**Swan Centre Limited v Kisumu House of Lighting & Décor Limited (Civil Appeal E014 of 2022) [2024] KEHC 4480 (KLR) (2 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4480 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL E014 OF 2022**

**RE ABURILI, J**

**APRIL 2, 2024**

**BETWEEN**

**SWAN CENTRE LIMITED ..... APPELLANT**

**AND**

**KISUMU HOUSE OF LIGHTING & DÉCOR LIMITED ..... RESPONDENT**

***(An appeal arising out of the Judgement and decree of the Honourable P.N. Gesora in the Chief Magistrate's Court at Kisumu delivered on the 28th January 2022 in Kisumu CMCC No. 235 of 2020)***

**JUDGMENT**

## Introduction

1. The appellant, Swan Centre Limited, was the respondent's landlord. The appellant the respondent Kisumu House of Lighting and Decor Limited, for the sum of Kshs. 1,335,352.87 being accrued rent for two shops leased to the respondent as well as service charge for the two shops and Value Added Tax with interest. The appellant further sought an order compelling the respondent to repair, refurbish and repaint the said shops to the appellant's satisfaction and further hand over the keys to the main doors of the shops or in the alternative, costs of replacing the said door locks.

2. In response the respondent filed a statement of defence dated 22nd July 2020 in which it claimed that on 4th September 2019, the suit premises were fenced off by the National Youth Service on allegations that the premises stood on illegally acquired public land, thus denying the respondent the opportunity to carry on the business and that this amounted to constructive eviction without notice and thus the respondent vacated the premises with full knowledge of the appellant.

3. It was the respondent's defence and contention that the appellant refused to use the deposit paid for the purposes provided for in the agreement and that the circumstances under which the respondent was

forced to vacate the suit premises were such that it was impossible to carry out repairs in the premises. Further, that in fact, there was no damage to warrant a demand that repairs be undertaken.

4. In his judgement, the trial court found that the appellant failed to prove its case on a balance of probabilities and that it should have applied the deposit paid by the respondent on the arrears due. The court therefore dismissed the appellant's suit with costs to the respondent.

5. Aggrieved by the said judgment and decree, the appellant filed a memorandum of appeal dated 27th April 2022 raising the following grounds of appeal:

    1. The learned trial magistrate erred in fact and in law in dismissing the plaintiff's case with costs to the defendant.

    2. The learned trial magistrate erred in law in failing to reach a finding that the respondent had grossly and fundamentally breached the terms of the agreement between the parties by failing to pay the appellant Kshs. 1,335,352.87 in respect of rent, service charges, VAT and utility bills in respect to shop number G017B and failing to carry out repairs, refurbishing, repainting of the shop to the appellant's satisfaction.

    3. The learned trial magistrate erred in law and in fact, failing to find that the appellant had proved its case on a balance of probabilities hence arriving at a decision unsustainable in law.

    4. The learned trial magistrate erred in law and in fact in ignoring and or disregarding the fact that the rent arrears had accrued even prior to the actions of the NYS hence there was no factual or legal basis for payment not to have been made.

    5. The learned trial magistrate erred in fact in failing to find or appreciate that the respondent was already in rent arrears of Kshs. 527,647.95 prior to the actions of the NYS and that the amount held as security was inadequate to settle the rent arrears and repairs.

    6. The learned trial magistrate erred in fact and in law in holding that the appellant should have utilized the deposit to offset rent arrears and to carry out repairs.

    7. The learned trial magistrate erred in law and in fact in failing to consider th evidence, submission and the relevant authorities cited in the written submissions presented and filed by the appellant as a whole.

    8. The learned trial magistrate erred in law and in fact in otherwise failing to exercise his discretion in a proper manner resulting in injustice to the appellant.

    9. The learned trial magistrate grossly misdirected himself in treating the appellant's evidence and submissions before him superficially and consequently came to a wrong conclusion on the same.

    10. The learned trial magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered by the appellant and thereby arrived at a decision unsustainable in law.

6. The appeal was canvassed by way of written submissions.

**The Appellants' Submissions**

7. The appellant submitted that despite informing the respondent through its letter dated 23.10.2019 of the need for it to carry out repairs in the suit premises and that rent would continue to accrue until the

repairs had been done and the keys handed over, the respondent failed to do so and thus the respondent breached clause 1 (j) of the lease agreement.

8. It was submitted that the respondent was liable to pay for the rent arrears and the rent until the date it handed over possession of the suit premises as was held in the case of *WJ Blakeman LTD v Associated Hotel Management Services Ltd* [1985] eKLR as well as the case of *Kenya Commercial Bank Limited v Pickwell Properties Limited* [2020] eKLR.

9. It was further submitted that the lease being a commercial lease, it did not contain a termination clause and thus the premature termination by the respondent amounted to a breach of the lease terms and thus the respondent was liable to pay 12 months' rent as long as the premises remained vacant for 12 months from the date that the lessee vacated as provided in Section 71 (5). Reliance was placed on the cases of *Kenya Commercial Bank Limited v Popatial Madhavji & Another* [2019] eKLR and that of *Chimanlal Meghji Naya Shah 7 Another v Oxford University Press (EA) Limited* [2007] eKLR.

10. The appellant submitted that the respondent breached the terms of the lease agreement by prematurely terminating the lease hence it was entitled to damages for breach of contract. The appellant further submitted that prior to the actions of NYS in September 2019, the respondent was already in breach and in arrears of Kshs. 527,647.97 which could not be offset by the security deposit which was inadequate and that this sum should have been awarded by the trial court.

11. It was further submitted that it was fair and just in the circumstances of the case that the appellant be awarded interest on the claims at court rates from the date of filing the suit until payment in full as provided for in Section 26 of the *Civil Procedure Act* and upheld in the case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* (1970) EA 469.

**The Respondent's Submissions**

12. On behalf of the respondent, it was submitted that the appellant permitted the respondent to vacate the suit premises in circumstances that amounted to constructive eviction and thus the trial court was right in holding so.

13. The respondent submitted that the appellant's failure to call its directors and manager who were present at the meeting to testify could only be inferred to mean that their testimony would have been averse to their case had they come to court as was held in the case of *In Re Estate of Mwangi Kuria (Deceased)* [2020] eKLR.

14. The respondent submitted that the appellant was estopped from bringing any claim for rent that was outstanding at the time of eviction or that continued to accrue as the appellant would not have allowed the respondent to leave. Further, the respondent submitted that the appellant could not claim rent for the period from September 2019 when the respondent could not access the premises as the respondent was not doing any business in the premises for no mistake of its own.

15. It was submitted that the claim for unpaid rent was misconceived as there was an agreement for the liquidation of the arrears in installments as evidenced by the receipts issued by the appellant and produced by the respondent and that there was no proof that the said agreement was dishonoured or breached by the respondent.

**Analysis and Determination**

16. This being a first appeal, it is the duty of this Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated as follows:

> " ....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...."

17. In obedience to the principle espoused in the above case, this Court will bear in mind that it neither heard nor observed the demeanor of the witness and will therefore take that into consideration.

18. The main issue for determination in this appeal, from the grounds of appeal and submissions is whether the appeal is merited. there are of course, specific questions that the court will answer.

19. First things first, is the legal burden of proof. Sections 107 and 108 of the *Evidence Act* Cap 80 provide for burden of proof and who is to prove as follows:

> 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.

20. 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 that the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.

21. 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 v 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."

22. Similarly, the Court of Appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR stated that the evidential burden that 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 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.

23. 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 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 that:

> " 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."

24. 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 favour of either of the parties, that party will be successful. Anything more than an equal weight will ensure that party is victorious.

25. Evidently, this case shall turn on whether or not the Appellant discharged its legal and evidential burden of proof.

26. In support of its case, the appellant called PW1 who testified that on the 4.9.2019, the National Youth Service, (NYS) personnel surrounded the suit premises and wanted to erect a fence but the management of the appellant talked to them and managed to stop the process and the fence was removed. He testified that there was a bit of tension and that the respondent never handed over the keys, the shops and items.

27. In cross-examination, PW1 admitted that although he had worked for the appellant for 15 years, he was based in Kisii and was not on the ground on the material date, 4.9.2019, and that the day to day management of the suit premises was with one Sefana Asif.

28. PW1 testified that the respondent was in rental arrears and that there was no provision in the lease for use of deposit to offset rent arrears and carry out repairs. He admitted that the issue with the NYS who attempted to fence off the suit premises went to court and the matter was resolved.

29. In re-examination, PW1testified that his work was to issue invoices and follow up on payments. He testified that he could not explain how the defendant left the premises. It was his testimony that there was a procedure of surrendering the premises.

30. On their part, the respondent called DW1 who testified that on the 4.9.2019 while at Nakuru, she received information that NYS personnel had surrounded the suit premises and were erecting a fence. She testified that she rushed to Kisumu where they had a meeting with the management of the appellant on the suit premises. DW1 further testified that she had two shops at the premises and that she moved out, with the appellant allowing them to move out. She denied moving out unproceduraly or without consent.

31. DW1 admitted that the respondent had arrears but that the respondent and the appellant had an arrangement on how to clear the arrears at the time of vacating as was evident from DEX1 -19, receipts received issued by the appellant. She further testified that the respondent did not owe the appellant any money and that she had not been informed of the amount spent by the appellant on repairs. She testified that 98% of the residents moved out of the premises.

32. In cross-examination, DW1 testified that she had no authority to appear on behalf of the respondent but that she signed all the leases entered into between the appellant and the respondent. It was her testimony that she made efforts to surrender the keys of the shops to the management of the suit premises but the efforts were rendered futile as the management declined to accept the keys and that her advocate advised her to take the keys to the appellant's advocate who accepted the same.

33. I have considered the aforementioned. The trial court record reveals that the respondent leased shop number G018A from the appellant, which she surrendered at the end of April 2018 and took up a lease of shop number G17B vide lease agreement dated 24th April 2018 registered on the 25th April 2018, for a term of five years and one month which term was to expire on the 30th April 2023. Further, the appellant and the respondent entered into a lease agreement dated 10th May 2016 over shop No. B003 for a term of five years and one month, a term which was to expire on the 31st December 2019.

34. It is also undeniable that on the 4th September 2019, officers from the NYS surrounded the suit premises in an attempt to fence off the same. From the evidence adduced, it is discernable that the appellant's tenants, including the respondent were thus denied entry into the suit premises and could not carry on with their business. Further, it is evident from the record that following the actions by the NYS, the respondent moved out of the suit premises. There is also evidence on record that prior to the actions of 4.9.2019, the respondent was in rent arrears of Kshs. 527,647.95.

35. The appellant alleged that this action of the respondent moving out of the suit premises prior to lapse of the lease agreement amounted to a breach of the said lease thus entitling the appellant to damages as well as settlement of the rent arrears owed by the respondent.

36. On its part, the respondent contended that the actions of the NYS that led to the respondent vacating the premises constituted constructive eviction and further that it had moved out of the suit premises with full knowledge of the appellant's agent and that when they tried to return the keys to the shops, the appellant's management declined to accept the keys, forcing the respondent to surrender the said keys to the appellant's advocates. It was their case that indeed they were in arrears but that they had come into an agreement with the appellant on settlement of the said arrears.

37. Rent is the consideration a tenant pays to the landlord for the enjoyment of the premises let. Rent is that due when the enjoyment persists. When possession is taken away, the right to receive rent cannot be retained. That is what section 77, *Land Act* provides in no uncertain terms as follows:

(1) A lessee who is evicted from the whole or a part of the leased or buildings, contrary to the express or implied terms and conditions of a lease, shall be immediately relieved of all obligation to pay any rent or other monies due under the lease or perform any of the covenants and conditions on the part of the lessee expressed or implied in the lease in respect of the land or buildings or part thereof from which the lessee has been so evicted.

