrangement between the appellant and the 1st respondent was not legally enforceable. He also contended that in the absence of a lease Agreement between the 1st & 2nd respondents, the appellant's access to the premises would have amounted to trespass. Additionally, that while the appellant obtained approval for construction, it failed to notify the 1st respondent and the SGR Operator or specify a commencement date for the construction as required under Clause 11 of

the approval letter. Mr. Achach asserted that the appellant was not entitled to compensation for any alleged losses or to damages.

ANALYSIS AND DETERMINATION.

13. This being a first appeal, it is by way of re-trial, and as the first appellate Court, I have a duty to re-evaluate, re-analyze and re-consider the evidence adduced before the Trial Court and draw my own conclusions, whilst bearing in mind that I did not see witnesses testifying and give due allowance for that fact.That was the position held by the Court in the case of Peters v Sunday Post Limited [1985] EA 424, where the Court rendered itself as follows -

> It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...

14. An appellate Court will only interfere with the Trial Court's finding if the same is founded on wrong principles of law or if the Trial Court misdirected itself on issues of fact, or considered issues that ought not to have been considered in arriving at its finding. That position was buttressed by the Court of Appeal finding in the case of Mwanasokoni v Kenya Bus Services Ltd [1985] KLR 931 where it was held that -

> Accordingly, on when a finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere.

15. I have re-examined the Record of Appeal and given due consideration to the written submissions by Counsel for the parties. The issues that arise for determination are –

    i. Whether the 2nd respondent had a bonafide legal interest in the restaurant space in question that could be transferred to the appellant;

    ii. Whether the appellant was the 1st respondent's periodic tenant; and

    iii. Whether the appellant is entitled to an order for refund of Kshs.765,600/= on account of rent paid to the 1st respondent,Kshs.3,500,000/= on account of payment made to Urpida Services, Limited, & Kshs.1,600,000/= on account of incurred storage charges.

Whether the 2nd respondent had a bonafide legal interest in the restaurant space in question that could be transferred to the appellant.

16. The appellant's case is that vide an Agreement for sale dated 3rd December 2018, it purchased a 1,100 sq. ft. restaurant space at the Mombasa SGR Terminus from the 2nd respondent. The appellant contended that the 2nd respondent had leased the said space from the 1st respondent for six (6) years, thus upon purchase, it took over the remainder of the lease term. The plaintiff contended that the 1st respondent was duly notified of the sale and transfer and acknowledged it.

17. Upon perusal of the evidence adduced before the Trial Court, it is evident that the 1st respondent vide an offer letter dated 11th June 2018 offered Power General Contractors Limited T/A Paul Caffé an opportunity to operate a catering outlet at Mombasa station SGR Terminus. On perusal of the said offer letter, it is evident from the last paragraph thereof that the said offer was only valid for fourteen

(14) days, after which it would automatically lapse if full payment would not have been received by the 1st respondent before the lapse of the said time.

18. The appellant however failed to provide evidence of payment under the offer letter or a lease Agreement between the 1st and 2nd respondents. Additionally, there is no proof that the 1st respondent received the appellant's letter dated 29th March 2019 regarding the Agreement with the 2nd respondent. Contrary to the appellant's claim that the 1st respondent was informed of the Agreement between the appellant and the 2nd respondent and acknowledged it, vide a letter dated 22nd November 2018 Power General Contractors Limited T/A Paul Caffé requested the 1st respondent to change the business name to Al-Yusra T/A Al-Yusra Restaurant Limited, which request was approved on 27th November 2018.

19. The Court of Appeal in the case of William Muthee Muthami v Bank of Baroda [2014] eKLR, addressed its mind on the elements of a legally binding contract and made the following observation –

> In the law of contract, the aggrieved party to an Agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.

20. Further, Lord Clarke, in RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] 1 WLR 753 at [45], [2010] UKSC 14, cited with authority by the Court of Appeal in Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR), held that –

> The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend Agreement of such terms to be a precondition to a concluded and legally binding Agreement.

