Sadique v Buru (Civil Appeal E386 of 2022)
[2024] KEHC 10652 (KLR) (Civ) (11 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10652 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E386 OF 2022

RC RUTTO, J

SEPTEMBER 11, 2024

BETWEEN

AFZAL MAJOTHY SADIQUE ..... APPELLANT

AND

FRIDAH WAMBUI BURU ..... RESPONDENT

(Being an appeal from the judgment and decree of the Milimani Small Claims Court delivered by Hon.C. A Okumu (RM & Adjudicator) on 23rd May, 2022 in Nairobi SCCC No. E1305 of 2022)

JUDGMENT

Background

1. The Appellant, aggrieved by the decision of the Small Claims Court in SCCC No. E1305 of 2022 dated 23rd May 2022 lodged this appeal seeking to set it aside. The Appellant also seek that the Respondent suit in Nairobi SCCC No. E1305 of 2022 be dismissed, and costs of the appeal and in the Small Claims Court be granted to him.

2. In the Small Claims Court, the respondent by a Statement of Claim dated 10th March 2022, averred that on 20th July 2021, she entered into a verbal agreement with the Appellant regarding a Landlord-Tenant relationship for a godown. That she proceeded to pay a deposit of Kshs 140,000 to the appellant who issued an official receipt. However, no tenancy agreement was finalized, nor did she take possession of the godown. The Respondent sought judgment in the sum of Kshs 140,000 against the Appellant, alongside costs of the suit and interest.

3. The appellant by way of a response dated 21st March 2022, stated that the respondent owes him Kshs 55,000. This amount represents unremitted money and/or rent that was left with the respondent by her former business partner who was also the appellant's client, Mike Myukuri Watitwa. He further

stated that while a tenancy agreement was prepared, it was never signed by the respondent, who had paid a deposit of Kshs 140,000. The appellant also stated that the premises were left unoccupied and available for occupation hence by a letter dated 12th October 2021, he demanded rent payment for the month of October, but the respondent did not make the payment.

4. The appellant also contended that, the respondent had been a business partner with Mike, she was well aware of the rent payment obligations as well as the procedures for issuing notice to vacate or terminate the tenancy. He thus claimed that even in the absence of a signed agreement, which the respondent declined to execute, Kshs 70,000 was used for rent, and the balance was intended as payment in lieu of notice.

5. During the hearing, the respondent called one witness, while the appellant three witnesses testified.

6. Upon taking evidence of the witnesses, the trial court entered judgment in favor of the respondent in the following terms;

    i. Judgment in the sum of Kshs 140, 000/=

    ii. The counterclaim against the Claimant by the Respondent for Kshs 55, 000/= is dismissed.

    iii. Costs of the claim

    iv. Interest at court rates from the date of filing suit until payment in full.

The Appeal

7. Being aggrieved by the said decision, the appellant filed a memorandum of appeal dated 9th June, 2022 setting out seven (7) grounds of appeal as follows: -

    i. That the Honourable court erred in law and in fact in reaching a conclusion that there was a counteroffer by the Respondent, which amounted to a second Tenancy Agreement between the Appellant and the Respondent and that the alleged counteroffer acted as termination of the initial Tenancy Agreement between the Appellant and the Respondent.

    ii. That the Honourable court erred in law and in fact by misinterpreting and misdirecting itself in finding that the Tenancy Agreement between the Appellant and the respondent began in the month of July, 2021 instead of 1st October 2021 after the tenancy agreement with the previous tenant had ended.

    iii. That the Honourable court erred in law and in fact by reaching a finding that the appellant and the respondent entered into two different Tenancy Agreements instead of one.

    iv. That the Honourable court erred in law and fact in reaching the conclusion that the Tenancy Agreement between the appellant and the respondent was to take effect upon the respondent taking possession of the premises.

    v. That the Honourable court erred in law and fact in considering and relying on the Claimant's evidence of increase of rent from Kshs 70, 000/= to Kshs 80, 000/= despite the Claimant having not pleaded the same in her pleadings and/or proven the said allegation.

    vi. That the Honorable court erred in law and in fact in failing to consider the provision of Land and Tenant (shops, hotels and catering establishments as Tenant) Act on who is a tenant.

    vii. That the Honourable court erred in law and in fact in failing to consider the provisions of Section 57 of the *Land Act* on periodic tenancy.

8. Reasons whereof, the appellant prayed for the following reliefs: -

   i. That the appeal be allowed.

   ii. That the judgment of 23rd May, 2022 delivered by Hon. C. A Okumu be quashed and set aside in its entirety.

   iii. That the claim by the Respondent filed in the Small Claims court be dismissed and the counterclaim filed in the Small Claims Court by the Appellant be allowed.

   iv. That the Appellant be allowed costs of the appeal and the claim before the Small Claims court.

