Mctough v Hassanali (Civil Appeal E123 of 2022)
[2024] KEHC 6746 (KLR) (5 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6746 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E123 OF 2022

RE ABURILI, J

JUNE 5, 2024

BETWEEN

JAMES M. MCTOUGH ..... APPELLANT

AND

AMINA HASSANALI ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable B. Omollo in the Chief Magistrate's Court at Kisumu delivered on the 9th November 2022 in Kisumu CMCC No. 244 of 2015)

JUDGMENT

Introduction

1. The appellant James M. Mc Tough was a tenant of the Respondent in her residential premises. Vide a plaint dated 19th May 2015, the appellant sought an order that accounts be taken between himself and the respondent Amina Hassanali and further that a permanent injunction be issued restraining the respondent from attaching his property as a result of rent arrears.

2. It was the appellant's case that he did not have any rental arrears and that due to the incurred expenses caused by defective sewer line and continued repairs that he had made due to the respondent's failed responsibilities and as such, it was the respondent who was currently indebted in arrears to the appellant.

3. In response, the respondent filed a replying affidavit dated 29th June 2015 deposing that she was the landlord of the suit residential premises situated on the parcel of land known as Kisumu Municipality Block 13/26 where the appellant was a tenant.

4. It was her contention that the appellant was in arrears of unpaid rent in the sum of Kshs. 810,000 as at September 2013 which the parties agreed mutually and in writing that the appellant would settle on or before 1st December 2013.

5. The respondent averred that by a renewed lease of tenancy dated 1st October 2013 between the parties herein, she leased the suit premises to the appellant at an agreed monthly rent of Kshs. 115,000 for the period between 1st October 2013 and 30th September 2014 subject to the appellant's undertaking in writing that he would settle the outstanding arrears of unpaid rent of Kshs. 810,000 on or before 1st December 2013.

6. The respondent averred that when the aforementioned lease lapsed on the 30th September 2014, the appellant vide a letter dated 15.10.2014 was granted extension of the lease for an additional 6 months at an agreed rent of Kshs. 150,000 per month which was due to lapse on the 15th April 2015 at which point, the appellant was expected to vacate the premises.

7. The respondent averred that the appellant defaulted in payment of outstanding rent arrears of Kshs. 810,000 as agreed and only completed paying the same on the 4th March 2014.

8. The respondent further averred that on the 15th May 2015, the unpaid rental arrears were Kshs. 1,085,000 and so she instructed Auctioneers who went to execute for distress of arrears of rent by attaching the appellant's goods including vehicles when the appellant paid a sum of Kshs. 460,000 towards unpaid rent arrears and an additional Kshs. 100,000 towards the auctioneer's charges leaving a balance of Kshs. 635,000 which the auctioneer was right in pursuing further on the 18th May 2015.

9. It was the respondent's case that whatever repairs that the appellant carried out in the said premises were undertaken in compliance with the written agreement of the lease having been damages which occurred during the appellant's occupation of the said premises and which the appellant was liable to repair prior to vacating the premises.

10. The respondent subsequently filed a counterclaim dated 25th June 2015 seeking Kshs. 785,000 from the appellant being the total amount due and payable from the appellant to the respondent as arrears of unpaid rent and mesne profits until the month of June 2015 and thereafter such mesne profits at the rate of Kshs. 150,000 per month that would continue to accumulate for the period that the appellant continued to be in occupation of the suit premises. The respondent also sought an order of eviction against the appellant from the suit premises as well as costs of the suit.

11. The trial magistrate after considering the evidence adduced before her and the relevant supporting documents found and held that firstly, there was a new lease agreement between the parties herein over the suit premises and therefore the appellant was estopped from denying the conditions of the extension of the lease agreement as he remained in occupation of the premises; that by appending his signature on to the lease agreement, the appellant agreed to the terms and conditions therein including the term that he would take care of the repairs of the suit premises and the cost thereof would not be deducted from the rent arrears and further that by being in arrears of rent, the appellant herein could not claim an injunction as against the respondent. The trial court proceeded to order the appellant to pay special damages of Kshs. 785,000 to the respondent.

12. Aggrieved by the said judgment and decree, the appellants filed a memorandum of appeal dated 19th April 2023 raising the following seven grounds of appeal:

    1. The learned trial magistrate erred in both law and fact in dismissing the appellant's suit and allowing the respondent's counterclaim.

    2. The judgement of the trial court was based on no evidence. There was no evidence that monthly rent for lease of demised premises was Kshs. 150,000 per month.

3. The learned trial magistrate erred both in law and fact in misconstruing evidence with respect to the rent payable for the demised premises. The signed lease talked of Kshs. 115,000 but the trial court misconstrued it to be Kshs. 150,000 leading to an injustice on the part of the appellant.

4. The learned trial magistrate erred in both law and fact in failing to appreciate that the lease agreement entered between the appellant and respondent imposed both an express and implied duty upon the respondent as the landlord to shoulder all the repairs and maintenance of the demised premises failure to which the appellant as the tenant is at liberty to undertake the repairs and offset the same from the rent.

5. The learned trial magistrate erred in both law and fact in failing to consider the appellant's evidence during trial before arising at her decision.

6. The learned trial magistrate erred in both law and fact in failing to consider the appellant's submission when arriving at her decision.

7. The judgement was against the weight of evidence.

13. The parties filed submissions to canvass the appeal.

The Appellants' Submissions

14. The appellant submitted that his rent was Kshs. 115,000 per month as per the initial lease agreement and not Kshs. 150,000 as stated by the respondent in her defence and counterclaim, which was the basis upon which the trial court arrived at its judgement that the defendant was entitled to Kshs. 785,000.

15. It was submitted that the respondent did not amend the previous lease agreement or create a new one so as to reflect the new rent rates of Kshs. 150,000 per month and have the same be executed by the parties so as to have a binding agreement of the same. The appellant submitted that the respondent failed to prove her case and thus her claim of Kshs. 150,000 rent per month which was used to compute the counter-claim was baseless and unsubstantiated and thus he did not owe the respondent any arrears.

16. The appellant submitted that it was the respondent's responsibility to undertake any repairs and maintain the premises and that in the event that the appellant shouldered the same, he was entitled to recover it from the rent as per the agreement. The appellant submitted that reconciliation of the costs he incurred for maintenance reveals that an amount of Kshs. 607,169 was refundable to him by the respondent.

The Respondent's Submissions

17. The respondent submitted that although the appellant had distanced himself from the revised rent claiming that he declined, in his testimony, he acknowledged that the rent had been revised to Kshs. 150,000 but that he paid the previous rate. It was submitted that the appellant was well aware of his continued stay in the suit premises and that the respondent had approved the appellant's continued occupation as per the appellant's request and thus the appellant was estopped from denying the new rent.

18. It was submitted that the appellant failed to prove that the rent was never revised upwards and or that the parties had agreed that the appellant would undertake repairs on the suit premises and the same be deducted from the rental arrears.

19. The respondent further submitted that the appellant failed to establish that he had a right that the court ought to have protected and was thus not entitled to an order of permanent injunction against the respondent and thus his suit was ripe for dismissal.

20. On her counterclaim, it was submitted that the respondent sufficiently established that she was entitled to the unpaid rent in the nature of special damages amounting to Kshs. 785,000 as she had adequately proved that the appellant had rent arrears.

Analysis and Determination

21. The role of the first appellate Court is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of Selle & Anor. v Associated Motor Boat Co. Ltd (1968) EA 123). This court is nevertheless aware that as an appellate Court, it will not ordinarily interfere with the findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga v Kiruga & Another (1988) KLR 348).

22. Having examined the grounds of appeal and the parties' respective submissions, the issues for determination are:

    a. Whether there was a valid lease agreement between the parties from the period of October 2014 to May 2015

23. It is not in dispute that by a renewed lease of tenancy dated 1st October 2013, the parties hereto entered into a lease agreement over the suit premises at an agreed monthly rent of Kshs. 115,000 for the period between 1st October 2013 and 30th September 2014 subject to the appellant's undertaking in writing that he would settle the outstanding arrears of unpaid rent of Kshs. 810,000 on or before 1st December 2013.