21. On perusal of the offer letter dated 11th June 2018, there is no evidence of acceptance of the terms therein by the 2nd respondent. The said offer letter at the last paragraph provided that the offer contained therein would automatically lapse after fourteen (14) days if full payment provided for in the letter had not been made. It is trite law that he who alleges must prove. The said maxim is derived from the provisions of Sections 107, 108, 109 & 112 of the *Evidence Act*. On perusal of the Record of Appeal, it is evident that the appellant did not adduce and/or produce any evidence to demonstrate that there was acceptance of the offer letter dated 11th June 2018, and that full payment of the sums provided for in the said letter were made within the prescribed timeline.

22. In the premise, this Court finds that the appellant did not on a balance of probabilities prove the existence of a contract and/or lease Agreement between the 1st & 2nd respondents. As such, it is my finding that the 2nd respondent did not have a bonafide legal interest in the restaurant space in question that could be transferred to the appellant.

Whether the appellant was the 1st respondent's periodic tenant.

23. The appellant contended that the 1st respondent having received from it payment of Kshs.765, 600/ = on account of rent, a contractual relationship in the name of tenancy was born. A periodic lease is defined under Section 2 of the *Land Registration Act* as hereunder –

> "periodic lease" means a lease from year to year, half year to half year, quarter to quarter, month to month, week to week or the like;

24. A periodic lease is also provided for under Section 57 of the *Land Act* as follows -

1. If in any lease –
    a. the term of the lease is not specified and no provision is made for the giving of notice to terminate the tenancy, the lease shall be deemed to be a periodic lease;
    b. the term is from week to week, month to month, year to year or any other periodic basis to which the rent is payable in relation to agricultural land the periodic lease shall be for six months;
    c. the lessee remains in possession of land with the consent of the lessor after the term of the lease has expired, then -
        i. unless the lessor and lessee have agreed, expressly or by implication, that the continuing possession shall be for some other period, the lease shall be deemed to be a periodic one; and
        ii. all the terms and conditions of the lease that are consistent with the provisions of subparagraph (i) shall continue in force until the lease is terminated in accordance with this section.
2. If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any Agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.
3. The periodic tenancy contemplated in subsection (1)(a) shall be the period by reference to which the rent is payable.
4. A periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.

25. I have already made a finding that vide an offer letter dated 11th June 2018, the 1st respondent offered Power General Contractors Limited T/A Paul Caffé an opportunity to operate a catering outlet at Mombasa station SGR Terminus which offer was only valid for fourteen (14) days, after which it would automatically lapse if full payment would not have been received by the 1st respondent. Thereafter, vide a letter dated 22nd November 2018 Power General Contractors Limited T/A Paul Caffé requested the 1st respondent to change the business name to Al-Yusra T/A Al-Yusra Restaurant Limited, which request was approved on 27th November 2018.

26. From the foregoing, the appellant was bound by the terms under the offer letter dated 11th June 2018 since the 2nd respondent in its letter 22nd November 2018 informed the 1st respondent that it would be operating the catering outlet at the Mombasa SGR Terminus under a different business name being,

Al-Yusra T/A Al-Yusra Restaurant Limited, being the appellant herein. Consequently, the payment of Kshs.765,600/= on account of rent made by the appellant to the 1st respondent was pursuant to the terms of the offer letter dated 11th June 2018 as provided thereunder.

27. In view of the fact that the offer letter expressly indicated that the lease offered to Power General Contractors Limited T/A Paul Caffé would be for a period of six (6) years subject to three months' termination notice by either party, I am not persuaded that the appellant and the 1st respondent entered into a periodic lease in view of the appellant's payment to the 1st respondent of Kshs.765,600/= on account of rent.

Whether the appellant is entitled to an order for refund of Kshs.765,600/= on account of rent paid to the 1st respondent, Kshs.3,500,000/= on account of payment made to Urpida Services, Limited, & Kshs.1,600,000/= on account of incurred storage charges.

28. It is not disputed that the appellant paid Kshs.765,600/= in rent to the 1st respondent but was never granted access to the restaurant space. Further, although the 1st respondent approved the appellant's building plans, its agents denied the contractor access in October 2019, forcing the appellant to store materials in a rented warehouse at Kshs.100,000/= per month from December 2019 to March 2021. As a result, the appellant claimed that it suffered losses, including rent paid in April 2019, Kshs.3,500,000 paid to Urpida Services Limited for construction, and Kshs.1,600,000 in storage costs.