9. The appeal was directed to be canvassed by way of written submissions. The appellant submissions are dated 10th June 2024 while the respondents are dated 19th June 2024

Appellant Submissions

10. The appellant submitted that this appeal is merited and ought to be allowed as prayed. In his submissions, the appellant submitted on grounds 1 and 3; ground 5 and ground 6 and 7 of the Memorandum of appeal hence the presumption is that grounds 2 and 4 of the appeal were abandoned.

11. The appellant urged the court to re-evaluate and re-asses the evidence placed before the trial court and come up with its own findings since this was a first appeal. To that extent, reliance is made on the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* (1968)EA123.

12. The appellant faulted the trial court for reaching a conclusion that the appellant and respondent entered into two different tenancy agreements instead of one. It was argued that the finding that there was a counteroffer by the appellant which amounted to a second tenancy agreement and acted as termination of the initial tenancy was erroneous.

13. Further the appellant submitted that when it came to the alleged second oral contract of kshs 80,000/- the court seemed to deviate from the three principles of establishing a valid and enforceable contract. That the respondent indicated that she rejected the appellant counter offer to increase the rent to kshs 80,000/- . This clearly demonstrated lack of mutual agreement preventing the formation of another valid and enforceable contract. That no additional consideration was paid to the appellant. The appellant relied upon the case of *Rose and Frank Co v JR Cromptoon & Bros Ltd* (19923) 2KB 293. They urged the court to find that there was only one tenancy agreement between the appellant and the respondent for a monthly rent of kshs.70,000/- and the same was never repudiated.

14. On ground 5 of the appeal it was submitted that the trial court erred in considering and relying on the respondent's evidence of increase of rent from kshs.70,000/- to kshs 80,000/- despite the respondent having not pleaded the same in her pleadings and/or proven the said allegations. Reliance was placed on the case of *Independent Electoral and Bounderies Commission & Another v Stephen Mutinda Mule & 3 others* (2014) eKLR and *Law Society of Kenya v Hillary Mutayambai Inspector General National Police Service & 4 others; Kenya National Human Rights & 3 others (interested parties)*(2020) eKLR to urge that parties are bound by their pleadings and should not depart from them.

15. They urged that the trial court significantly erred in law and fact by relying on such evidence, which should have been disregarded, in reaching its determination.

16. On grounds 6 and 7 it was submitted that the trial court erred in fact and law in failing to consider the provision of the Landlord and Tenant (shops, hotels, and catering establishment a tent) Act on who is a tenant and section 57 of the *Land Act* on periodic tenancy. They urged the court to find that based on the established tenancy agreement between the appellant and the respondent, it was safer to

say that the respondent was a tenant. Reference was made to the case of *Ukwala Supermarket (Eldoret) Limited v Amritral Sojpar Shah Wholesalers Limited* (2017)eKLR; and *Ram International Limited v Maasai Mara University* (2021) eKLR.

17. They urged that the trial court failed to appreciate that the relationship between the appellant and the respondent was periodic tenancy and could only be terminated by either party giving notice of not less than the period of the tenancy as per the provisions of section 57(4) of the *Land Act* being one month.

18. The appellant urged the court to find that the appeal is merited and allow it as prayed.

Respondent's submissions

19. The respondent summited that the claim was one seeking a refund for rent deposit of kshs 140,000/- paid for a godown, together with costs and interest. That it was confirmed that they entered into an oral agreement for the lease of a godown; the terms of the proposed tenancy were not in dispute; that they paid kshs.140.000/- and were issued with a receipt.

20. The respondent submitted that the trial court did not err in law and fact in entering judgment in her favour since she did not owe the appellant any money for the month of October because she never took possession of the godown.

21. It was her further submission that they did not agree on the new terms of tenancy whereby the appellant made another offer increasing the monthly rent for the month of October from kshs 70,000/- to kshs 80,000 hence the appellant was not entitled to utilize the funds as he did.

22. They urged the court to find that this appeal lacks merit and it be dismissed with costs.

Analysis and Determination

23. To begin with, the duty of this court as the appellate court is well prescribed under Section 38 of the *Small Claims Court Act* (the Act) which limits the jurisdiction of this court to matters of law only. Section 38 of the Act provides that:

    1. A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.

    2. An appeal from any decision or order referred to in subsection (1) shall be final."

24. What constitutes a point of law has been settled. In the case of *J N & 5 Others - v- Board of Management, St. G School Nairobi & Another* [2017] eKLR, in addressing a point of law and a point of fact, Justice Mativo stated thus:

> " In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.
>
> In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

25. I further make reference to the Court of Appeal decision in the case of *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR where the court in addressing the question whether a memorandum of appeal on a second appeal raised factual issues and the distinction between a matter of fact and matter of law, observed that; -

> "One of the best expositions on the distinction between the two is to be found in the judgment of Denning J in the English case of *Bracegirdle V. Oxley* (2) [1947] 1 ALL E.R. 126 at p 130;
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> "The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."

26. I have done a thorough examination of the grounds of appeal as it appears in the Memorandum of Appeal dated 9th June, 2024 and the submission by parties. Based on this, I must first start by dispelling the appellant's notion that this being a first appeal this court has jurisdiction to re-evaluate, re-asses the evidence placed before the trial court and come up with its own findings as was held in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* (1968)EA123.

27. I must state that the jurisdiction of this court with regards to appeals from the small claims court is well prescribed under section 38 of the Act which limits it to matters of law only. Consequently, I will only address myself to matters of law.

28. An analysis of the memorandum of appeal reveals that the appellant contests the finding of the small claim court that there were two oral contracts. The first contract involved the payment of Kshs. 140,000 as rent and deposit, while the second was a counter offer of Kshs. 80,000 as rent which was rejected by the respondent. Based on this reasoning, the court determined that the appellant was obligated to refund the Kshs. 140,000/- paid to him since the respondent did not take possession of the premises having rejecting the counter-offer.

29. Thus, this appeal primarily rests on whether the trial court arrived at the right conclusion based on the facts presented. The evidence presented before the court was that the appellant, who is a landlord received Kshs. 140,000/- from the respondent for lease of a godown in the month of October 2021. The respondent advanced that she did not take possession of the godown because the initial rent was Kshs. 70,000 but the appellant increased the rent to Kshs. 80,000 which she could not manage. It's on the basis of that, that the trial court found that the increase of rent to Kshs. 80,000 was a counter-offer which was rejected by the respondent. The question therefore is whether the trial court correctly arrived at that conclusion.

30. *Chitty on Contracts*, 24th edition, Vol.1 at page 21, paragraph 41 states that-

> "In order to decide whether the parties have reached an agreement, it is usual to inquire whether there has been a definite offer by one party and an acceptance of that offer by the other. In answering this question, the courts apply an objective test: if the parties have to all outward appearances agreed in the same terms upon the same subject matter neither can generally deny that he intended to agree."

31. From the evidence on record, the respondent paid Kshs. 140,000, which amounts to a rent of Kshs. 70,000 per month. However, the appellant sought rent at the rate of Kshs. 80,000 per month. This indicates that there was no meeting of mind between the two parties regarding the rent amount. Although the respondent paid Kshs. 140,000, had they taken possession of the premises, it would have implied acceptance of the offer of Kshs. 80,000 as the monthly rent for the godown.

32. The trial court therefore correctly reasoned that the offer of Kshs. 80,000 constituted a counter-offer, which was ultimately rejected by the respondent. In the case of *Hyde v Wrench* (1840) 49 ER 132, the court noted that, "a counter-offer amounts to a rejection of the offer, and so, operates to bring it to an end." Consequently, without acceptance of the counteroffer, any existing relationship between the parties was terminated. Thus, the appellant was obligated to refund the amount of money received from the respondent.

33. The Appellant also contests that the trial court erred in failing to consider the provisions of the Landlord and Tenant (Shops, hotels and catering establishments a tenant) Act on who a tenant is and further, to consider the provisions of Section 57 of the *Land Act* on periodic tenancy. This court notes that the claim in the trial court was for contract for money which falls under the purview of Section 12 (1) of the *Small Claims Act* which provides that:-

> 1. Subject to this *Act*, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—
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> a. a contract for sale and supply of goods or services;
>
> b. a contract relating to money held and received;
>
> c. liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
>
> d. compensation for personal injuries; and
>
> e. set-off and counterclaim under any contract.

34. This claim, having been brought within the confines of Section 12(1) of the *Small Claims Court Act*, cannot encompass provisions related to a *Landlord and Tenant (Shops, hotels and catering establishments a tenant) Act* at the appellate level. Be it as it may be, the Landlord and Tenant (Shops, hotels and catering establishments a tenant) Act is a self-executing Act, with clear provisions on how disputes arising from its implementation ought to be addressed. Notably, Section 11 of the Landlord and Tenant (Shops, hotels and catering establishments a tenant) Act provides for the establishment of a Tribunal to deal with disputes arising out of the implementation of the Act, Section 12 sets out the powers of the Act while section 15 provides for the appeal mechanisms for any party aggrieved by the decision of the Tribunal.

35. Therefore, the appellant cannot now fault the Small Claims Court for failing to encompass provisions of the Landlord and Tenant (Shops, hotels and catering establishments a tenant) Act on who a tenant

is and for failing to consider the provisions of Section 57 of the *Land Act* on periodic tenancy since it did not have jurisdiction to make a pronouncement on such a determination. Likewise, and based on the above, this court is not vested with the jurisdiction at the first instance to hear and determine such an issue on tenancy.

36. Based on the above, I make the following orders: -

    i. Judgment and Decree of the Honourable C.A. Okumu made on 23/5/2022 in Nairobi SCC No. E1305 of 2022 is upheld.

    ii. This Appel is dismissed with costs to the respondent.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 11TH DAY OF SEPTEMBER, 2024.

For Appellants:

For Respondent:

Court Assistant: