



REPUBLIC OF KENYA



**Wambua v Nganga (Civil Appeal 68 of 2019)
[2023] KEHC 22597 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 68 OF 2019
TM MATHEKA, J
SEPTEMBER 25, 2023**

BETWEEN

HANNAH NJOKI CHEGE WAMBUA APPELLANT

AND

BENARD KITUVA NGANGA RESPONDENT

(Appeal from the judgment of Mwaniki J CM in Makueni CMCC 5 /2017)

JUDGMENT

1. By a plaint filed on 23/1/2017 the plaintiff /respondent filed a suit seeking orders:- for reinstatement into premises he had been evicted from by the defendant/appellant, compensation for unlawful eviction, damages for lost business, cost of the suit plus interest.
2. The basis for the claims were that around March, 2016 the plaintiff/respondent entered into a verbal agreement with the defendant/appellant for rental of one of her premises at Kshs. 15,000 for three months from 1/3/2016 for the purposes of running a bar. That upon receipt of the rent, the appellant issued a notice to vacate to the tenants who were in occupation of the premises.

The respondent was only able to occupy the premises from 30/4/2016 after carrying out requisite repairs at his own costs. In June, 2016 - he was leased an extra 2 rooms by the appellant at Kshs. 1,500 each increasing the rent to Ksh 6500 per month.
3. On 17/7/2016 - and without any notice – the appellant closed premises , only reopening them after the respondent sent her Kshs. 5,000 rent . On 17/11/2016 she again closed the premises without any notice to the respondent.
4. The respondent produced receipts for the rent for Kshs. 15,000 paid on 15/3/2016, and Kshs. 4,500 dated 25/9/2016, Ksh. 3,000 dated 1/6/2016 for the 2 rooms, Kshs. 5,000 dated 28/7/2016 and receipt



- for repair for Kshs. 4,300 and an Mpesa extract showing payment of Kshs. 1524 to Hannah Njoki Chege.
5. The appellant filed a defence on 9/2/2017 where he denied all the allegations. She put the respondent to strict proof of all the allegations that he had made. She contended that theirs was a landlord and tenant matter, that the same ought to have been heard by the Business Premises Rent Tribunal . The record shows that in that regard the appellant raised a preliminary objection which was dismissed by the trial court.
 6. The appellant also averred that the suit was defective and did not disclose a cause of action, and sought its dismissal with costs. That no demand notice was issued hence the plaintiff/respondent was not entitled to costs.
 7. The matter proceeded to full trial. The plaintiff/respondent testified that he was adopting his witness statement as evidence - the statement reiterated what he had stated in his pleadings. He said he operated a bar in the premises and made a profit of Kshs. 15,000 per month. He produced the receipts mentioned herein above as evidence
 8. On cross-examination he told the court that he operated a bar and a hotel and paid rent of Kshs. 5,000 per month for the bar area - and Kshs. 3,000 for the 2 extra rooms. That he made profit of Kshs. 500 per day and paid the employee Kshs. 100 per day and Kshs. 6,000 per month.
 9. He told the court that he did not have proof of the said income - no proof that his employee paid NHIF or that he paid taxes. He had no banking statements or receipts/ or evidence of the items locked in the bar by the defendant /appellant . He said he did renovation of Kshs. 8,000 but the appellant refused to acknowledge the same and did not have proof either
 10. The record shows that the case for the defendant was closed without her testimony or that of any witness.
 11. In the judgment delivered on 3/7/2019 - the learned trial magistrate found in favour of the plaintiff and gave the following awards;
 - i. Kshs. 39,000 or 6months rent in lieu of notice - on the ground that the plaintiff used to pay rent of Kshs. 6,500 per month.
 - ii. Kshs. 90,000 profits lost in 6 months (at Kshs. 500 per day, Kshs. 15,000 per month.)
 - iii. Kshs. 75,000 general damages for unlawful eviction.Total Kshs. 204,000 plus costs and interest.
 12. The appellant filed this appeal on 5/8/2019 on 21 grounds.Ground 1& 2 - that there was no evidence to support the monetary awards.Ground 3 that the magistrate failed to consider the defence and submissions in totality.Ground 4, 5, 6, 7 - that the respondent was in rent arrears for 4 months, that the respondent had closed the business for one year before it was closed down - and he had done business for only 6 months - facts the magistrate did not considerGrounds 8, 9, 10, 11, 12, 13, 19 - repetition of grounds 1 &2 that there was no evidence to support the monetary awards.Ground 14,15, - repetition of grounds 4, 5, 6, 7Ground 16,17,18 - that the appellant was entitled to damages , a fact the magistrate failed to consider.
 13. Parties agreed to proceed by way of written submissions.



14. Citing *David Bagine v Martin Bundi* [1997] eKLR where the Court of Appeal cited *Bonham Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 1777 – where Lord Goddard CJ stated;

“ [The] 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”

The appellant argues that the plaintiff did not provide any evidence to prove any of the claims he made. That these were facts within his knowledge and going by Section 112 of the *Evidence Act* - he was bound to prove the same.

15. The appellant also relied on *Caltex Oil (Kenya) Limited V Rono Limited* [2016] eKLR for the proposition that the learned trial magistrate did not have any inherent jurisdiction to award general damages where mere none were claimed. There in it was held that - “ damages must be pleaded It was not right for the trial court to purport to engage in an exercise in futility ... a prayer for damages must be specifically pleaded and particularized... “ The appellant also relied on *Raila Amolo Odinga & Another Vs IEBC & 2 others* [2017] eKLR for the proposition that court and the party are bound by its pleadings, and without pleadings, any evidence produced cannot be considered and that a court ought not to frame an issue not arising from the pleading.

Appellant also cited -

Joseph Mbuta Nziu v Kenya Orient Insurance Co. Ltd [2015] eKLR *Libyan Arab Uganda Bank for Foreign Trade & Development and another v Vassiliadis* [1986] UG CA 6 *Owners of the Motor Vessel Lilian v Caltex Kenya Limited* [1989] eKLR *IEBC and Another v Stephen Mutinda Mule & 3 others* [2014] eKLR

16. On the proposition that special damages must be pleaded specifically and proved – whether the suit proceeds inter partes /ex parte and the plaintiff still bears the burden to prove the same, the appellant cited *Haji Asuman Mutekanga v Equator Growers (U) Ltd* Civil Appeal No. 7 /1995.
17. Further on damages for loss and profit - it was held in *Bank of Baroda (Kenya) Ltd Vs Tinwood Products Ltd* [2008] eKLR that they are in the nature of special damages to be specifically pleaded specifically proved.
18. It was submitted that the appellant deserved the orders sought on appeal.
19. The respondent filed his submission on 29/8/2023. His submissions reiterated the witness statement and the pleadings he filed arguing that he had proved his case.
- With respect to appellant’s claim for Kshs. 36,000 arrears in rent, he argued that the appellant, had not raised the same before the trial court.
20. Upon considering all the evidence on record, the pleading, the submissions by parties - the issue for determination is whether the respondent established the claim for; General damages For arrears of rent For loss of profit

Before the trial court.

21. The respondent suit was that he entered into an oral agreement to rent the appellant’s premises and that he rented the same, established a bar and restaurant business, and employed a person he refers to as a bar maid.



22. From the record and pleading and document annexed - the appellant appears to concede that there was a landlord tenant relationship between the 2 of them. The terms would be drawn only from the first receipt for Ksh 15000 which appears to document the relationship that rent is Ksh 5000 per month payable on the 15th day of every month. That meant that either party could give the other a notice of one month notice to end the relationship, and if rent was not paid each month then that could mean that the relationship had been terminated.
23. However, it was the duty of the respondent to prove that indeed he was running a bar and restaurant business.
24. He did not produce a single business licence or health inspection certificates despite pleading that renovation were supervised by the OCS and public health officials from Wote. He did not produce any evidence of purchase of stock of anything - neither beer nor food – that would give the court the basis upon which to accept from the word go that indeed there was a bar and restaurant business going on or at all. He claimed to have made profits of Kshs. 500 per day - such a claim cannot be made from the air it must be backed by something tangible - a profit comes from business – there will be some evidence of trading - there was no evidence of any trading placed before the trial magistrate.
25. This alleged employee was not called as a witness even to support the claim that there was a bar business that was ongoing in the 1st place without evidence of the business - this court must question the basis upon which the learned trial court drew its conclusion that the respondent was making profit of Kshs. 15,000 per month.
26. In addition - there is no explanation for the 6 months multiplier. For everything. It seems to have been plucked from the air as I did not find any evidence in the record for this action. - there was no evidence that the appellant was required to give the respondent 6 months' notice - to warrant the 6 months multiplier.
27. On damages - the learned trial court even pointed out that the plaintiff had not submitted on damages - but he proceeded to award Kshs. 75000 as a reasonable award. There was no basis laid for this award.
28. What is before me is that the respondent paid rent from 15/3/2016 for three months and when the rent was not paid for July - the landlord closed the premises - the plaintiff paid and the land lord re-opened - again, he fell into arrears - and the land lord locked up again. It would appear that that was their modus operandi. Nothing was placed before the court to show that the plaintiff respondent was in business at the time he alleges that the shop was closed, or that there was any stock inside the premises or that the employee or customers came and found the place locked up. There is just not enough evidence to establish this claim.
29. It is clear to me - from the record that the plaintiff did not establish any of the claims he made in to warrant the orders that were made in his favour.
30. With respect to the appellant , claims for arrears of rent – that appears to be an afterthought- and the same cannot succeed.
31. In the circumstances - I find that the appeal is merited. The judgment of the learned trial magistrate entered on 31/7/2019 be and is hereby set aside and substituted with an order dismissing the plaintiff's case. .
32. Each party to bear its own cost.
33. Right of Appeal 30 days



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH SEPTEMBER, 2023

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MUMBUA T MATHEKA

JUDGE

CA Nelima

Mutinda for Appellant

Respondent in open court present in person

E.K Mutinda & Associates Advocates

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Respondent

Benard Kituva Nganga

