**Jiwani v Muita & another (Civil Appeal E561 of 2022)**
**[2024] KEHC 9945 (KLR) (Civ) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9945 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E561 OF 2022**

**BM MUSYOKI, J**

**JULY 24, 2024**

**BETWEEN**

**MANSOOR JIWANI ..... APPELLANT**

**AND**

**ANNE MUITA ..... 1ST RESPONDENT**

**ATTA MUGO ..... 2ND RESPONDENT**

***(Being an appeal from judgement and decree of Honourable E.M. Kagoni PM dated 24-06-2022 in Milimani Chief Magistrate's Courts (Commercial Courts) commercial case number E730 of 2021)***

## JUDGMENT

1. In the Milimani Commercial Courts Chief Magistrate commercial case number E730 of 2021 the appellant had prayed for judgement against the respondents as follows;
   a. Kshs 400,000.00 rent deposit;
   b. Interest on (a) above at courts rates from March 2021; and
   c. Costs of this suit.
2. The appellant's claim was based on the fact that the appellant was a tenant in the 1st respondent's premises known as L.R. No. 30/1303. The tenancy agreement between the parties was terminated in January 2021. The appellant had paid Kshs 400,000.00 as security deposit for due performance of his obligations under the tenancy. The respondents admitted that the appellant was a tenant but they claimed that the deposit was liquidated to offset repair costs and auctioneer's charges which they had

incurred in recovery of rent arrears from the appellant. The court found that the appellant had come to court with unclean hands and dismissed the whole suit with costs to the respondents.

3. It is against the judgment of the court that the appellant has raised four grounds of appeal which I reproduce as follows;

    1. The Learned Magistrate erred in law and fact by failing to find that the appellant was entitled to refund of Kshs 400,000.00 rent deposit.

    2. The Learned Magistrate erred in law and fact by finding that the auctioneers' charges of Kshs 184,610 were calculated in accordance to the Auctioneers' Rules.

    3. The Learned Magistrate erred in law and fact and misdirected himself by finding that the respondent had proved the costs alleged to have been incurred in further renovation of the premises.

    4. The Learned Magistrate erred in law and fact and misdirected himself by failing to find that even after considering the sums alleged to have been utilised by the respondent, a balance of Kshs 72,290.00 was refundable to the appellant.

4. This is a first appeal. It is an established principle of law that a first appeal is in form of a re-hearing and the appellate court must re-examine and re-evaluate the evidence on record and come to its own independent conclusion always reminding itself that it did not have the advantage of taking the evidence of the or seeing the demeanour of the witnesses. In Ayoti Distributors Ltd v Erick Ergine Oduor t/a Health Consult Auctioneers Services (2024) KEHC 3880 (KLR) as in many other authorities, it was held that;

    > 'This being a first appeal, this court is under a duty to re-evaluate and re-assess evidence before the trial court and reach its own conclusion. It must however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of witnesses and hearing the evidence first hand.'

5. On the part of the appellant, only him testified. He told the court that the initial rent payable for the tenancy was Kshs 242,500.00 per month but after the corona virus ravaged the country, him and the 1st respondent agreed to reduce the rent to Kshs 200,000.00 from May 2020 until the tenancy was terminated. He had paid a deposit of Kshs 400,000.00 which was refundable upon termination of the tenancy less any costs of redecoration and compensation for any broken and/or missing items.

6. The appellant added that since the parties were not able to agree on renewal terms, he vacated the premises at the end of January 2021 and undertook to restore the premises to the condition it was in at the time of taking up the lease. He asked that the deposit be utilized to offset rent for December 2020 and January 2021 but the 1st respondent insisted that the appellant should pay the rent and restore the premises to its initial condition after which she would refund the deposit. He then settled rent for December 2020 and January 2021 and restored the premises to tenantable condition and handed over the premises on 9th March 2021 on which date the respondents confirmed to their satisfaction that the premises was in order except for a few items which he agreed to replace.

7. According to the appellant, he emailed the respondent on 9th March 2021 asking for samples of items he was to replace which was ignored until 17th March 2021 when the respondents started raising new issues and took position that before refunding the said deposit, they needed to apply part of the deposit to address the new issues. Some of the issues the appellant stated were new were payments to contractors to clean all bathrooms, laundry area and servant's quarters but according to him, they were in the same condition they were as at the time he took up the lease. He also claimed that staining of the sanitary

apparatus which was being raised by the respondents was caused by the dirty borehole water which the respondents provided his family with. The other new issues according to the appellant was the claim by the respondents that they would utilize the deposit to offset debt collector's costs which had been incurred in recovering rent arrears.

8. The appellant added that the debt collector's charges were unlawful as the act of engaging the collector was unlawful which he had to report to Muthangari police station vide occurrence book entry number 56/12/02/2021. The appellant insisted that he restored the premises to acceptable standards and was therefore entitled to the refund of the deposit. He produced a copy of the lease agreement dated 1-01-2020; copies of email correspondences between him and the respondents dated 7-08-2020, 5-01-2021, 16-02-2021, 17-02-2021, 19-02-2021 and 9-03-2021; copy of certificate under Section 106 of the *Evidence Act* and copies of the parties' advocates' letters dated 18-03-2021 and 25-03-2021.

9. In cross examination, the appellant confirmed that he was a tenant between February 2015 and February 2021. He also admitted that he accumulated rent of Kshs 1,923,100/= between December 2019 and July 2020 and that the landlady distressed for arrears and after he paid Kshs 478,600/=, the landlady levied distress for the balance. The distress according to him was slipped under the door by an auctioneer. He added that by the time he wanted to vacate in February 2021, he had accumulated arrears of Kshs 600,000/= because of which the landlady stopped cube movers from moving him out following which he sought help from Muthangari police station. He completed his evidence by saying that joint inspection was done on 9-03-2021. In re-examination, he confirmed that he vacated on 28-02-20203 and that the landlady was aware that he was vacating. He also said that he had no rent arrears by the time he was vacating.

10. The defendant called 3 witnesses. The first witness was one Tiberius Otieno Onyango. He described himself as a director of a debt collection company known as Brixx International Limited. He narrated that the company was instructed by the respondents to assist in debt collection of arrears of 1.4m from the appellant. He stated that he got a licenced auctioneer to levy distress and upon collection of the arrears, he informed the appellant. He said that on 8-07-2020 he received instructions from the 1st respondent to levy distress for rent for Kshs 1,444,450.00 against the appellant. He states in his recorded witness statement which he adopted that upon receipt of the instructions, he proceeded to the premises where he met the appellant and proceeded to make proclamation of household goods as well as three motor vehicles.

11. In cross examination, he said that his invoice was for Kshs 134,610/= which was settled by the 1st respondent after the appellant refused to settle. On 10-02-2021 he also received instructions from the 1st respondent to collect rent arrears of Kshs 600,000.00 and when they arrived at the premises accompanied by Vin Auctioneers, the plaintiff alerted police from Muthangari police station who came and upon explanation, the appellant confirmed that he was in arrears. According to him, the appellant negotiated for a grace period instead of his goods being proclaimed and he agreed with the 1st respondent that he will settle the arrears the following week and also agreed to settle the collection charges. According to him, the collection charges were 10% of the principal amount which they discounted to Kshs 50,000.00. The appellant refused to pay the collection charges and the same was settled by the 1st respondent. He stated that he forwarded the receipt to the lawyers and maintained that he did not conduct the distress and that they used an auctioneer to carry out the distress.

12. DW2 was the 1st respondent. She stated that she resided in the USA. She testified by adopting her statement dated 15-11-2021. She told the court that she was the registered owner of the premises. She also confirmed that the terms of the lease between her and the appellant were as narrated by the appellant. She added that during the time of the lease, the appellant serially defaulted in paying rent necessitating her to issue instructions for distress in July 2020 and February 2021. She stated that

between December 2019 and July 2020, the appellant accumulated rent arrears of Kshs 1,923,100.00. When she demanded payment, the appellant paid Kshs 478,650/= upon which she issued instructions to Vin Auctioneers to recover the balance of Kshs 1,444,450.00 vide letter dated 8-07-2020. She alleged that the appellant refused to pay auctioneers charges of Kshs 134,610.00 forcing her to pay and recover the same from rent deposit.

13. She added that between December 2020 and February 2021, the appellant accumulated arrears of Kshs 600,000.00 and on 10-02-2021, he attempted to vacate without paying the rent arrears but was stopped by the estate security. Upon being informed of the attempted vacation, she instructed Vin Auctioneers to levy distress for rent and the appellant negotiated to pay within a week's time and undertook to settled the auctioneer's debt collection charges instead of them proclaiming his goods. She said that she ended up settling the auctioneer's charges of Kshs 50,000.00 and recovered the same from the rent deposit. She confirmed that the appellant vacated the premises on 28-02-2021 but failed to restore the premises to the same good condition they were in at the time of commencement of the lease as provided in their lease agreement. According to her, the appellant painted the wooden surface with gloss paint instead of wood vanish and she had to engage a contractor to scrap off the paint and sand the wooden surface and apply wood vanish. She also had to engage a contractor to clean and restore utility facilities to tenantable condition. She added that she notified the appellant of all the expences amounting to Kshs 327,710.00.

14. DW2 produced lease agreement dated 1-02-2015; lease agreement dated 1-01-2020; email correspondence dated 6-04-2020, 5-04-2021, 6-02-2021, 8-02-2021, 10-02-2021 and 12-02-2021; copies of instructions letter to Vin Auctioneers dated 8-07-2020, proclamation notice dated 9-07-2020, invoice dated 22-07-2020 issued by Brixx International Limited, a receipt dated 22-02-2021 issued by Brixx International Limited, several photographs, a quotation dated 12-03-2021 and letters dated 1-02-2021, 3-02-2021, 4-02-2021, 18-03-2021 and 25-03-2021.

15. When she was cross examined, she confirmed that the appellant paid Kshs 400,000/= deposit and she could not tell whether the appellant had arrears by the time he vacated. She added that defendant's exhibit 4 (the instructions note and proclamation notice) was from Vin Auctioneers and receipt for Kshs 136,610/- was not issued by the auctioneers she had instructed.

16. Atta Mugo was the third defence witness. She told the court that she was the sister to the 1st respondent and her agent. She adopted her statement dated 16-11-2021. In cross examination, she confirmed that the appellant had paid a deposit of Kshs 400,000.00. She maintained that instructions for distress were issued to Vin Auctioneers but the receipts were not in their names. She said that Brixx International is related to Vin Auctioneers. She also stated that they did a hand over after the appellant vacated and that they spent Kshs 143,100/= to do renovations. She said that she subcontracted the renovations work because there was quite a lot of work but she did not have receipts for the cost. In re-examination she stated that there was a joint inspection and the appellant was notified of the repairs. She also stated that the repairs were done by a contractor who issued her with a receipt.

17. Form the above it is clear to me that the following is not in dispute;

    a. That the appellant had paid a refundable deposit of Kshs 400,000.00.

    b. The appellant had no rent arrears on the date he vacated.

    c. The 1st respondent was entitled to recover costs of restoring the premises to the condition it was in at the time of commencement of the lease.

18. In my considered view, what is in dispute is;

a. Whether the amounts charged for recovery of the rent arrears are justified and recoverable from the deposit;

b. Whether the repairs allegedly done by the respondents were actually done and if so for how much was it;

c. Depending on the answer to the above, what is due to the appellant?

