Guinesse Construction & Housing Co Ltd v Hemed t/a Ghaniya Petrol Station (Civil Appeal 29 of 2009) [2023] KEHC 24565 (KLR) (5 May 2023) (Judgment)

Neutral citation: [2023] KEHC 24565 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 29 OF 2009

MN MWANGI, J

MAY 5, 2023

BETWEEN

GUINESSE CONSTRUCTION & HOUSING CO LTD ..... APPELLANT

AND

SAID HASSAN HEMED T/A GHANIYA PETROL STATION ..... RESPONDENT

(An Appeal from the entire Judgment and decree of Hon. P. Kiama, Resident Magistrate, delivered on 3rd February, 2009 in Kilifi SRMCC No. 629 of 2004)

JUDGMENT

1. The suit against the appellant in the lower Court was that sometime in the month of October, 2003, the respondent retained the appellant as his agent to apply for and collect the rent due to the respondent from his residential and office properties in Kilifi district and duly to account to the respondent. In turn, the respondent agreed to pay the appellant a commission of five percent on the amount so collected. The respondent averred that it was an implied term of the agreement that it was the duty of the appellant to take all reasonable and proper steps and to exercise all due diligence to collect the said rent and to render a true and full account of all such debts collected by it.

2. It was stated by the respondent that the appellant from time to time collected rent due to the respondent but in breach of the said agreement and the terms thereof, it failed and/or refused to render a true or full account of all such rent collected and that it failed to take all reasonable or proper steps to collect the said rent or to exercise all due diligence and as a result, the respondent lost payment of the said rent or part thereof and has suffered loss and damages.

3. The appellant filed an amended statement of defence dated 10th August, 2007 where it denied all the averments contained in the amended plaint. It further denied that there was an agreement between the parties with terms and conditions. It averred that it always provided the full statement of accounts and it forwarded the rent for the period of October 2003 to March 2004 to V. N. Okata & Company

Advocates vide registered post, which amounts it had received from the tenant. In the said amended defence, the appellant stated that the tenant who was also the respondent's lawyer undertook to pay the outstanding rent from April 2004 to October 2004 amounting to Kshs. 70,000/= directly to the respondent as per his letter dated 9th November, 2004.

4. The appellant averred that the letter from the respondent did not give it any powers to take any action against the tenant unless specifically authorized in writing. The appellant contended that this was demonstrated severally whenever it intended to take action and the respondent would stop it from further action. The appellant gave an instance when it gave the tenant notice to vacate on 8th March, 2003, which notice was duly accepted by the tenant but the respondent intervened and decided to retain the said tenant.

5. In the lower Court, Judgment was entered for the respondent against the appellant for Kshs. 110,000/= all inclusive with interest and costs. Being dissatisfied with the said Judgment, on 5th March, 2009, the appellant filed a Memorandum of Appeal dated 3rd March, 2009 raising the following grounds of appeal-

    i. That the learned Magistrate erred in law and fact in allowing prayer (b) of the amended plaint when no particulars for the claim had been provided therein;

    ii. That the learned Magistrate erred in law and fact in allowing prayer (b)of the amended plaint without first allowing prayer (a) of the amended plaint;

    iii. That the learned Magistrate erred in law and fact in not finding that all the proper, reasonable and diligent efforts to collect rent from the tenant had been made by the appellant;

    iv. That the learned Magistrate erred in law and fact in not finding that all the proper, reasonable and diligent efforts to collect rent from the tenant had been made by the appellant but the same had been frustrated by the actions of the respondent;

    v. That the learned Magistrate erred in law and fact in failing to hold that the proper accounts had been rendered to the respondent by the appellant;

    vi. That the learned Magistrate erred in law and fact in failing to hold that the suit was misconceived and misplaced as against the appellant;

    vii. That the learned Magistrate erred in law and fact in failing to hold that the only proper case ought to have been one for accounts;

    viii. That the learned Magistrate erred in law and fact in allowing prayer (b) of the amended plaint when there was no evidence to support such a finding;

    ix. That the learned Magistrate erred in law and fact in failing to appreciate the terms of the retainer or contract between the parties;

    x. That the learned Magistrate erred in law and fact in failing to hold that the terms of the contract had been frustrated by the actions of the respondent himself;

    xi. That the learned Magistrate erred in law and fact in holding the appellant liable for rent not collected by it;

xii. That the learned Magistrate erred in law and fact in failing to levy a prayer (b) of the amended plaint;

xiii. That the learned Magistrate erred in law and fact in allowing prayer (b) of the amended plaint when no steps had been taken by the plaintiff to mitigate his loss;

xiv. That the learned Magistrate erred in law and fact in allowing prayer (b) of the amended plaint when the contract between the parties had already been frustrated by the efforts of the respondent and a third party, the tenant;

xv. That the learned Magistrate erred in law and by failing to take into account the relationship between the respondent and the tenant;

xvi. That the learned Magistrate erred in law and fact in failing to appreciate the evidence tendered by the defendant;

xvii. That the learned Magistrate erred in law and fact in basing his findings on suppositions which were not supported by evidence;

xviii. That the learned Magistrate erred in law and fact in failing to address himself and to find merit in the documentary evidence adduced by the appellant;

xix. That the learned Magistrate erred in law and fact in failing to place due weight on the appellant's evidence;

xx. That the learned Magistrate erred in law and fact in failing to take into account the appellant's evidence or at all;

xxi. That the learned Magistrate erred in law and fact by not taking into account the submissions of the appellant;

xxii. That the learned Magistrate erred in law and fact in finding the appellant liable to the respondent; and

xxiii. That the learned Magistrate erred in law and fact in awarding costs to the respondent.

6. The appellant's prayer is for this Court to allow the appeal with costs, set aside the Judgment dated 3rd February, 2009 and substitute it with an order dismissing the respondent's suit thereof. In the alternative, the appellant prays for this Court to reassess the evidence and issue a ruling (sic) thereon, and in the alternative, for this case to be heard afresh before a different Magistrate.

7. The appeal herein was canvassed by way of written submissions. The appellant's submissions were filed on 25th September, 2018 by the law firm of Kanyi J & Company Advocates, whereas the respondent's submissions were filed by the law firm of Odhiambo S.E & Company Advocates on 20th November, 2020.

8. Mr. Maundu, learned Counsel for the appellant submitted that the suit filed in the lower Court had no basis since basic particulars such as how much rent was payable from each premises, and which months the respondent was claiming were missing. He stated that without the said information, the Court could not find that such rent was payable, or the number of months that rent was not paid or accounted for. He relied on the case of *Kenya Meat Commission v Raden* CA No. 40 of 1989 [1990] KLR 292, where it was held that the purpose of pleadings is to give the opposing party notice of what

claim he was coming to meet. The appellant's Counsel submitted that no attempt was made by the respondent to include the missing particulars in his pleadings. He stated that the appellant was able to demonstrate to the Trial Court the amount that was received from the tenant and what was remitted to the respondent or his Advocate or back to the tenant.

9. Mr. Maundu submitted that the respondent ought to have brought the suit against the tenant who would thereafter join the agent if the agent had failed to forward any money received from the tenant, since the tenant is the one who had failed to pay rent. He stated that the tenant vide a letter dated 9th November, 2004 admitted owing the respondent Kshs. 70,000/= and proceeded to make himself responsible for payment of the said sum being the arears for the months of April 2004 through to October, 2004.

10. The appellant's Counsel asserted that the suit against the appellant could only be one for accounts. He contended that the suit in the lower Court was defective as it did not disclose the basis for the amount of Kshs. 110,000/= in special damages. He argued that the tenant ought to have been called as a witness in the said case so as to assist the Court in ascertaining how much was paid. Mr. Maundu contended that in the absence of the tenant's testimony, the Court ought to have been guided by the appellant's accounts which showed that all monies collected were accounted for.

11. Mr. Maundu submitted that it is not disputed that the respondent retained the appellant to manage and collect rent from his Mtaani residential house and offer space in Kilifi occupied by a tenant, Chalalu Advocate, but the said retainer was not a contract and the terms of the said retainer can only be deduced from the retainer and nothing else. He stated that when there is a written document, the parties to the contract are not allowed to introduce other terms to the said document, but are bound by the terms of that document. He further stated that the terms of the said retainer are found in the authority to manage and collect rent dated 3rd June, 2007, which the respondent gave the appellant and that the latter did not breach any of the terms therein. The appellant's Counsel also stated that nothing in the normal construction and interpretation of the authority mandated the appellant to do any more than that reasonably expected of an estate agent to manage and collect rent.

12. The appellant's Counsel indicated that real estate managers collect rent, address tenants' problems and concerns, install new tenants and seek out the ones leaving, pay bills, but they do all this in close consultation with the landlords. He submitted that when the tenant defaulted in his obligation to pay rent, the appellant as a Manager had the option of issuing a notice and no more, since levying distress, eviction or suing the tenant for rent, required the landlord's express permission.

13. It was submitted by Mr. Maundu that the respondent interfered with the appellant's functions due to the fact that he had a special relationship with the tenant, which can be seen from the fact that the appellant issued the tenant with a notice to vacate the premises but the respondent advised the tenant to ignore the said notice as the same was issued without authority.

14. He stated that the appellant did render accounts for all the monies received from the tenant, being Kshs. 51,300/= which was forwarded to the respondent's lawyer, V. N Okata, who returned it to the appellant and thereafter the said money was collected by the tenant on 7th April, 2005 as can be seen from the signed voucher produced before the Trial Court. He stated that the issue of the signature being different was not addressed by way of evidence, as the respondent ought to have remitted the document to an Examiner. Mr. Maundu submitted that it was improper for the respondent to ask the Court to note difference in signing, as it was tantamount to asking the Court to become an expert witness in the case.

15. Mr. Odhiambo, learned Counsel for the respondent submitted that the respondent gave particulars of special damages as loss of rent which was pleaded at paragraph 6 of the amended plaint and that prayer (b) in the amended plaint could still be granted even if prayer (a) was not granted. He further submitted that the respondent's evidence was that the appellant received Kshs. 110,000/= from October, 2003 to November, 2004 which was eleven months at the rate of Kshs. 10,000/= per month. He stated that the appellant sent the respondent a cheque for Kshs. 41,800/= which was returned because the months for which rent was unpaid were more than the amount offered. He submitted that the Court properly considered the evidence and submissions by the parties herein in respect to the claim of Kshs. 110,000/= which the appellant admitted was outstanding from Mr. Chalalu.

16. The respondent's Counsel contended that the appellant had deliberately not included the respondent's submissions and some of the evidence that was produced before the Trial Court. He argued that the evidence given by the appellant with regard to rendering of proper accounts did not meet the required standard. Mr. Odhiambo asserted that the learned Magistrate correctly stated that the only statement of accounts which the appellant rendered was for June, 2003 to October, 2003 vide a letter dated 20th January, 2004, and that the accounts for the disputed period of October 2003 to November, 2004 were not rendered.

17. He contended that the respondent did not frustrate the appellant when carrying out its duties and that no evidence was tendered by the appellant to demonstrate that its efforts to collect rent were frustrated by the respondent. He stated that the Trial Court properly considered the evidence given by both the parties herein and held that the appellant was in breach of the contract between itself and the respondent. He further submitted that the relationship between the respondent and the tenant was not proved in any event and that the said relationship was not a matter for determination, as was held by the Trial Magistrate.

18. Mr. Odhiambo relied on the case of *Bwana Mohamed Bwana v Silwano Buko Banaya & 2 others* [2015] eKLR in support of the respondent's submissions herein.

