East Africa Institute of Certified Studies Limited v Mayfair Holdings Ltd (Civil Appeal E066 of 2023) [2024] KEHC 4482 (KLR) (3 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4482 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E066 OF 2023

RE ABURILI, J

APRIL 3, 2024

BETWEEN

EAST AFRICA INSTITUTE OF CERTIFIED STUDIES LIMITED ... APPELLANT

AND

MAYFAIR HOLDINGS LTD ..... RESPONDENT

(An appeal arising out of the Judgement and Decree of the Honourable E.A. Obina in the Chief Magistrate's Court at Kisumu delivered on the 11th May 2023 in Kisumu CMCC No. E442 of 2021)

JUDGMENT

Introduction

1. The respondent Mayfair Holdings sued the appellant East African Institute of Certified Studies Limited for recovery of Kshs. 3,031,501 being the sum allegedly due and owing by the appellant to the respondent in rental arrears. The appellant denied being indebted to the respondent in the amounts claimed and put the respondent to strict proof thereof.

2. In the impugned judgement, the trial court found that the appellant was indeed indebted to the respondent, that the respondent had proved its case against the appellant to the required standard and proceeded to enter judgement in favour of the respondent in the sum of Kshs. 3,031,501. The trial court further found that the appellant's deposit be taken into consideration and be discounted therefrom.

3. Aggrieved by the said judgment and decree, the appellant filed a memorandum of appeal dated 15th May 2023 raising the following grounds of appeal:

1. The learned magistrate erred and was wrong in holding that the respondent had not given to the appellant a moratorium on payment of rent (save for the months of April and May 2020) and consequently erred in giving judgement in the sum of Kshs. 3,032,501.

2. The learned magistrate was wrong and erred in finding that the respondent is not estopped by conduct from claiming rents on the months of June to October 2020 when the respondent had sent no invoice or demands for such rent during the period and when such demand was only made on 9th February 2020 long after the appellant (with the assistance of the respondent's staff) had vacated the premises.

3. The learned magistrate erred and was wrong in holding that the Covid 19 Pandemic was not an event of force majeure, which would excuse the appellant from paying rent when such event was a "natural disaster" referred to at Section 65 (1) (e) (iii) of the *Land Act* and which excused the appellant from paying rent.

4. The parties filed written submissions to canvass the appeal.

The Appellants' Submissions

5. The appellant submitted that the respondent's conduct with regard to rent accruing during the Covid 19 Pandemic is such that it led the appellant to believe that it had waived its right to such rent.

6. The appellant further submitted that the Covid 19 Pandemic was an event of force majeure that affected its business and thus the appellant ought to have been excused from paying rent during the said period, as the appellant being an educational institution did not operate during the said period following the government's directive closing down all institutions of learning. Reliance was placed on the cases of *Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited* (COACA No. 64 of 2022, Nakuru) and *Shiloah Investment Limited v East Africa Institute of Certified Studies* Kisumu High Court Civil Case No. E005 of 2021 where the courts ruled that the Covid 19 Pandemic was an unexpected and unforeseen disaster thus a force majeure.

The Respondent's Submissions

7. It was submitted that the appellant failed to prove that it was given a moratorium and waiver. The respondent submitted that the appellant was not given a moratorium on rent but that having written a letter seeking waiver of payment of rent due to Covid 19 Pandemic, the said waiver was not granted but the respondent offered to accept monthly payment of rent instead of quarterly payments.

8. The respondent further submitted that the appellant knew that its rent was never waived as was evident from the letter dated 1st April 2020 and produced as DEX2 where the appellant wrote to the respondent requesting for a total waiver.

9. It was submitted that Covid 19 Pandemic was not a force majeure or a natural disaster referred to at Section 65 (1) (e) (iii) of the *Land Act* and which excused the appellant from paying rent and further, that the appellant never sought to terminate the agreement when it became clear that it could not perform their obligation to pay rent.

10. The respondent submitted that the appellant was aware of its statutory obligation to pay rent under the tenancy agreement as stipulated in section 66 (1) of the *Land Act* and the respondent therefore needed not to send monthly reminders to the appellant informing them of their obligations as stated in the lease agreement.

Analysis and Determination

11. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. This duty is espoused in section 78 of the *Civil Procedure Act* and as interpreted in may judicial pronouncements. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

> " ...This Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court .... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this 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...."

12. This Court will however bear in mind that it neither heard nor saw the witnesses testify hence it cannot tell their demeanor and will therefore give an allowance for that.

13. The issue for determination is whether the appeal has merit. there are questions that follow that general issue, which I will endeavour to resolve. I must however first and foremost discuss the legal burden of proof. Sections 107 and 108 of the *Evidence Act* Cap 80 provide for burden of proof and whose burden it is to prove. Under section 107 of the *Evidence Act*:

> 107. Burden of proof
>
> (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

14. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the "onus" is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant "on a balance of probabilities". This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.

15. In the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the Court of Appeal examined the standard of proof as follows:

> " The burden of proof is placed upon the Appellant and is to be discharged on a balance of probabilities. Denning J. in *Miller –vs- Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:- "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept,

where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

16. Similarly, in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR the Court of Appeal stated that the evidential burden that is cast upon any party is the burden of proving any particular fact which he desires the Court to believe in its existence. That burden is captured in sections 109 and 112 of the *Evidence Act* thus:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

17. Further, in the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR the Court of Appeal explained that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned Judges cited with approval the same principle of law as amplified by the learned authors of The *Halsbury's Laws of England, 4th Edition, Volume 17*, at paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
>
> The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

18. Therefore, in a Civil case, if the probabilities are weighed and found equal, the Defendant will be successful as the Plaintiff carries the burden of proof. If the scale however tips in the slightest in the favour of either of the parties, that party will be successful. Anything more than an equal weight will ensure that party is victorious.

19. I have considered the pleadings, evidence adduced before the trial court and the grounds of appeal as submitted on by both parties' counsel. To answer the issue of whether this appeal is merited, it is not in dispute that the appellant and the respondent entered into a lease agreement over premises known as Kisumu Municipality Block 7/326 wherein rent was to be paid on a quarterly basis by the appellant tenant to the respondent landlord. The aforementioned lease was to commence on the 1st July 2017 and to run for a term of 5 years.

20. Further, it is also evident from the record that the appellant paid rent up until March 2020 after which he defaulted for the months of April, May, June, July, August, September and October 2020 leading to an accumulation of rental arrears of Kshs. 3,031,501.79.

21. The appellant claimed that the accumulated rent was not payable as it had been waived upon request. The appellant also claimed that it could not uphold the obligations in the lease agreement as a result of the Covid 19 Pandemic which was a force majeure.

22. On its part, the respondent denied waiving any rent and instead con testified in contention that in understanding the difficult conditions caused by the Covid 19 Pandemic, it agreed to have the appellant pay rent in monthly installments rather than on a quarterly basis as agreed in the lease.

23. Like in all cases where terms are set out in contracts, the parties herein are bound by the terms of the Lease Agreement. The Court of Appeal in the case of *National Bank of Kenya Ltd –vs- Pipeplastic Samkolit (K) Limited*, Court of Appeal Civil Appeal No.95 of 1999, held that:

> "...a court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved."

24. Having said that, the question is whether the lease agreement between the parties herein was frustrated by circumstances and the law, specifically the Covid 19 Pandemic and the government's directive that all learning institutions be shut down.

25. The appellant attributed its failure to uphold the terms of the lease to the government directive issued in March 2020 following the outbreak of the Covid-19 pandemic that led to closure of all learning institutions.

26. The principles of the doctrine of frustration were restated in *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR, where the Court of Appeal stated the principles as follows:

> "....the doctrine of frustration operates to excuse further performance where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration.(See also *Halsbury's Laws of England* (3rd Edition) Volume 8 page 185(i), on the doctrine of frustration para 320) and *Davis Contractors Ltd versus FAREHAM U.D.C.* [1956] A.C.696 for the observations inter alia that: "Frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because, the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract..."

27. In the earlier case of *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd* [2014] eKLR, the Court of Appeal, considering the doctrine of frustration of an agreement, revisited the multi-factorial approach set out in the *Halsbury's Laws of England*, Vol 1. 9(1), 4th edition at paragraph 897 as follows:

> "As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have

been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."

28. Applying the above settled guiding principles of the doctrine of frustration to this appeal, it is important to evaluate the evidence to ascertain whether the appellant contributed to the frustration.

29. It is not disputed that the parties entered into the lease agreement that was to commence on the 1st July 2017 and to run for a term of 5 years. Both parties are in agreement that there was an order of closure of institutions by the government following the onset of the Covid 19 pandemic, to contain the spread of the most feared global pandemic which was in essence killing many people world over. Further, it is also not disputed that the appellant only started defaulting on the rental payments following the closure of learning institutions by the government. It is also not in dispute that the premises leased were for purposes of learning or training, and that following the government's directive to close all learning institutions, the appellant had no option but to close down, which in essence, frustrated the implementation of the lease.

30. The other important question therefore, is, whether the frustration was foreseeable in the circumstances. Ewan Mckendrick's, Contract Law, eighth edition, Par 14, 15 Page 251, sets out what constitutes a foreseeable event as follows:

> " An event is foreseeable and will prevent frustration of the contract only where it is one which 'any person of ordinary intelligence would regard as likely to occur' (see Treitel, 2007, para. 19-078, and contrast Hall 1984). In other words, the question would appear to be one of fact and degree and much will depend on the extent to which the event in question was foreseeable by the parties. As Rix LJ stated in The Sea Angel [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517, [127], 'the less that an event, in its type and its impact, is foreseeable, the more likely it is to be a factor which, depending on other factors in the case may lead on to frustration.'"

31. This court takes cognizance of the government mandated lockdown that affected all learning institutions and especially the hospitality industry institutions and most other businesses in this country as well as the effect this lockdown which was necessary, had on all those businesses and learning institutions. Like all other learning institutions, the appellant was affected by the lockdown and subsequently closed its doors. It is therefore not disputed that for the said period, the appellant was rendered unable to use the property subject of the lease agreement and was therefore, not generating any income from the intended purpose of the lease agreement.

32. Consequently, it is my finding and holding that the Covid 19 pandemic was a force majeure event that caused the appellant undue difficulty in continuing with the execution of the lease agreement in accordance with its purpose and making the rent payments thereupon as agreed impossible.

33. The Covid 19 pandemic was no secret, and the respondent was aware of the government directive to close schools and universities. Therefore, to require performance of a lease agreement in the face of such unforeseen and unavoidable circumstances, not caused by any acts and/or omission on the part of the appellant is absurd, unfair, and unjust.

34. It is also evident from the evidence presented before the trial court that there were efforts by the appellant to discuss future modes of payment of rent, which efforts and proposals were rejected by the respondent, who admitted that it only offered up the option of the appellant paying the rent in monthly disbursements rather than the agreed upon quarterly disbursements. This refusal by the respondent was, in my humble view, unreasonable because the appellant was not in any position to raise the rent due and payable due to the unforeseen circumstances occasioned by the Covid 19 outbreak and the measures taken by the government to contain the pandemic by closing down all learning institutions.

35. In the circumstance therefore, I find that this court would be in error in condemning the appellant to make rental payments for the entire duration of the lease, when the appellant was no longer using or benefiting from the premises, due to forces beyond its control. In my humble view compelling the appellant to pay the rent due for the period in question is tantamount to trying to get milk out of a bull.

36. Accordingly, I find this appeal merited. I allow it. Consequently, I set aside the judgment and decree passed on the 11th May 2023 by the lower court and substitute it with an order dismissing the respondent's suit against the appellant but with an order that each party shall bear their own costs of this appeal and of the suit as dismissed, reasons being that none of the parties was to blame for the emergence of Covid 19 which frustrated the lease and its implementation in terms of rent payment.

37. This file is closed.

38. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF APRIL, 2024

R.E. ABURILI

JUDGE