Prafula Enterprises Limited v Samco Traders Limited (Civil Appeal E036 of 2022) [2024] KEHC 3403 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3403 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E036 OF 2022

RE ABURILI, J

APRIL 4, 2024

BETWEEN

PRAFULA ENTERPRISES LIMITED ..... APPELLANT

AND

SAMCO TRADERS LIMITED ..... RESPONDENT

(An appeal arising out of the Judgement of the Honourable W.K. Okunywa in the Chief Magistrates Court at Kisumu delivered on the 20th April 2022 in Kisumu CMCC No. 365 of 2011)

JUDGMENT

Introduction

1. The appellant herein was sued by the respondent who sought a declaration that the appellant was not entitled to demand and collect rent arrears and that the levy of distress for rent was unlawful, wrongful and irregular. The respondent further sought a permanent injunction barring the appellant from recovering the amount for which distress had been levied, from levying distress for rent and from interfering in any manner whatsoever with the respondent's use or occupation of the premises. The respondent further sought damages for wrongful distress.

2. In response, the appellant filed its amended defence and counterclaim denying all the respondent's allegations and seeking that the respondent's suit be dismissed with costs. The appellant counterclaimed against the respondent for rental arrears plus VAT with interest at commercial rates of 25% from due date till payment in full, a declaration that the respondent was duty bound to meet the repair costs in the sum of Kshs 241,600 with interest at commercial rates of 25% from 21.3.2012 till payment in full as well as costs of the suit.

3. In his judgement, the trial magistrate found that the respondent had proved his case on a balance of probabilities and that the defendant's counterclaim was not merited. The trial magistrate dismissed the appellant's counterclaim and granted the respondent the orders sought.

4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 18th May 2022 raising the following grounds of appeal;

    1. That the learned trial magistrate erred in law and fact by dismissing the counter claim dated 24.08.2012 despite there being an existing lease agreement between the appellant and the respondent providing for an increment of rent to be 5% p.a.

    2. That the learned trial magistrate erred in law and in fact by failing to evaluate the evidence of the defendant and bundle of documents dated 20.11.2012 produced in the trial court in support of the defendant's case.

    3. That the trial magistrate erred in law and in fact by failing to appreciate the appellant's submissions and the authorities therein.

    4. That the judgement herein was against the weight of the evidence tendered before the trial court.

5. The parties filed submissions to canvass the appeal.

The Appellant's Submissions

6. The appellant submitted that on the basis of the evidence tendered before the trial magistrate there was no dispute that there was a lease agreement between the parties that provided rent increment to be 5%p.a. and thus the trial court erred in its finding and holding and hence its judgement was unsupportable.

7. It was submitted that the appellant led evidence on the counterclaim that it was the respondent who was reneging on the agreement by failing to fulfil the terms thereof and thus being the party in default, the respondent ought not to have been awarded damages. The appellant submitted that the trial court engaged in a miscarriage of justice as it failed to look at the counterclaim. The appellant thus proposed that it be awarded 60% costs of the appeal.

The Respondent's Submissions

8. It was submitted that that the trial court rightfully held that there was no amendment to the written agreement or the execution of a fresh agreement incorporating the new terms and that in the absence of a new agreement, the parties were bound by the terms of the agreement dated 16th January, 2007 which was fully supported by Section 97 of the *Evidence Act* which provides that when the terms of a contract have been reduced to the form of a document, no evidence shall be given in proof of the terms of the contract except the document itself or secondary evidence of its contents where such secondary evidence is admissible.

9. The respondent submitted that the appellant was suggesting that the principle of estoppel applied to bar the respondent from taking the position that there was no alteration however, that for the principle of estoppel in Section 120 of the *Evidence Act* to apply, the act or omission alleged to constitute estoppel must be clear and unequivocal which was not the case in the instant appeal as vide PExh.3, the respondent made it clear that it did not agree with the actions of the appellant and even forwarded a copy of the lease agreement they had both executed just to remind it about what the terms of the relationship were.

10. It was submitted that the appellant failed to adduce evidence to support his special damage claim, saying that supporting evidence was lying somewhere in the office which assertion the respondent denied in its Reply to the Amended Defence and Defence to Counterclaim thus putting the appellant on notice that the claims were contested.

11. It was submitted that the respondent succeeded in getting the reliefs sought and must be the party to be awarded costs in terms of Section 27 of the *Civil Procedure Act*.

Analysis and Determination

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

13. further, it is a settled principle of law that an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

14. Having considered the Appellant's Grounds of Appeal and the respective parties' Written Submissions, this court has identified the issue for determination to be whether the trial court erred in granting the respondent the orders sought and dismissing the appellant's counterclaim.

15. At the onset, the law is that he who alleges must proof. The term burden of proof draws from the Latin Phrase *Onus Probandi* .

16. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to *Phipson on the Law of Evidence,* the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

17. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

18. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to persuade the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

19. The question therefore is whether either of the parties herein proved their cases before the trial court.

20. Commencing with the respondent who was the plaintiff in the trial court., as earlier herein stated, the respondent sought a declaration that the appellant was not entitled to demand and collect rent arrears and that the levy of distress for rent was unlawful, wrongful and irregular. The respondent further sought a permanent injunction barring the appellant from recovering the amount for which distress had been levied, from levying distress for rent and from interfering in any manner whatsoever with the respondent's use or occupation of the premises. The respondent further sought damages for wrongful distress.

21. From the evidence on record it is undisputable that there was a lease agreement dated 16th January 2007 between the parties herein which though not registered, was for a term of 5 years commencing 1st February 2007 wherein the rent was to increase by 5% per year. The respondent testified that had he completed the term of the agreement, the total rent due was Kshs 4,641,530.25. However, that on the 18.9.2011, the appellant is said to have sent auctioneers to levy distress for rent to the tune of Kshs 1,066,678 at which time, the respondent testified that he had paid rent amounting to Kshs 4,471,350.

22. The respondent further testified that vide a letter dated 5.5.2010 from the appellant, the appellant sought to increase the rent from Kshs 70,000 to Kshs 125,000 plus VAT with effect from the 1.7.2010 but that the respondent did not agree with the contents of the letter because as at the time, period for the lease agreement had not lapsed. The respondent produced in evidence the correspondences to this effect between itself and the appellant but nothing in those correspondences showed any agreement incorporating the new terms proposed by the appellant.

23. On its part, the appellant filed its amended defence and counterclaim denying all the respondent's allegations and seeking that the respondent's suit be dismissed with costs. The appellant counterclaimed against the respondent for rental arrears plus VAT with interest at commercial rates of 25% from due date till payment in full, a declaration that the respondent was duty bound to meet the repair costs in the sum of Kshs 241,600 with interest at commercial rates of 25% from 21.3.2012 till payment in full as well as costs of the suit.

24. In its evidence, the appellant testified that the respondent had paid Kshs 4,642,767 as at the time the lease period expired, which amount did not include Kshs 70,000 paid in January 2007 and Kshs 340,341.60 paid on the 9.2.2012 which payments were in respect of the lease agreement dated 16.1.2007.

25. The appellant further testified that its was claiming Kshs 558,280.20 from the respondent despite having instructed the auctioneers to levy distress for rental arrears running to Kshs 1,066,678. The appellant did not state the basis upon which it issued the said instructions to the auctioneers to distress for rent.

26. The appellant further testified that it had carried out repairs on the suit premises but no document was produced in the form of receipts in support of the same, this being a special damage that must be pleaded and proved..

27. Taking all the aforementioned into consideration, the evidence on record points to the fact that there was only one lease agreement between the parties herein, the one dated 16.1.2007 as there was no evidence adduced to show a lease detailing the new terms as alleged by the appellant. The parties were thus bound by that lease agreement of 1.1.2007 and the court could not infer any terms in the said agreement.

28. Further, there was no evidence adduced by th appellant before the trial court to show that the respondent was in any arrears of rent. In addition, from the testimony of the appellant's witness as compared to the instructions to Nyaluoyo Auctioneers, it is evident that the appellant itself was not aware of how much, if any amount the respondent allegedly owed the appellant.

29. The appellant also despite counterclaiming for a refund of the repair costs allegedly used on the suit premises, it failed to adduce any evidence of the said costs despite the fact that this was a special damage which by law needs not only to be specifically pleaded but also strictly proven.

30. In the circumstances, I am inclined to agree with the trial court that the respondent proved its case on a balance of probabilities against the respondent whereas the respondent failed to prove its counterclaim against the respondent.

31. I am not satisfied as claimed by the appellant that the trial magistrate failed to consider the counterclaim and the evidence tendered therein in support . To the contrary, I find that the evidence adduced by the appellant both before the trial court and submissions made to this court to be wanting in substance.f

32. I thus find this appeal to be devoid of merit. I dismiss it and uphold the trial court's finding in favour of the respondent and dismissing the appellant's counterclaim and order that the respondent shall have costs of this appeal.

33. The respondent shall have costs of this appeal to be paid by the appellant.

34. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2024

R.E. ABURILI

JUDGE