



REPUBLIC OF KENYA



**Nkubitu v Mugwika (Civil Appeal E005 of 2024)
[2024] KEHC 15792 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E005 OF 2024
CJ KENDAGOR, J
DECEMBER 13, 2024**

BETWEEN

JOEL M NKUBITU APPELLANT

AND

JUSTUS MEMEU MUGWIKI RESPONDENT

(Being an appeal against the judgment of the Small Claims Court delivered on 13th December 2023 by Hon. Adjudicator Lilian Maina in SCCCOMM. E370 of 2023)

JUDGMENT

Introduction

1. The Appellant and the Respondent entered into an oral lease agreement in which the Appellant leased the Respondent's property for an agreed monthly rent. The parties do not agree on the exact date of the oral lease agreement and the agreed rent, but they reduced the same into writing on 11th March, 2019 under which they settled the monthly rent at Kshs.40,000/= . They amended the agreement in December, 2020 in which they reviewed the rent upwards to Kshs.50,000/= . The amendment also allowed the Appellant to construct semi-permanent structures on the premises. The Appellant constructed the semi-permanent structures.
2. However, the parties had a dispute on the payment of rent arrears, as a result of which the Business Premises Rent Tribunal (BPRT) ordered the Appellant to vacate the premises. The Appellant vacated the premises and removed the semi-permanent structures on the leased premises. The Respondent took possession but he was not contented with the state in which he found the premises. He claimed that the Appellant had excessively damaged the premises when he was vacating the premises and while removing the semi-permanent structures. He sued the Appellant seeking Kshs.640,100/= as compensation for damages on the leased premises.



3. The Appellant filed a Response to Claim in which he denied the Respondent's claims. He denied that he damaged the leased premises and insisted that he left the premises in its original state. But before the Court could hear the matter, the Appellant questioned the jurisdiction of the Small Claims Court to hear and determine the dispute through an application dated 20th November, 2023. The Court heard the application and dismissed it in a ruling delivered on 28th November, 2023. In the ruling, the Court held that it had jurisdiction to hear and determine the dispute under Section 12 of the [Small Claims Court Act](#).
4. The Appellant did not file an appeal to the ruling and the matter proceeded to hearing. The Court delivered a judgment in favor of the Respondent on 13th December, 2023 in which it awarded him Kshs.640,100/= as compensation for the damages on the leased premises.
5. The Appellant was dissatisfied with the judgment of the Court and appealed to this Court vide a Memorandum of Appeal dated 10th January, 2024 in which he listed the following grounds of Appeal;
 1. The learned magistrate erred in law and fact in finding that the Court had jurisdiction to entertain the case.
 2. The learned magistrate erred in law and fact in finding that material damage to the property was caused by the Respondent.
 3. The learned magistrate erred in law and fact in finding that the Respondent proved his case on a balance of probability.
 4. The learned magistrate erred in law and fact in finding and entering judgment in favor of the Respondent as prayed in the claim seeking a sum of Kshs.640,000/= with costs and interests.
6. The Appellant asked the Court to allow the appeal and set aside the judgment of Hon. Lilian Maina in Meru SCCCOMM. E370 of 2023 delivered on 13th December, 2023. The Appeal was canvassed by way of written submissions.

The Appellant's Written Submissions

7. The Appellant submitted that the lower Court's finding that it had jurisdiction was wrong. He argued that liability in tort arises out of breach of duty and that the duty that existed between the Appellant and the Respondent was that of a landlord and tenant. He submitted that the substratum of the dispute emanated from the landlord tenant relationship which does not fall within the Court's jurisdiction under Section 12 of the [Small Claims Court Act](#). He argued that the dispute fell within the jurisdiction of the Business Premises Rent Tribunal because the issue was closely tied to rent arrears.
8. In addition, the Appellant submitted that the Court's holding that he was responsible for the damage was wrong because the Respondent did not adduce enough evidence to prove that fact. He argued that the Respondent did not provide any evidence to show the condition of the premises before and after the alleged damage hence he did not discharge the evidential burden. He also argued that the Respondent did not prove the case on a balance of probability. Lastly, the Appellant argued that the amount quantified as owing to the Respondent was not in order because the same was not proved.

The Respondent's Written Submissions

9. The Respondent submitted that the lower Court had jurisdiction because the dispute fell within the purview of liability in tort in respect of loss or damage caused to any property as provided under Section 12 (1) 9 (c) of the [Small Claims Court Act](#). He requested the court to uphold the trial magistrate's finding that the Court had jurisdiction. In addition, he submitted that he discharged the burden of



proof and adduced the required evidence to show that the Appellant was responsible for the damage on the leased premises. He argued that the Quantity Surveyor's report and viva voce testimonies were sufficient proof that the Appellant damaged the suit property.

Issues for Determination

10. I have considered the grounds of appeal and submissions by both counsels for the parties and I am of the view that the issues for determination are;
 - a. Whether the Appellant has properly raised the issue of Jurisdiction.
 - b. Whether the Respondent proved his Claim at the Lower Court on a Balance of Probabilities.

The Duty of the Court

11. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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 ...”

Whether the Appellant has properly raised the issue of Jurisdiction

12. The Appellant submitted that the lower Court's finding that it had jurisdiction was wrong. He argued that the dispute fell within the jurisdiction of BPRT because the issue was closely tied to rent arrears. On the other hand, the Respondent requested this Court to uphold the trial magistrate's finding that the Court had jurisdiction. This Court appreciates that issues of jurisdiction are key and ought to be given due consideration whenever they are raised. This Court has relooked at the history of this current dispute with a view to ascertaining whether the question of jurisdiction is properly before it.
13. This is not the first time the Appellant is raising the issue of jurisdiction. He first raised this question at the lower Court through a Notice of Motion dated 20th November, 2023 in which he argued that the Court lacked jurisdiction to hear and determine the matter. The Respondent replied to the application and the same was adequately considered by the lower Court, as a result of which a ruling was delivered on 28th November, 2023. In the ruling, the Court dismissed the Appellant's challenge to the Court's jurisdiction and held that it had jurisdiction over the matter pursuant to Section 12 of the *Small Claims Court Act*.
14. I note that the Appellant did not pursue an appeal on the lower Court's ruling delivered on 28th November, 2023. It then becomes appropriate for this Court to interrogate whether it is appropriate for the Court to revisit the question of jurisdiction given that it was never appealed.



15. The issue that arises from these facts is whether the issue of jurisdiction of the trial Court is open for determination by this court, the Ruling on the preliminary objection not having been subjected to an appeal, and taking note of Section 68 of the *Civil Procedure Act* which states that:

“Where any party aggrieved by a preliminary decree does not appeal from that decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.”

16. Very recently, the Court of Appeal faced a similar challenge in *Otieno v Equity Bank Limited* [2024] KECA 811 eKLR. In that case, during the trial of the matter at the magistrate’s Court the defendant raised a preliminary objection on jurisdiction. The magistrate dismissed the preliminary objection but the defendant did not appeal against the said Ruling. The matter was eventually heard and a judgment was delivered. The Defendant appealed the judgment to the High Court and argued that the trial court did not have jurisdiction. The High Court revisited the issue of the jurisdiction of the trial Court and arrived at a different conclusion from the one that had been arrived at by the magistrate in the preliminary objection. The other party appealed to the Court of Appeal and argued that it was wrong for the High Court to revisit the issue of jurisdiction. The Court agreed with this argument and held as follows;

From the above it is apparent that the learned Judge revisited the issue of the jurisdiction of the trial court, and came to a different conclusion from the one that had been arrived at by the Chief Magistrate in the preliminary objection. With due respect, the learned Judge erred in revisiting the issue of the jurisdiction of the trial court to hear the appellant’s suit. This was a matter that had already been determined in the Ruling in the preliminary objection. Since no appeal was preferred against the Ruling, section 68 of the *Civil Procedure Act* was applicable, and both the High Court and the Bank were bound by that Ruling. The issue was not therefore open for determination by the learned Judge.

17. Based on the above very recent authority of the Court of Appeal, I find that the issue of jurisdiction is not open for this court to determine. Since no appeal was preferred against the ruling, this Court is bound by the Ruling delivered on 28th November, 2023.

Whether the Respondent proved his Claim on a Balance of Probabilities

18. The Appellant submitted that the Court’s holding that he was responsible for the damage was wrong because the Respondent did not adduce enough evidence to prove that fact. He argued that the Respondent did not discharge the evidential burden because he did not provide any evidence to show the condition of the premises before and after the alleged damage. On the other hand, the Respondent argued that the Surveyor’s report and viva voce testimonies were sufficient proof that the Appellant damaged the suit property. The Court will reevaluate the evidence to ascertain whether the trial Court arrived at the correct conclusion of the available evidence and applicable law.

19. It is trite that special damages must be pleaded and proved by evidence. This rule was restated in *Virani t/a Kisumu Beach Resort Vs Phoenix of East Africa Assurance Company Limited* [2004] 2 KLR 269, where the court held as follows;

“Finally we agree with Mr. Menezes, as it is the law, that a claim for special damages should not only be pleaded but strictly proved. There is a long line of authorities on that principle



but we only cite *Eldama Ravine Distributors Ltd & Anor Vs Samson Kipruto Chebon* [CA No 22/1991](#) (ur) where the Court stated:

“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 Vs 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 on page 532, 533, in *Ratcliffe Vs Evans* (1892) 2QB 524, an English leading case on 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”.

20. The Respondent relied on the Quantity Surveyor’s report and viva voce testimonies. I have perused the Quantity Surveyor’s report. It shows that the premises had extensive damage as follows; the Asbestos roof had visible damages that were attributable to construction activity and the window panes to the residential units were damaged. It also shows that the power termination unit had the cover damaged and missing from the site and there were other damages on the roof, Fascia Board, Window pane glass, ceiling, Parapet wall, and the gates. It also showed that there was substantial amount of debris arising from the demolitions. The said report was duly produced as exhibit.
21. I relooked at the Respondent’s testimony and that of the Quantity Surveyor and I have formed the opinion that they are consistent. I find that the Respondent proved, on a balance of probabilities, that the Appellant was responsible and ought to take liability for the damages. I thus find no reasons to disturb the lower court’s finding on the issue of the Appellant’s liability for the damages caused on the leased premises.
22. I also relooked at the Quantity Surveyor’s with a view to ascertain whether the items enlisted in the report are merited. The Respondent claimed cost of the Asbestos sheets, their removal and disposal. The Surveyor calculated the value of the Asbestos roofing sheets at Kshs.68,000/=, the value of transporting the Asbestos containing materials at Kshs.10,000/=, NEMA regulations Escort at Kshs.20,000/=, securing disposal site at Kshs.120,000/= and Kshs. 7,500/= for the actual disposal. In total, he claimed Kshs.225,500/= for the entire exercise.
23. This Court takes judicial notice that the Government of Kenya has already banned the use of Asbestos for roofing purposes. The Legal Notice No.121 of the Environmental Management and Coordination (Waste Management) Regulations 2006 classifies waste containing asbestos as hazardous waste. It also takes judicial notice that on 28th August, 2024, the Government of Kenya issued a countrywide directive for the removal of asbestos roofing sheets from all buildings—both public and private—within 3 months.
24. I find that, at some point, the Respondent would have removed the Asbestos roofing in compliance with the Government directive and would have incurred the cost of removing the Asbestos anyway. For these reasons, I find that the Respondent’s claim for the cost of removing the Asbestos sheets from the



roof and their subsequent disposal are unjustified and unmerited. He would have done it anyway and the costly removal and disposal are not a direct consequence of the Respondent's tortious conduct, but the government's directive.

25. The Respondent also claimed the cost of new galvanized corrugated sheets to replace the Asbestos roofing at Kshs.105,000/=. I note that he also claimed the value of the Asbestos roofing sheets at Kshs.68,000/=. In my view, he cannot claim the cost of the Asbestos Sheets that were in the leased premises and at the same time claim the cost of the new roofing sheets. That would be double compensation and unjust enrichment. In these circumstances, given that it is not legally possible to roof the premises using Asbestos materials, it is only logical that he should claim the cost of new galvanized corrugated sheets.
26. The Court also relooked at the available evidence to determine whether it is appropriate for the Respondent to single-handedly cater for the cost of replacing the Asbestos roof. I have relooked at the report of the quantity Surveyor to ascertain the extent of the damage on the roof.
27. The report states that the damages ranged from breaking of sections of the edge of the roof to holes on the roofing sheet. It shows the roof had 68 pieces of Asbestos sheets, but it does not state how many of these were damaged as a result of the construction activities. The court is unable to decide the exact number of sheets which ought to have been replaced. Nonetheless, I find that, for the sake of justice, the Respondent and the Appellant ought to equally share the cost of the new roofing materials, that is, the galvanized corrugated sheets.

Disposition

1. The Appeal partially succeeds.
2. Trial Court's award for Kshs.640,100/= is hereby vacated in the following terms. For reasons outlined above, the Respondent is not entitled to the following items tabulated in the Quantity Surveyor's Report;-
 - a. The Asbestos roofing sheets at Kshs.68,000/=
 - b. Transporting the Asbestos Containing Materials at Kshs.10,000/=
 - c. Escort required by NEMA regulations at Kshs.20,000/=
 - d. Securing the secure disposal site Kshs.120,000/=
 - e. The actual disposal at Kshs. 7,500/=
 - f. 1/2 of the galvanized corrugated sheets at Kshs.52,500/=Total Amount Kshs.278,000/=
3. The trial Court's award of Kshs.640,100/= is hereby reduced by Kshs.278,000/= to Kshs.362,100/=.
4. No order as to costs.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 13TH DAY OF DECEMBER, 2024.

C. KENDAGOR

JUDGE

In the presence of:



Court Assistatn: Beryl

Mr. Mwongela Advocate for the Applicant

No appearance by Respondent

