**Ngari v Mwamburi alias Kadogo & another (Civil Appeal E003 of 2020) [2025] KEHC 5276 (KLR) (12 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 5276 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VOI**

**CIVIL APPEAL E003 OF 2020**

**AN ONGERI, J**

**MARCH 12, 2025**

**BETWEEN**

**FRANCIS GACHUA NGARI ..... APPELLANT**

**AND**

**JUDITH MWAMBURI ALIAS KADOGO ..... 1ST RESPONDENT**

**BOBSON MUWERUGHA SAFARI ..... 2ND RESPONDENT**

***(Being an appeal from the Judgment of Hon. Karimi Njeru (RM) in Voi PMCC No. 11 of 2020 delivered on 11th November 2020)***

## JUDGMENT

1. The Appellant filed PMCC No. 11 of 2020 seeking a refund of Kshs. 30,000/= plus costs being the amount advanced to the Respondents by virtue of deposit and rent in a tenancy agreement.
2. The Respondent denied the claim.
3. The Appellant's evidence was that he paid the Respondent's Kshs. 30,000/= on or about the month of April 2018 as rent deposit which was to be returned upon termination of the tenancy.
4. The Respondents failed to refund the same hence this suit. The Appellant produced the agreement as an exhibit.
5. The Appellant had rented a shop at Voi Modern Market from the 2nd Respondent for Kshs. 15,000/= per month. No receipt was issued for rent paid.
6. The Respondents said the Appellant paid Kshs. 30,000/= instead of Kshs. 45,000/= and further that the Appellant utilized the deposit for the rent of the month of August 2018.
7. Further that the Appellant did not give notice before vacating.

8. The Trial court dismissed the Appellant's case with costs to the Respondents.

9. The Appellant has appealed to this court on the following grounds:-

   i. That the learned Magistrate erred in both law and fact in failing to find that the 2nd Respondent had not called evidence in proof of his case against the Appellant.

   ii. That the learned Magistrate erred in both law and fact in finding that the Appellant had only paid Kshs. 30,000/= as deposit and rent and a receipt issued to that effect.

   iii. That the learned Magistrate erred in both law and fact in failing to consider the effective date of the tenancy agreement was 1st of May 2018.

   iv. That the learned Magistrate erred in both law and fact in failing to consider the express terms of the tenancy agreement as to payment of rent and deposit.

   v. That the learned Magistrate erred in both law and fact in finding that the Appellant had not proved his case when there was evidence in support of the Appellant's case.

   vi. That the learned Magistrate erred in both law and fact in finding that the termination notice was to take effect on 14th September 2018.

   vii. That the learned Magistrate erred in both law and fact in finding that the Appellant had forfeited the deposit for failure to give adequate notice.

   viii. That the learned Magistrate erred in both law and fact in finding that the Appellant had breached the contract when it was the Respondents who had breached the agreement.

   ix. That the learned Magistrate erred in both law and fact when she decided the case against the weight of the evidence before her.

10. The parties field written submissions as follows:- The appellant submitted that he entered into a Tenancy Agreement dated 18th of April 2018 with the 2nd Defendant/Respondent). The 1st Defendant/Respondent herein represented his as her house agent for a business stall located at the Voi modern market, in which the plaintiff was to occupy at a monthly rent of Kshs 15,000/= effective from 1st May 2018 as expressed in the Tenancy Agreement.

11. That after paying Kshs 45,000 the Plaintiff/Appellant and the 1st Defendant signed the Tenancy Agreement in performance of the express terms therein being two (2) months tenancy deposit of Kshs 30,000/= and one month (1) rent of Kshs 15,000 for the commencing month of May 2018 as per the express terms of the agreement.

12. The express terms and conditions for signing the Tenancy Agreement was only if a payment of Kshs 45,000/= was paid before taking the house/stall and in the absence of which the agreement would not have been signed by both parties. The 1st defendant was the mother acting as agent of her son, the 2nd Defendant and the tenancy was short lived for four (4) months beginning 1st May 2018 to 31st August 2018.

13. The appellant submitted that the main issues for determination is whether there was an authority for the 1st defendant to act on behalf of the 2nd defendant both having entered into appearance and defense and the legal effect thereof.

14. Further, whether there is refundable deposit/security equivalent to 2 months' rent deposited by the plaintiff to the 1st defendant/respondent.

15. The other issue was whether the effective date of tenancy commencement was expressly stated in the tenancy agreement and if so what was the date,

16. Finally, whether there was an outstanding rent due for the month of April 2018 as testified by 1" defendant.

17. The appellant submitted that it is a common ground that there was no dispute of rent paid amounts from the commencement month of May, June and July 2018.

18. The appellant submitted that if there was a rent amount deductible for the month of August 2018 from the plaintiffs refundable rent deposit after notice of vacation issued on 14th August 2018 Plaintiff/ Appellant having testified breach of contract by the defendants.

19. Further, that the 1st defendant's statement that was adopted as her evidence in chief she indicated in page 20 of the record of appeal paragraph *8*, that the plaintiff paid Kshs 30,000/= as rent and deposit for one month and entered the premises immediately. The terms and conditions of the tenancy agreement did not allow the appellant to be given possession of premises without full payment of deposit and rent.

20. That was confirmed by the testimony of the 1st defendant/respondent when She stated further that plaintiff/appellant thereafter paid another payment in the subsequent months of May, June and July showing the first Kshs 30,000 which was of deposit was paid for, then there was no chance or possibility that the appellant could have owed the respondents Kshs 15,000/= of deposit as alleged.

21. According to paragraph 4 of page 9 of court records, the 1st defendant said in verbatim that "Francis paid from April 2018 to July 2018. He entered the premises immediately even though the agreement says he ought to have entered the premises in May."

22. This is because by express term of clause no. 1 of Pex no. 1, there was no rent due for April 2018 as proved that the commencement date was 1st May 2018 and therefore the Kshs 30,000 testified by the 1st defendant evidence in chief was the refundable rent deposit amount.

23. The appellant relied on the case of South Nyanza Sugar Co. Ltd vs. Leornard O. Arera (2020) EKLR the court held that;

> " It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts"

24. The appellant also said in their submissions that in the case of National Bank of Kenya Ltd vs. Pipe Plastics Samkolit (K) Ltd (2002) 2.E.A. 503, (2011) EKLR, the Court of Appeal at page 507 stated as follows:

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or under influence are pleaded and proved."

25. Similarly in the case of PUIS KIMAIYO LANGAT VS. CO-OPERATIVE BANK OF KENYA LTD (2017) EKLR the Court of Appeal further stated that;

> " We are alive to the hallowed legal maxim that it is not the business of the Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or under influence are pleaded and proved"

26. The appellant also submitted that Clause no. 1 of Pex no.l (tenancy agreement) did not envisage signing by either of the parties without full payment on execution date and that was the reason why the tenancy

agreement was signed on 18th April 2018 and became binding to all the parties therein but didn't literally mean the contract commenced on that date other than clause no.l of Pex no. I. Pex no.l as dated 18th April 2018 did not also have any express clause that it was to apply retrospectively back to 1sl April 2018 such that the month of April 2018 would be due or obligatory or fell in rent arrears requiring rent payment.

27. Further, the honourable Trial Magistrate did not consider that the expressly stated date of 18th April 2018 in clause no. 14 of Pex no. 1 was the signing date of the tenancy agreement was signed by both parties, the execution clause was done upon payment of Kshs 45,000 which was a mandatory requirement after fulfillment of clause no. 1 of Pex no. 1.

28. That the Trial Magistrate erred in law and in fact by being selective and partial in considering one part of clause no. 1 of tenancy agreement that "receipt must be given". She failed to consider the weight expressed in the present tense of the terms and conditions of clause no. 1 of the contract of the tenancy agreement that the tenant in quote (plaintiff herein) "have paid" as expressed in verbatim.

29. Further, that the tenancy agreement was binding to the respondent just like the way it was binding to the appellant and hence she could not shift her inaction and failure to enforce her part of the contract. The Trial Magistrate on a balance of probability ought to have given an equitable and fair weight of expressed term of "have paid" as it is in present tense of an action executed by both parties as she applied on the "receipt must be issued".

30. The receipt to be issued there was an action that was fulfilled in execution of clause no. 1 of the tenancy agreement. It meant the clause no. 1 being in express present tense of an action Kshs 45,000/- had been paid by plaintiff to the 1st defendant, whether the receipt was issued or not is another action.

31. The receipt issued was an act of bad faith and an afterthought to raise it as the 1 st defendant had already come to court to testify without written statement and the receipt produced as indicated in paragraph 1 of page 6 of court records by defense advocate. The prayer that the 1 st defendant made and allowed by court was only to go and file 1st defendant written statement but a receipt no. 1 was filed together prejudicially leading to a miscarriage of justice on the part of the plaintiff. The plaintiff had testified that he was never issued with receipts by 1st defendant for cash paid up to June 2018 the reason the plaintiff started paying through Mpesa in July 2018, Pex no. 2.

32. That if in any event rent would not be paid by plaintiff, the defendants would have to evoke clause 10(d) of the tenancy agreement, which states that;-

> " Failure to pay rent for one full month the agent shall serve a quit notice to the tenant, with effect from the 1st day of the defaulted month." and We) " The agent shall deny entry to the tenant who defaults in rent payment and if such rent has become overdue."

33. According to paragraph *2* page 5 of judgment, the trial magistrate found that the appellant failed to adhere to the terms of the tenancy by failing to pay rent in the month of August 2018 and giving notice at the time of vacating the premises violating the terms leading to breach.

34. It is the appellant's position that the defendant's had already breached the tenancy by interfering with the choice the plaintiff wanted to stock in the premises but told to wait for a confirmation by 1st defendant if cosmetics, shoes and women leather bags were allowed by consulting county officials since it was within the precincts of the foodstuff market.

35. In any case since there was sufficient prove that the full deposit amount had been paid by appellant to the 1st defendant. The trial magistrate ought to have made an order that deposited security of

Kshs30,000/= be paid to the appellant less the month of August rent Kshs 15,000/= in case if there was any breach which breach in any event was not there.

36. The trial Magistrate erred in fact and in law for giving the plaintiff an unfair hearing by allowing the 1st defendant to go and write a statement after the plaintiff had already testified. Prejudicial to plaintiff, that gave the 1st defendant a chance to go on a fishing expedition of fictitious receipt and photographs that were filed as an afterthought.

37. The trial magistrate therefore by the order to the defendant to restructure their case prejudiced the plaintiffs testimony and it was a blatant abuse of court process and unfair administration of justice. The trial Magistrate failed to consider that the 1st defendant wrote her statement after the plaintiff had given his testimony which is an unfair administration of justice on the part of the honourable magistrate. There was no level playground left to plaintiff since he/plaintiff had closed his case.

38. The 1st defendant got an advantage of writing her statement after plaintiff testified leading to a partial hearing since she had come to court to testify without having filed a written statement. The respondents had not disclosed the issue of receipts to the appellant at pretrial and at plaintiffs/appellant case but the receipts and photographs emerged much later when they were filed in court after plaintiffs case hearing.

39. That the validity of receipt of Kshs 30,000 was in dispute since plaintiff told the court that no receipt were issued to him and there is no proof that the plaintiff acknowledged receiving the alleged partially paid receipt.

40. Further, that the 1st respondent filed this receipt as an afterthought since she had an advantage of hearing the appellant's testimony upfront and then the court told her to go and write her statement after plaintiff had testified This put the appellant to an unfair hearing, which was prejudicial since the 1st respondent was able to fill in the gaps in the late written statement and the filed receipt.

41. It is worthy to note the 1st respondent's statement is also undated and was filed in court on 5* October 2020 after the appellant had fully testified and cross-examined on 9th September 2020 in presence of the 1st respondent who wanted to testify that day and it is in courts record she was directed to file defense written statement. This was an unfair hearing to the plaintiff since the 1st respondent was put in an advantageous level playing ground from that of the plaintiff.

42. The magistrate erred in fact and in law for finding that, the plaintiff forfeited the rent of one month in lieu of notice by selective application of tenancy agreement without considering the prevailing circumstances testified by the appellant/plaintiff. The plaintiff testified that the 1st respondent interfered with his business and he did not stock the intended products from May 2018 leaving him with no choice but to end the tenancy agreement.

43. That the said actions were nothing other than breach of the contract the 1st respondent never confirmed to plaintiff which products were allowed by county to be sold within the new Voi modern market as she had put plaintiff in waiting. As for the 1st defendant testimony that the plaintiff never paid rent for the month of August 2018 and hence the Kshs 15,000 deposit be converted for the month of August was in breach of item 10(b) of the tenancy agreement which states, "the deposit is strictly not convertible to any monthly rent under any circumstance". The plaintiff had also done everything humanly and contractually possible to perform his part of contract by paying all monthly rents and leaving the house in its original condition for a house he never utilized. Paragraph 2 of page 5 of judgment also states plaintiff failed to give notice at the time of vacating the premises negating what is indicated in paragraph 4 of page 4 of the same judgment that the notice was dated 14/08/2018 and served the same date.

44. The honourable magistrate erred in fact and in law for delving into a matter that would be a criminal case within a civil case if there was damage of property as there was no criminal case reported by defendants for 2 years. On these allegations of damage testified by the 1st defendant in paragraph *2*, page 2 of judgment, there was no proof that there was any damage to doors and if the damage of premises was caused by the plaintiff at the time of vacation.

45. The terms of the contract between the plaintiff and the defendants are set out in the agreement and need no interpretation. In this case the 1st defendant's word against that of plaintiff as to whether that happened or not required a criminal case procedure to proof beyond reasonable doubt, but the plaintiff testified he left the defendants premises in good condition.

46. The plaintiff testified that he never used the premises at all after issuing the notice to vacate on 14th August 2018 but defendants never reported any criminal case against the plaintiff until 2 years later on 5th October 2020 when The defendant filed pictures of damages which were criminal in nature that ought to have been filed prosecuting a criminal case and not in a civil case.

47. Since no criminal case of damages was reported proved and plaintiff convicted of any such offense, the deposit was not convertible to rent in whatever circumstances as per the terms of Pex no. 1. Albeit the case was civil, the photographic prints filed, Dex no. 2 were not proved to have been caused by plaintiff and they were not examined to have complied with the requirements of section 78 of *evidence Act* on photographic evidence admissibility as they were taken by the 1st defendant and no certificate of photographic print was adduced in court.

48. The claim raised remained as a hypothesis and not based on proof of fact. On issue of painting the stall before vacating in the defendant's case by 1st defendant on page 2 paragraph 2 of the judgment, the 1st defendant testified she was not available to inspect the house when plaintiff/appellant vacated. She would therefore not know its condition as plaintiff testified he did not use the house for business.

49. As written in the judgment in the defendant's case paragraph *2* page 2 of judgment that there were breakages contravening clause 10 of Pex no. 1 tenancy agreement, this did not arise since the 1st defendant was not available to inspect until in September 2018 as testified with no specific date shown.

50. The honourable magistrate erred in fact and in law by relying on authorities of civil case laws irrelevant to the fact in issue of this case, circumstance and evidence adduced on page 3 of judgment under the paragraph of locus standi and pleadings Galaxy Paints Co Ltd vs “Grandy v..." and"Fernandes v”.

51. Therefore in light of the foregoing contractual and/or legal analysis of the witnesses' testimony / evidence as tendered in Court, it is our humble submission that the Lower Court's judgment did not apply fairness and impartiality on the full cumulative weight of evidence to the required standards on a balance of probability and prayers/orders sought in the Memorandum of Appeal be allowed and/or granted.

52. This being a first appeal, the duty of the first appellate court is as stated in the case of Selle v Associated Motor Boat Co. [1968] EA 123 where the Court of Appeal held that:

> “The first appellate court has a duty to re-evaluate the evidence presented before the trial court and arrive at its own independent conclusion. The appellate court must subject the entire evidence to a fresh scrutiny and draw its own inferences. While the appellate court should consider the trial court's findings, it is not bound by them and must form its own independent judgment”.

53. The issues for determination in this appeal were as follows:-

i. Whether the Appellant proved his case to the required standard.

ii. Whether appeal should be allowed.

54. On the issue as to whether the Appellant proved his case, there is evidence that the parties signed an agreement in which it is stated that Ksh 45,000 was paid as two months deposit and one month rent.

55. The oral evidence cannot be used to change the written agreement signed by the parties.

56. In Civil Appeal No. 61 of 2013, Fidelity Commercial Bank Limited Vs Kenya Grange Vehicle Industries Limited (eKLR) where the Court also cited with approval decision in Civil Appeal No. 23 of 2005, Prudential Assurance Company of Kenya Limited Vs Sukhwender Singh Jutney and Another, the Court of Appeal expressed itself in the following manner:

> "So..... where the intention of parties has in fact been reduced to writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it".

57. It is not the duty of this court to rewrite contracts between parties. The parties are bound by their agreement and in the current case, there is no indication that the appellant was allowed to occupy the premises without paying the two months deposit and one month rent amounting to Kshs. 45,000.

58. I agree with the appellant that there was an action that was fulfilled in execution of clause no. 1 of the tenancy agreement. It meant the clause no. 1 being in express present tense of an action Kshs 45,000/- had been paid by plaintiff to the 1st defendant.

59. I also find that it is not in dispute that clause 10(d) of the tenancy agreement states that;-

> " Failure to pay rent for one full month the agent shall serve a quit notice to the tenant, with effect from the 1st day of the defaulted month." and IWe) " The agent shall deny entry to the tenant who defaults in rent payment and if such rent has become overdue."

60. There is no evidence that the appellant was in default or that he was served with a quit notice.

61. The appeal has merit and the same is accordingly allowed.

62. The dismissal order is set aside and replaced by judgment in favour of the appellant against the respondent in the sum of Ksh. 30,000 plus costs of the suit and interest from the date of filing suit until payment in full.

63. The respondent to pay the costs of the appeal.

**DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MARCH 2025 IN OPEN COURT AT VOI.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Court Assistants: Maina/Millicent