19. In his judgment, the Honourable Magistrate stated that a sum of Kshs 134,610/= was rightly recovered from the deposit for being costs of recovering the rent arrears on the two occasions. In have noted that the judgment of the learned magistrate majorly analysed and critiqued the appellant's evidence. The magistrate failed to sufficiently interrogate, analyse and make any references to the evidence produced by the respondents. However, since this is a first appeal which is done in a form of a hearing, I take it on myself to analyse the evidence of all the parties in order to reach my own independent conclusion.

20. To me, once the appellant established that he had paid the security deposit and handed over the premises back to the respondents in tenantable condition, it was the duty of the respondent to rebut that evidence. It is notable that the respondents did not plead a set-off. However, that did not exempt them from disproving the appellant's claim. It is my finding that the magistrate should have at this point delved into interrogating and evaluating the evidence of the respondents in order to establish whether the same was enough defence to the appellant's claim. The magistrate failed to do so. He gave little attention to the veracity of the respondents' evidence and subsequently reached a conclusion that the appellant had come to court with unclean hands because he had in two occasions accumulated rent arrears.

21. The appellant may have had dirty hands when he defaulted but the time of consideration should have been the time he was seeking the court's intervention. In my view, the appellant had cleaned his hands or had his hands cleaned by the time he approached the seat of justice. I take position that, the trial court should have considered whether the alleged charges against the appellant's deposit were indeed properly and lawfully incurred.

22. The 1st respondent told the court that she instructed Vin Auctioneers to recover rent arrears on the two occasions. This is what she said in paragraph 7 of her statement dated 15-11-2021, 'I issued instructions for distress for rent for the remainder of Kshs 1,444,450.00 (copies of the instructions to Vin Auctioneers dated 8-07-2020 and proclamation notice dated 9-07-2002 are produced as documents number 4 in the defendant's list and bundle of documents).' The letter of instructions shows that it was addressed to Vin Auctioneers for attention of one Miss Wairimu. The proclamation notice shows the name of the auctioneer as Vincent Brian Okullu. The 1st respondent proceeds to say at paragraph 9 of her statement that; 'upon notification of this, I issued instructions to Vin Auctioneers to levy distress for rent.' The latter instructions were in respect of the 2nd distress which was to be carried out on 10-02-2021. In the whole statement, she does not indicate anywhere that she issued instructions to Brixx International Limited or DW1. The person named in the statement are Vin Auctioneers, Vincent Okullu and Miss Wairimu. These three did not testify in the matter.

23. DW3 told the trial court that when the appellant fell in arrears, the 1st respondent issued instructions for distress for rent and she proceeded to identify the same instructions letter and proclamation notice produced by the 1st respondent for the first distress. It is the same case for the 2nd distress where she said that it was the auctioneers who went to levy distress for rent. She does not mention Brixx International Limited anywhere in the process of recovery until when it comes to producing receipt for the alleged auctioneers' charges.

24. DW1 testified that on 8-07-2020, he received instructions from the 1st respondent to levy distress upon the appellant and in his own words which I quote; 'I proceeded to the premises where I met the plaintiff and proceeded to make a proclamation of household goods as well as three motor vehicles.' It was the same for the 2nd distress where he states that; 'on 10-02-2021, I received instructions from the 1st defendant to collect rent arrears of Kshs 600,000.00 and when we arrived at the premises accompanied by Vin Auctioneers, the plaintiff alerted police officers.'

25. DW1 is on record saying and admitting that he is not a licensed auctioneer. The respondents alleged that Brixx International Limited and Vin Auctioneers are related. DW1 who said that he was a director of Brixx International Limited did not talk of the kind of relationship they had with Vin Auctioneers. No evidence of the relationship was produced. No one from the auctioneer's firm was called to testify. Section 9(1) and (2) of the *Auctioneers Act* Chapter 526 of the Laws of Kenya provide that;

> '(1) No person shall, in Kenya, carry on the business of an auctioneer unless he holds a valid licence issued by the Board under this Act.
>
> (2) A person who contravenes the provisions of subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding two years, or both.'

