



**Benghalia v Ashburton Grove Limited (Civil Appeal E018 of 2024)  
[2024] KEHC 16936 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16936 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E018 OF 2024  
F WANGARI, J  
DECEMBER 6, 2024**

**BETWEEN**

**TLILANI SAFIA BENGHALIA ..... APPELLANT**

**AND**

**ASHBURTON GROVE LIMITED ..... RESPONDENT**

*(This is an Appeal from the Judgment and Decree of Hon. NYARIKI J, Resident Magistrate delivered on 07/12/2023 arising from Mombasa CMCC No. 587 of 2020)*

**JUDGMENT**

1. This is an Appeal from the Judgment and Decree of Hon. Nyariki J, Resident Magistrate delivered on 07/12/2023 arising from Mombasa CMCC No. 587 of 2020. The Appellant pleaded that the trial court inter erred in law
2. The Appellant further stated that the trail court misdirected itself in the award of Kshs. 150,000 and Kshs. 120,000 as Special Damages which were not pleaded nor proved. The court was faulted on making a decision where there was no written agreement between the parties. The Appellant sought to have the judgment of the lower court set aside, and substitute it with an order dismissing the suit.

**Pleadings**

3. The Respondent, who was the Plaintiff in the lower court via the Plaint dated 17/12/2020 sued the Appellant/ Defendant for Kshs. 979,561, General Damages costs for malicious damage of property belonging to the Plaintiff.
4. It was averred that the Plaintiff and the Defendant had a lease agreement where the Defendant was the tenant. The lease was to run for 5 years. Before the expiry of the lease period, the Defendant gave a vacation notice. Upon vacating the shop premises, she vandalized the premises and stole good therein, and the damage was valued at Kshs. 979,561.



5. The Appellant/ Defendant in her Statement of Defence denied the allegations in the Plaintiff and put the Plaintiff to strict proof thereof. She admitted having vacated the premises prematurely but denied vandalizing the shop as alleged. She prayed that the suit be dismissed with costs.
6. The Plaintiff called two witness, who testified as per their witness statement on record. The Defence did not give evidence during trial. I have confirmed from the Record of Appeal that the Defendant did not file her witness statement.
7. The court thereafter directed that the parties do file their submissions. Both parties complied by filing their rival submissions. Judgment was entered in favour of the Plaintiff. The Defendant being dissatisfied with the decision of the court filed this appeal.
8. The court directed that the appeal be canvassed by way of written submissions. Both parties complied by filing their respective, submissions which I have considered.

### **Analysis**

9. Having perused through the pleadings and the submissions, the issue for determination are;
  - a. Whether the appeal has merits
  - b. Who meets the costs of the appeal
10. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (See *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123)
11. The Appellant faulted the trial court for including rent in the total being sought yet it was not specifically pleaded nor proved. The Appellant also took issues with the invoices relied on by the Respondent in the lower court and the said evidence ought not to have been relied on by the trial court. The Appellant also pleaded that the Respondent had not proved that repair works were done on the premises, and that there was no proof of vandalism as no police report was produced as an exhibit.
12. A party who alleges, must proof. Section 107 of the *Evidence Act* provides as follows;  
Burden of proof
  1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
13. Upon perusing the lower court proceedings, the Plaintiff was able to discharge the burden of proof by giving evidence that there was a tenant/ landlord agreement between the Appellant and the Respondent. A written agreement was produced as exhibit. I dismiss the allegations by the Appellant that there was no agreement between the 2 parties as stated in the Memorandum of Appeal.
14. Further, the Respondent by way of oral evidence and receipts have proved that the losses were incurred as alleged. There was an eye witness (PW2) to the vandalizing of the premises. The evidence was not contradicted.



15. On the other hand, the allegations by the Defendant were not supported either by way of oral or documentary evidence. The Defendant did not defend the suit as the Statement of Defence was just mere denial of the facts. I find that the averments therein were not supported by any evidence.
16. In the case of *CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd)* [1978] eKLR had this to say in respect to proof of pleadings;

“The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.”
17. In the absence of the evidence by the Defendant in the lower court, and the fact that there was no witness statement, the evidence of the Plaintiff remains unchallenged.
18. On costs, I find that the Appellant having been unsuccessful in both the primary suit and the appeal, she ought to meet the costs of this appeal. I exercise the discretion of the court and direct that costs shall be awarded to the Respondent.

### **Determination**

19. In the upshot, this court orders as hereunder;
  - a. The appeal is dismissed and the lower court judgment upheld.
  - b. The Appellant shall bear the costs of this appeal.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024.**

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**F. WANGARI**

**JUDGE**

In the presence of;

Ng'arua Advocate h/b for Ng'ang'a Advocate for the Appellant

Saeta Advocate for the Respondent

Brian, Court Assistant