29. The 1st respondent does not deny that the appellant's contractor was denied access to the site but averred that while the appellant obtained approval for construction, it failed to notify the 1st respondent and the SGR Operator or specify a commencement date for the construction as required under Clause 11 of the approval letter. The 1st respondent as such contended that the appellant was not entitled to compensation for any alleged losses or to damages.

30. On perusal of the communication for approval of the appellant's building plans by the 1st respondent dated 30th September 2019, it is clear that they included a condition requiring notification of both the 1st respondent and the SGR Operator before commencing work. The appellant's witness on being re-examined before the Trial Court testified that both parties were notified and that on 13th December 2019, the 1st respondent requested the Operator to grant the appellant access. On reviewing the letter to Mr. Li Jiuping, I note that it only informed him of the approval and forwarded the approval letter for facilitation, rather than explicitly directing access. The said letter does not confirm whether the appellant notified the 1st respondent and the SGR Operator of its intention to begin construction. Additionally, the appellant has not demonstrated that it or the 2nd respondent provided the required notification before commencing work.

31. Despite the lack of prior notification, the appellant repeatedly sought the 1st respondent's intervention after being denied site access in October 2019. The appellant sent letters on 20th January, 18th February, and 14th August 2020, requesting urgent action to proceed with construction and open the restaurant. Although the 1st respondent received the first two letters, it neither responded to the same nor intervened. In the letter written in August 2020, the appellant noted that during a visit on 6th July 2020, the 1st respondent's business and operations team promised to arrange a meeting with the Chinese operators but took no further action. In view of the foregoing, it is my finding that although there is no evidence that the appellant notified the 1st respondent and the SGR Operator before beginning construction, the 1st respondent had multiple opportunities to clarify this requirement by responding to the letters by the appellant.

32. The notification was a condition for approval, not a contractual obligation that could be breached. The 1st respondent could have simply requested for the required notice but failed to do so. In the circumstances, I am inclined to agree with the appellant that it suffered losses and damage due to being denied access to the restaurant space despite repeated requests. The appellant claimed that the losses suffered include Kshs.765,600/= in rent paid to the 1st respondent, Kshs.3,500,000/= paid to Urpida Services Limited, and Kshs.1,600,000/= in storage costs. Since these are special damages, they must be strictly proved with as much particularity as circumstances permit, in addition to being specifically pleaded.

33. It is not disputed that the appellant paid Kshs.765,600/= in rent to the 1st respondent but was never granted site access. Both the appellant and the 1st respondent provided a funds transfer receipt from KCB Bank of Kenya Ltd dated 12th April 2019 as proof of this payment. Regarding the Kshs.3,500,000/= paid to Urpida Services Limited as down payment for commencing the construction works, the appellant submitted receipts and invoices from Urpida Services Limited, but a review of these documents confirms a payment of Kshs.3,000,000/=, not the claimed amount of Kshs.3,500,000/=.

34. In order to demonstrate payment of Kshs.1,600,000/= storage charges for the construction materials, the appellant provided receipts from Fadli Construction & Transport Limited for storage charges from December 2019 to April 2021, totaling Kshs.1,700,000/=. The appellant however only claimed Kshs.1,600,000/= in its pleadings, I can only award that amount, as Courts are bound to grant only what is specifically pleaded.

35. In the premise, I am satisfied that the special damages claimed by the appellant save for the claim of Kshs.500,000/= paid to Urpida Services Limited, have been proved on a balance of probabilities.

36. It is my finding that the Trial Magistrate erred in dismissing the appellant's claim against the 1st respondent and finding that the claims for Kshs.3,500,000/= paid to Urpida Services Limited and Kshs.1,600,000/= storage charges were not proved.

37. The upshot is that the instant appeal is partially merited. I set aside the Trial Court's judgment in respect to the appellant and the 1st respondent and any consequential orders therefrom. I hereby enter judgment for the appellant against the 1st respondent for –

    i. The total sum of Kshs.5,365,600/=;

    ii. Interest in (i) above at Court rates from the date of judgment of the Trial Court;

    iii. Costs of the suit before the Trial Court between the 1st respondent and the appellant herein are hereby granted to the appellant; and

    iv. Costs of this appeal are granted to the appellant.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence:

Mr. Okata h/b for Mr. Nyanyuki for the appellant

No appearance for the 1st respondent

Ms B. Wokabi - court Assistant.