



REPUBLIC OF KENYA



KENYA LAW
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Juma & another (On behalf of the Estate of Juma Muchemi) v Odongo (Commercial Civil Suit 45 of 2018) [2023] KEHC 63 (KLR) (17 January 2023) (Judgment)

Neutral citation: [2023] KEHC 63 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CIVIL SUIT 45 OF 2018
FA OCHIENG, J
JANUARY 17, 2023**

BETWEEN

MARY JUMA 1ST PLAINTIFF

JOYCE MUCHEMI 2ND PLAINTIFF

ON BEHALF OF THE ESTATE OF JUMA MUCHEMI

AND

GRACE WAMBUI ODONGO DEFENDANT

JUDGMENT

The suit was filed by Juma Muchemi, who was the registered proprietor of the property LR No Kisumu Municipality/Block 8/143.

1. Following the demise of Juma Muchemi, he was substituted by his widow, Mary Juma and Joyce Muchemi.
2. Essentially, the claim is in respect of;
 - a. Rental Arrears of Kshs 4,551,166.84;
 - b. Cost of repairs to remedy the damage caused by the defendant – Kshs 7,587,260/=;
 - c. Aggravated Damages;
 - d. General Damages;
 - e. Costs of the suit; and
 - f. Interest on the sums awarded.



3. It is common ground that the Plaintiff leased to the Defendant, the suit property LR No Kisumu Municipality/Block 8/143. The Lease Agreement is dated July 4, 2008.
4. It was the Plaintiff's case that the Defendant defaulted in the payment of rent, resulting in the Plaintiff levying distress for the rental arrears.
5. The Defendant asserted that although the Plaintiff collected rents from her, the Plaintiff failed to issue Electronic Tax Receipts to the Defendant.
6. According to the Defendant, the failure of the Plaintiff, to issue ETR had disintitiled the Defendant from claiming 'the output as a benefit for her.'
7. Secondly, whilst the Defendant admitted that the Lease Agreement had a provision for rent to be paid quarterly, she told the Court that the parties had varied that provision, through an oral agreement.
8. Thirdly, the Defendant told the Court that when the Plaintiff levied distress for rent, the Defendant instituted proceedings at the Chief Magistrate's Court, Kisumu. The said case is Kisumu CMCC No 129 of 2013.
9. As that case was still pending when this case was instituted, the Defendant submitted that this case was subjudice.
10. The Court is of the view that the issue as to whether or not this case was subjudice must be determined first. I so find because if the rule was applicable to the circumstances prevailing herein, the Court would be barred from trying this case, if the issues herein were pending determination in the case which had been filed earlier.
11. It is well settled that the subjudice rule was formulated to stop the filing of a multiplicity of suits between the same parties, in respect to the same subject matter.
12. The rule is intended to prevent the courts from simultaneously entertaining parallel sets of litigation, because otherwise there could arise a real possibility of contradictory decisions by the two or more courts; which could bring disrepute to the courts.
13. There can be no justification in having two cases running parallel to each other, when the parties in the said cases are the same, and when the cases are in respect of the same subject matter.
14. Pursuant to Section 6 of the *Civil Procedure Act*;

' No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigation under the same title, where such suit or proceeding is pending in the same or other Court, having jurisdiction in Kenya to grant the relief claimed.'
15. In this case, the case that was filed at the Chief Magistrate's Court was later transferred to the Business Premises Tribunal.
16. Thereafter, the tenancy agreement came to an end, through effluxion of time.
17. The Defendant vacated the suit property.
18. In the circumstances, the Business Premises Tribunal ceased to have jurisdiction to hear and determine the case.



19. Accordingly, the subjudice rule does not come into play in this case.
20. In any event, I think that when a party invokes the subjudice rule in any proceedings, it is important that that issue be determined at the earliest opportunity. It defies logic to have the parties give evidence during the trial, and then re-visit the subjudice rule, in trying to stop the proceedings.
21. I will now pay attention to the evidence tendered and the submissions made by the parties.
22. It was an express term of the lease that rent was payable quarterly. Secondly, the tenant covenanted;
 - a) To pay the Lessor the rent hereby reserved together with 16% VAT in advance, clear of all deductions whatsoever.'
23. Documents speak for themselves. Therefore, when the Defendant asserted that the express letter of the lease was varied by an oral agreement, she had the onus to provide proof of the alleged variation.
24. The Defendant told the Court that from the outset, the suit property was in a sorry state. Therefore, there was need to renovate and also to refurbish it, so as to make it fit for use as a guest-house.
25. If the situation was so obvious, as stated by the Defendant, I find it strange that the Defendant did not incorporate into the Lease Agreement, the terms of the alleged variation.
26. But I also note that in 2013, the Defendant put together a Bill of Quantities. She attributed the said Bill of Quantities to the need to provide evidence to the landlord, to prove the amount of money which she had utilized when she converted the property into a guest-house.
27. The Plaintiff thereafter put together a separate Bills of Quantities. The detailed document was prepared by Marks & Ashton Consultants, and it is dated February 17, 2014.
28. The subject matter of the document was;
 - ' Alterations & Refurbishment of Classic Hotel, Kisumu for James Juma Muchemmi.'
29. In my understanding, work that was being tendered for was not limited to the necessary repairs, to restore the property to the state that it was in earlier. It does appear that the Plaintiff wished to carry out some alterations and also some refurbishment.
30. In the absence of a clear delineation of the work required for the purposes of restoration of the property, the Court is unable to make an informed decision about the value of the work which was in respect to alterations or refurbishment.
31. Meanwhile, as regards the Bills of Quantities which Eston Consultants prepared in March 2013, I note that the same was in respect to the;
 - ' Renovation and Extension to Classic Guest House.'
32. The consultants gave the 'Total Cost Estimate as Kshs 7,587,260.
33. In my considered opinion, the cost of the work which the Defendant had already carried out in 2008, should not be the subject of an estimate in 2013. The Defendant ought to have provided proof of the actual expenditure she had incurred when she undertook work on the suit property.
34. I find that the Defendant failed to prove that she had spent Kshs 7,587,260/= when restructuring the suit property into a guest-house, in 2008.



35. The Defendant told the Court that upon the determination of the lease, she removed all the renovations which she had done on the property. It was her case that she was entitled to remove the renovations, so as to comply with the requirements set out in the lease; that the property be returned to the tenantable position that she had found the said property in.
36. From the observation of the photographs showing the status of the structures on the suit property, it is very clear that the Defendant had removed the renovations which she had earlier made.
37. It is clear that the removal of the said renovations was done in such a manner that the remaining structures were rugged. The fixtures and fittings appear to have been literally ripped-off.
38. The Defendant has submitted thus;

' The defendant was therefore entitled, as per the lease, to remove the constructions she had carried out on the premises and return the same in a position which is tenantable, despite having gotten in when the same had been vandalized during the post-election violence.'
39. The photographs exhibited by the Plaintiff show a vandalized property. The said property was definitely not tenantable, in the state in which the Defendant left it.
40. Even if the Defendant had earlier carried out renovations to the premises, when she first entered therein, she later removed the thing which she had brought on board. Therefore, the Defendant cannot have any further or other claim or counter-claim against the Plaintiff.
41. Meanwhile, the Plaintiff would definitely have had to incur considerable expenditure to render the premises tenantable.
42. The actual cost of the repairs required is a Special Damage, which ought to have been pleaded and then specifically proved.
43. I find that although the claim was pleaded, the Plaintiff did not prove that she had incurred the 'heavy expenses amounting to Kshs 7,587,260/= '.
44. Similarly, the Plaintiff did not specifically prove that the Defendant owed the rental arrears amounting to Kshs 4,551,166.84, which was claimed in the Plaintiff.
45. The claim for rental arrears was said to be inclusive of interest. However, the Plaintiff did not satisfy the Court that she had any contractual foundation upon which she could load interest onto outstanding rents.
46. If a Plaintiff wishes to charge interest on rental arrears, he ought to incorporate that provision in the lease agreement.
47. When the lease agreement does not contain a provision mandating the landlord to charge interest on rental arrears, the Plaintiff's claim for interest can only be entertained by the Court as a part of the General Damages.
48. Just like the Defendant cannot read into the written lease agreement, the alleged oral variation to the terms of the said lease; so too, the Plaintiff cannot read into the written lease agreement an unwritten provision that would enable her to charge interest on rental arrears.
49. By her own admission, as contained in the documents prepared by James Nganga, the Defendant owed Kshs 830,844/= as at April 14, 2013.
50. I therefore enter judgment in favour of the Plaintiff for the unpaid rent of Kshs 830,844/=.



51. I find that the ferocity with which the Defendant ripped-off the fixtures and fittings was clear evidence of malice on her part. Accordingly, I find that the Plaintiff is entitled to exemplary damages, due to the oppressive manner in which she had acted. I therefore award exemplary damages in favour of the Plaintiff, in order to punish the Defendant for her conduct, whilst providing some compensation to the Plaintiff.
52. The said exemplary damages are assessed in the sum of Kshs 2,000,000/=.
53. In the result, I enter judgment in favour of the Plaintiff for;
- a. Unpaid Rent - Shs 830,844
 - b. Exemplary Damages - Shs 2,000,000
 - c. Costs of the suit
 - d. Interest on (a) above at Court rates, from April 14, 2013 until payment in full.
 - e. Interest on (b) above at Court rates, from the date of judgment.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF JANUARY 2023.

FRED A. OCHIENG

JUDGE

