Kanagi t/a Wheels Motors v Kenya Railways Staff Retirement Benefits Scheme (Civil Appeal E985 of 2022) [2024] KEHC 14391 (KLR) (Civ) (18 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14391 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E985 OF 2022

TW OUYA, J

NOVEMBER 18, 2024

(FORMERLY ELC NO. 1027 OF 2015)

BETWEEN

GEOFFREY MACHARIA KANAGI T/A WHEELS MOTORS ..... APPELLANT

AND

KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME ..... RESPONDENT

(Being an appeal from the judgment of Cheptoo, C.K., PM delivered on 4.11.2022 in Milimani CMCC No. 4925 of 2019)

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 4.11.2022 in Milimani CMCC No. 4925 of 2019. The suit was commenced by way of the plaint dated 15.10.2015 and amended on 25.04.2018 (the amended plaint) filed by Geoffrey Macharia Kanagi t/a Wheels Motors, the plaintiff in the lower court (hereafter the Appellant) against Kenya Railway Staff Retirement Benefits Scheme, the defendant in the lower court (hereafter the Respondent). Therein, the Appellant sought the following reliefs:

    a. A declaration that the forcible eviction of the Plaintiff from the suit premises by the Defendant was illegal and unlawful.

    b. General/Vindicatory/Exemplary damages for the illegal demolition of the Plaintiff's business car yard and illegal eviction occasioned by the Defendant.

c. Compensation in the sum of Kshs. 1,049,920/- on account of the costs incurred in repairing the Plaintiff's customers motor vehicles that were damaged during the illegal eviction exercise.

d. Compensation to the tune of Kshs. 500,000/- on account of loss of capital investment in the demised premises together with the cost of the Plaintiff's items illegally seized and detained by the Defendant.

e. Compensation for loss of expected profits the Plaintiff would have made at Kshs. 200,000/- per month from the date of eviction up to the remaining term of the unexpired lease.

f. That the Defendant be condemned to pay the costs of the suit and all incidentals thereto.

g. Any other or further reliefs that the Honourable Court may deem fit to grant.

2. It was pleaded that sometime on or about 30.07.2013 the Respondent herein offered the Appellant a renewable license (the tenancy agreement) to lease part of the former's premises known as Land Reference Number 209/11954/2 adjacent to Kenya Railways Headquarters (hereafter the suit premises) for a period of five (5) years and three (3) months at a monthly rent of Kshs. 47,250/- subject to an annual increment, which suit premises was to operate as a car bazaar. That however, on 26.08.2014 the Respondent issued the Appellant with a three (3)-months' notice of intention to terminate the tenancy agreement, which notice was allegedly short and issued in bad faith and/or malice.

3. It was further pleaded that consequently, the Appellant lodged a complaint before the Business Premises and Rent Tribunal (BPRT) vide BPRT Complaint No. 680 of 2014 and managed to obtain an interim injunctive order against the Respondent. That before the complaint could be heard on merit before the BPRT, the Respondent moved the High Court-Judicial Review Division by way of an application namely Judicial Review Miscellaneous Application No. 440 of 2014, challenging the jurisdiction of the BPRT to issue the abovementioned order. That upon hearing the said application, the Judicial Review Court by way of a ruling delivered on 14.10.2015 issued an order for certiorari, thereby quashing the decision by the BPRT and consequently prohibiting it from entertaining the Appellant's complaint.

4. The Appellant pleaded in the amended plaint that on the following day being 15.10.2015, the Respondent through its agents, forcefully entered the suit premises at 3.00 am and proceeded to illegally evict the Appellant. That in the process, the said agents further illegally impounded and/or destroyed the Appellant's properties. That the Appellant's attempts at reporting the incident at the Kenya Railways Police Station were rendered futile. That as a result of the alleged illegal eviction and demolition exercise by the Respondent through its agents, the Appellant suffered loss and/or damage, the particulars of which were set out in the amended plaint.

5. The Respondent filed the statement of defence dated 18.11.2015 and amended on 14.05.2018 (the amended defence), denying the key averments in the plaint and liability. Whilst admitting to the existence of the tenancy agreement and issuance of the termination notice on 26.08.2014 the Respondent averred that the same set the notice period at 60 days and similarly outlined the reasons thereof, and constituted sufficient notice of termination. The Respondent further averred that the notice was made in good faith and that it was well within its rights to issue the same.

6. The Respondent equally denied the averments made in the amended plaint, regarding the alleged forceful eviction and destruction of the Appellant's property by its agents. In contrast, the Respondent averred that it took vacant possession of the suit premises on 15.10.2014, upon the Appellant's removal

of his properties therefrom. The Respondent further denied the particulars of loss and/or damage set out in the amended plaint.

7. The suit proceeded for full hearing with the Appellant testifying and calling one (1) additional witness. The Respondent on its part summoned (1) witness. Upon close of submissions, the trial court by way of the judgment delivered on 4.11.2022 dismissed the Appellant's suit with costs.

The Appeal

8. Being aggrieved by the aforementioned dismissal order, the Appellant preferred this appeal by way of the memorandum of appeal dated 30.11.2022 which is based on the following grounds:

    i. The Learned Trial Magistrate generally misapprehended the law and facts pertinent to this matter and the applicable law by proceeding to reach a finding that the Appellant did not adduce sufficient evidence to demonstrate that it is the Respondent who forcefully demolished and evicted the Appellant from the suit premises.

    ii. The Learned Trial Magistrate acted unilaterally and ignored the cogent and weighty evidence tabled by the Appellant that would have gone to assist the Court to reach the finding that it was the Respondent who undertook the illegal eviction exercise since it was the only entity that was keen and interested in kicking out the Appellant from the suit premises and harboured a Constructive Common Intention to evict the Appellant from the suit premises the moment it issued him with a tenancy termination notice.

    iii. The Learned Trial Magistrate further erred in law and fact in failing to appreciate that the Respondent had even alluded that the Appellant vacated the suit premises on his own volition which was not true but just a bare denial of no probity value, noting that this denial did nothing to aid the process of justice and general law apart from clouding the truth and justifying the reason as to why the Respondent had deprived the Appellant access to the suit premises after the illegal eviction exercise which the Respondent had dissociated itself from.

    iv. The Learned Trial Magistrate further failed to appreciate that the very fact that the Respondent deprived the Appellant access to the suit premises and took vacant possession of the suit premises after the illegal eviction it had dissociated itself from, still amounted to constructive eviction since the Respondent took possession of the suit premises by extra judicial means other than the eviction proceedings envisaged and required by the law.

    v. In all the circumstances of the case, the decision of the Learned Trial Magistrate did not serve the interests of justice as she ended up unilaterally tilting the scales in favour of the Respondent who was the party at default having acted unlawfully and who should not have been allowed to benefit from its own illegal conduct having failed to adhere to legal means to recover possession of the suit premises from the Appellant since any eviction must be authorized by law.

    vi. The Learned Trial Magistrate further failed to appreciate that the Respondent was legally stopped from seeking to benefit from its illegalities, inequities and transgressions conducted through its water tight demolition and eviction strategy that was unlawful, aggressive, and wholly infringed on the Appellant's rights and which involved the co-option of senior officers from the Kenya Railway Police under whose jurisdiction the suit premises falls who even declined to record the Appellant's complaint of forceful entry contrary to section 90 of the Penal Code Cap 63 Laws of Kenya and further exhibited total indifference towards the Appellant.

vii. The Learned Trial Magistrate also failed to appreciate and weigh evenly the various issues of fact and law so as to do justice and equity to the parties before her as may be necessary for the ends of justice including taking judicial notice of the fact that illegal evictions have in the previous past been carried out in the wee hours of the morning using hired goons, which was not the exception in the present circumstances.

viii. The Learned Trial Magistrate also reached an erroneous finding that the Appellant had not discharged his evidential duty and burden of proof yet the Appellant had adduced both primary and circumstantial evidence to prove his case.

ix. The decision of the Learned Trial Magistrate is in its entirety is bad and unjust and cannot be supported either on the facts or the law pertinent to the various issues placed before the Court.

x. The decision appealed against offends all notions of justice, equity, fairness and rationality and as such ought to be quashed and set aside. (sic)

9. The Appellants consequently seek the following orders:

i. That the appeal be allowed.

ii. That the Judgment of Honourable C.K. Cheptoo, Principal Magistrate delivered on 4.11.2022 in Milimani CMCC No.No. 4925 of 2019 be set aside and this Honourable Court be pleased to substitute therefore its own judgment.

iii. That the costs of the appeal be awarded to the Appellant.

Parties' Submissions On The Appeal

10. The appeal was canvassed by way of written submissions. Counsel for the Appellant restated the grounds of appeal setting out that the Respondent acted illegally in forcefully and unjustifiably evicting the Appellant. Counsel submitted that at the time of the unlawful eviction (alleged), the Appellant was still lawfully entitled to occupy the suit premises pursuant to the tenancy agreement, while relying on the decision in Nginyo Investment Limited v Mobile Pay Limited [2020] KEHC 3261 (KLR) where the court held thus:

> "In conclusion therefore, once a tenancy has been determined in the manner agreed and unless the tenant remains in possession no term can be implied that the tenancy remained in force in accordance with the terms of the terminated tenancy. Any questions relating to repairs, or other unsettled issues are regarded as breaches of the tenancy terms, not on extended tenancy on the basis of constructive possession."

11. On the subject whether the Appellant had proved his case to the required standard, counsel borrowed from the decision in Gichinga Kibutha v Caroline Nduku [2018] KEELC 3981 (KLR) and Sections 107 and 108 of the *Evidence Act*, Cap. 80 Laws of Kenya, regarding who has the burden of proof in civil cases. Counsel then argued that in the present instance, the Appellant tendered evidence to prove his case on a balance of probabilities and hence the trial court ought to have found in his favour.

12. Counsel went on to argue that in view of the foregoing circumstances, the Appellant was entitled to receive compensation, by way of the reliefs sought. Counsel cited inter alia, the case of Hahn v Singh Civil Appeal No. 42 of 1983 [1985] KLR 716 at page 717 regarding the principle that special damages must both be specifically pleaded and strictly proved. On those grounds, the court was urged to allow the appeal accordingly.

13. Counsel for the Respondent firstly raised a preliminary issue that the appeal ought to be dismissed with costs for want of service of the memorandum of appeal upon his client. In arguing so, counsel cited the decision in Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others [2016] eKLR where the Court of Appeal stated that:

> " The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms".

14. On the merits of the appeal, counsel relied on the decisions in Kyallo Elly Joy V Samuel Gitahi Kanyeri (2021) eKLR and Anne Wambui Ndiritu (Suing as Administrator of the Estate of George Ndiritu Kariamburi -Deceased) v Joseph Kiprono Ropkoi & Four By Four Safaris Company Ltd [2004] KECA 65 (KLR among others, touching on the subject of who has the burden of proof, to argue that the trial court acted correctly in finding that the Appellant had failed to prove his case against the Respondent, on a balance of probabilities. Counsel further submitted that as earlier stated in its pleadings before the trial court, the Respondent had previously issued the Appellant with a termination notice requiring him to vacate the suit premises within 60 days of the date of issuance. That it was never proved that the Respondent either forcefully and unlawfully evicted the Appellant therefrom, neither was it proved that the Respondent hired goons or engaged the services of police officers in executing the purported eviction.

15. Regarding the reliefs which were sought before the trial court but denied; more particularly the compensation sums; it is counsel's contention that no documentation or particulars were tendered to support any of the said sums, borrowing from the case of Kenya Women Microfinance Ltd v Martha Wangari Kamau [2020] KEHC 4845 (KLR) where the court reasoned that any allegations of loss and damage must be proved by way of evidence. Counsel further refuted the claim on special damages, restating that the same were not proved in tandem with the well-known principles set out in the case of Coast Bus Services Limited v Sisco E. Murunga Ndanyi and 2 others-Nairobi C.A.No. 192 of 1992 (UR).

16. Ultimately, counsel for the Respondent submitted that the tenancy agreement terminated through frustration. That notwithstanding, the trial court arrived at a well-reasoned finding which ought not to be disturbed.

Analysis And Determination

17. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account

of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

18. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was unfounded, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

19. Upon review of the memorandum of appeal and submissions by the respective parties before this court it is evident that the appeal is essentially challenging the decision by the trial court to dismiss the Appellant's claim.

20. However, before delving into the merits thereof, the court observed that the Respondent sought to challenge the competency of the appeal on the basis that the memorandum of appeal was never served upon it or its advocates. It is noteworthy that this issue has been raised at the submissions stage of the appeal proceedings. It is trite law that submissions do not constitute evidence and hence a party cannot be heard to raise new issues or arguments by way of his or her submissions. This position was succinctly stated by the Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR when it held that:

> "Submissions cannot take the place of evidence...Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."

21. Be that as it may, the court is of the view that the issue of service of the memorandum of appeal is now moot, since the Respondent in any event participated both in the lower court suit and in the present appeal proceedings at all material times up until this final stage.

22. In view of all the foregoing positions, the court is of the view that the Respondent cannot be heard to challenge the competency of the appeal on those grounds.

23. Now to the merits of the appeal, the legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV

of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

24. The gist of the parties' respective pleadings have already been set out hereinabove.

25. At the trial stage, the Appellant adopted his executed witness statement dated 15.10.2015 as his evidence-in-chief. He went on to state that though the tenancy agreement was set to run for a term of five (5) years, the Respondent issued him with a termination notice thereof before the term concluded. He further stated that on the material date, the suit premises was invaded by persons who raided his properties and removed the motor vehicles therein. That he attempted to report the matter to the local police station, but that he was not issued with an Occurrence Book (OB) number. That the said local police officers were part and parcel of the group that forcefully evicted him from the suit premises.

26. During cross-examination, the Appellant stated inter alia, that the termination notice stated that his yard business was operating near a railway line/station, which he confirmed to have been the position at the time. He further stated that the area was relatively secure as a result of the security services being offered by the neighboring police officers. It was also his testimony that the Respondent issued him with a 60-day termination notice but that he did not voluntarily remove his properties from the suit premises, as is claimed by the Respondent. That while he was not initially present at the scene, he was later informed of the alleged eviction, at which point he visited the suit premises. That at the time, he had in his possession motor vehicles belonging to various customers, which he eventually had to incur repair costs on. That he made a profit of Kshs. 200,000/- every month from his business, which constitutes part of the reliefs sought in the amended plaint. That he would also be seeking a sum of Kshs. 500,000/- on the investments lost.

27. In re-examination, it was the Appellant's testimony that an order had been issued by the Environment and Land Court (ELC) barring the Respondent from entering the suit premises at the material time. He further testified that he was served with a court order.

28. Timothy Macharia Ireri who was PW2 equally adopted his signed witness statement dated 3.07.2019 as part of his evidence-in-chief before proceeding to testify that he worked as a mechanic at all material times. He stated that he and the Appellant have been long-time friends. That on the material day, he received a call from another friend, informing him of the alleged eviction, thereby prompting him to convey the information to the Appellant via telecommunication. That upon arriving at the suit premises, they discovered that the Appellant's watchman was away but that another watchman informed them of the alleged incident. That the Railway police officers informed them that they had no knowledge of the supposed incident but that both he and the Appellant took photos and presented them to the said police. That he had no way of telling whether the Appellant was robbed by the police officers.

29. In cross-examination, he restated his earlier evidence save to add that he was unsure whether the Appellant had a personal watchman to guard the suit premises, but that he was relying on the watchmen guarding the opposite premises, but that upon inquiry, they too said they were unaware of any incidents that had occurred on the suit premises.

30. However, during re-examination, the witness testified that upon arriving at the suit premises later on the material day, he found people removing motor vehicles therefrom, claiming to have instructions from the Railway staff. This marked the close of the Appellant's case.

31. The Respondent in turn called its Estates Officer, Moses Eric Obuya, as DW1. His evidence-in-chief consisted of the adoption of his signed witness statement dated 16.02.2022. He testified that the termination notice resulted from concerns that the Appellant's business posed a security threat. He further testified that the suit premises was still vacant at the time of giving his testimony.

32. During cross-examination, the witness stated that he had no knowledge of the hiring or involvement of any goons. That he equally had no knowledge of any order by the ELC restraining the eviction of the Appellant from the suit premises. That as per his knowledge, the Appellant voluntarily vacated the suit premises. On being re-examined, it was the evidence of the witness that the court order being referenced by the Appellant was issued on 19.10.2015 while the Appellant vacated the suit premises earlier on 15.10.2015.

33. Upon close of final submissions, the trial court after restating and analyzing the evidence, reasoned that the Appellant did not prove that his properties were demolished or otherwise destroyed by the Respondent whether through its agents, or hired goons. The trial court further reasoned that the Appellant did not prove that the Respondent undertook any illegal eviction against him. In the premises, the trial court proceeded to dismiss the Appellant's suit with costs.

34. Upon noting that the 10 grounds of appeal all relate to the dismissal order made by the trial court, this court will proceed to address them contemporaneously, hereunder.

35. To begin with, the applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "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." The above provision provides for the legal burden of proof.
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> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> "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."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
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> "Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes

that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

36. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

37. From the foregoing guiding authorities, it is clear that the duty of proving the averments contained in the amended plaint lay squarely with the Appellant. 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)

38. Upon re-examination of the pleadings and material on the lower court record, it is not in dispute that the parties herein entered into a tenancy agreement in respect of the suit premises. This is further confirmed by a copy of the executed offer letter dated 30.07.2013 found on pages 25 to 28 of the record of appeal. The same reads that the tenancy agreement was to run for a term of five (5) years and three (3) months with effect from 1.08.2013 being the date of execution. It is equally not in dispute that sometime thereafter, the Respondent issued the Appellant with a 60-day termination notice dated 26.08.2014 (found on page 32 of the record of appeal). The same sets the reasons for termination as being the fact that the suit premises is situated near the Railway Station, thereby giving rise to security concerns which rendered the Appellant's business untenable in that area. The Appellant likewise attached subsequent correspondences between the parties and/or their representatives, dated 30.09.2014 and 9.10.2014 and found on pages 33 to 35 of the record of appeal.

39. Upon a further re-examination of the record, it is similarly not disputed that following issuance of the abovementioned termination notice, the Appellant lodged a complaint with the BPRT thereby resulting in an order made on 23.10.2014 (found on page 48 of the record of appeal) granting interim injunctive orders against the Respondent, but which orders were later quashed alongside the BPRT proceedings, by the ELC vide an order made on 14.10.2015.

40. Suffice it to say that, the crux of the appeal lies in whether the trial court arrived at a reasonable finding regarding the alleged eviction of the Appellant coupled with the alleged demolition of his properties.

41. From a perusal of the pleadings and totality of the material on record, the court did not come across any credible evidence to support the Appellant's averments of forceful and/or unlawful eviction and demolition of properties, by the Respondent. It is interesting to note that not even PW2 whose evidence was intended to corroborate that of the Appellant, was present at the suit premises when the purported eviction took place. He stated in his oral testimony that he received a call from a third person who is not presented before the trial court, informing him of the eviction exercise. Such evidence is therefore hearsay at the very least.

42. In addition, neither the Appellant nor PW2 were able to state with clarity and certainty whether a forceful eviction took place and if so, to ascertain that the same was done at the hands or instruction of the Respondent. In the same manner, the court observed that the Appellant attached unclear copies of photographs to the record of appeal on pages 61 to 66. From a glance thereof, there is no way of ascertaining that a demolition or eviction exercise took place. If it were so that the Appellant's properties were demolished by or on behalf of the Respondent, the former would still be required to tender credible material to support such an allegation. As it stands, it has not been demonstrated that the Respondent for one evicted the Appellant; whether forcefully or otherwise; neither has it been demonstrated that the Appellant's goods were destroyed and/or demolished at the instruction of the Respondent or otherwise, as claimed in his pleadings.

43. In the court's view, the averments by and on behalf of the Appellant are merely speculative and do not stand supported by way of any credible evidence.

44. Further to the foregoing, whereas the Appellant claimed that the purported eviction exercise was made in contravention of an existing court order which barred any such eviction, he did not tender any such court order for reference either before the trial court or before this court now sitting on appeal. As it stands, the Appellant's averments were unsubstantiated.

45. Upon considering all the foregoing factors therefore, the court is satisfied that the trial court properly analyzed the pleadings and evidence placed before it and arrived at a reasonable finding on the Appellant's suit. The court finds that no proper basis has been laid, warranting a disturbance with the trial court's decision.

Disposition

46. Consequently, the appeal is found to be lacking in merit and it is hereby dismissed with costs to the Respondent. The judgment delivered by the trial court on 4.11.2022 in Milimani CMCC No. 4925 of 2019 is hereby upheld.

    a. The Appeal is hereby dismissed with costs to the Respondent

    b. The judgment delivered by the trial court on 4.11.2022 in Milimani CMCC No. 4925 of 2019 is hereby upheld.

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

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Appellant.....Gikaria

For Respondent.....Maalim HB Wafula

Court Assistant.....Martin