



**Roam Eye Limited Company v Okundi (Civil Appeal E112 of 2023)
[2024] KEHC 7538 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E112 OF 2023
RE ABURILI, J
JUNE 20, 2024**

BETWEEN

ROAM EYE LIMITED COMPANY APPELLANT

AND

PHILIP O. OKUNDI RESPONDENT

*(An appeal arising out of the Judgment and Decree of the Honourable
D.O. Onyango in the Chief Magistrate's Court at Kisumu delivered
on the 5th July 2023 in Kisumu CMCC No. E042 of 2023)*

JUDGMENT

Introduction

1. The appellant Roam Eye Limited Company was sued by the respondent Phillip O. Okundi vide a plaint dated 17th July 2019 in which the respondent sought a declaration voiding the lease agreement made on 29th December 2019, an order of vacant possession of Kisumu Municipality Block 8/220 against the appellant as well as an order of eviction from the said premises against the appellant which eviction would be supervised by the OCS Central Police Station. The appellant filed a defence denying the respondent's claim and put him to strict proof thereof.
2. Vide a plaint dated 16th February 2023, Roam Access Ltd sued the respondent herein and another not before court seeking orders that the respondent's action in evicting it from Kisumu Municipality Block 8/220 was illegal and unlawful, an injunction restraining the respondent and his agents from interfering with its peaceful enjoyment of the suit property.
3. The two suits were consolidated by consent entered into by the advocates for the parties on the 12th April 2023, for purposes of hearing with the respondent herein becoming the plaintiff while Roam Access Ltd alias Roam Eye Ltd became the defendant.



4. In his impugned judgement, the trial magistrate found that there was no valid lease between the parties herein and as such, the court was left to ascertain the intention of the parties by examining all the circumstances surrounding their engagements. The trial court further held that the suit instituted by Roam Access Ltd was instituted without proper resolution of the directors and that the relationship between the respondent and appellant had broken down irretrievably and the only remedy was for the appellant to vacate the premises.
5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 14th July 2023 raising the following two main grounds of appeal:
 1. The learned honourable magistrate erred in law and in fact by granting an order for vacation of suit property despite finding, based on evidence, that there was no valid lease agreement between the parties and as such none of the parties can rely on the exhibited lease agreements to sustain their suits.
 2. That the trial magistrate erred in law and fact in misapprehending the issues raised by respective pleadings and testimonies hence reaching an erroneous decision.
6. Despite several notices, the respondent did not take part in this appeal. Only the appellant filed its submissions canvassing the appeal.

The Appellants' Submissions

7. The appellant submitted that upon finding that the lease agreement between the parties herein was not valid, the court ought to have proceeded to strike out the respondent's suit. It was submitted that this meant that the suit was dead and as such, nothing could arise from it.
8. The appellant relied on the case of *Patrick Tarzan Matu & Another v Nassim Shariff Abdulla & 2 Others* [2009] eKLR where Azangalala, J. (as he then was) struck out the plaintiff's case where he found the contract relied upon was in contravention of Section 3(3) of the *Law of Contract Act* and declined to entertain the claim for damages for breach of the contract.
9. Reliance was also placed on the case of *Silverbird Kenya Limited v Junction Ltd & 3 Others* [2013] eKLR wherein Hon. Justice J. Mutungi held inter alia that it mattered not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law as it did not satisfy the requirements of Section 3(3) of the *Law of Contract Act* thus the plaintiff's suit must fail for being in contravention of Section 3(3) of the *Law of Contract Act*, Cap 23 Laws of Kenya.
10. The appellant thus submitted that the instant appeal be allowed and the Judgment and decree of the Honourable trial Court issued on 5th July 2023 be set aside and in its place an order be made dismissing and or striking out the Respondent's suit; Kisumu CM's Court CMCC Case No. E.42 of 2023 with costs.

Analysis and Determination

11. As the first appellate Court, my role as set out in section 78 of the *Civil Procedure Act* is to revisit the evidence on record, reevaluate 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 nevertheless appreciates that an appellate Court 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).
12. I have considered the record herein. The testimony of PW1 for the respondent was that he owned the suit property and had entered into an agreement with the appellant on the 29th December 2019 for the lease of the suit property for 6 years at a monthly rent of Kshs. 173,643.75, that the appellant had failed to pay rent consistently and thus the respondent sought the orders of eviction against the appellant.
 13. The said lease agreement was produced by PW1 as exhibit and I note as the trial magistrate did that the signatures of the parties therein were not witnessed.
 14. Section 38 of that *Act* as amended by Section 55 of the *Land Laws (Amendment) Act* No. 28 of 2016 deals with the validity of a contract for sale of land. Section 38 (1) provides, in essence, that no suit shall be brought upon a contract for disposition of an interest in land unless the contract on which the suit is founded is in writing, is signed by all parties thereto and the signature of each party has been attested by a witness who was present when the contract was signed.
 15. Further, section 2 of the *Land Act* proceeds to define a disposition to include any sale, charge, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer and includes the disclaimer or the creation of an easement, a usufructuary right, or other servitude or any other interest in a land or a lease and any other act by the owner of land or under a lease where the owner's rights over that land or lease are affected or an agreement to undertake any of the dispositions.
 16. It is trite law that all transactions involving land must be in writing and to that extent, Section 3(3) of the *Law of Contract Act* provides that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless: -

 - (a) The contract upon which the suit is found-
 - (i) Is in writing
 - (ii) Is signed by all the parties thereto; and
 - (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”
 17. In the case of *Silverbird Kenya Limited supra*, Mutungi J stated *inter alia*:

“... Section 3(3) of the *Law of Contract Act* is indeed couched in mandatory terms and does in fact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff's suit must fail for being in contravention of Section 3(3) of the *Law of Contract Act*, Cap 23 Laws of Kenya.”
 18. See also the cases of *Rainald Schumacher v Aubrey Garth Monsey* [2008] eKLR, *Laikipia Mifugo Ranching Co. Ltd v Nanyuki Ranching Ltd* [2007] eKLR and *John Michael Wanjao v Alubala Abonayo Andambi* [2011] eKLR where the courts declined to enforce contracts which fell afoul of Section 3(3) of the *Law of Contract Act* and proceeded to strike out the suits for non-compliance thereof.
 19. The general rule is that Courts do not enforce contracts which are in contravention with statutes. In Nairobi Civil Appeal No. 165 of 2007 *D. Njogu & Company Advocates v National Bank of Kenya Limited* (2016) eKLR the Court of Appeal stated as follows:



23. Likewise we reiterate that any contract that contravenes a statute is illegal and the same is void ab initio and is therefore unenforceable.
20. The decision in the English Court of Appeal in *David Taylor & Son v Barnett Trading Co* [1953] 1 WLR is illustrative on the fate of contracts that are deemed illegal at formation. In that case, Barnett Trading Co agreed to sell steak to David Taylor for a period of 4 months at a particular price. The company failed to deliver and David sued for damages. At the date of entering into the contract, there was in place an order preventing the buying or selling of meat over a certain price. The contract exceeded that particular set price. The Court held that the contract was illegal at its formation and as such could not be enforced.
21. As stated above, the 'lease agreement' between the parties hereto was in violation of Section 38 (1) of the *Land Act* and Section 3 (3) of the *Law of Contract Act*. It was thus void ab initio and the court could not enforce it.
22. In the circumstances, it is my finding and holding that the trial court was right in declining the claim by the appellant herein and in ordering for the appellant to vacate the respondent's premises as the lease agreement relied on was *void ab initio* for non-compliance with the law.
23. As there is no tenancy agreement in place, and the respondent having voided the same, the question of payment of rent by the appellant for the period in occupation or distress for rent by the respondent does not arise. The appellant shall vacate the respondent's premises, in the event that it is still insitu, within 60 days of this judgment and in default, the respondent is at liberty to evict the appellant by removing the appellant's properties from the premises Kisumu Municipality Block 8/220 but without destroying the said properties, at the cost of the appellant.
24. I thus proceed to set aside the decision by the trial magistrate on payment of rent and distress for rent over a void lease agreement.
25. Each party to bear their own costs of this appeal as the respondent did not participate in these proceedings.
26. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

