



REPUBLIC OF KENYA



**George Makori Gesaka t/a Buxton Hospital v Bacha (Civil Appeal
E052 of 2021) [2024] KEHC 16928 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 16928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E052 OF 2021
F WANGARI, J
FEBRUARY 7, 2024**

BETWEEN

GEORGE MAKORI GESAKA T/A BUXTON HOSPITAL APPELLANT

AND

UMMI KULTHUM BACHA RESPONDENT

*(Appeal arises from the Judgement and Decree of Trial Court delivered on 1st
April 2021 by Hon. G. Kiage, SRM in Mombasa CMCC No. 632 of 2017)*

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 1st April 2021 by Hon. G. Kiage, SRM in Mombasa CMCC No. 632 of 2017. The Appellant preferred the 11 grounds in the Memorandum of Appeal which largely disputed the finding of the Trial Court on matters that were not pleaded in the Plaintiff.

Pleadings

2. Vide the Plaintiff dated 18th April 2017, the Appellant instituted the suit in the Lower Court seeking a permanent injunction restraining the Defendant from attaching, selling and or evicting the Plaintiff or in any manner interfering with the Business Operation on the suit premises.
3. The Plaintiff averred that he was the tenant of the Defendant on the Defendant's Plot No. 424/XVII, Mombasa. The lease was for five years and the rent was at Kshs. 105,000 per month. It was stated that on 7th September 2016, the Defendant instructed Auctioneers to levy distress for rent against the Plaintiff on an outrageous amount of Kshs. 644,276.43 alleged to be rent arrears.
4. The Defendant filed a Defence and Counterclaim dated 21st October 2020 denying the averments in the Plaintiff. The Defendant also raised a Counterclaim seeking among others to recover rent arrears pleaded as Kshs. 7,148,366 from November 2014 to 10th October 2020.



Evidence

5. During the hearing, the Plaintiff adopted his witness statement and bundle of documents dated 9th November 2019 and 16th November 2020 respectively. He testified that he paid a 2-month deposit of Kshs. 315,000 on 24th October 2014 and one month rent and also spent over Kshs. 4,000,000 on renovations.
6. It was also his case that he was in arrears of Kshs. 7,148,366 but was not supposed to pay rent before February 2015 because renovations were incomplete.
7. On cross examination, it was his testimony that the lease commenced in November 2014 but he was dissatisfied with the status of renovations. He stated that his last payment of rent was on 14th January 2021 for Ksh. 120,000.

Defendants case

8. The Defendant, DW1 also testified in Court relying on the witness statement and bundle of documents. It was her case that she did not know the total rent the Plaintiff had paid so far. She wished the tenancy to be terminated.
9. The Defendant also called a witness, DW2 one Wahida Mohamed. She testified that at the request of the Plaintiff, they undertook to renovate the premises at a cost of Kshs. 500,000. The Plaintiff started paying rent in February 2015 because he was exempted in December 2014 and January 2015 due to renovations going on. She testified that they were not aware of the source of the Plaintiffs' claim that he had used Kshs. 4,000,000 on renovations.
10. The court considered the case and rendered its judgement on 1st April 2021. In the Judgement the court made the following Orders:
 - i. The Plaintiff's suit be dismissed.
 - ii. A declaration that the Plaintiff is indebted to the Defendant in the sum of Kshs. 6,523,587.50 in rent arrears for the period between 31st December 2019 to 1st April 2021.
 - iii. A claim for VAT is dismissed
 - iv. Interest on the above sum shall accrue until payment in full
 - v. An Order of vacant possession is issued against the Plaintiff which is suspended for a period of 90 days.
 - vi. Cost of the suit and counterclaim awarded to the Defendant.
11. Aggrieved, the Appellant lodged a Memorandum of Appeal hence this Appeal.

Submissions

12. The Appellant reiterated the grounds in the Memorandum of Appeal in his submissions and relied on Section 120 of the *Evidence Act* to buttress the submission that the Respondent was estopped from denying expenses on renovations after admitting that the premises required renovation.
13. Counsel submitted in material that the trial court misapprehended the evidence and ended at an erroneous conclusion on her findings on rent liability. Reliance was also placed on the case of Air Services Limited v Theuri Munyi Civil Appeal No. 310 of 2014.



14. On the part of the Respondent, it was submitted that the Trial Court correctly seized the case before it and arrived at a correct determination based on the existence of a valid lease. Counsel submitted that the Court could not rewrite the lease and was bound to apply the terms thereof as it did.
15. It was also submitted that the Respondent had lawfully exercised her right to distress for rent over the suit premises since the Appellant was persistently in rent arrears. Counsel relied on Section 3 of the [Distress for Rent Act](#).

Analysis

16. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and in opposition to the Appeal. The issue that falls for this Court's determination is whether the Trial Court erred in dismissing the Plaintiff's suit and allowing the Counter claim.
17. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy.
18. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. In the case of *Selle & Another vs. Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

19. I note from the pleadings, proceedings and evidence produced at the Trial Court, that the Respondent did not plead for general and special damages in respect of breach of the lease. This gives me the impression that the Appeal is against the award in the Counterclaim and not the dismissal of the suit because the Appellant only prayed for a permanent injunction.
20. Faced with similar circumstances, the court in *John Kisaka Masoni v Nzoia Sugar Co. Limited* [2016] eKLR stated as follows:

The Claimant prayed for several remedies during the hearing including some that were not pleaded in the plaint. Obviously those prayers that were not contained in the plaint cannot be considered by the court. The only prayers in the plaint which the court has considered are for general damages for unlawful dismissal, costs and interest.



21. It has been held that a party ought to lead evidence based on his pleadings and ought not to wander away from his pleadings. The Court of Appeal in *Dakianga Distributors (K) Ltd vs. Kenya Seed company Limited* [2015] eKLR rendered itself as follows: -

“A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob’s precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The common law Library No. 5) where the learned authors declare: -

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

22. It thus follows that the appeal is clearly on the award granted to the Respondent in the Counterclaim. The matter involved breach of a lease. I have perused the terms of the impugned lease agreement. It is indeed a contract between the parties.
23. The Respondent’s case was that the Appellant had breached the terms of the lease by failure to pay the rent and remained in arrears. The Appellant on the other hand maintained that the Respondent was the one in breach of the lease for failure to renovate the premises to the required form thereby necessitating the Appellant to spend Kshs. 4,417,800 in renovating the premises when in fact the cost ought to have been incurred by the Respondent.
24. The court is tasked to find whether the learned trial magistrate erred in finding that the Appellant was in breach of the lease by failure to dutifully remit the rent.
25. The Court established that the Appellant failed (on the basis of the receipts produced in court), to discharge his obligation under the lease agreement by failing to pay rent to a total of Kshs. 6,387,150 as at 31st December 2019. The court also observed that the Appellant did not prove the claim on renovation cost of Kshs. 4,417,800 as no receipts were produced to prove the expenses, and the bill of quantities produced could not be proof of expenditure.
26. In this case, the question revolves around whether the Respondent proved on a balance of probabilities that the Appellant was in arrears. In *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

27. My perusal of the grounds in the Memorandum of Appeal, the trial court declared arrears as payable between the period of 31st December 2019 to 1st April 2021. The Appellant on the other hand appeals



- that the court failed to determine the correct rent for the year 2015 and rent received in November 2019. These months were outside the purview of the trial court's awarded.
28. The Appellant also appealed against the finding that there was no proof that the Appellant had incurred renovation cost of Kshs. 4,417,800.
 29. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”
 30. Renovation costs are typically special damages. They are incurred before the filing of the suit and evidence ought to have been laid before the trial court to support the claim.
 31. I am fortified by the reasoning of the court that special damages must not only be specifically pleaded, they must be strictly proved as stated in *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* [2016] eKLR. The Court of Appeal stated:

“[I]t is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.”
 32. The same court reiterated that position in *Provincial Insurance Co. EA Ltd v Mordekai Mwangi Nandwa*, KSM CACA 179 of 1995 (ur), that:

“It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract.”
 33. The Supreme Court of Nigeria weighed in on the issue in *Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another* (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), where Mahmud Mohammed, JSC. stated:

“I must emphasize that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.”
 34. As I have earlier observed, the Appellant did not also plead the special damages for the renovations and on this ground the trial court, apart from correctly finding that the same was not proved ought to have found in the first place that it was not pleaded. Indeed, the trial court noted that the Appellant only produced bill of quantities, which were not proof of payment and did not produce receipts.



35. In Davidson Kariuki Maina t/a Bills Consults vs Bobmill Properties Limited [2019] eKLR, the Court of Appeal defined bill of quantities as:

“By definition, a BOQ is an “itemized list used in the construction industry to detail the required material* parts and labour, together with their costs, for the purpose of eliciting bids from contractors or sub-contractors” see Black’s Law Dictionary, 10th Edition.”

1. I also do not see the basis that bill of quantities is proof of expenses actually incurred. I do not fault the trial court on its finding.
2. On costs, the court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR. In the present circumstances, I see no reason why I should deny the Respondent costs of the suit

Determination

38. The upshot is that this court makes the following orders;

- a. The appeal lacks merits and is hereby dismissed.
- b. Costs of the appeal awarded to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024.

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F. WANGARI

JUDGE

In the presence of;

N/A by the Appellant

Khadijah Advocate for the Respondent

Barile, Court Assistant