24. It is also not in dispute that vide a letter dated 15.10.2014, the appellant sought an extension of the aforementioned lease agreement for a further period of 6 months and in response, vide a letter dated 24th October, the respondent accepted the appellant's request on condition that the rent payable over the premises for the said period of extension would be Kshs. 150,000 per month.

25. The appellant in his own testimony stated that the letter dated 24.10.2014 extended his tenancy for a period of 6 months but that he continued paying rent at Kshs. 115,000.

26. Section 120 of the *Evidence Act* provides as follows:

> When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

27. Lord Denman CJ in the English case of Pickard v Sears 112 E.R. 179, on estoppel, had this to say:

> " The rule of law is clear that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time."

28. The Court of Appeal in the case of Serah Njeri Mwobi v John Kimani Njoroge (2013) eKLR, held that:

> "The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person."

29. Further, the Court of Appeal in the case of John Mburu v Consolidated Bank of Kenya [2018] eKLR made reference to the case of D&C Builders Vs. Sidney Rees [1966] 2 QB 617 where Lord Denning, M. R. stated that:

> "It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties."

30. Applying the above principles espoused in the cited cases to this case, the appellant herein sought the extension of the lease agreement between himself and the respondent which request was approved by the respondent on the conditions set out by the respondent specifically that the rent increases to Kshs. 150,000 and subsequently, the appellant continued occupation of the suit premises without raising any issue with the stipulated condition.

31. In my humble view, the appellant's continued occupation of the suit premises based on his request and the conditions attached to the extension created an implied lease agreement between himself and the respondent and he is thus estopped from denying existence of the extended lease and the terms thereof.

32. In the circumstances, I find no error in the trial court's finding that there indeed existed a new lease agreement as between the appellant and respondent.

b. Whether the appellant had rental arrear and whether the counterclaim was proved on a balance of probabilities

33. It was the uncontroverted evidence of the respondent that as at 15th May 2015, the appellant had unpaid rental arrears of Kshs. 1,085,000 to which, following the actions of the auctioneers distressing for rent, the appellant settled Kshs. 460,000 leaving a balance of Kshs. 635,000. In his counterclaim 25th June 2015, the respondent also sought Kshs. 785,000 from the appellant being the total rental arrears due.

34. I find no reason to depart from the finding of the trial court that indeed the appellant was in rental arrears and that the respondent proved on a balance of probabilities that she was owed the sum claimed.

c. On whether the costs of repairs carried out by the appellant were to be offset against the rent due

35. The respondent relied on clauses 1(iv), (v), (vi), (vii) and (xxii) of the lease agreement which place the costs of repairs of the suit premises upon the appellant.

36. It is trite law that parties are bound by the terms of their contract and that a court of law cannot rewrite a contract between parties unless fraud, mistake, misrepresentation or unfair bargain is apparent. The

appellant having agreed to the terms of the lease agreement dated 1st October 2013 on the repairs to be effected by him to the premises, was thus bound by the terms of that agreement. The appellant could thus not escape from effecting the said repairs.

37. Furthermore, the aforementioned lease agreement did not provide for the offsetting of repair costs from rent due. Had the parties intended to have this in the lease agreement, nothing could have been easier than to include it. I thus find no reason to interfere with the trial court's holding on this issue

> d.Finally, on whether the appellant was entitled to a permanent injunction against the respondent restraining the respondent from attaching the appellant's property in distress for recovery of the rental arrears

38. A permanent injunction fully determines the rights of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. Courts have the power to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.

39. The question in this case is whether there were any compelling factors that would warrant the granting a permanent injunction to the appellant?

40. It is not disputed that the appellant was in rental arrears to the respondent. Accordingly, it is my finding that this case does not fall within the category of clear-cut cases that can form a basis to grant a mandatory injunction as that would permanently prevent the respondent landlord from recovering rent arrears from the defaulting tenant, appellant herein.

41. I thus find that the trial court did not err in declining to grant the appellant the prayer for a permanent injunction.

42. The upshot of the above is that I find that the instant appeal lacks merit on all fours and I proceed to dismiss it with costs to the respondent assessed at Kshs 50,000 payable within 30 days of this judgment and in default, the respondent shall be at liberty to execute for recovery.

43. I so hold.

44. This file is closed and the lower court file to be returned.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 5TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE