



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC APPEAL NO. 16 OF 2019

MUSA KIMENGICH KIMUGE.....APPELLANT

VERSUS

BETH WANGARI NJOROGE.....RESPONDENT

(An appeal from the Ruling of the Chief Magistrate's Court at Nakuru delivered by Hon. J Omido (P.M)

on 31st May, 2019 in Nakuru CM Civil Suit No. 230 of 2012,

Musa Kimengich Kimuge –vrs- Beth Wangari Njoroje)

J U D G M E N T

1.This appeal is against the ruling delivered by Hon J M Omido PM on 31st May 2019 in Nakuru CMCC No. 230 of 2012. The ruling was on the Respondent's (plaintiff in the subordinate court) Notice of Motion application dated 7th February 2019. The respondent in the application prayed for the following orders:-

1. *That this Honorable Court be pleased to certify this matter urgent and service be dispensed with in the first instance.*

1. *That the honorable court be pleased to strike out the pleading of the plaintiff/respondent dated 29th February, 2012 for not disclosing a reasonable cause of action. Being vexatious and amounting to an abuse of court process.*

2. *That the honorable Court be pleased in the alternative to order that all the prayers sought in plaint dated 29th February, 2012 be marked as spent, the cause of action eroded and that no further proceedings be taken in relation to this suit and the file be closed.*

3. *That costs of this application as well as costs of the suit be borne by the plaintiff/respondent.*

2. The application was supported on the grounds on the face of the application and the Respondents affidavit sworn in support thereof on 7th February 2019. The appellant opposed the application vide a preliminary objection filed on 14th February 2019 and a replying affidavit sworn in opposition by the appellant on 20th February 2019.

3. After hearing the parties on the application the learned trial Magistrate rendered the impugned ruling. The learned trial magistrate held the contested lease upon which the appellant's suit before the lower court was premised having expired by effluxion of time, there was nothing to proceed to trial. He allowed the application and made the following orders:-

(a) All the prayers sought in the plaint dated 29th February, 2012 are hereby deemed as spent and overtaken by events and there is therefore no outstanding issue left for this court to determine in respect thereof.

(b) No further proceedings regarding the plaintiff's claim in the plaint dated 29th February 2012 are to be taken pursuant to (a) above.

(c) Costs of the application and the suit are awarded to the defendant.

4. The effect of the ruling was to terminate and close any proceedings in the suit initiated by the appellant (plaintiff) and to award the costs of the suit to the Respondent (defendant).

5. Aggrieved by the learned trial magistrate's ruling the appellant has appealed to this court and has set out 8 grounds of appeal in his memorandum of appeal as hereunder: -

1. *The learned Magistrate erred in barring the prosecution of the plaintiff/Appellant's case/claims in the said suit, including his claim for damages for breach of contract, without according the Appellant an opportunity to be heard on the merits thereof.*
2. *The magistrate erred in effectively summarily dismissing the Plaintiff/appellant's suit, including the prayer for damages for breach of contract, when no such application for summary dismissal had either been made or canvassed and without according the plaintiff/appellant a chance to be heard on the same.*
3. *The trial magistrate erred in declaring that the plaintiff/appellant's suit or claim had been overtaken by events and been eroded through effluxion of time, when in fact the law expressly provided otherwise.*
4. *The learned trial magistrate erred in holding that the law, and more specifically section 60 (1, 2) of the Land Act, 2012, did not apply to the suit tenancy premises.*
5. *The learned trial magistrate erred in effectively barring the plaintiff /appellant from moving the court for amendment of plaint, in order to plead to new matters/circumstances which has arisen or been created through effluxion of time, and when the law expressly provided for such amendment, and when the plaintiff/appellant had expressly expressed his intention for such amendment.*
6. *The learned trial magistrate erred in condemning the plaintiff/appellant to pay the cost of the suit, when in fact the plaintiff/appellant was not at any fault, and when indeed the trial court did not find or ascribe any fault on the plaintiff/appellant.*
7. *The decision and orders as the subordinate court were contrary to the law, and against the weight of the facts and circumstances of the case.*
8. *The decision and orders of the subordinate court were in total abrogation of the plaintiff/appellant's constitutional right to a fair and public trial, to equality before the law, and to an opportunity to have his dispute heard and determined before court in accordance with the law.*

6. In the suit before the subordinate court, it was the appellant's case that he had entered into a lease agreement with the respondent, for the lease of Respondent's premises **Nakuru Municipality Block 4/28** for a term of 8 years from 1st January, 2011 at the monthly rent Kshs.100,000/= with annual escalation of Kshs.3,000/=. According to the Appellant, the Respondent who was the Landlord unilaterally refused and/or declined to accept the rent agreed stating that the rent had been increased to Kshs150,000/= per month. The Respondent allegedly threatened to levy distress for the unlawful rent and to evict the appellant prompting the appellant to file the suit before the subordinate court. In the suit the appellant prayed for the following reliefs:-

- (a) *An order of temporary injunction pending the hearing and final determination of this suit, and thereafter an order of permanent injunction, restraining the defendant by herself, her agents, servants, auctioneers, heirs. Legal representatives, or anyone else claiming or acting through or under her, from entering, remaining on, alienating, evicting the plaintiff from levying distress for rent against the plaintiff for, increasing the rent outside the stipulation in the Lease Agreement for, or in any other way whatsoever interfering with the plaintiff's tenancy, quiet occupation possession and use of, the suit premises being all that business premises known as Land Title Number Nakuru Municipality Block4/28 situate along Tom Mboya Street within Nakuru town, for the entire eight (8) year period of the Lease commencing 1st January 2011.*
- (b) *Specific performance of the Contract/Lease Agreement dated 1st January 2011 with regard to the rate of rent payable and the term of lease for the suit premises, and damages with interest) for breach of contract.*
- (c) *Costs of this suit with interest at court rates.*
- (d) *Any other or further relief as the court may deem fit to grant.*

7. The respondent in her statement of defence denied the appellant's averments in the plaint and contended that the appellant was not entitled to the orders sought in the plaint. For reasons that are not entirely clear from the record the suit in the subordinate court never progressed to trial and that most of the time was spent in dealing with the initial interlocutory application and other applications. On 11th March 2015, Munyao, J in a judgment on an appeal arising out of an order made on an interlocutory application where the learned trial magistrate had ordered the release of rent that the appellant was depositing in court, directed that all the interlocutory matters be dispensed with and the trial magistrate to proceed with the hearing of the suit on a priority basis.

8. Notwithstanding the direction of the learned judge that the matter proceeds for hearing on a priority basis, the suit was not heard as directed. A hearing that was scheduled on 12th February 2016 did not proceed and soon thereafter the issue whether or not the subordinate court had jurisdiction to hear and determine the matter was raised and although no formal determination was made by the Court below, the issue was rendered moot following determination by the Court of Appeal that the Magistrates' Courts had jurisdiction to hear and determine environment and land matters where the subject matter fell within their pecuniary jurisdiction as set out in the Magistrates' Court Act No.26 of 2015.

9. However, before the suit could be heard and determined by the trial court, the respondent filed the Notice of Motion dated 7th February 2019 which the trial Magistrate heard and rendered a considered ruling on 31st May 2019 allowing the same. It is this ruling that provoked

the instant appeal.

10. The parties canvassed the appeal by way of written submissions. The appellant's submissions were filed on 5th August 2021 while the Respondent's submissions were filed on 5th March 2021.

11. The appellant in his submissions submitted that the trial magistrate erred in holding in his ruling that the term of the lease of the subject property of the suit had expired as at 7th February 2019 when the application that resulted in the ruling was filed; and further erred in holding that the suit before it had in its entirety been spent, overtaken by events, and there was no outstanding issue to go to trial for determination by the court and hence terminated the suit ordering the appellant to bear the costs of the suit. The appellant averred that he was in occupation of the premises and continued to pay the agreed rent as directed by this court on appeal. The appellant submitted that the prayers he sought vide the plaint for a permanent injunction; specific performance and damages for breach of contract were not spent and/or overtaken by events. The appellant referred to paragraph 11 of the plaint where he pleaded he had expended about Kshs.3 million in repairs renovations and improvement of the premises upon taking possession of the suit premises as the same were in a dilapidated state, with the approval and authority of the respondent.

12. The respondent further contended he was not afforded a fair hearing as envisaged under Article 50 (1) of the Constitution before the suit was terminated. He argued that since he was in possession and occupation and was paying monthly rent, which the respondent as receiving and accepting, his lease could not have lapsed after expiration as he became a periodic tenant. The appellant submitted that having regard to section 60 (1) and (2) of the Land Act, 2012 the lease continued in existence for as long as the Respondent continued to accept and receive rent notwithstanding the initial term of the lease had expired.