26. Whatever relationship was there between Brixx International Limited and Vin Auctioneers could not extend to the function of the former acting as an auctioneer. Brixx International Limited could only issue instructions to an auctioneer if it was management agent of the 1st respondent. This was not the case in this matter. I have no doubt that the scenario in this case is the popular illegal operations we have in this country where people posing as debt collectors use legally registered entities like auctioneers and law enforcement agencies to intimidate people perceived to be debtors or trouble makers to accede to some demands. This is a practice which must be stopped as it is archaic and unacceptable in civilised societies.

27. It is my finding that the alleged proclamation done on 9-07-2019 was carried out by a unlicenced person who actually committed a criminal offence. From an illegal act, there comes nothing. That proclamation was therefore invalid and null and void and no legitimate fees or charges can accrue from such an action. The operation of the rule of law is core to our democracy and letting people collect debts through unlawful means can do nothing but bring anarchy, lawlessness and breaches of the peace. A court of law should not be seen to condone such acts.

28. About the second attempted distress, DW1 stated that he was accompanied by an auctioneer. That could have given the exercise some legitimacy. However, it is admitted that the auctioneer did not proclaim anything in which case no fees could accrue to them. Interestingly the fees were charged by Brixx International Limited who did no legitimate work. The auctioneer did not issue an invoice for the work done. I am alive to the fact that a party who disputes auctioneers charges should seek a forum for taxation or assessment of the auctioneer's charges. But that can only happen where there is a basis for charging the fees. There was no action taken by the auctioneer which would kick off the process of taxation or assessment of their charges.

29. In view of my finding above, I hold and find that the amount of Kshs 134,610.00 levied against the appellant was illegal and lacked any basis and the respondents were not entitled to recover it from the

deposit paid by the appellant. In so holding, I am guided by holding of the Court of Appeal in Kenya Airways Limited v Satwant Singh Flora (2013) eKLR where the court stated that;

> 'No person can claim any right or remedy whatsoever under an illegal transaction in which he/she has participated. The Court is bound to veto the enforcement of a contract once it knows that it is illegal whether that knowledge comes from the statement of the guilty party or from outside'.

30. I wish to add that this animal called debt collectors is not a product of any legislation. The charges they levy has no basis in law. An appointment of a debt collector is a contract between them and the appointing principal and cannot be loaded on the debtor. The principle of privity of contract will restrict their debt collection charges to payment by their principals.

31. Even if I were wrong on the above position, I am of the view that the doctrine of estoppel will apply against the respondents as far as recovering the debt collection charges from the appellant's deposit is concerned. In the parties' communication leading to the appellant's vacation from the premises, the respondent and their advocates did not allude to the recovery of the auctioneer's or debt collection costs. There were correspondences exchanged between the parties which clearly indicated that once the appellant repaired and redecorated the premises, his deposit will be refunded in full. From these correspondences, one cannot fail to notice that the only liability that was being attached to the deposit was the repairs and redecorations. I sample the communication as follows;

    a. There is an email from the 2nd respondent dated 7-08-2020 which forwarded the appellant's statement of account. This statement shows opening balance and rent. This was a month after the first distress. It did not make reference to the amount allegedly paid to the debt collector.

    b. There is an email dated 19-02-2021 from Tiberius Otieno (DW1) which was asking the appellant to pay three months' arrears after which his deposit will be refunded. I quote the relevant part thus; 'The landlady avers that the rent as per stipulations of the Lease ought to be paid on/by 5th day of every month. You note that you were in 3 months arrears. Now therefore, given that she did away with the penalties, please pay up the full rent of Kshs 400k for Jan-February 2021 and that your refund of the deposit will be made as soon as you handover the house in its original condition'.

    c. There is also email dated 19-02-2021 from the appellant to DW1 and 2nd respondent. In this email, the appellant states that he has arranged for the payment of 400,000/= which will be full and final settlement of all payment up to and including February 2021 and committing to repair the premises. This email was in response to the one referred to in 'b' above.

    d. On 1-02-2021, the advocates for the respondents wrote to the appellant and demanded payment of rent for December 2020 to February 2021 and penalties for late payment amounting to Kshs 882,500.00. There was no mention of debt collection charges. The penalties mentioned in the letter were written off if the email mentioned in 'b' above is anything to go by.

    e. The letters between the parties' advocates dated 3-02-2021, 4-02-2021, 18-03-2021 and 25-03-2021 are all silent on the issue of debt collection charges.

32. The above communication leads me to conclude that the issue of debt collection and auctioneer's charges were an afterthought. The respondents must have made the appellant believe that there were no charges except those that may arise from repairs and redecoration of the premises. The doctrine of estoppel comes into play in this issue. The respondents were estopped from claiming charges which

were not raised for months which would have made the appellant believe that there was no other debt. The respondent's actions on this issue fits into the holding of the Court of Appeal in Serah Njeri Mwobi vs John Kimani Njoroge (2013) eKLR, where it held that;

> 'In our understanding, the doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. 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.'

33. I now turn to the issue of the repair and redecoration of the premises. The appellant told the court that he carried out repairs and redecoration and handed over the house in tenantable condition as he found it. The 2nd respondent is on record stating that the handover and inspection was done. While analysing this issue, the trial court observed that, it is prudent that while acquiring vacant possession of any premises to record the state of the premises that a tenant intends on leasing. I totally agree with this position but add that it is also prudent that when the tenancy ends, there be a joint inspection and the check list upon entry be compared against the results of the joint inspection. A lessor who decides to carry out repairs after the tenant has vacated without a joint checklist also takes a risk of losing recovery of the costs of repairs.

34. It is a common ground that the appellant carried out repairs and redecoration. It was the respondents who were claiming that they did more repairs after the handover and the burden of proving that fact was on them. DW3 alluded to joint inspection and alleged that the appellant was informed of the repairs but there is no evidence to that effect. The photographs produced by the respondents as proof of the condition of the house are of no probative value. There is nothing in the said photographs to connect them to the house. There is no report of an architect or engineer or any relevant professional on the condition of the house before and after the appellant handed over and after the alleged repairs done by the respondents. The document dated 12-03-2021 produced by the respondent as document 8 is not a receipt for payment but a quotation which does not proof that the contractor was engaged for the exercise. If the document was a receipt, it would not have indicated at the bottom as it has that '70% deposit on commencement of assignment'. There are no receipts for payment of the contractor. That document is not enough proof as far as repairs are concerned. It is therefore my finding that the respondents did not prove that they carried out further repairs to the tune of Kshs 143,100.00 as alleged.

35. Assuming that there was proof of the repairs and the debt collector's fees were proved, that would bring the total amount recoverable from the deposit to Kshs 327,710.00. It was admitted that the appellant had paid a deposit of Kshs 400,000.00. This would leave a balance of Kshs 72,290.00 payable to the appellant. In that case, the trial court should have entered judgment for the appellant for the remainder of Kshs 72,290.00. Instead, it dismissed the appellant's case in its entirety and I find that to have been unjustifiable.

36. It is my conclusion that this appeal is merited. However, the 2nd respondent was an agent of a known and disclosed principal and there is no evidence that she received the deposit of Kshs 400,000.00 from the appellant. I do therefore allow the appeal in the following terms;

    a. The judgment of the trial court in Chief Magistrate's Court at Milimani Commercial Courts commercial suit number E730 of 2021 dated 24-06-2022 is hereby set aside and substituted for an order entering judgment for the appellant against the 1st respondent for a sum of Kshs 400,000.00 plus interest at court rates.

b. The interest on the decretal sum shall be calculated from the date of filing the suit in the subordinate court until payment in full.

c. The appellant shall have the costs of this appeal and the costs of the suit in the lower court.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**