



GIBB Africa Limited v Rent Works East Africa Limited (Civil Appeal E122 of 2023) [2024] KEHC 14396 (KLR) (Civ) (18 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14396 (KLR)

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

**CIVIL
CIVIL APPEAL E122 OF 2023**

TW OUYA, J

NOVEMBER 18, 2024

BETWEEN

GIBB AFRICA LIMITED APPELLANT

AND

RENT WORKS EAST AFRICA LIMITED RESPONDENT

(Being an appeal against the Judgment of the Hon. E.M. Kagoni (PM) delivered on 13th February, 2023 in Nairobi Milimani CMCC No. 457 OF 2019)

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 13.02.2023 by the lower Court in Nairobi Milimani CMCC No. 457 OF 2019. Rentworks East Africa Ltd, (hereinafter the Respondent), the Plaintiff before the lower Court, initiated Nairobi Milimani CMCC No. 457 OF 2019 (hereinafter lower Court suit) as against Gibb Africa Ltd, (hereinafter the Appellant), the Defendant before the lower Court by way of plaint seeking judgment in the sum of Kshs. 1,456,870/- (accrued rental arrears as at 13.08.2019), Kshs. 843,464/- (accrued interest), Kshs.967,446.17/- (cost of unreturned equipment), interest on each of the above at 14% from date of filing the suit until full payment, costs of the suit and interest thereon; any other or further relief as the Court may deem necessary to grant.
2. The Appellant averred that they entered with the Respondent in a Master Rental Agreement (MRA) dated the 21.06.2013 pursuant to which the Appellant could subsequently lease equipment and or machinery from the Respondent as well as acquire professional services by executing, Rental Schedules in respect of the equipment or machinery leased wherein each executed Rental Schedule constituted an independent supplemental contract to the MRA. It was further averred that without due regard to



Clause 17 of the MRA the Appellant unilaterally opted to return some of the equipment meanwhile neglected, refused and/or failed to return other equipment and machinery.

3. That Clause 4(e) of the MRA provided for interest accrued at the overdue rate whereas despite issuing invoices and demanding payment for rental fees, the Appellant has neglected, failed and or refused to pay the rental fees, pay all accrued rental fees, pay interest, pay all monies due and payable under the agreement, pay early repayment, pay break costs or return various equipment as stipulated in Clause 13 of the MRA between the parties. If was further averred that in view of the foregoing breaches, the Appellant as at 13.08.2019 was in arrears of Kshs. 1,456.870 being rental arrears, Kshs. 843,464 being interest accrued on the facility as well as Kshs. 976,446.17 being costs of the unreturned equipment as provided per the rental schedule. That under Clause 9 of the MRA it was an essential term that the Appellant pay all rent on time whereas as a consequence of all the forestated the Respondent continues to suffer loss from the Appellant's breach of the MRA and the Rental Schedule.
4. The Appellant filed a statement of defence admitting to existence of the MRA but denied that the Rental Schedules were independent supplementary contracts. It further averred that the terms in the Rental Schedules expired and thereafter it entered into negotiations with the Respondent but except for the monthly charge did not reach an agreement on the terms and conditions pertaining to the new Rental Schedule. That except for three (3) stacking chairs and thirty-eight (38) number of headsets the items claimed by the Respondent were not returnable meanwhile the Appellant denied owing the latter any monies save for the residual value of the forestated items admitted as not returned.
5. The suit proceeded to full hearing, during which both parties called evidence in support of the averments in their respective pleadings. In its judgment, the trial Court found in favour of the Respondent and awarded judgment as against the Appellant as pleaded in the plaint.

The Appeal

6. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in its memorandum of appeal as itemized hereunder: -
 1. That the learned Magistrate erred in law and in fact by holding that the Master Rental Agreement dated 21st June 2013 was renewed by the parties pursuant to Clause 13 and 17 of the Master Agreement dated 21st June 2013.
 2. That the learned Magistrate erred in law and misdirected himself in fact by relying on a draft contract that was not signed by the parties.
 3. That the learned Magistrate erred in law and misdirected himself in fact by holding that the Appellant was not entitled to the reliefs sought in its defence therefore arriving at an erroneous decision.
7. In light of aforecaptioned itemized grounds of appeal, the Appellant seeks before this Court orders to the effect that: -
 - a) That this appeal be allowed.
 - b) That the judgment and decree of the lower Court dated 13th February, 2023 and all consequential orders there from be set aside and substituted by the orders of this Court.
 - c) That the Appellant's appeal against the Respondent in the High Court be allowed.
 - d) That the Costs of this appeal be awarded to the Appellant. (sic)



8. Directions were taken on disposal of the appeal by way of written submissions, of which the Court has duly considered.

Submissions

9. On the part of the Appellant, counsel began submitting by setting out the historical background of the matter leading to the instant appeal meanwhile proceeded to condense his grounds of appeal into two (2) salient issues. Concerning whether the Respondent was entitled to the judgment award by the trial Court, it was submitted that the parties hereto entered into an MRA dated 21.06.2013 which was executed by the parties whereafter they subsequently executed rental schedule(s) in relation to leasing of certain equipment however the latter did not constitute an independent supplementary contract and it ought not to be treated as such. That despite negotiations on the new rental schedule the terms advanced therein were not acceptable to the Appellant therefore no new contract was executed. It was further posited that an addendum of the rental schedule purporting to supplement the terms of the MRA are void as the Appellant declined and or refused to sign the new rental schedules as the terms therein were not acceptable to it, therefore it is trite that an addendum is only valid if both parties agree to it. The decisions in Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR, Sands v Mutual Benefits Limited (1971) E.A 156 and Young v Van Bienen (1953) 3 DLR 702 as cited in Brand City Limited v United Housing Estate Limited [2016] eKLR were relied on in the forestated regard.
10. It was further submitted that due to the non-existence of a legally binding and enforceable contract, the Appellant cannot be in breach given that the MRA expired in 2017 therefore late payments, interest and payment in lieu of notice is alien and unreasonable. Citing the decision in Mistry Singh v Serwano Wofunia Kulubya (1963) E.A 403, it was argued that it would be improper to have the Appellant weighed down with a huge decretal sum as it would be tantamount to enforcing an illegal contract. In conclusion, this Court was urged to allow the appeal in its entirety by setting aside the decision of the subordinate Court with the attendant costs of the appeal in favour of the Appellant.
11. Counsel for the Respondent on the other hand, addressed the Court on a solitary issue in respect of the appeal. Submitting on whether there was binding a contract between the parties, counsel asserted to there being a binding contract between the parties per the MRA and its subsequent rental schedules which constituted independent supplementary contracts to the MRA. That the Appellant does not dispute having executed both the MRA and the rental schedules therefore the parties were bound to the terms and conditions whereas it is not the business of the Court to rewrite such contracts. The decisions in Pius Kimaiyo Langat (supra) and Joel Phenehas Nyaga & Joseph Nyaga Nzau (suing as the Chairperson and Treasurer of Kemagui Electrification Self Help Group) v Aloysius Nyaga Kanyua & Julia Gichuku Nyaga [2020] eKLR were cited in the latter regard.
12. It was further argued that the Rental Schedules constituted independent supplementary contracts to the MRA on accord of the fact that they were addendums supplementing the terms of the MRA as earlier agreed on by the parties herein. While citing Clause 2, 3, 17 & 22 of the MRA it was submitted that the latter gives life to the MRA whereas this Court ought to interpret them in light of each other to arrive at the intention of the parties. That the Appellant does not dispute being in possession of the Respondent's equipment therefore by dint of Clause 17.1 of the MRA, it opted to renew meanwhile the implied extension was cemented by the Appellant's continued payment of rental fee up to the year 2019 despite expiry of the MRA in 2017. Counsel called to aid the decision in Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR to assert that on accord of the forestated, the Appellant was estopped from denying the existence of the contract while it admits having the Respondent's equipment and continued to settle areas until 2019.



13. That in any event, return of equipment was to be done in accordance with the provisions of Clause 13 of the MRA and given that it had not opted to buy the said equipment it cannot unilaterally opt to keep the Respondent's equipment indefinitely. In summation, it was submitted that on account of the executed MRA and the Appellant's actions, it was in breach of the terms of the MRA therefore the learned Magistrates decision ought to be upheld by dismissing the appeal herein.

Analysis and Disposition

14. At this juncture, it would be apt to observe that the instant appeal was disposed of as part of the Judiciary Rapid Result Initiative (RRI) matters. That said, the original lower Court record did not form part of the record before this Court. Nevertheless, the Court has duly considered the Record of Appeal and Supplementary Record of Appeal as well as the respective parties' submissions.
15. Having stated the above, it is trite that the duty of this Court as a first appellate Court is to re-evaluate the evidence adduced before the trial Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123. Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. That said, a revisit of the memorandum of appeal and submissions by the respective parties before this Court it is evident that the appeal turns on the question whether the trial Court properly applied itself to the facts and law at arriving at the decision it did.
16. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. See Court of Appeal decision in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91. This Court had earlier outlined the gist of the respective parties' pleadings, as such it serves no purpose restating the same. Further, having equally identified the dispute before the trial Court, to contextualize the latter, it would be apposite to quote in extenso the relevant facets of the impugned judgment. The trial Court after restating the evidence tendered before it addressed itself as follows; -

...“I have considered the pleadings filed before the Court, the witness testimonies, as well as the parties submissions and in my view, the issues for determination are;-

- a. Whether the master rental agreement dated 21.06.2013 was renewed by the parties?
- b. Whether the master rental agreement dated 21.06.2023 is still the governing agreement between the parties, pursuant to its Clause 13 and 17?
- c. Whether the Defendant has breached the terms of the master rental agreement dated 21.06.2013?.
- d. Whether the plaintiff is entitled to the remedies sought?

SUBPARA e.

Who should bear the costs of the suit?

Whether the master rental agreement dated 21.06.2013 was renewed by the parties?



..... Since the Defendant never gave notice in accordance with Clause 17, the Court returns that the master rental agreement dated 21.06.2023 was renewed by the parties pursuant to Clause 13 and 17 of the master rental agreement dated 21.06.2023.

Whether the master rental agreement dated 21.06.2023 is still the governing agreement between the parties, pursuant to its Clause 13 and 17?

..... The Court agrees that there is evidence that the parties were exploring options of entering a new lease. However, it is familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The Rule applies as well as to deeds as to contracts in writing. Again, clause 22.2 and 22.3 stipulate that no variation of the agreement is effective unless made in writing and signed by both parties. The Defendant also by executing the master rental agreement dated 21.06.2023, waived the right to rely on alleged provisions not contained in the master rental agreement dated 21.06.2013. These reasons, coupled with the Defendant's default fortifies the Court's mind on what agreement was subsisting between the parties herein.

Whether the Defendant has breached the terms of the master rental agreement dated 21.06.2013?

Once the Defendant harboured the intention to end the agreement between the parties, it should have applied its mind on the termination clauses of the agreement. Once it issued the letter dated 27.05.2019, the Defendant was in breach and the breach continued until the agreement between the parties was lawfully determined. i.e. as per their agreement. The Court is aware of the argument raised by the Defendant that some items were not returnable. However, this argument is a non-starter. The Defendant should have complied with the agreement he executed under Clause 13.3 is clear on the way forward.

Whether the plaintiff is entitled to the remedies sought?

.....It is ridiculous for the Defendant to admit it owes the residual value and still seek that the plaint before Court to be dismissed. A clear indication its lacks bonafide. I have further taken note that, even in the adopted statement of DW1, she never provided the Court with the rationale why the Defendant does not owe the amount claimed, other than reliance on the argument that, the new rental schedule were not agreed upon and that the master rental agreement dated 21.06.2013 was inapplicable, as the same had expired. In view of this, in the absence of any other testimony as to why the amounts claimed by the plaintiff are not merited, the Court finds the amounts claimed by the Plaintiff in the plaint merited.

Reasons whereof judgment is hereby entered for the Plaintiff as against the Defendant....." (sic)

17. With the fore stated in reserve, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Whereas, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. Court of Appeal decision in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR. Hence, the duty of proving the averments contained in the plaint lay squarely on the Respondent vice versa with respect to the averments contained in the Appellant's statement of defence. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that: -

“ [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended



and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

18. The material facts leading up the instant appeal are not contested, particularly that parties hereto entered into a Master Rental Agreement (MRA) dated the 21.06.2013. What appeared to be in dispute before the trial Court was whether the said agreement was still alive, whether the rental schedules were independent or an extension of the MRA, whether there was breach of either of the latter and the purport of Clause of 13 and 17 of the MRA. Indubitably, the dispute before the trial Court was premised on the MRA which was the underlying contract in respect of the dispute. As rightly, observed by the trial Court, the role of a Court in adjudicating a dispute arising between contracting parties is well settled. In the oft-cited decision of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court held that; -

“A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.”

19. At the hearing, Moreen Awuor testified as PW1 on behalf the Respondent. She identified herself as an employee of the Respondent working as an Asset Manager. She further adopted her written witness statement as her evidence in chief meanwhile adduced into evidence the documents appearing in her list of documents as PExh.1 – 4. On cross examination she stated that the renewed lease agreement had not been filed in Court whereas Respondent's claim as against the Appellant was in respect of the MRA and particularly in respect of Clause 13 and 17 thereof. She further stated that upon expiry of the contract, the Appellant continued using the items but was not fully paying for them whereas upon expiry of the lease, Clause 22 applied. That the claim before the trial Court was pegged on the MRA and not the unsigned new and or draft agreement meanwhile there were unreturned equipment. Further there were fixed assets that had not been returned meanwhile Clause 13.3 of the MRA provided for how to deal with permanently fixed assets. In re-examination, she asserted that the MRA is the master contract meanwhile a re-write is executed, if need arises, for individual rental schedules therefore the MRA and rental schedules have to be read together.
20. On behalf of the Appellant, Lucy Gathoni Kibe, testified as DW1. She identified herself as the Appellant's Finance Manager meanwhile proceeded to adopt her witness statement as her evidence in chief and adduced into evidence the Appellant's bundle of documents appearing in the list of documents as DExh.1. On cross examination, she summarily stated that the invoices raised were not paid on due dates.
21. A review of the record and material relied on by the respective parties, it is undisputed that the parties hereto had contracted and agreed to engage in terms of the MRA as executed between them. Prior to execution of the MRA, parties hereto executed what appears to be a 'offer letter' and or 'heads of terms' dated 04.06.2013 that was a rental facility in favour of Appellant (DExh.1). By dint of the contents therein and the Appellant's execution of the same, the essential elements of contract being offer, acceptance and consideration were fulfilled. Notably, the forestated letter captured the term of



the rental facility to be a duration of forty-eight (48) months. The facility letter at the outset read as follows: -

“We are pleased to confirm that the following rental facility has been approved subject to the terms and conditions contained herein and any other terms and conditions set out in an agreement or proposal between GIBBS AFRICA LIMITED and Rentworks East Africa Limited”

22. Clause 3 of the forestated letter provided for an acceptance condition that required of the Appellant to execute certain standard documentation. Among the standard documents captured in the said Clause, was the MRA. Palpably, from the above, the rental facility which was executed by the Appellant would run the course of four (4) years on accord of the duration captured therein.
23. Which then brings us to the MRA itself. The disputed clauses of the MRA were Clauses 13 and 17 thereof. In order to place into context the disputation, the MRA must be construed in its entirety. The latter MRA defined “term” to mean “the rental term referred to in Clause 3.1 as extended or varied under Clause 17 or Clause 22 of the Agreement”. Meanwhile, Clause 3 which is titled “Rental Term” and by extension Clause 3.1 states that: - “in respect of each agreement for rental of equipment arising under this agreement, the term commence on the first payment date occurring on or after the commencement date and subject to Clause 17 and 22, continues for the number of months specified in the applicable Rental Schedule”
24. Clause 13 titled “Return of Equipment” on its part provided that: -
 - 13.1 At the expiration or earlier termination of the renting of the equipment you will at your expense deliver the equipment in good working order and condition, packed and crated in a similar manner as originally supplied to our nominated Kenya address
 - 13.2 The Equipment will be regarded as returned, unless (where applicable) it is decommissioned in accordance with the original manufacturer’s specifications by an authorized person and appropriate certificates have been supplied and it is returned in accordance with the requirements set out in this agreement.
 - 13.3 If it is not possible for you to return the equipment to us in accordance with the provisions of this agreement then you must immediately at the expiration or earlier termination of the renting of the equipment in terms of this agreement and at your cost deliver to us replacement equipment approved by us and or a similar nature to the equipment, provided that we may in our sole discretion accept payment of an amount equal to the residual value of the equipment instead of delivery of such replacement equipment AND it is expressly agreed that this provision shall not in any way constitute this agreement a hire purchase agreement. A certificate duly completed by our auditors indicting the amount of the residual value will be prima facie evidence of the contents thereof. For purpose of this agreement “residual value” shall mean the financial interest which we acquire in the equipment at the inception of the rental of the equipment in terms of this agreement and retain for the duration of the rental of the equipment in terms of this agreement.
25. Whereas, Clause 17 titled “End of term” provided that: -
 - 17.1 At the conclusion of the term, you may either return the equipment or request us under Clause 22 to agree to extend the term or vary the equipment rented. You must in either case give us written notice of your intention at least 90 Business Days prior to the expiry of the term. If you do not give us written notice within the above-mentioned period you agree that unless we



otherwise notify you in writing, the term will be automatically extended for further term of twelve (12) months.

- 17.2 If you give notice under Clause 17.1 that you will be returning the equipment then you must deliver the equipment to us on the expiry of the term in accordance with Clause 13. If you do not do so, the term will be automatically extended for a further term of twelve (12) months unless we otherwise notify you in writing.
26. Attached to the MRA were various rental schedules (PExh.2) in respect of rented equipment of which a cursory perusal of the same, it can be noted therefore the least ran of forty-five (45) months with the longest going on forty-eight (48) months. The bulk of rental schedules were all executed in 2013 with one executed in 2014, as such going by the foretated, the expiry with respect to the executed rental schedule would be between 2017 and 2018. It was not disputed that upon expiry of the rental schedules' parties attempted to re-negotiate on the terms wherein by the Appellant's own admission in its defence it averred that except for the monthly charges, parties did not reach an agreement on the terms and conditions pertaining to the new Rental Schedule. Thus, it would appear that there was a partial meeting of minds on a way forward with respect to the MRA despite expiry of the rental schedules. This position appeared to obtain until the year 2019, when on 27.05.2019, (DExh.1) the Appellant wrote to the Respondent notifying it of its intention to surrender assets in its possession on accord of the rental schedule. I find it useful to capture the contents of the letter ad verbum for the benefit of the parties herein.

“ Re: Surrender of Assets

Please be advised that we have opted to surrender all the assets effective 31st May 2019.

The assets shall be available at Kaka House 1st & 2nd Floor for your collection as from 31st May 2019. The premises will be handed over to the landlord on 3rd June, 2019.” (sic)

27. What the Court garner from the above is that as at 2019, the Appellant was still in possession of various rented assets belonging to the Respondent, notwithstanding the expiry and or duration component in the respective rental schedules as juxtaposed against the MRA. It on the premise of the latter letter that the Respondent's suit was predicated on. The question that begs at this juncture would be notwithstanding the foretated, was the MRA still alive as at 2019? Reading of Clause 13 and 17 of the MRA, it was required of the Appellant upon lapse of the respective rental schedules to return the equipment or request for an extension or vary the equipment rented. However, the rider on the above was that Appellant had to give notice at least 90 business days prior to the expiry of the term failure to which the term will be automatically extended for further term of twelve (12) months. The implication of the above provision was that despite the rental schedule having matured by effluxion of time the intention of the parties per the MRA was that if there was no notice by the Appellant as earlier captured the rental schedules would continue to survive.
28. The Appellant has argued that the rental Schedule's did not constituted independent supplementary contracts with the Respondent agitating the contrary which was contradictory in itself since by PW1's own evidence she, confirmed that MRA and rental schedules have to be read together. I am agreeable to the Appellant's position that in spite of the different rental schedule they were not independent of the MRA given that it was the latter that set out the respective parties' rights and obligations in respect of the rental schedules. Further, even if parties had not agreed on salient terms in respect of the new proposed rental schedule, if the Appellant failed to comply with the prerequisites of Clause 17, it can be reasonably deduced that MRA and respective schedules were still in effect post 2017 and 2018 upon their lapse.



29. The learned Magistrate to a great extent similarly applied himself to the provisions of the MRA to arrive at the decision that the MRA was renewed by the parties on accord of the Appellant's failure to comply with the provisions of Clause 17. The Appellant assailed the foregoing position by arguing that given that there were no newly executed rental schedules, the MRA had expired in 2017 therefore any late payments, interest and payment in lieu of notice claims, were alien and unreasonable in the circumstance. Here, for reasons earlier address this position as advanced by the Appellant could not reasonably obtain by dint of Clause 13 and 17 of the MRA.
30. Therefore, despite the manner in which the learned Magistrate arrived at his determination, the latter Clauses were conditional and operative in keeping the MRA and attendant schedules alive rather than renewal of the MRA, to wit the Appellant cannot be heard on having failed to invoke what was his right by dint of Clause 17. The Appellant's action brings to mind the words of Kuloba, J (as he then was) in *Gabriel Mbui v Mukindia Maranya* [1993] eKLR stated in his characteristic pithy style that: -
- “No one can improve his condition by his own wrong. The latin of it is *Nemo ex suo delicto meliorem suam conditionem facere potest*...it is an ancient dictum of our law, that a person alleging his own infamy is not to be heard. People whose wisdom I cannot profane by making modern comparisons to them abbreviated their wisdom in the saying, *Allegans suam turpitudinem non est audiendus*.... By which they meant that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a right or claim. No one shall be allowed to set up a claim based on his own wrongdoing. A person cannot take advantage of his own wrong and in equity, the maxim holds good that he who comes into equity must come with clean hands... *Null prendra advantage de son tort demesne*... meaning no man shall profit by the wrong that he does, and *Nullus commodum capere potest de injuria sua propria*... which means, no one can gain an advantage by his own wrong.”
31. Had the Appellant properly applied itself to the MRA it would have acted on relevant facets of the same to bring about termination the MRA therefore it cannot be heard on the argument that the MRA expired in 2017 in contrast to its tacit acquiescence on extension of the same up until 2019 by dint of Clause 17. Therefore, irrespective of the trial Magistrates determination on renewal of the MRA by dint of Clause 13 and 17, for reasons earlier highlighted the MRA was still alive on accord of the Appellant's actions or inaction thereof as may be juxtaposed against Clause 17. To be put in another way, even if the Court were to fault the learned Magistrate on the finding of renewal, the same did not in diminish and or extinguish the Respondent's claim as against the Respondent.
32. On whether the learned Magistrate erred by relying of a draft contract that was not signed? This Court has reviewed the trial evidence and impugned decision. The learned Magistrate in rendering his decision referred to the MRA and rental schedules whereas he only mentioned the unfiled renewed leases to assert that notwithstanding the Respondent's failure to evince any new renewed rental schedules, the MRA was still alive having been automatically renewed by dint of Clause 17. In any event, the draft rental schedules in DExh.1 had no bearing on the matter in light of aforecaptioned Clause other than to demonstrate that there were attempts at negotiations that did not crystalize. Therefore, this Court is at a loss as to what was the Appellant's intention by advancing, the said ground of appeal.
33. Penultimately, on whether the Appellant was entitled to any reliefs sought in it defence? It is trite that parties are bound by their pleadings meanwhile a Court is duty bound to pronounce itself on issues



canvassed through the parties' pleadings. This position was fortified by the Court of Appeal in North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others [2014] eKLR stated: -

“The complaint running through the submissions by the learned counsel for the appellant in this appeal was that the learned judge wrote and delivered a judgement on issues that were not pleaded in the plaint and which were therefore not be before the learned judge for determination.

.....One of the issues for determination on appeal in the case of Abdul Shakoor Sheikh v Abdul Najeid Sheikh Civil Appeal No. 161 of 1991 (ur) was the complaint that the trial judge dealt with an issue which was not properly before him as it had not been pleaded in the plaint. It was also contended in that appeal that in making this part of the order dependent on a non-existent appeal the judge grossly erred in that he granted a relief which had not been sought. This court differently constituted agreed and held that a plaintiff is not entitled to reliefs which he has not specified in his statement of claim as pleadings play a very pivotal role in litigation. The court cited a quote from the authors Bullen and Leake (12th edition) page 3 under the rubric Nature of Pleadings:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

See also: - Galaxy Paints Co. Limited v Falcon Guards Limited [2000] 2 EA 385

34. The Appellant's statement of defence constituted selective admission of uncontested facts and denial of contested facts. To the foregoing, end no substantive claim was made as against the Respondent either by way of counter-claim or set off to enable the trial Court make any pronouncement in favour of the Appellant, in any event. Save for the request to have the suit dismissed with costs, which would be predicated on the Respondent's failure to establish its case on a balance of probabilities meanwhile the same could not sustain, on accord of the framed issues by the trial Court, that if found in favour of the Respondent. By the learned Magistrate's decision, it was a ratification of the fact that the Respondent had proved its case on a balance of probabilities hence the issuance of the judgment in favour of the Appellant. Therefore, the forestated question as presented for determination on this appeal must equally fail.
35. In conclusion, this Court while applying its mind to the facts and the law finds that the appeal herein lacks merit and that the Appellant has failed to demonstrate that the trial Court erred in law or fact in arriving at an erroneous decision to warrant the same being set aside on appeal.

Determination

- i. This Appeal is hereby dismissed.
- ii. Cost of the appeal to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18th DAY OF November, 2024



HON. T. W. OUYA

JUDGE

For Appellant.....Kimanzi HB Kihara

For Respondent.....Ms. Kale

Court Assistant.....Martin

