



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muchugia v Ayallo (Civil Appeal 132 of 2019)  
[2023] KEHC 4068 (KLR) (Civ) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4068 (KLR)

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

**CIVIL**

**CIVIL APPEAL 132 OF 2019**

**AN ONGERI, J**

**MAY 8, 2023**

**BETWEEN**

**EDWIN MUCHUGIA ..... APPELLANT**

**AND**

**MAY AYALLO ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. P. Muboli  
(RM) in Milimani CMCC 6752 of 2015 delivered on 2/11/2016)*

**JUDGMENT**

1. The respondent filed a plaint dated 4/11/2015 in Milimani 6752 of 2015 seeking a refund of a deposit of kshs.170,000.00 paid to the appellant in respect of a residential house owned by the appellant where the respondent was a rent paying tenant.
2. The respondent avers that in the plaint that on or about 28/3/2014 she paid the appellant rent for April and two months' deposit. She vacated the house on 4/5/2014 but the appellant refused to refund her deposit hence this suit.
3. The appellant filed a statement of defence in which he averred that the respondent vacated the said premises without prior notice and further, that water and electricity have not been cleared to date.
4. The trial court ordered the appellant to refund the respondent £USD2000 in respect of the two months' deposit.
5. The appellant has appealed on the following grounds:
  - a. The learned honorable magistrate erred in law and fact when he held that the amount refundable is USD 2,000 only, while the respondent claimed Kshs. 170,000.



- b. The learned honorable magistrate erred in law and in fact when he held that the appellant produced one witness, one Sabina Petros and disregarded the evidence of Edwin Muchugia without recording reasons from disregarding such evidence.
  - c. The learned honorable magistrate erred in law and in fact when he failed to imply a tenancy agreement between the appellant and the respondent as the parties had reached an agreement even before the respondent assumed possession.
  - d. The learned magistrate erred in law and in fact when he failed to take into account the fact that the appellant had prepared a lease which the respondent frustrated the efforts for the respondent and appellant to sign.
  - e. The learned honorable magistrate erred in law and in fact when he held that the appellant had failed to show that the house had been renovated or redecorated.
  - f. The learned honorable magistrate erred in law and in fact when he failed to appreciate the importance of the deposit paid by a tenant and forfeiture thereof where the tenant fails to give adequate notice.
  - g. The learned honorable magistrate erred in law and in fact when he held that the appellant had shown the duration of time the house had remained vacant after the respondent had vacated the house
6. The appellant in his submission argued that from the evidence adduced by the respondent at trial it was clear that there was an offer, acceptance and consideration satisfying the three elements of a contract. That despite the absence of an executed document binding the appellant and the respondent, a tenancy agreement was reached when the respondent perused a draft lease agreement and proceeded to assume possession of the appellants apartment as a tenant.
  7. It was the appellants submission that the respondent was bound by the terms of her implied tenancy agreement with the appellant. among the terms of the tenancy agreement was that the tenant ought to give two months notice to vacate in writing in order to eligible for a refund of their deposit. The respondent did not tender the said notice and there the honorable magistrate erred when he held that the deposit was refundable to the respondent.
  8. It was submitted that the trial court failed to appreciate the purpose of deposit and the role it plays in cushioning the landlord from unfair practice such as that displayed by the respondent. The appellant testified that he paid Kshs 42,500 to the agent which was half of the respondents one month rent. He also used the money for deposit to renovate the apartment restoring it to pleasant condition for the next tenant.
  9. The appellant finally submitted that the respondent claimed Kshs. 170,000 in her plaint yet the trial court held that USD 2000 was refundable.
  10. The respondent alternatively submitted that the appellant did not dispute receiving USD 2000 hence the claim by the respondent was proved. That at that time the rate for the dollar was Kshs 85 hence USD 2,000 calculated to Kshs. 170,000. The appellant further did not provided evidence to the court of the lost opportunities, money spent for restoration of the premise, payment to the agent and payment for any utility bills.
  11. The respondent argued further that there was no executed document as the respondent did not sign the same as the property was not suitable for her as she could not get suitable hanging space for her clothing. That a document that is not signed cannot be used to imply terms of tenancy agreement.



12. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the first appellate court had the opportunity to see the witnesses.
13. The issues for determination in this court are as follows:
  - i. Whether the trial court was right in directing the appellant to pay USD2000 while the respondent claimed 170,000/=
  - ii. Whether the respondent should have forfeited the deposit for failure to give adequate notice.
  - iii. Whether the trial court ignored relevant evidence in arriving at its decision.
14. On the issue as to whether the trial court was right in directing the appellant to refund USD2000 when the amount pleaded was kshs.170,000.00 I find that the trial court ordered a refund of the deposit.
15. I find that the USD2000 was not pleaded in the plaint dated 4/11/20156 and the trial court had no basis for ordering a refund of US2000.
16. Although in her evidence the respondent said that she deposited USD2000 she is bound by her pleadings.
17. On the issue as to whether the respondent should have forfeited the deposit for failure to give notice, there is evidence that the respondent was willing to help the appellant get another tenant but the appellant declined.
18. I agree with the findings of the trial court that there is no evidence that the house was not occupied and further that there is no evidence that the money was utilized for renovating the house since the Respondent only stayed in the premises for a very short time.
19. In the circumstances I find that the appellant was liable to refund the deposit.
20. On the issue as to whether the trial court ignored relevant evidence, the appellant submitted that the trial court ignored the evidence of Edwin Muchugia without recording the reasons for disregarding such evidence, I find the trial court at page 68 of the proceedings stated that the evidence and submissions were considered.
21. I find that the appeal herein succeeds partially to the extent that the deposit refundable is kshs.170,000.00 and not USD2000.
22. I accordingly set aside the judgment of the trial court and substitute the figure USD2000 with kshs.170,000.00.
23. Judgement be and is hereby entered in favour of the respondent against the appellant in the sum of kshs.170,000.00 together with costs and interest at court rates from the date of filing suit until payment in full.
24. Since the appeal partially succeeded, each party to bear its own costs of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF MAY, 2023.**

.....  
**A. ONGERI**



**JUDGE**

**In the presence of:**

.....for the 1<sup>st</sup> Appellant

.....for the 2<sup>nd</sup> Appellant

.....for the Respondent