13. The Appellant submitted that the learned trial magistrate erred in terminating the appellant's suit when the appellant would have been afforded an opportunity to amend the plaint to align the same to the changed circumstances considering that a party could seek leave to amend pleading at any stage of the proceedings. The Appellant further submitted the Respondent in her statement of defence had not pleaded that the appellant's suit did not disclose any cause of action and indeed had denied the existence of a valid lease between her and the appellant which was an issue to be tried and determined by the court. The appellant submitted that the respondent could not properly deny the existence of the lease and at the same time seek to place reliance on the disputed lease when it suited her purpose. that amounted to approbating and reprobating.

14. The respondent on her part submitted that the appellant delayed in prosecuting his suit before the lower court to the extent that his claim which was founded on the lease agreement dated 1st January 2011 for a term of 8 years became extinguished upon the expiry of the lease. The appellant in the suit had sought an order of injunction to restrain the respondent from terminating the lease; and an order of specific performance of the lease. The respondent argued the lease ran its full term and hence the lease having expired here was nothing to injunct and/or specifically enforce. On that account the respondent contended the appellant's suit had been overtaken by events as no order that the appellant had sought in the suit was capable of being granted by the court. The court could not injunct the termination of a lease that had already expired and neither could an order of specific performance issue for a lease that had expired. The respondent in support of her submission relied on the case of **Julius Mutiga & 16 others -vs- Ministry of Agriculture & 3 others (2020) eKLR** where Korir, J relying on the Court of Appeal decision in **Ernie Campbell & Co Ltd -vs- National Housing Corporation (2019) eKLR** held that where the substratum of the case had ceased to exist and/or had been overtaken by events such a case would no longer be fit for determination. The judge stated in the judgment at paragraphs 17 and 18 thus:-

17. These provisions supersede the impugned directive issued by the respondent in 2014. The 3rd interested party is therefore correct that this petition has been overtaken by events and is no longer fit for determination. The impugned directive is no longer in existence and determining its constitutionality has become moot.

*18. Court should not determine moot matters as was held by the Court of Appeal in **Ernie Campbell & Company Limited v National Housing Corporation (2019) eKLR** as follows:-*

“ Further, we note that the tender was re-advertised on 29th November 2016 and the appellant submitted its bid. On 22nd February, 2017, the tender was awarded to M/s Endeavours Construction Company Limited. The contract having been awarded to M/s Endeavours Construction Company Limited, the prayers sought in the applicant's Notice of Motion of 5th February, 2016 are clearly overtaken by event.

*In Tanzania **Roads Agency -vrs- Kondan Singh Construction Limited & Another (2013) eKLR** this Court stated:-*

“ ...since this appeal was to be determined either way, by either dismissing it or allowing it, and since the appeal or all intents and purposes has been overtaken by events, the best result that commends to us in this appeal is to have it dismissed”

*Similar sentiments expressed in **Alcon International Limited vs Standard Chartered Bank of Uganda & 2 others, Appeal No.3 of 2013, wherein the East African Court of Justice at Arusha stated:-***

“The abstract exposition of the law is the province of academics and not Courts of Justice and hence the use of the adjective “academic” to describe such endeavours”.

*In the Ugandan case of the **Environment Action Network Ltd Vrs. Joseph Eryau, Civil application No.98 of 2005, the Court of Appeal stated:-***

“The reliefs which the respondent is seeking on appeal cannot be granted because there is no live dispute between the parties.

Courts do not decide cases for academic purposes because court orders must have principal effect and must be capable of enforcement. The determination of Miscellaneous No.39/01 by the High Court drove the Respondent into a limbo of legal mootness”

In our view, to grant the appellant the order sought will be futile and tantamount to an academic exercise”

15. The respondent further placed reliance on the case of **John Agufa & 3 others -vs- Chairman Selection panel for Recruitment of chair and members of Migori County Service Board & 2 others (2020) eKLR** where Mathews Nduma, J held where the petition had been overtaken by events, the court could not grant any orders sought as they would be in vain. He stated the petition was spent as it had been overtaken by events and proceeded to dismiss the same. The judge in the case stated:-

“ This petition has been overtaken by events. This is a court of equity and is not given to issuing orders in vain. The court finds that this petition has been overtaken by events and is thus spent”

16. The respondent further submitted that the ruling by the learned trial magistrate took account of all the attendant circumstances and could not be faulted either in the application of the facts and/or the law. The respondent contended that section 60 of the Land Act, 2012 did not have any application in the present case as the appellant’s case was wholly premised on the lease that he wanted to be enforced by the court as it was. The respondent submitted the appellant was in possession of the suit premises and was paying rent pursuant to an order of the court pending the determination of the suit. The Respondent stated she signified that she wished the appellant to vacate from the premises upon the expiry of the lease through a letter dated 24th December 2018 and consequently the appellant cannot invoke Section 60 of the Land Act, 2012 to justify her continued possession of the premises after the lapse of the lease period.

17. The respondent further submitted that by the time the application dated 7th February 2019 was filed by the respondent, the appellant had not made any application for leave to amend the plaint if indeed he had any grounds to do so. The lease upon which he predicated his suit expired by effluxion of time by 31st December, 2018 and from that date there was no lease upon which the suit could be hinged.

18. I have carefully considered the record, the rival written submissions by the parties, the authorities relied upon and the law. The appeal before me being a first appeal my obligation is as was set out in the case of **Selle -vs- Associated Motor Boat Co. Ltd & others (1968) EA 123** where the court stated:-

“An appeal to this court from a trial by the high court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court 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 impression based on the demeanor of a witness is inconsistent with the evidence in the case generally: Abdul Hameed Saif -vs- Ali Mohamed Shelan (1955) 22 EACA 270”.

19. The Appellants grounds of appeal may easily be clustered and/or condensed into three grounds of appeal as follows: -

(i) Whether the learned trial magistrate erred in law in holding that the appellant’s suit had been overtaken by events and terminating the same without affording the appellant an opportunity to prosecute his claim for damages for breach of contract.

(ii) Whether the appellant’s lease with the respondent having expired through effluxion of time, the appellant became a periodic tenant pursuant to the provisions of section 60 of the Land Act, 2012.

(iii) Whether the learned trial magistrate erred in summarily terminating/dismissing the appellant’s suit without giving the appellant an opportunity to move the court for leave to amend his pleadings to take account of the changed circumstances.

20. The court earlier in this judgment set out the reliefs that the Appellant had sought in his suit before the subordinate court. Under prayer (a) the appellant sought an order of restraint against the respondent restraining the latter inter alia, from alienating, evicting, levying distress for rent, increasing the rent outside the stipulation in the lease agreement, or in other way whatsoever interfering with appellant’s tenancy, quiet occupation, possession and use of the suit premises for the entire eight (8) year period of the lease commencing 1st January 2012. Prayer (b) was for specific performance of the Lease Agreement dated 1st January 2011 with regard to the rate of rent payable and the term of lease for the suit premises, and damages for breach of contract. It is clear the appellant’s prayers (a) and (b) were the principal prayers in the suit and were tied to the lease. Principally the appellant wanted his lease for the term of 8 years to be allowed to run its course without any interference in its terms particularly the term relating to the rate of the rent and the agreed escalation of Kshs.3,000/= per annum. In the body of the plaint no particulars of breach of contract were pleaded and the indication was that all the appellant desired was to be permitted to pay the rent as agreed. The suit was precipitated by the respondent refusing to accept payment of the rent of Kshs.103,000/= as she wanted the rent increased to Kshs.150,000/=.

21. It is instructive to note that the appellant’s occupation of the premises was not disrupted at any time and that the issue of rent payment was handled firstly, by the trial magistrate who had directed that the rent be deposited in court and the subsequently varied the directions and ordered the rent deposited in court to be released to the respondent. The Appellant protested that the order for deposit of rent into court was by consent and that they had not consented to the order being varied. The ruling by the trial magistrate that the deposited rent be released to the Respondent provoked HCA No.108 of 2012 by the Appellant and Munyao, J dealt with the appeal delivering a judgment on 11th March 2015. The judge inter alia held the order made by the learned trial magistrate was not by consent and that even if it had been he would have set the same aside as it was inequitable and would have qualified as one that was against Public Policy. The judge expressing concern that even the initial application for interlocutory injunction by the appellant had not been determined as at time he rendered judgment on the

appeal, felt constrained to step in and made an order in the following terms at paragraph 20 of the judgment: -

“ 20. In exercise of the above powers (referring to Order 42, rule 32), I am of the view that the interlocutory matters in the suit before the Magistrate need to be dispensed with. In lieu of hearing the application for injunction, I make an order that the appellant do remain in the premises but do pay the undisputed rent, that is Kshs.100,000/- as at 2012 with annual increments of Kshs3,000/= per annum until the final determination of the suit”.

22. As demonstrated, the Appellant's suit was pegged on a lease that was for a term of 8 years from 1st January 2011 and the term was lapsing on 31st December 2018. The term was not extended and the Respondent unequivocally advised the Appellant vide her letter dated 24th December 2019 that she did not intend to renew the lease and he should therefore arrange to vacate from the premises. The appellant had not sought a renewal of the lease. The lease having expired on 31st December 2018, the substratum of the suit disappeared and there was nothing left for the suit to stand on. The Appellant had obtained the full benefit conferred under the lease as he was able to carry on his business for the full term of the lease without any intervention by the respondent. The prayer for injunction cannot be granted since it was intended for the term of the lease of 8 years from 1st January 2012. Equally the prayer for specific performance cannot be granted as what was sought to be specifically performed was the lease which expired on 31st December 2018 after the lapse of its term of 8 years.

23. Having carefully analyzed and reviewed the material that was before the learned trial magistrate I am not able to fault the learned magistrate on the decision he reached that indeed the appellant's suit had been overtaken by events following the expiry of the lease and it would have been futile to proceed with the hearing.

24. On the issue of the Appellant's contention that his claim for damages for breach of contract remained alive even after the expiry of the lease, I respectively would disagree. The contract that was allegedly breached was the lease which as observed ran its full term with the appellant deriving all the benefits that it conferred. How then was it breached? It ran its full term and the rent clause which apparently was one that was the contested remained as provided for the full term of the lease with the initial agreed monthly rent of Kshs100,000/= being escalated annually by Kshs.3,000/=. The plaintiff never pleaded any special damages and none were prayed for. The Appellant may of course have expended money in renovating the premises to fit his business purposes but then those were expenses he was expected to recoup in the course of doing business in the premises and that would perhaps explain why the appellant and the respondent entered into a long term lease arrangement and not a short term one. I agree with the learned trial magistrate that with the lapse of the lease and in the absence of any claim for special damages the claim for damages for breach of contract was unsustainable.

25. On the issue whether or not the provision of Section 60 of the Land Act, 2012 was applicable in the circumstances of this case, I would agree with the learned trial Magistrate that it had no application. The court had directed the appellant to continue to pay rent to the Respondent until the suit was heard and determined. The respondent therefore did not have the choice of declining to receive rent upon the expiry of the lease since the suit had not yet been heard and determined. Section 60 (1) & (2) does not envisage a situation where a matter is pending before a court of law touching on the property the subject of a lease involving parties to the lease. In the present matter the parties to the lease were in court in a dispute touching on the terms of the lease between them and it was only the court that could vary or review the terms of the order that it had imposed pending the determination of the suit. The respondent as stated earlier in this judgment made it clear to the appellant that she did not intend to renew the lease when the term expired through effluxion of time on 31st December 2018.

26. The Appellant further contended the learned trial Magistrate erred in failing to afford the appellant an opportunity to seek leave to amend the plaint when under Order 8 Rule 3 of the Civil Procedure Rules, a party could amend his pleading at any stage of the proceedings. He further pointed out that even under Order 2 Rule 15 (1) under which the Respondent brought the application dated 9th February 2019 it is provided that - ***“At any stage of the proceedings the court may order to be struck out or amended any pleading...”***. The appellant faulted the learned trial magistrate for not exercising his discretion to allow the appellant leave to amend his pleading when he had expressed a wish to be allowed leave to amend the same.

27. The trial magistrate adverted to the issue of the appellant's intention to seek leave to amend the pleadings and in his view such intention was not properly grounded. It was his view that the appellant acted in a dilatory manner and did not apply for leave to amend the plaint from 2012 when the suit was filed up to 31st December 2018 when the subject lease expired. I cannot fault the learned trial magistrate's exercise of discretion. The appellant came to court to protect his lease of 8 years running from 1st January 2011 and expiring on 31st December 2018. It ran its full course and after expiry there was essentially no case that the appellant could prosecute as the orders he was seeking in the suit could not be granted. The cause of action had dissipated. Any amendment in my view would relate to a fresh cause of action as the cause of action in respect of which the appellant filed suit ceased to exist once the lease expired.

28. Having held that the appellant's suit had been overtaken by events and had become spent the learned trial magistrate properly allowed the respondent's Notice of Motion dated 7th February 2019 and hence any further proceedings in the suit before the subordinate court were legally terminated. There was in my view no denial of a fair hearing to the appellant. There was after the expiry of the lease, which was the subject matter of the suit nothing to go to trial. Courts do not act in vain.

29. The upshot is that after a careful review and analysis of the ground of appeal and the record, I find no basis upon which the learned trial magistrate could be faulted. The appeal is without any merit and the same is dismissed with costs to the respondent.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF DECEMBER 2021.

J M MUTUNGI

JUDGE