Jaffer v Shah (Civil Appeal 96 of 2020) [2023] KEHC 20827 (KLR) (11 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20827 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 96 OF 2020

OA SEWE, J

JULY 11, 2023

BETWEEN

MOHAMED JAFFER ..... APPELLANT

AND

BIKHU RATILAL GHELA SHAH ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. F. Kyambia, Senior Principal Magistrate, delivered on 18th July 2020 in Mombasa CMCC No. 1759 of 2016)

JUDGMENT

1. The appellant was the plaintiff in the lower court suit, namely, Mombasa Chief Magistrate's Civil Case No. 1759 of 2016: Mohamed Jaffer v Bikhu Ratital Ghela Shah. His cause of action was that, on or about the 13th January 2014, the Rent Restriction Tribunal made an order requiring him to cede possession of and vacate the premises which were partly occupied by him for business purposes. Being dissatisfied with the order, the appellant moved the Court and obtained leave to institute an application for judicial review; which leave was to operate as a stay in accordance with Order 53 rule 1(4) of the *Civil Procedure Rules*.

2. The appellant was therefore aggrieved that on 17th February 2014, in total disregard of the stay order, the respondent proceeded to execute the order of the Rent Restriction Tribunal by forcefully evicting him; and in the process thereof carted away or destroyed his stock worth Kshs. 889,828/=. Particulars thereof were supplied at paragraph 7 of the Plaint dated 23rd September 2016. The appellant further complained of loss of business for 3 years, computed at Kshs. 7,560,000/= and pointed out that judgment was delivered in his favour in the Judicial Review matter and the decision of the Rent Restriction Tribunal was accordingly quashed. He therefore filed the lower court suit claiming Kshs. 7,560,000/= on account of loss of business for 3 years and Kshs. 889,828/= being loss of stock together with costs and interest.

3. The claim was resisted by the respondent, to which end a Defence dated 11th October 2016 was filed by counsel for the respondent. After hearing both parties, the learned magistrate, Hon. Kyambia, SPM, dismissed the suit with costs on the ground that the appellant had failed to prove his case on a balance of probabilities.

4. Being dissatisfied with the decision of the learned trial magistrate, the appellant lodged the instant appeal on 20th July 2020 contending that:

   (a) The learned magistrate erred in law and in fact by failing to consider the appellant's submissions;

   (b) The learned magistrate erred in fact and in law by dismissing the appellant's case without considering that in law there cannot be a wrong without a remedy.

   (c) The learned magistrate erred in law and fact by failing to appreciate that the respondent evicted the appellant in violation of a High Court order.

   (d) The learned magistrate erred in law and in fact by failing to understand the cause of action of the case filed by the appellants.

   (e) The learned magistrate erred in law and in fact by failing to understand that the appellants suffered real damages and inconvenience by reason of the respondent's illegal eviction and ought to have been compensated at the very least.

   (f) The learned magistrate erred in law and in fact by failing to appreciate that the respondent had been made aware of the stay order from the High Court.

   (g) The learned magistrate erred in law and in fact by holding that the appellant did not prove his case on a balance of probability.

   (h) That the learned magistrate erred in law and in fact by making a holding contrary to the pleadings and evidence filed by the parties and particularly that the order of the Tribunal had since been quashed by the High Court and that the purported order by the Tribunal was null and void ab initio and of no consequence in law.

5. In the premises, the appellant prayed that the judgment of the trial magistrate dated 18th June 2020 and its consequential Decree be set aside; that the claim by the appellant as per his Further Amended Plaint dated 27th November 2019 be allowed and that the appellant be awarded costs of the appeal as well as the lower court suit.

6. Pursuant to the directions given herein on 20th June 2022, the appeal was canvassed by way of written submissions. Thus, the appellant's written submissions were filed herein on 18th July 2022 by Mr. Muchiri, Advocate. He submitted that there was sufficient proof presented before the lower court to support the appellant's case; and therefore that the learned magistrate erred in dismissing the appellant's suit. In particular, counsel pointed out that the appellant had demonstrated that there was a stay order issued by the High Court in Judicial Review Case No. 5 of 2015: *Mohamed Jaffer v Rent Restriction Tribunal & Bikhu Ratilal Ghela Shah*, when the eviction was carried out. He also pointed out that Judicial Review matter was ultimately resolved in favour of the appellant and the eviction order quashed.

7. Counsel cited *Rev. Simon Ndungu Mungai & Another v Municipal Council of Kiambu* [2010] eKLR in which Kshs. 2,000,000/= was awarded for an illegal eviction. He therefore urged that the appellant

be awarded no less than Kshs. 5,000,000/= as damages for trespass in addition to Kshs. 889,828 for lost/destroyed goods and Kshs. 7,560,000/= on account of loss of business for 3 years.

8. On his part, Mr. Omwenga, Advocate, for the respondent relied on his written submissions dated 12th September 2022, which he filed on 16th September 2022. He submitted that the lower court identified 4 issues for determination which were analyzed and conclusively determined before the court arrived at its decision to dismiss the appellant's suit. He added that the burden of proof was on the appellant to demonstrate, on a balance of probability, that he was entitled to the prayers sought by him before the lower court. Counsel relied on Section 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya and the case of *Kanyungu Njogu v Daniel Kimani Maingi* [2000] eKLR, and *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR, among other authorities, to augment his submissions on the burden of proof.

9. It was further submitted by Mr. Omwenga that the appellant failed to prove that, as at the time of eviction on 17th February 2014, the respondent was aware of the stay orders issued by the High Court. He explained that the respondent is the rightful owner of the suit property; and therefore it was absurd for the appellant to posit that he committed trespass; especially from the standpoint of Section 24(a) of the *Land Registration Act*. He accordingly prayed that the appeal be dismissed with costs to the respondent.

10. This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court and come to its own conclusions and findings on the basis thereof, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses. (See *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123)

11. I have paid attention to the evidence of the appellant, adduced on 23rd October 2019. He adopted his Witness Statement dated 3rd September 2016, in which he stated that he had been a resident on the premises owned by the respondent since 1976; and that he began operating a grocery business on a portion of the premises in 1996. The appellant further testified that when the Rent Restriction Tribunal made an order requiring that he cedes possession of the suit property. He was dissatisfied and moved to the High Court for a stay under Order 53 Rule 1(4) of the *Civil Procedure Rules* and obtained orders which the respondent disregarded and evicted him anyway.

12. The appellant produced a list of the property the subject of his complaint as well as the order and judgment of the High Court in Judicial Review Application No. 5 of 2014. He also produced photographs of the shop and the goods in issue to ramp up his claim for compensation.

13. The respondent also adopted his Witness Statement filed on 4th April 2017. He testified that the appellant was his tenant on property known as Plot No. XXXI/62 Old Town. The respondent further confirmed that he filed Rent Restriction Tribunal Case No. 26 of 2012 for the eviction of the appellant from the premises on grounds that he had breached the terms of the tenancy; and that on the 13th January 2014, the Rent Restriction Tribunal issued an eviction order against the appellant which was to take effect after 30 days. At paragraph 7 of his Witness Statement, the respondent stated that he was purportedly served with a Court Order on 18th February 2014 after the eviction had been effected on the 17th February 2014. He further testified that the appellant moved out with all his property and none of them was damaged or lost. On that account, the respondent denied the appellant's claim and prayed that the suit be dismissed with costs.

14. The essence of the appellant's appeal is captured in the last ground, in which he averred that the learned magistrate erred in law and in fact by making a holding contrary to the pleadings and evidence filed by the parties and particularly that the order of the Tribunal had since been quashed by the High

Court and that the purported order by the Tribunal was therefore null and void ab initio and of no consequence in law. Hence, the single issue for consideration is the question whether the appellant proved his case before the lower court on a balance of probabilities.

15. In a civil case such as this the burden proof is on the party who would fail if no evidence is presented to prove a point in issue. Accordingly, the following provisions of the *Evidence Act*, Chapter 80 of the Laws of Kenya, are pertinent:

    (a) Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya is explicit that:

        (1) 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.

        (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

    (b) Section 108 of the *Evidence Act* provides that:

        The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

    (c) Section 109 of the *Evidence Act* provides that:

        " 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."

    (d) Lastly, Section 112 provides that:

        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. A perusal of the documents relied on by the appellant reveals that indeed an order was obtained on the 12th February 2014 by the appellant in Judicial Review Miscellaneous Application No. 5 of 2014. Whereas the appellant had asked for the leave, if granted, to perated as stay pending the filing of the substantive judicial review application, that prayer was declined and an order given that it be heard inter partes on 19th February 2014. Nevertheless, the Court granted a limited stay for 7 days. Hence, the question to pose is whether the order of stay was extracted and served on the respondent before the eviction. There appears to be no such proof presented before the lower court. In cross-examination, the appellant is on record as having stated:

    " I moved to the High Court on 12.2.2014...The order was served upon the Agents on 17.2.2014. I do not know who served the order of the High Court..."

17. The general position as stated in *Mwangi Wang'ondu v Nairobi City Council* (Appeal No. 95 of 1998) was that:

    " ...no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or to abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if it is disobeyed, he is liable to the process of execution to compel him to obey it. This requirement is important because the court will only punish for breach of injunction if satisfied that the terms of the injunction

are clear and unambiguous that the Defendant has proper notice of the terms and that a breach of the injunction has been proved beyond reasonable doubt."

18. This position has since been adjusted, such that in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR for instance, the Court of Appeal held:

> "...this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved... Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola, J. in the case of *Basil Criticos vs Attorney General and 8 Others* [2012] eKLR pronounced himself as follows:
>
> "...the law has changed and as it stands today knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary."

19. The appellant having failed to prove either that the order was served on the respondent before the 17th February 2014 or that the respondent was otherwise aware of the order of stay, the learned magistrate cannot be faulted for coming to the conclusion that his aspect of the appellant's case was not proved on a balance or probabilities.

20. Although the appellant complained, in one of his grounds of appeal, that the lower court failed to take into consideration his written submissions, a perusal of the judgment however reveals otherwise, especially at page 129 of the Record of Appeal. Similarly, it was upon the appellant to prove that his property was either stolen or destroyed in the course of eviction; and further that the value of the goods was as itemized at paragraph 7 of the Amended Plaint and in the Schedule he produced as Document No. 1 in his List and Bundle of Documents. Upon my independent evaluation of the evidence presented before the lower court, there is no basis for concluding otherwise than that the appellant had not discharged the burden of proof in terms of the sums claimed, as lost or destroyed stock as well as loss of business. I need only rely on *Hahn v Singh* [185] KLR 716 for the holding that;

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

21. Similarly, in *Douglas Odhiambo Apel & Emmanuel Omolo Khasin v Telkom Kenya Limited*, Civil Appeal No. 115 of 2006 it was held:

> "A plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court. The need for proof is not lessened by the fact that the claim is for special damage. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. ... It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved."

22. In terms of general damages for loss of business, the principle expressed in *Butt v Khan* [1981] KLR 349, is that:

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."

23. That said, authorities abound to show that this was a claim in the nature of special damages and therefore had to be specifically pleaded and proved. Thus, in *David Bagine v Martin Bundi* [1997] eKLR (Gicheru, Shah & Pall), for example, the Court of Appeal held:

> We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in not circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved."

24. The same is the case with a claim for loss of profits. Moreover, there is the obligation on the part of every plaintiff to mitigate his loss. The principle was aptly discussed by the Court of Appeal in *African Highland Produce Limited v John Kisorio* [2001] eKLR, thus:

> " The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimize the damages or embark on dubious litigation. The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant."

25. In the aforementioned case of *David Bagine v Martin Bundi* (supra), the Court of Appeal had the following to say:

> " ... the learned judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent's lorry could have been repaired plus some period that may have been required to assess the repair costs. There was no evidence before the learned judge of what period the vehicle would have needed for repairs or for assessment of repair costs. The learned judge quite erroneously proceeded to award general damages at the rate of Kshs.500/= per day from the date of accident until date of judgment."
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> The award of Kshs. 540,000/= was made in total disregard of the principles for assessing special damages and we have no alternative but to set it aside in toto."

26. Likewise, in this instance, no justification exists for the appellants claim for loss of business for three years. He did not avail proof, for example that he was unable to set up his grocery shop elsewhere in

under three years. Accordingly, had he proved his case, I would have considered an award of loss of profits for only 12 months.

27. In the light of the foregoing, I find no merit in the appeal. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF JULY 2023

OLGA SEWE

JUDGE