Abdi v Ahmed (Civil Appeal E007 of 2024)
[2025] KEHC 2556 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2556 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL APPEAL E007 OF 2024

JN ONYIEGO, J

FEBRUARY 20, 2025

BETWEEN

MOHAMED GEDI ABDI ..... APPELLANT

AND

HABIBA JAMA AHMED ..... RESPONDENT

(Being an appeal from the judgment and the decree of Hon. Jackson Omwange (SRM) delivered on 14th February 2024 in Garissa Civil Case No.01 of 2019)

JUDGMENT

Brief Facts

1. Through a plaint dated 18.01.2019 and filed on 22-01-2029, the plaintiff sought for orders that the court grant: rent arrears for 6 months of Kes. 440,000/-, general damages, costs and interest at commercial rates.

2. The plaintiff/respondent's claim was based on breach of a tenancy agreement entered on 01-12-2013 between him and the respondent together with two other individuals named as; Mowlid Mohamed and Sahal Saeda Hussein. The premises in question referred to as plot 375, Garissa situated off Ngamia road, Garissa Town comprising of permanent structures was being rented out for purposes of operating a school otherwise known as Khalifa High School. That the rent payable was Kshs 40,000 monthly but was later revised upwards to Kshs 80,000.

3. It was an express term of the said contract that the tenancy period was to run for a period of five years commencing on 01-12-2013 to terminate on 01-12-2018. That contrary to the said agreement, the appellant/ defendant terminated the same by 30-07-2018 after; carrying out unauthorized constructions that were uncompleted thus diminishing the property value; failing to floor the constructed class rooms; failing to plaster the constructed walls; failure to fix fisher board and failure to paint the premises. She averred that as a consequence of the said breach, she suffered loss of rent for

a period of six months amounting to kshs 440,000/= exclusive of kshs 40,000/= that was paid earlier. She further prayed for general damages for the incomplete class rooms that the appellant was supposed to pay.

4. Upon service of the plaint to file defence and summons to enter appearance, the appellant/defendant proceeded to only enter appearance dated 29-07-2019. Having defaulted in filing defence, the respondent/ plaintiff requested for entry of interlocutory judgment which was entered on 27-03-2019 for a sum of kshs 440,000/= plus interest at court rates. The court then ordered for a date to be fixed for formal proof in respect to the claim for general damages and costs to the suit.

5. However, in unclear circumstances, and without any evidence on record showing whether leave to set aside the interlocutory judgment was made, the appellant filed his defence and counter claim dated 01-04-2019 thus denying the claim of breach of contract. He admitted the existence of the tenancy agreement but denied breaching the same. He went further to state that the monthly rent payable was kshs 40,000 and later increased to kshs 100,000/= and not kshs 80,000/= as claimed by the respondents.

6. The defendant further denied constructing any structures without the respondent's authority. That the respondent was part and parcel of the construction projects on the understanding that the amount spent would be recoverable as part of the rent calculated at kes 20,000 per month. That as at August 2018, the respondent had reimbursed a total of kshs 360,000/= to the appellant.

7. It was averred that there was no breach of contract and if any, it was caused by the respondent/plaintiff. He denied receipt of any notice to vacate the premises. On the question of non-completion of the commenced buildings, the appellant attributed the same to the respondent's premature termination of contract.

8. On his counter claim, he claimed a sum of; kes 994,210/= being expenses incurred in the construction of buildings in the respondent's/plaintiff's premises at the request of the respondent/ plaintiff; Rent deposit of kes 240,000/=; Tanks and buildings valued at Kes 25,000/=; Flag post valued at kes 3,500; Laboratory shelves valued at kes 12,000/=; staff room shelves valued at 30,000/= and fans valued at Kes 5,000/=.

9. In her reply to the defence and counter claim, the respondent denied every allegation contained in the defence and counterclaim and put him on strict proof.

10. From the record, it appears that at some point the court referred this matter for mediation but upon parties' failure to reach an agreement, the matter was referred back to court for hearing and eventual disposal.

11. During the hearing, Habibah Jama Ahmed the respondent/plaintiff reiterated the content contained in the particulars of the plaint. She basically blamed the appellant for breach of contract. She claimed that the appellant left her premises in amess and that they did not repair the damaged parts. That they left without notice.

12. Pw2 Muktar Abdullahi son to the respondent adopted his witness statement which content is a replica of his mother's testimony. He also claimed that he witnessed the signing of the tenancy agreement. He blamed the appellant for breach of contract. On cross examination, he claimed that no notice was issued to them.

13. Pw3 an elder who among others unsuccessfully mediated over the matter adopted the content contained in his witness statement dated 12-01-2003 in which he merely recited the background of the suit and that he and other elders failed to resolve the dispute.

14. On his defence, Dw1(appellant) denied the claim. He adopted the content contained in his witness statement recorded on 24-10-2022. He claimed that he gave 3 months' notice to terminate the agreement and that he repaired the premises but not completely as he was interrupted by the land lady. He basically adopted the content contained in his defence and counter claim.

15. Upon conclusion of the trial, the court delivered its judgment on 14-02-2024 thus finding that the appellant was in breach of contract hence ordered him to pay the outstanding rent of kes 440,000/=

16. The appellant being dissatisfied with the findings of the court, preferred this appeal via a memorandum of appeal dated 23.04.2024 on the following grounds:

    i. That the learned trial magistrate erred in both in law and fact when he failed to appreciate that the agreement was entered between the respondent and Khalifa School which is a legal entity under the *Basic Education Act*.

    ii. The learned trial magistrate erred both in law and fact when he deliberately failed to look at the counter claim filed by the appellant and rather decided the case on cherry picking of the pleadings.

    iii. That the trial magistrate erred in both law and fact in stating that the appellant was owing Kes. 480,000 at the date of termination of contract an amount that the appellant rebutted in a letter dated 20.11.2018 and which is well demonstrated in the counterclaim that it is the respondent herein who is indebted to the appellant Kes. 1,840,000.00/-which the trial court did not look at or pronounce itself on.

    iv. That the learned trial magistrate erred in both fact and law by failing to appreciate the facts laid down before the court by the appellant but instead proceeded to re-state his own version of facts in complete departure of the pleadings before him.

    v. That the learned trial magistrate erred in both fact and law by failing to apply the applicable law before him and failing to cite any single piece of law on why he reached to his decision.

    vi. That the learned trial magistrate erred in both fact and law in making a finding that the respondents herein proved their case on a balance of probability despite the inconsistencies in the plaintiff's witness who to them it was on breach of contract by the appellant leaving the premises earlier than the agreed date.

17. It was thus prayed that:

    i. This appeal be allowed.

    ii. The judgment delivered by the trial court on 14.02.2024 be set aside.

18. Directions were issued that the application be canvassed by way of the written submissions.

Appellant's submissions

19. The firm of Upendo Allan Advocates on behalf of the appellant filed submissions dated 16.11.2024 raising four issues for determination as follows:

    i. Whether the appellant herein was rightfully sued.

    ii. Whether there was breach of tenancy agreement dated 01.12.2013 by the appellant herein.

iii. Whether the trial court acted justly to disregard the counterclaim and the deposit by the appellant herein.

iv. Who to bear costs of this appeal.

20. On the first issue, it was argued that pursuant to section 1(a) of the Fourth Schedule of The *Basic Education Act* 2013, it provides that the board management shall be a body corporate with perpetual succession and common seal and shall in their corporate names be capable of suing and being sued. To that end, reliance was placed on the case of Headmistress Menengai Primary School and another v Jamilla Anyona [2006] eKLR where Kimaru J. (as he then was) held that the respondent ought not to have sued the headmistress of Menengai Primary School since she had no capacity in law to be sued.

21. That the respondent having sued Mowlid Mohamed Muhumed and Sahal Saeda Hussein who entered into an agreement in respect of plot No. 375 on behalf of Khalifa High School, he was wrongfully sued.

22. On the second issue, it was urged that from the agreement entered between the parties herein, the monthly rent agreed upon was Kes. 40,000.00/- and on 26.04.2018, the rent was thus increased to Kes. 100,000.00/-. Additionally, on 30.07.2018, Khalifa High School wrote a letter notifying the respondent that from 30.08.2018 which was in line with paragraph 11 of the Tenancy agreement that required three calendar months' notification before termination, it intended to terminate the agreement.

23. Similarly, it was contended that the trial court did not factor in the fact that as at the relocation date, 30.08.2018, Khalifa High School had incurred expenses in construction, rent deposit, tanks and fittings, flag post, laboratory shelves, staffroom shelves and fans installation all valued at Kes. 940,000/-, 240,000/-, 25,000/- ,3500/-, 12,000/-, 30,000/- and 5000/- respectively.

24. On the third issue, the trial court was faulted for having found that at the time of exit, the appellant owed the respondent Kes. 480,000/- yet the same was not proved. Further, the appellant faulted the trial court for failing to support its finding by any authority or case law and therefore, this court was urged to set aside the said finding by the trial court.

25. That the trial court without scrutinizing the evidence on the record, relied on the default judgment entered by Hon. Mbuteti on 27.03.2019 despite the matter proceeding for inter partes hearing and both parties having been accorded an opportunity to prosecute their case. The trial court's finding could not be relied on as it did not factor in the fact that the appellant had previously paid Kes. 240,000/- to the respondent as deposit.

26. On costs, the appellants submitted that pursuant to section 27 of the *Civil Procedure Act*, costs of and incidental to all suits shall be at the discretion of the court although the general rule is that costs follow the event. The appellant thus prayed that he be awarded costs of the appeal herein.

Respondent's submissions

27. The firm of Mahadha & Company Advocates filed submissions dated 02.12.2024 on behalf of the respondent urging that the trial magistrate fully analyzed the evidence of all the witnesses that testified and rightfully noted that the existence of the tenancy agreement was not in dispute. In the same breadth, it was argued that the respondent demonstrated in her evidence that she was still owed rent arrears of Kes. 440,000.00. That it was not disputed that the parties herein had tried to amicably reach a settlement and at some point, the amount as established by the respondent herein was agreed upon as the outstanding rent arrears. It was submitted that despite the fact that the appellant filed a

counterclaim to the suit, he did not controvert the averments by the respondent and as such, the same solidified the respondent's claim.

28. Regarding the claim by the appellant, it was urged that the same was in terms of special damages and it was incumbent upon the appellant to annex receipts and produce the same as evidence. It was urged that the said claim remained unsupported and therefore, cannot issue. To that end, support was drawn from the case of Snade v Kenya co-operative Creameries Ltd [1992] where the Court of Appeal stated that special damages must not only be pleaded but also be specifically proved.

29. It was argued that DW1 gave contradictory evidence on whether he had done the alleged repairs he was chased away before completing the repairs. He also failed to raise and or produce any documents to claim the alleged deposit nor was it raised in the statement of defence and counter claim.

30. As such, it was submitted that the appeal herein must be restricted to the issues raised either in the plaint, defence and counter claim and accordingly, the appellant ought to demonstrate the threshold set for determination of such matters. In the end, this court was urged to dismiss the appeal herein with costs and the money held in the joint account be released to the respondent as this appeal has inconvenienced the respondent a great deal.

31. I will now look at the issues raised by both the appellant and the respondent. From the above issues I will condense the same to two issues and analyze them as hereunder:

    i. whether the respondent's case in the lower court disclosed a cause of action against the appellant herein.

    ii. whether the respondent proved her case on a balance of probabilities.

32. By virtue of this court being the first appellate court, it is bound to reconsider the evidence afresh, re-evaluate and draw its conclusion bearing in mind that the court did not have the advantage of hearing or seeing witnesses testify so as to assess their general demeanour of witnesses. [See the case of Kenya Ports Authority v Kuston (Kenya)Ltd, [2009] 2 EA 212].

33. On the first issue, it was the appellant's submission that he was sued wrongfully in his capacity as a representative of Khalifa High School. Having perused the tenancy agreement dated 01.12.2013 drawn by C.P. Onono Advocates, the appellant together with two other persons were listed as joint and separate tenants carrying out a business of running a school under the name of Khalifa High School.

34. The appellant urged that the tenant was the school which automatically translated to the fact that it was the body which could sue or be sued pursuant to Section 10(2) (2) of the Education Act cap 211 which provides that:

> " the minister may, by order, declare a board of governors to be a body corporate under the name of the board of governors of the school or schools, and the board shall have perpetual succession and a common seal with power to hold both moveable and immovable property, and may in its corporate name sue and be sued."

35. Similarly, in the case of Republic v The Secretary to the Board of Governors, Musingu High School-Kakamega [2011] eKLR Lenaola J (as he then was) at paragraph *5* stated that "from the above it is obvious that the body lawfully capable of being sued on behalf of a school is the Board of Governors as a corporate entity and not one of its officials such as the secretary to the board.

36. Further, the Board of Governors Order Rule 10 provides as follows:

> " No governor shall be subject to any personal liability in respect of any matter or thing done or omitted or any contract entered into by or on behalf of the board which he is a governor or by or on behalf of any school or group of school administered by that board."

37. In Kisumu ELC case No. 225 of 2014, Evans Otiende Omollo vs School Committee Union Primary School and Another (2015) eKLR Kibunja J. stated that "the parties described as defendants herein do not exist as they are not legal entities under the *Basic Education Act* capable of being sued or to defend this suit. He further stated at paragraph *5* that "having found that the four named defendants are nonexistent as entities capable of being sued, the court finds that to allow the suit as filed to continue to further hearing would be an abuse of the courts' process"

[Also see the case of J.N. and 5 others v Board of Management, St. G School Nairobi and Another (2017) eKLR].

38. Whereas I am in agreement that members of a board of management of a school cannot directly be held liable for actions or omissions or commissions of the school, in this case, it was different. From the content of the agreement, the appellant and his colleagues did not execute the contract in their official capacity as either chairman, secretary or director of the school. They entered the contract in their private capacity.

39. The appearance of the word Khalifa school is just but a business venture which was to be operated in the premises. There was no proof that the said school was even legally registered to qualify as a legal entity capable of suing or being sued. If the intention was that of acting on behalf of the school as a party to the contract, it would have been stated as such expressly.

40. It is trite that a contract is only binding and enforceable against the contracting party/ies. See Pius kimaiyo Langat v co-operative bank of Kenya ltd [2017] eKLR where the court held that;

> " ...alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties as the said parties were bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved"

41. In the case of National Bank of Kenya Ltd v pipe plastic Samkolit(K) Ltd& another (2001) eKLR the court of appeal had this to say regarding parties wanting to escape from what they deem to be a bad bargain in a contract;

> " It was clear beyond para adventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain"

42. From the clear and unambiguous words of the tenancy agreement, the agreement was between the respondent and the appellant and two others who allegedly ceased being the school partners for purposes of operating the school business (see para.7 of the agreement). Obviously, the school was a private enterprise and not a public school. In a nutshell, the appellant cannot run away from the contract's obligations. That is why even in the counter claim, he made a personalized claim as an individual.

43. For the above reasons stated, it is my finding that the appellant was properly sued and there was reasonable cause of action disclosed against him and if proved, he shall be held liable in his own capacity.

The school was just but a business venture and not a party in the agreement. In any event, the appellant never raised the issue of lack of a reasonable cause of action before the trial court. Unfortunately, the issue is being raised on appeal thus reopening the trial at the appellate stage. To that extent, that ground is dismissed.

44. The next issue is who was in breach of the contract. The claim herein is hinged on the counter allegation that parties were in breach of their part of the agreement. The respondent argued that the appellant was in breach of contract by terminating the same earlier before the expiry of the 5 year lease period and without notice. She relied on an agreement signed before council of elders dated 18 August 2018(See page 38-39 record of appeal) in which the appellant agreed to pay Kshs 480, 000/= as the outstanding rent and that he was to forfeit his deposit of 240,00/= besides agreeing to repair the premises. The appellant did not dispute signing this agreement.

45. The appellant argued that he had given notice to terminate his contract because of harassment from the land lord. On cross examination, he admitted that he did not serve notice to terminate tenancy upon the land lady but insisted he served her son(pw2) who denied service. Clearly, notice ought to have been served upon the land lady and not a third party who was not privy to the contract. To that extent, the appellant has failed to prove service to terminate tenancy.

46. The appellant had a duty to discharge his burden of proof that he indeed served the requisite notice upon the land lady. It is trite that he who alleges must prove. See section 107(1) of the *Evidence Act* which provides that whoever desires any Court to give judgment as in any legal right or liability dependent on existence of any facts which he asserts must prove that those facts exist. See also Mununga Tea Factory limited &another v Karani (civil appeal 24 of 2006) [2023] KEHC 19439(KLR)(27 June)2023)(Judgment).

47. The claim by the appellant that he was hounded out of the premises was not proved. To that extent, the respondent's claim that termination of the contract in July 2018 before December 2018 was against the contractual term of 5 years' lease period correct. That is fortified by the appellant signing an agreement to pay the outstanding rent of 480, 000/=. For those reasons, I am convinced that the respondent did discharge her burden of proof hence the award made by the trial court was justified albeit in summary form. It is clear therefore that it was the appellant who was in breach of the contract.

48. As to the counter claim on refund of the rent deposit of Kshs 240,000/=, parties agreed on forfeiting the same vide the agreement entered before elders. I believe this forfeiture must have been occasioned by various concessions in their contract. I will therefore not interfere with their agreement (see page 38-39 record of appeal).

49. Regarding compensation of Kes 994,220 on construction works done in the premises, this was part of the contract that the appellant was to put up some structures and part of the expenses be recovered by paying rent less by kes 20,000/=. The court was not told how much deductions were made to cover what cost of construction and for what period and what is the balance. This being a specific claim, it must be proved specifically which is not.

50. As to fixtures like flag post, lab and staff room shelves, these are movables which the appellant should have moved with. There was no proof that they did exist. If at all they exist, they can make private arrangement for removal. As to the water tank valued at kes 25,000/=, again, there was no proof of its existence and why he did not carry it along if movable. This claim therefore cannot stand and if they do exist, they can make private arrangements for removal.

51. On the issue of costs, it is trite that the same is at the discretion of the court. From my own assessment, the parties contributed to the circumstances they currently find themselves in. As such, the orders that remain recommendable to me are as follows:

    i. That the appeal herein is unmeritorious hence dismissed.

    ii. Each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY 2025

J. N. ONYIEGO

JUDGE