(2) For purposes of this section, a lessee shall be considered as having been evicted from the whole or part of the leased land or buildings, if, on the commencement of the lease, the lessee is unable to obtain possession of the land or buildings or part thereof, as a result of any action or non-action of the lessor or any of the lessor's agents or employees, contrary to the express or implied terms of the lease: Provided that a lessee who is aggrieved as a result of unlawful eviction under this section may commence an action against the lessor for remedies.

38. I am in agreement with the respondent that the act of the NYS in denying it access to the suit premises amounted to constructive eviction and this falls within the provisions of section 77 of the *Land Act*. The appellant failed to adduce evidence as to what actions they took to ensure that the respondent regained access into the suit premises save to state that other tenants went back to the suit premises.

39. The uncontroverted evidence of the respondent was that it left the suit premises with full knowledge of the management of the appellant who at all times, though present, never stopped it from moving out. As it is clear that the actions of the NYS were not instigated by the respondent, the respondent cannot therefore be held liable for moving out. Accordingly, the respondent's moving out amounted to constructive eviction following the NYS actions which created tensions amongst tenants as admitted by PW1. In the absence of evidence to the contrary by the appellant, the respondent cannot therefore be held liable for breach of the terms of the lease.

40. Further to the above, it was undeniable that on 4.9.2019 when the NYS cordoned off the suit premises, the respondent owed the appellant arrears amounting to Kshs. 527,647.95. However, the evidence presented by the respondent which was uncontroverted showed that the parties had entered into an arrangement of payment of the said arrears as was demonstrated by DEX1 -19, receipts issued by the appellant for installments received from the respondent. This evidence remained uncontroverted by the appellant. Further, it is clear that the appellant never claimed in the suit, for setting off of the rent arrears with the deposit made by the respondent hence this court cannot make orders and neither could the trial court make orders that were never sought for. Parties are bound by their pleadings.

41. In addition, there is no evidence that the appellant levied distress for rent following the respondent's alleged failure to pay rent alluding to the fact that indeed there was an agreement to settle the arrears of rent owed.

42. There is also uncontroverted evidence that the respondent paid a total security of Kshs. 91,891.86 in respect of shop B003 and Kshs. 367,569 in respect of shop no. G17B which monies were admitted to be held by the appellant by PW1.

43. Taking all the aforementioned into consideration, it is my finding and holding that following the actions of the NYS on the 4.9.2019, the respondent was immediately relieved of all obligations to pay any rent or other monies due under the lease or perform any of the covenants and conditions on expressed or implied in the lease in respect of the suit premises from that date going forward.

44. Further, in compliance with section 77 of the *Land Act*, the lease agreement between the parties herein terminated on the 4.9.2019 following the actions of the NYS. The respondent was thus not obligated to settle any sums arising after the 4.9.2019

45. Despite the fact that the lease agreement did not expressly provide for the security deposit to be used to settle funds owed by the respondent, it is undeniable that the appellant retains funds paid to it as deposit by the respondent. The logical thing to do would be to deduct the same from the alleged monies owed as rental arrears and. The evidence that is uncontroverted also shows that the respondent had paid some monies in settlement of the accrued rental arrears.

46. The upshot of the above is that I find and hold that the appellant failed to prove its case on a balance of probabilities before the trial court. The trial court was thus correct in dismissing the suit. I uphold the order dismissing the appellant's suit against the respondent.

47. I thus find this appeal lacking in merit and I proceed to dismiss the same with costs to the respondent assessed at kshs 50,000 payable within 30 days of today in default, the respondent will be at liberty to execute for recovery.

48. Save for the assessed costs, this file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 2ND DAY OF APRIL, 2024**

**R.E. ABURILI**

**JUDGE**