



REPUBLIC OF KENYA



**Kejela v Jewar Holdings Limited (Civil Appeal E072 of 2021)  
[2023] KEHC 17282 (KLR) (Civ) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17282 (KLR)

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

**CIVIL**

**CIVIL APPEAL E072 OF 2021**

**DAS MAJANJA, J**

**MAY 12, 2023**

**BETWEEN**

**DIRISA NAGARA KEJELA ..... APPELLANT**

**AND**

**JEWAR HOLDINGS LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. D. Mbeja, PM date 1st February 2021 at the Nairobi Magistrates Court at Milimani in CMCC No. 10312 of 2018)*

**JUDGMENT**

1. The Subordinate Court allowed the Respondent's claim and entered judgment against the Appellant for ksh 325,000.00 thus precipitating this appeal.
2. By way of background, the Respondent ("the Landlord"), as an owner of Harrian Flats in Pangani Estate in Nairobi ("the suit premises") entered into a lease agreement on November 1, 2011 with the Appellant ("the Tenant") for payment of rent for House no A26 at ksh 15,000.00. The Landlord also had other occupants in the premises who paid a rent at a sum varying from ksh 14,000.00 to ksh 17,000.00 per month.
3. The Landlord's case before the trial court was that the Tenant entered into an arrangement with the other tenants that he would collect their rent and deposit it to the Landlord's bank account no 003xxxxxxx195 held at Family Bank and thereafter forward the deposit slips to DM, the caretaker of the premises. The Landlord noted anomalies of the deposit slips written and signed by the Tenant and the bank statements of about ksh 325,000.00 for the period between July 2017 and December 2017.
4. The Landlord accused the Tenant of breach of contract, misrepresentation, fraud and unjust enrichment. He reported the matter to the Directorate of Criminal Investigations which resulted



in the Tenant being charged with related offences in Milimani Criminal Case no 93 of 2018. The Landlord then filed the suit before the Subordinate Court claiming ksh 325,000.00, general damages for misrepresentation, fraud and forgery together with costs.

5. The Tenant denied the claim in his Statement of Defence dated December 24, 2018. He however admitted that he was a tenant at the suit premises since 2010. He attributed the dispute to a rent increment proposal received from the Landlord in August 2016 which he and other tenants accepted despite the short notice on condition that the premises be renovated but the Landlord ignored the condition. According to the Tenant, the caretaker later on served all the tenants with eviction notices prompting them to move the Rent Restriction Tribunal which ruled in the Landlord's favour by permitting it to increase the rent by ksh 3,000.00 effective September 1, 2017. The Tenant and the other tenants appealed against this decision in Nairobi ELC Case no 653 of 2017 which is still pending. The Tenant accused the Landlord of instructing auctioneers to demand rent from the tenants despite the status quo orders issued by the ELC.
6. The Tenant complained that he was arrested on January 17, 2018 and charged in relation to the collection of rent amounting to ksh 325,000.00 for the months of July-December 2017. He admitted receiving money from some tenants which he would deposit into the Landlord's account and thereafter remit the deposit slips to the caretaker. That he acted in good faith as most of the tenants were of Ethiopian and did not understand English.
7. The Tenant stated that the Landlord instructed auctioneers to forcefully evict all the tenants who were forced to pay the amount now claimed by the Landlord. He therefore contended that the Landlord was not entitled to the reliefs sought.
8. As the hearing, the Landlord called two witnesses; George Karumba Mwacharo (PW 1) and David Mbugua (PW 2) while the Tenant testified and called Amos Oduyo Owao (DW 2), one of the tenants, on his behalf.
9. In its judgment, the trial court confirmed that the parties were in a landlord-tenant relationship and that the Tenant would collect rent on behalf of the other tenants and submit the money to the Landlord. It concluded that the Tenant failed to collect the rent hence he was liable for the breach of contract and as a result awarded ksh 325,000 plus costs and interest of the suit as sought in the Plaint.
10. The Appellant raises six grounds in his Memorandum of Appeal dated February 17, 2021. The main issue is whether the Respondent proved its case on the balance of probabilities. In considering this appeal, this court is guided by the general duty of the first appellate court to review the evidence adduced before the trial court and satisfy itself that the decision is well-founded and at all times making allowance that it neither heard nor saw the witnesses testify (see *Selle and Another v Associated Motor Boat Co Ltd and Others* [1968] EA 123). The appeal was argued by way of written submissions.
11. In his submissions, the Appellant argues that the Respondent failed to prove that it was entitled to ksh 325,000.00. That the Landlord ought to have provided evidence to prove that amount and in absence of such proof, the court could not make the award. He submits that although the Respondent relied on bank statements, the amounts did not tally with those in the deposit slips which could not have been forged. He further submits that the bank statements produced in evidence did not comply with section 177 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya) which requires a bank officer to produce an entry in the Bankers book and since this was not done, the statements were inadmissible. He also argued that the claim of forgery ought to have been pleaded and proved.
12. The Respondent opposes the appeal and supports the judgment. It submits that it produced all the evidence to support its claim and was therefore entitled to judgment. It further points out that its claim



for special damages was specifically pleaded and proved despite the fact that it was not particularized. It states that failure to particularize does not amount to failure to plead. In respect to the bank statements, the Respondent submits that the Appellant did not object to the production of the bank statements and that section 177(1) cannot be read in isolation but must be read together with section 177(2) and section 178 of the Evidence Act.

13. The issue for determination is whether the Respondent proved its claim. Although the parties did not have a written contract, the agreed arrangement was that the Appellant collected rent on behalf of the other tenants and deposited it into the Respondent's account. The Tenant admitted collecting rent on behalf of the other tenants and remitting it to the Landlord's account. The Tenant contends that it deposited all the monies it received from the other tenants but argues that the tenants had challenges which were subject to proceedings at the Rent Tribunal and the Environment and Land Court. The issue of pendency of those proceedings is not relevant because the issue before the trial court was whether the Appellant owed the Respondent the ksh 325,000 in question.
14. In resolving this matter, the court is guided by the general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Section 107(1) of the Evidence Act provides:
  - "107. Whoever desires any court to give judgment as to any legal right or liability (1) dependent on the existence of facts which he asserts must prove that those facts exist."
15. The evidential burden is cast upon any party with the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Evidence Act as follows:
  - "109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
  112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."
16. In Mbuthia Macharia v Annah Mutua and Another [2017] eKLR, the Court of Appeal discussed the interplay of the aforesaid provisions as follows:
  - (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.
17. In light of the foregoing principles, the legal burden of proof to establish that the ksh 325,000.00 was not paid into his account was on the Landlord while at the same time evidentiary burden was on the Tenant to show that he remitted the amount into the Landlord's bank account. Starting with the Landlord, he produced the forensic document examiners report from the Directorate of Criminal



Investigations, family bank deposit slips and bank statements. According to the Plaintiff, the Landlord listed the deposit slips with anomalies to wit;

July 2017

House no B-25 - ksh 14,000/=

House no I-12 - ksh 14,000/=

House no B-20 - ksh 14,000/=

August 2017

House no B-17 - ksh 14,000/=

House no A-16 - ksh 14,000/=

House no A-30 - ksh 14,000/=

House no B-16 - ksh 14,000/=

September 2017

House no A-21 - ksh 14,000/=

House no A-29 - ksh 14,000/=

House no B-6 - ksh 14,000/=

House no B-27 - ksh 14,000/=

October 2017

House no A-18 - ksh 14,000/=

House no A-28 - ksh 14,000/=

House no A-30 - ksh 14,000/=

House no A-7 - ksh 14,000/=

House no B-17 - ksh 14,000/=

House no B-20 - ksh 14,000/=

December 2017

House no B15 - ksh 17,000/=

Total ksh 255,000/=

18. Based on the calculations in the Plaintiff's case the amount tabulated is ksh 255,000.00 but the amount sought is ksh 325,000.00. Courts have stated that parties are bound by their own pleadings and special damages can only be granted where they have been specifically pleaded and proven (see *Hahn v Singh* [1985] KLR 716).
19. In establishing its case, the Landlord produced bank statements which show that the sums in the tabulations do not appear in the statements. In the tabulations, the Landlord did not include the sums of November 2017 making the total claim ksh 325,000 which ought to have been remedied through an amendment of pleadings. The bank statements were produced without objection and I reject the



argument that the bank statements ought to have been produced by a bank officer in view of section 178 of the *Evidence Act* which provides:

"178. A Banker or officer shall not in any proceedings to which the Bank is not a party, be compellable to produce any Banker's books the contents of which can be proved under this Chapter or to appear as a witness to prove the matters, transactions and accounts therein recorded unless by order of the court made for special case."

20. From the totality of evidence, I hold that the Landlord discharged its burden of showing that the amount as stated was not paid into its bank account in accordance with the arrangement. Did the Tenant discharge its evidential burden of showing that he remitted ksh 255,000.00 into the Landlord's bank account? While the Tenant gave evidence of how the rent was increased and other matters concerning eviction and related disputes, he did not specifically address how, whether and when the amount paid to by the other tenants was remitted. His response was insufficient to discharge the evidential burden bearing in mind that the payments remitted to him were within his knowledge and he was bound to prove them otherwise the court is entitled to make an adverse inference in accordance with section 112 of the *Evidence Act* (see *Kenya Akiba Micro Financing Limited v Ezekiel Chebii and 14 Others* [2012] eKLR).
21. In conclusion, I find that the Landlord having discharged its burden of proof it was entitled to payment of ksh 255,000 which was specifically pleaded and proved. The trial magistrate therefore came to the correct conclusion on the evidence.
22. The appeal is therefore dismissed save that the judgment for the sum of ksh 325,000.00 is varied and substituted with an award of ksh 255,000.00. The Respondent is awarded costs of the Appeal assessed at ksh 50,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY 2023.**

**D. S. MAJANJA**

**JUDGE**

Gachie Mwanza and Company Advocates for the Appellant

J. Makumi and Company Advocates for the Respondent