Analysis and determination

19. I have re-examined the Record of Appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this Court is alive to its duty, which was stated in the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 as hereunder-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

20. An appellate Court will only interfere with a lower Court's judgment if the same is founded on wrong principles of fact and or law. This was the Court of Appeal's holding in *Mkube vs Nyamuro* [1983] LLR, 403-415, at 403 where JA, Kneller & Hannox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

21. The appellant is challenging the Trial Court's Judgment on the ground that the respondent did not prove its case to the required standard. It is not disputed that the appellant was managing the respondent's house and office occupied by one Chalalu Advocate (hereinafter referred to as the tenant), from some time in October 2003. It is also not disputed that the appellant had a duty to collect rent from the said Advocate on behalf of the respondent, and thereafter forward it to the respondent after deducting 5% of the total amount collected as his commission for his services.

22. PW1 testified that the appellant remitted the rent collected from the tenant for some time but later stopped and when the respondent inquired, the appellant stated that it was not getting any money from the tenant. The respondent's case was for arrears for eleven months from October 2003 to November 2004 totaling to Kshs. 110,000/=. PW1 stated that he returned a cheque of Kshs. 41,800/= to the appellant because it was less than what he believed the appellant owed him. He further stated that the appellant is the one who leased the office and the house to the tenant and he did not receive any money directly from the tenant. On cross-examination, PW1 confirmed that he received Kshs. 43,700/= as can be seen from the cash voucher dated 28th January, 2004 but the said rent was not for the year 2004 but for 2003.

23. Mr. Osoro testified as DW1. He stated that he was given work by the respondent to collect rent from his residential and office premises on 3rd June, 2002 for 5% commission of the rent collected. That he collected rent from 3rd September, 2003 up to 20th January, 2004 and the respondent signed for the same each time he collected the said rent from him as could be seen from the petty cash voucher signed by the respondent dated 28th January, 2004 produced as defence exhibit No. 4. He stated that the tenant was the respondent's Advocate and the authority given to him by the respondent restrained him as could be seen from the fact that when the tenant started defaulting in his rent payments, the appellant issued him with a notice to vacate on 8th March, 2003 but the tenant later informed the appellant over the phone that he could not move.

24. DW1 stated that when he received instructions to demand for Kshs. 110,000/= which had remained unpaid, the tenant paid and the appellant forwarded Kshs. 41,800/= to Okata & Company Advocates who had issued the instructions. The said witness stated that on 13th October, 2004 he received another letter from Okata & Company Advocates demanding for Kshs. 68,000/= and he asked the tenant to clarify to the respondent that he had not yet paid Kshs. 70,000 and that the respondent should collect the said amount directly from the tenant, which he did vide a letter dated 2nd November, 2004. It was DW1's evidence that on 8th November, 2004, Okata & Company Advocates returned the cheques the appellant had forwarded to them, and the same money was later released to the tenant who said that his property had been attached by Mwara Investments on the respondent's instructions hence he needed the money to prevent the sale.

25. The appeal herein is against the award of Kshs. 110,000/= in special damages made by the Trial Magistrate in favour of the respondent. Special damages must be strictly pleaded and proved. Upon perusal of the amended plaint dated 3rd July, 2007, the respondent particularized special damages as

Kshs. 110,000/= being loss of rent. In addition, he particularized breaches of agreement and duty and among them was loss of rent from October 2003 to the date of filing suit.

26. From the evidence on record, it is evident that the rent collected cumulatively from the residential and office premises was Kshs. 10,000/= per month. It is also evident from the authority given by the respondent to the appellant to manage the respondent's house, the appellant was authorized to collect rent and recover 5% of rent collected as his commission. Further, no action could be taken by the appellant without the respondent's written authority. Accordingly, the appellant's duty was to collect rent from the tenant and thereafter forward the same to the respondent.

27. The respondent submitted that the appellant owes him Kshs. 110,000/= being rent for the months of October 2003 to November 2004. It is however evident from the petty cash voucher signed by the respondent which was produced as defence exhibit No. 4, that rent collected by the appellant for the month of October 2003 was thereafter forwarded to the respondent.

28. It is not disputed that the appellant forwarded a cheque for the sum of Kshs. 41,800/= and another one for Kshs. 9,500/= being monies it had received from the tenant, but the respondent returned the said amounts on the basis that it was less than what was owed to him. The tenant acknowledged to have paid rent up to March 2004 and that he was in arrears of Kshs. 70,000/= for the rent of April 2004 to October 2004. This can be seen from the letter dated 8th March, 2003 addressed to the respondent. Looking at defence exhibit No. 14, it is clear that the said Kshs. 51,300.00 was returned to the tenant to enable him to settle with the Auctioneer who had attached his items.

29. It is trite that he who alleges must prove. In addition, the legal burden of proof lies upon the party who invokes the aid of the law. That is the purport of Section 107(1) of the *Evidence Act* which provides that-

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..."

30. Inasmuch as the respondent claims that the appellant owes him Kshs. 110,000/= being rent arrears for the months of October 2003 to November 2004, the respondent has not adduced any evidence to that effect. The Court of Appeal in *Capital Fish Limited v Kenya Power and Lighting Company Limited* [2016] eKLR addressed a similar situation where a party merely listed special damages without proof. The Court stated as follows-

> " The appellant apart from listing the alleged loss and damage, it did not... lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.

31. Similarly, in *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the Judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177), where he stated that:

> " ...Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."

32. The Trial Magistrate in his Judgment held that it was the appellant's duty as an agent of the respondent to collect rent on behalf of the respondent and render regular statements of account to the respondent, and that it was clear that the appellant could not account to the respondent the rent for the period from October 2003 to November 2004. It is my finding that the Trial Magistrate misapprehended the evidence on record in arriving at this conclusion since Kshs. 51,300/= being rent for the months of November 2003 to March, 2004 was forwarded to the respondent but he declined to receive the same, a fact which was not disputed by the respondent. The said cash was later released to the tenant. I find that the respondent's conduct of declining to receive the said Kshs. 51,300/= is questionable, thus he cannot rush to Court crying foul and alleging that the appellant did not render accounts and/or surrender the rent received from the tenant. It is my finding that the accounts for rent for the months of November 2003 to March 2004 were duly rendered by the appellant.

33. As regards the rent for the months of April 2004 to October 2004, the respondent during cross-examination confirmed that he received the tenant's letter dated 8th March, 2003 acknowledging that he was in arrears of Kshs, 70,000/= for the rent of April 2004 to October 2004. This Court's finding is that in view of the fact that the tenant acknowledged not to have paid rent for the said period of time, there was no way the appellant could have released money that he had not collected from the tenant. The appellant contended that all he could do was issue the tenant with a notice to vacate in the event of default, which he did but the tenant refused to vacate on the ground that he was the respondent's lawyer.

34. The letter issued by the respondent authorizing the appellant to collect rent indicated that no action could be taken by the latter without the respondent's written authority. In the absence of written proof by the respondent authorizing the appellant to take further steps other than issuing a notice to vacate, it cannot be said that the appellant did not discharge its duties pursuant to the authority letter dated 3rd June, 2002.

35. In light of the foregoing, and pursuant to the holding in the case of *Mkube vs Nyamuro* (*supra*), I find that the Trial Court's award of Kshs. 110,000/= all-inclusive with interest and costs, was not supported by any evidence. The said Magistrate therefore erred in law and fact in making the said award.

36. It is my finding that the appeal herein is merited. I hereby set aside the Trial Court's Judgment dated 3rd February, 2009 and substitute it with an order dismissing the respondent's suit with costs to the appellant. Costs of the appeal shall be borne by the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 5TH DAY OF MAY, 2023.

NJOKI MWANGI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR