Sacred Training Institute Ltd v Bestly Cosmetics Ltd (Civil Appeal E639 of 2022) [2024] KEHC 1365 (KLR) (Civ) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1365 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E639 OF 2022

AN ONGERI, J

FEBRUARY 16, 2024

BETWEEN

SACRED TRAINING INSTITUTE LTD ..... APPELLANT

AND

BESTLY COSMETICS LTD ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. G. M. GITONGA (P.M) in Milimani CMCC No. 1853 of 2018 delivered on 19/7/2022)

JUDGMENT

1. The respondent in this appeal filed Milimani CMCC No 1853 of 2018 seeking a refund of Kshs 1,348,200 paid to the appellant in respect of a lease entered into on 14/11/2016 between the appellant and the respondent.
2. The respondent's case was that the premises were not ready for occupation.
3. The premises were on plot No 9 at Bungoma town. The rent was Kshs 200,000 inclusive of service charge and the period of occupation was from 1st January 2017 to 31st December, 2022.
4. The appellant in their amended defence and counter claim denied the respondent's claim and counter claimed for Kshs 1.348,200/=. They said the premises were ready for occupation prior to exchanging of the lease and by letter dated 8/11/2016 confirmed the same.
5. The trial court found that the respondent's advocate wrote a demand letter on 4/5/2017 complaining of failure to deliver vacant possession of the premises as per the lease agreement between the parties.
6. The trial court also relied on photographs produced by the respondent taken on 10th February 2017 showing that the house was still on construction.

7. The court considered the certificate of completion issued on 7/12/2016 by the Ministry of Health but in view of the respondent's evidence, the trial court found that the appellant was in breach and dismissed their counter claim.

8. The trial court ordered the appellant to refund the amount paid in respect of 3 months rent, 3 months deposit and 3months service charge amounting to Kshs 1,348,200 together with costs and interest at court rates from the date of the judgment until payment in full.

9. The appellant has appealed to this court on the following grounds;

   i. The learned magistrate erred in law and in fact in holding that the respondent had proved its case on a balance of probability.

   ii. The learned magistrate erred in law and in fact in failing to take into consideration the uncontroverted documentary evidence showing that the leased premises was at all times available for occupation by the respondent in compliance with the terms of the lease agreement dated 14th November 2016.

   iii. The learned magistrate erred in law and in fact in failing to appreciate the existence of documentary evidence that the building wherein a portion had been leased to the respondent was occupied by other tenants during the same period that the respondent alleges that the leased premises was not ready for occupation.

   iv. The learned magistrate erred in law and in fact in ignoring the terms of the lease agreement dated 14th November 2016 and purporting to rewrite the terms of the lease between the appellant and the respondent.

   v. The learned magistrate erred in law and in fact in dismissing the appellant's counterclaim dated 22nd October 2018 yet the appellant had demonstrated that it lost rent/income as a result of the respondent's failure to take possession of the leased premises as per the lease agreement dated 14th November, 2016.

   vi. The learned magistrate erred in law and in fact in directing the appellant to refund the respondent Kshs 1,348,200/= plus interest yet the said amount had been utilized by the respondent pursuant to the lease agreement dated 14th November 2016.

   vii. In all the circumstances of the case, the findings of the learned trial magistrate are contrary to the evidence and the documents adduced by both parties.

10. The parties filed written submissions as follows;

11. Counsel for the Appellant began his submissions by restating the events leading up to the instant appeal meanwhile anchored his submissions on the *dicta* espoused in *Jackson Kaio Kivuva v Penina Wanjiru Muchene* [2019] eKLR, *Abok James Odera t/a J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR on the duty of this court as the first appellate court. Submitting on the grounds 1 and 7 of the appeal counsel cited Section 107 of the *Evidence Act* and the decision in *Gichinga Kibutha v Caroline Nduku* [2018] eKLR to argue that the Respondent failed to establish before the trial court that the leased premises were not ready for occupation on 01.01.2017 as per the terms of the lease and therefore did not discharge its burden of proof.

12. Regarding grounds 2, 3, 4 and 6 of the appeal, firstly it was submitted that there in no indication that the photographs relied on by the Respondent before the trial court were taken in February 2017 as

found by the trial court. That the time and date on the photographs are handwritten and the same could have been written as at the time of filing the suit whereas if the photographs were taken on the alleged date the Respondent would have raised its concerns at the time. Secondly, that the demand letter dated 04.05.2017 was not proof that the leased premises were not ready for occupation in January 2017, given the timing of the letter and its mode of service. Further to the foregoing, counsel submitted that the Respondent kept his peace as from 01.01.2017 to 04.05.2017 meanwhile its demand was wrongly addressed. Citing Section 98 of the *Evidence Act*, the decisions in *Fairacres Development Limited v Margaret Apondi Olotch t/a M.A Kiosk* [2005] eKLR, {{>https://kenyalaw.org/caselaw/cases/view/11432/ *Building Contractors & another v Elizabeth Kuher-Heier & another* [2010] eKLR and *Deposit Protection Fund Board v Sunbeam Supermarket Ltd & 2 others* [2004] eKLR it was argued that the trial court erred by failing to give effect to the terms of the lease which were reduced into writing whereas the allegation by the Respondent that the premises were not ready for occupation was an attempt to introduce oral evidence to vary the express terms of the lease.

13. Thirdly, while calling to aid the decision in *Winfred N. Karanja v Regnoil Kenya Limited* [2018] eKLR, counsel took issue with fact that the trial court simply ignored and or overlooked the certificate of completion and instead relied on photographs in support of its erroneous finding that the leased premises were not ready for occupation in January 2017.

14. Fourthly, it was submitted that the Respondent's allegation that the premises were not ready for occupation was an afterthought meant to give credence to the Respondent's demand for refund that had been paid to the Appellant pursuant to the lease meanwhile the Respondent failed to take up the leased premise not because they were not ready for occupation but because it secured alternative but cheaper premises. Therefore, the Respondent failed to demonstrate that the Appellant breached the terms of the lease and the prayer for payment ought to have been dismissed by the trial court.

15. Submitting on ground 5 of the appeal, counsel summary argued that the Appellant lost income for a period of nine (9) months as a result of the Respondent's failure to occupy the leased premises thereby denying the Appellant the agreed rent of Kshs 232,000/- per month, inclusive of VAT, a consequence of which the trial court erred in dismissing the Appellant's counterclaim.

16. In conclusion it was submitted by the appellant that the trial court erred in both law and fact in allowing the Respondent's suit and dismissing the Appellant's counterclaim therefore this court ought to allow the appeal with the attendant costs.

17. On the part of the Respondent, counsel equally began his submissions by restating the events leading up to the instant appeal meanwhile anchored his submissions on the fact that this being a first appeal the court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court save for where the same is not supported by evidence or there is a misapprehension of the law. Addressing the gist of the appeal, it was argued that it is trite law that parties ought to perform their respective obligations in accordance with the terms of any contract executed by the parties whereas in the instant matter the Appellant was in clear breach of the terms of the agreement when it failed to complete construction of the suit premises within the stipulated time frame.

18. Further, that the photographs relied on before the trial court showed that the building was incomplete thus promoting the notice to terminate by the Respondent given the Appellant's failure to deliver the premises as agreed upon. It was further submitted that the Respondent had every right to terminate the lease as the Appellant reneged on its word and there was no semblance of an attempt to complete the building.

19. In response to the Appellant's submissions on ground 2, 3, 4 and 6 of the appeal, counsel asserted that the trial court considered the oral and documentary evidence on record, the submissions as well as the applicable law. Citing Section 30 of the *Physical Planning Act*, the decision in *Winfred N. Karanja* (surpra) counsel contended that it is an architect who certifies and draws a certificate of completion which is then submitted to the relevant County authorities whereafter the owner of the premises is furnished with a certificate of occupation.

20. Further, that the trial court considered foregoing issue and rendered its decision based on all the documentary and oral evidence before it as such this court ought to decline the Appellant's invitation to interfere with the foregoing finding. The decision in *Francis Lokadongoy Lokogy v Reuben Kiplagat Kiptarus* [2020] eKLR was called to aid in the latter regard.

21. Counsel went on to reiterate that the Respondent tendered evidence demonstrative of the fact that the premises was incomplete and inhabitable within the agreed time as per the lease meanwhile the Respondent only executed the lease because he relied on the Appellant's undertaking that the premises would be ready as of 01.01.2017 of which did not occur. Counsel further took issue with the Appellant's assertion that the Respondent's action was geared towards securing reduced rent notwithstanding the fact that it had already agreed to settle the lease amount in full.

22. In summation, it was submitted that the Respondent proved its case on a balance of probabilities therefore this court ought to uphold the trial court's decision and dismiss the appeal herein with costs.

23. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced in the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court.

24. The issues for determination in this appeal are as follows;

    i. Whether the respondent proved its case to the required standard.

    ii. Whether the appellant proved its counter claim.

    iii. Whether the appeal should be allowed.

    iv. Who pays the costs of the appeal?

25. On the issue as to whether the respondent proved its case, the trial court relied on pictures produced by the respondent taken on 10/2/2017 which showed that the building was vacant.

26. The trial court also relied on a letter dated 4/5/2017 which was complaining of failure to deliver the premises as per lease agreement.

27. The appellants on their part maintained that the leased premises was at all times available for occupation by the respondent in compliance with the terms of the lease agreement dated 14th November 2016.

28. I find that there is nothing in writing to show that the premises were officially handed over to the respondent.

29. I find that the respondent demonstrated on a balance of probabilities that the premises were not ready for occupation.

30. In any case, besides a lease agreement, it is standard practice for the lessor to hand over the leased premises to the leasee in writing.

31. I find that the appellant did not prove their counter-claim to the required standard. There was no response to the letter dated 4/5/2017.

32. I find that it is not true that the trial court ignored the documents produced by the appellant.

33. The appellant should have called witnesses to demonstrate that the building was ready as at the time of exchanging the lease.

34. I find that the balance in this case tilts in favour of the respondents.

35. I dismiss the appeal with costs to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent