Kahumbura v Njuguna (Civil Appeal E624 of 2022)
[2024] KEHC 14437 (KLR) (Civ) (14 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14437 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E624 OF 2022

MA OTIENO, J

NOVEMBER 14, 2024

BETWEEN

JAMES KAHUMBURA ..... APPELLANT

AND

RUTH NYAMBURA NJUGUNA ..... RESPONDENT

(An appeal from the Judgment and Decree of Honourable S.A Opande (PM) delivered on 27th July 2022 in the Milimani CMCC No. E4120 of 2020)

JUDGMENT

Introduction

1. This is an Appeal from the Judgment of the magistrate's court delivered on 27th July 2022 in the Milimani CMCC No. E4120 OF 2022 where the trial court partially allowed the Respondent's claim against the Appellant for refund of Kshs. 980,000/-.

2. The background of the matter is that by a tenancy agreement dated 9th June 2020 but commencing on 15th June 2020, the Respondent entered into a tenancy agreement with the Appellant at a monthly rent of Kshs. 130,000/-.

3. Prior to taking possession of the premises, the Respondent paid to the Appellant a total sum of Kshs. 1,040,000/- comprising of six months' rent (Kshs. 780,000) and a further Kshs. 260,000/- on account rent deposit. The Respondent subsequently moved in the house on 20th June 2020.

4. However, on 23rd June 2020, just three days after the Respondent took possession of the premises, due to disagreements between the Respondent and the Appellant, the Respondent moved out of the premises and demanded that the Appellant refund to her an amount of Kshs. 980,000/- being the advance rent paid (Kshs. 780,000/-) and a portion of the deposit on rent (Kshs. 200,000/-).

5. To enforce her claim, the Respondent moved to court and filed a plaint dated 12th August 2020 against the Appellant.

6. On his part, the Appellant filed a statement defence and a counterclaim dated 6th January 2021 denying plaintiff's allegation and also seeking as against the Respondent, general damages for breach of contract, general damages for mental anguish and costs of the suit.

7. On 27th July 2022, the trial court delivered its judgment and found that the Respondent had partly proved her case, thereby warding her a sum of Kshs. 780,000/- being the six months' rent paid in advance. Costs and interest of the suit was also awarded to the Respondent from the date of filing the suit.

The Appeal

8. Aggrieved by the decision of the lower court, the Appellant, vide its memorandum appeal dated 8th August 2022 lodged an appeal to this court, raising five (5) grounds of appeal as follows; -

    i. The learned magistrate erred in law and fact by failing to consider the terms of the agreement between the parties with payment of monthly rent.

    ii. The learned trial magistrate erred in law and fact by failing to consider the Appellant submissions.

    iii. The trial magistrate erred in law and fact by failing to consider the evidence tabled before him.

    iv. The learned trial magistrate erred in law and fact by failing to award the Appellant damages incurred by default of notice.

    v. The learned magistrate erred in law and fact by aiding Respondent's argue their case.

9. The appeal was canvassed by way of written submissions. The Appellant's submissions is dated 9th August 2024 whilst that of the Respondent is dated 12th September 2024.

Appellant's submissions

10. The Appellant submitted that the learned trial magistrate erred in law and fact when he awarded the Respondent Ksh 780,000/-. According to the Appellant, the court failed to consider that apart from the Respondent's failure to give the two months' notice, there was also the rent due for the month of June 2020, amounting to Ksh 130,000/- as per Clause (a) (ii) of the tenancy agreement.

11. The Appellant further submitted that the learned trial magistrate erred in fact when he failed to consider the costs incurred on repairs which was necessitated by the Respondent's actions. According to the Appellant, the Respondent had moved into the premises with three massive washing machines and had installed them on the premises, causing damage that required repair. That the Respondent was to be responsible for the repairs pursuant to Clause (p) and (q) of the tenancy agreement.

12. Additionally, it is the Appellant's submission that the trial court erred in failing to find that the Appellant was entitled to be compensated for the sum of Kshs. 100,000/- he paid to the agents who helped him procure the Respondent as a tenant. The Appellant asserted that due to the premature termination of the tenancy by the Respondent, and her failure to provide the required notice, the Appellant is entitled to be reimbursed for the agency fees.

13. Finally, the Appellant submitted that the trial court erred in failing to address his counterclaim for general damages due to the Respondent's early termination of the two-year tenancy agreement.

According to the Appellant, it took him four months after the termination to secure another tenant and therefore the Respondent ought to be held liable for the loss incurred.

14. In the premises, the Appellant prayed for orders that the appeal be allowed and trial court judgment be set aside in its entirety.

Respondent's Submissions

15. On her part, the Respondent supported the trial court's Judgment and urged this court to uphold the same. According to the Respondent, the trial court's decision to order the refund of Kshs. 780,000/- was premised on the fact that the Appellant demand that the Respondent vacate the premises was unwarranted and without any legal basis.

16. According to the Respondent, the Appellant failed, at the trial court, to provide any credible evidence in support of his claim that the Respondent had used the premises for commercial purposes.

17. On the Appellant's argument that the Respondent should pay Kshs. 100,000/- being the agents fees, the Respondent submitted that as rightly held by the trial court, the amount is not payable since the same was not indicated and therefore part of the tenancy agreement.

18. On the Appellant's claim of Kshs. 107,940/- being the cost of repairs, the Respondent submitted that pursuant to Clause b(q) of the tenancy agreement, such repair costs, where necessary, are to be deducted from the amount paid as two months' deposit on rent, an amount which by the order of the trial court is already in the hands of the Appellant. That further, no sufficient evidence was produced by the Appellant at trial to prove to the required standards that the repair costs were in fact incurred as alleged.

19. That in any event, the Appellant in his counterclaim did not superficially plead the costs of repairs in his pleadings before the trail court. That the same argument applies to the Kshs. 130,000/- being the rent for month of June 2020 which has only been introduced at the appellate stage. That in any event, it would be unjust to make the Respondent pay a whole month's rent in view of the fact that she stayed in the premises for a period of 3 days only.

20. Regarding the Appellant's claim for general damages for breach of contract, the Respondent submitted that the Appellant having withheld two months' deposit on rent cannot again claim general damages. Referring to the decision in Dharamshi v Karsan [1974] EA 41, the Respondent submitted that general damages are not awardable for breach of contract in addition to the quantified damages as doing so would amount to duplication.

21. The Respondent therefore urged this court to dismiss the appeal with costs in her favour.

Analysis and determination

22. This being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion, keeping in mind that unlike the trial court, it did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. See the Court of Appeal decision in Peters vs Sunday Post Limited [1958] EA where the court stated that; -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses.....the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

23. The court is equally aware that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses testify and seeing their demeanor as was held in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA where the court stated that: -

> " ...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial 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..."

24. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that: -

> " 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."

25. I have carefully reviewed the Appellant's memorandum of appeal dated 8th August 2022 by which this appeal was commenced. I have also reviewed the documents and pleadings in the record of appeal and the submissions by the parties in support of their respective positions.

26. From the record of appeal, it is clear that the Appellant (being the landlord) and the Respondent (tenant) executed a two-year tenancy agreement with a commencement date of 15th June 2020. The monthly rent was Kshs. 130,000/- payable six months in advance by the 15th day of every six month. The Respondent was also to pay to the Appellant a further sum of Kshs. 260,000/- being a refundable two months' deposit on rent.

27. It is also evident from the record that in line with the tenancy agreement, the Respondent paid to the Appellant a total sum of Kshs. 1,040,000/- comprising of the six months' rent (Kshs. 780,000/-) and a further sum of Kshs. 260,000/- being the two month's deposit on rent.

28. However, just after a few days after moving into the premises, it appears there was some disagreement between the Respondent and the Appellant as a result of which the Respondent opted to vacate the premises.

29. The Appellant claimed before the trial court that the Respondent's vacation of the premises was unjustifiable, without any basis and therefore a breach of the agreement for which he claimed compensation.

30. The Respondent on the other hand testified that she was threatened by the Appellant to vacate the premises.

31. I have carefully reviewed the evidence tendered by the parties in the lower court and cannot help but agree with the finding of the magistrate that the Respondent did not by way of evidence prove her claim that she was threatened to vacate the premises and that she vacated the premises without giving the requisite two month notice pursuant clause (b) (m) of the agreement.

32. In the circumstances, I hold, as the trial court did, that the Respondent was in breach of clause (b) (m) of the tenancy agreement.

33. Having found that the Respondent was in breach of the tenancy agreement, the next issue for determination would then be; what are the remedies available to the Appellant as a result of the breach?

34. From the reading of the tenancy agreement, it is clear that the agreement was for two years. However, a party would opt out of the agreement (either at the expiration of the agreement or earlier) by giving the other a two months' notice. It is also evident from the agreement that where this clause is complied with, there would be no penalty. However, in case of breach as is the case herein, the penalty/ compensation to the innocent party would be an amount equivalent to the two month's rent deposit, being the Kshs. 260,000/-.

35. In this case, there was no notice given by the Respondent to the Appellant as indicated above. The Respondent being in breach of the tenancy agreement in that regard, then, the Appellant was entitled to retain the whole of the Kshs. 260,000/- deposit on rent as compensation in lieu of notice.

36. To the extent that the tenancy agreement was clear that a party may opt out of the agreement (upon giving two months' notice) even before the expiration of the two-year period, the Appellant's claim for general damages for early termination of the agreement has no basis and cannot stand. The same goes for the Appellant's claim for general damages for mental anguish.

37. As established above, in my view, the only breach by the Respondent for which the Appellant is entitled to compensation is the failure to by the Respondent to issue the two-month notice.

38. The second question for determination in this appeal whether the trial court erred in failing to award to the Appellant the Kshs. 130,000/- being the rent for the entire amount of the rent of June 2020.

39. From the tenancy agreement, I note that the monthly rent agreed was Kshs. 130,000/-. Evidence tendered at trial indicated that the tenancy was to commence on 15th June 2020. In her evidence in chief, the Respondent who testified at trial as PW1 told court that she resided in the premises for ten (10) days. This therefore means that as per the tenancy agreement, an amount of Kshs. 130,000/- being the rent for the month June 2020 was due. It is immaterial that the Respondent only occupied the house for a shorter period. As long as the Respondent moved into the premises, even one day would suffice.

40. Thirdly, on the costs for repairs, the Appellant claimed that he spent a sum of Kshs. 107,940 to renovate the premises after the Respondent had left the house in a state of disrepair and sought that the Respondent refunds him this cost. I however reviewed the pleadings filed by the Appellant in the lower court, particularly the Appellant's Counter-Claim dated 6th January 2021 and note that there was no prayer for the refund of the cost of repairs.

41. It is trite law that special damages must not only be specifically pleaded, but must also be strictly proven. In Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR the Court of Appeal held as follows; -

> " We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of. In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & others Nairobi *CA No. 192 of 1992* (ur) appears in the Jivanji case:

> "It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v Chebon civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgement:
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> "It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J quoted in support the following passage from Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.
>
> The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

42. In this case, the Appellant having not specifically pleaded his claim against the Respondent for the refund of the cost of repairs, the claim cannot, on that basis alone, succeed.

43. Further, I note that the documents produced by the Appellant at trial in support of his claim for the costs of repairs were mainly invoices as opposed to receipts contrary to the established principle of law that an invoice is not a proof of payment. See the case of Idris & another v Lime & another (Suing as the legal representatives in the Estate of Samson Ndunde Lime (Deceased)) (Civil Appeal E20 of 2022) [2023] KEHC 18062 (KLR) (26 May 2023) (Judgment)where the court stated that; -

> " It is true that the trial court found that an expense of the sum of Kshs 1,724,347/= stated in the invoice from St. Luke's Orthopedic and Trauma Hospital had been proved. It is however not in dispute that indeed no receipt was produced to support this alleged expenditure. It is also a well settled principle of law that an invoice is not proof of payment and that special damages can only be proved by producing actual receipts or invoices endorsed with the word "Paid" (see Total (Kenya) Limited (formerly Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR."

44. The foregoing reasoning is to equally apply to the Appellant's claim for Kshs. 100,000/- for the agent which was also not pleaded and no receipts were produced in support of the claim.

45. In the final analysis, I find that the trial erred in failing recognize that the rent for month of June 2020 (covering the period 15th June 2020 – 14th July 2020) being a sum Kshs. 130,000/- was due to the Appellant from the Respondent under the tenancy agreement.

46. It also my finding that the trial court erred in failing to find that the whole of the two months' deposit (Kshs. 260,000) was not refundable under the tenancy agreement between the parties, the Respondent having breached the requirement for notice under the agreement.

47. The claim for cost of repairs (Kshs. 107,940/-) and the agency fees (Kshs. 100,000/-) fails for having not been specifically pleaded and strictly proved.

48. Accordingly, I find the appeal partially merited and hereby set aside the trial court's judgment of 27th July 2022 awarding the Respondent a sum of Kshs. 780,000/- and in its place, substitute it with a judgment of this court awarding the Respondent a sum of Kshs. 650,000/-.

49. The Appeal having partially succeeded, I direct that each party to bear their own costs.

50. It so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 14TH DAY OF NOVEMBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses – Court Assistant

Ms. Kirui..... for the Appellant

N/A.....for the Respondent