REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 44 OF 2017

OMAR GORHAN …..... APPELLANT

VERSUS

MUNICIPAL COUNCIL OF MALINDI

(COUNCIL GOVERNMENT OF KILIFI) .....1ST RESPONDENT

OVERLOOK MANAGEMENT KENYA LTD .....2ND RESPONDENT

(Being an appeal against the whole decision and Judgment of the Chief Magistrate Hon. Dr. J. Oseko delivered on the 31st day of July, 2017 in Malindi CMCC No. 68 of 2008)

CORAM: Hon. Justice R. Nyakundi

Richard O. Advocates for the Appellant

Muturi Gakuo & Kibara Advocates for the respondent

JUDGMENT

Background

The appellant in his suit filed on 11.3.2009 before the trial court against the respondent prayed for:

(i) General damages for loss of business.

(ii) Costs to the suit.

(iii) Interest on (i) and (ii) above at courts rates.

The elaborate plaint set out the claim that on or about the year 2007 the 2nd defendant – Overlook Management Kenya Ltd constructed facilities of a school within their property now known as **Muyeye Primary**, which was donated to the Municipal Council of Malindi.

That vide **Minute no. 22 of 2007**, the Municipal Council of Malindi, it was pleaded that a resolution passed resolved to transfer the school to the plaintiff (appellant) at a monthly rent of Kshs.40,000/= which amount was to be paid to Municipal Council of Malindi. That on or about the 10.12.2007 the defendants without any color of right and or notice re-entered the said school premises threw out the pupils out of the classrooms, teachers and all furniture, locking the facility. As a consequence, this latest action formed the basis of the claim for damages against the defendants.

The defendants filed statements of defence denying the particulars of lease, resolution made to hand over the school to the plaintiff, damages and loss suffered by the plaintiff.

In the evidence at the trial court the appellants evidence was that in the year 2002 he started a nursery and primary school by the name and style of **Malindi Star Academy**. He also testified that in 2007, the 2nd respondent Over Look Management approached him with information that it had purchased the suit property. He showed a lease agreement with Nairobi Homes expiring in the year 2013. He said that following the conversation with the 2nd respondent he asked for extension of two (2) years to transition from one site to another where

he was building another school, but that was turned down.

The appellants further evidence was that the premises was finally handed over to him through a resolution made by the Municipal Council he placed reliance to **Minute no. 3 of 7 of 2007, 22/07 and 17/07.** That on allocation of the premises he was to pay a monthly rent of Kshs.40,000/= but instead drew a bankers cheque of Kshs.30,000/= dated 9.10.2017 for a renewable lease of three (3) years. The three years did not end but in between the period he was evicted from the suit premises.

In cross-examination, the appellant told the court that he did not have statement of account on the business expansion. He confirmed existence of a tenancy agreement but with no supportive evidence on income earned during the operation of the school.

PW2 – Mohamed Yahya, the Deputy Mayor testified that **Overlook Management,** the 2nd respondent had purchased the suit land from the Nairobi Homes. The appellant rented it to operate a school but since they did not have the funds it was agreed that a tenant be looked for to take up a lease over the property.

According to PW2 witness statement, the appellant was later to be thrown out by what was alleged to be council askaris. He confirmed that the structures in the school had been built by **Overlook Management** the 2nd respondent. According to PW2, the buildings were officially handed over to the respondent to run it as a municipal school.

PW3 – Manyeso M. Mkoma testified as a member of **Muyeye Community Welfare Association** who played a role in evicting the appellant from the premises. He testified that a set of communication from Malindi Town Clerk legally allocated the school to the community. That is how the eviction came to be carried out against the appellant, for complete take over to enable the community benefit in having a school.

The defence case

The evidence from the defendants came from **Nurein Halmy,** Senior Town Engineer Malindi Municipal Council. On this issue, the witness told the court that the school in question was built by **Marco Vancini** – on a land belonging to the County Council. To that end he stated that the appellant applied to be given a lease to run the school. According to the witness the town council meeting did endorse the application subject to various approvals. He however did not give full disclosure on whether the application received full approvals by the Town Clerk and the Mayor at the time. On cross-examination, he claimed not to receive any rent from the appellant.

How did the Learned trial Magistrate acquit herself in determining the competing rights and interests of the parties?

The question to be determined on this part of the case by the trial court was whether the appellant cause of action on damages was tenable.

Determination

The tenor of this appeal has to be considered within the well settled principles in the cases of **Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates {2013} eKLR**, **The Kenya Ports Authority v Kuston (Kenya) Ltd {2009}** where in both decisions the predominant principles is:

> ***"On a first appeal the court should reconsider the evidence, evaluate it and draw its own conclusions, through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not introduce extraneous matters not dealt with by the parties in the evidence."***

In this appeal if the grounds of appeal were to be broken down into key definitive issues arising from the trial. It would not be stretching the claim too far if I reformulate them into two:

> ***(a) Whether a contract to enter into a lease or sublease can be inferred in the correspondence between the parties.***
>
> ***(b) Whether subsequent action of eviction entitled the appellant to an award of damages.***

The Law

Issue No. 1

The basis of any suit in contract performance or non-performance is as per requirements in Subsection 3 of the Law of contract. Act (Cap 23 of the Laws of Kenya). The appellant was therefore expected to proof on a balance of probabilities the following essential elements to a lease agreement with the respondent:

> ***(a) An offer.***
>
> ***(b) An acceptance.***
>
> ***(c) Any consideration.***

(d) Any intention to create legal relations.

The essential components of a contract as was observed by **Harris JA** in **Garvey v Richards {2011} JMCA 16** ought to ordinarily reflect the following principles:

> ***"It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."***

And the Supreme Court of United Kingdom in **RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co K. G. {2010} UKSC 14**:

> ***"The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement."***

The case involved negotiations over a property with a school whose construction was undertaken by Nairobi homes and later purchased by Overlook Management Kenya Limited. The property is located within Muyeye Community, as from the correspondence had been carrying on negotiations with Malindi Municipal Council to be handed over the school to manage it as a community project. It is also clear that the property and all improvements of a school, had been handed over by Overlook Management Ltd to the Municipal Council which in turn made an offer to the appellant to operate it as an institution of learning.

From the initial Minutes of 3.7.2007 there is evidence of willingness by the Municipal Council to offer the facilities to the appellant so that he can operate a nursery and primary school altogether. There was no conclusion as to the terms of the agreement which can be deduced from the Minutes.

A difficulty facing the trial Magistrate in dismissing the claim was that the property and the facilities for the school belonged to **Marco Vanani**, **Roberto Manara** and **Angelo Traleth** of **Overlook Management Ltd**. In the interim period upon the property being handed over to the Municipal Coucil, Muyeye Community raised an objection for any organization or person being granted permission to manage a school.

The contract between the appellant and the Municipal Council ran into problems as the subject matter was still in the name of Overlook Management Kenya Limited before formalization, a third party – Muyeye Community came into the picture. The correspondences availed to court also demonstrate that Muyeye Community pursued several negotiation for the school to be transferred to them as a public utility.

From the background material it shows of an apparent intention to enter into a valid binding contract between the Municipal Council and the appellant on the term of the contract he was to make payment of Kshs.40,000/= as consideration for the offer, but ended up drawing a cheque of Ksh.30,000/= in favour of Overlook Management Kenya Ltd..

Although, the appellant seemed to have taken vacant possession the terms of the lease agreement as proposed by the Municipal Council was yet to take effect in view of the objections prompted by Muyeye Community. Based on that and the fact the Municipal Council had not finalized the transfer of property with Overlook Management Kenya Ltd it could not be said privity of contract existed to trigger the right for an award of damages.

Returning to assessment of damages

In a case like this one would normally look at the principles which influence exercise of discretion in making decisions on assessment of damages. One of such principles is found in **British Weslinghouse Electric and Manufacturing Co. Ltd v Underground Electric Railways Co. of London Ltd v {1912} A. C. 673 – at 688, Viscourt Haidane L. C.** said:

> ***"I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed."***

In this vein I adopt in part the decision of **Edmond Davis L. J. in Ashcroft v Curtin 1971 3 ALL ER** and say for purposes of this appeal as he said at page 1213:

> ***"My greatest difficulty is in quantifying the loss, counsel for the defendant submits that the task cannot be performed and that the failure should result in a nil award on this aspect of the case. Having rejected the accounts as largely unreliable…" (See also John Wambugu Njoroge v Kenya Commercial Bank Ltd Kisumu CA No. 179 of 1972).***

The legal principles developed to impose a duty to award damages for breach of contract are clearly both on mitigation of loss and restitution in integration. The limits and breadth of the doctrine has been sanctity stated in **Kenya Industrial Estates Ltd v Lee Enterprises Ltd CA Civil Appeal No. 54 of 2004 {2009} eKLR, Kenya Breweries Ltd v Natex Distributors Ltd {2004} eKLR.** The principle in **National**

Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another Civil Appeal No. 95 of 1999 {2001} KLR clearly clarified the consensus theory of contract on the need for a meeting of minds that:

> ***"a Court of Law cannot rewrite a contract between the parties once ascertained that the intention was to enter into a valid contract. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."***

However, much as the appellant resents the behavior of the respondent in resorting to forcible eviction the question which arises from the evidence is whether the contract was predicated on express or implied terms of fact in the case of **Shah v Shah {1988} KLR**:

"the Court must give effect only to the intention of the parties."

A helpful authority on this difficulty question is the case by the **Privy Council** in **Attorney General of Belize v Belize Telecom Ltd {2009}** in which the court in exercising jurisdiction in the case at hand is asked to consider in the construction or interpretation of the contract to wit:

> ***"In every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean."***

The question which the trial court held to deal with was whether as she explained the claim was supported by a legally binding Lease Agreement to sustain damages for breach. It is at that stage of the case that could have given rise to the assessment of damages.

In this first appeal appraising the evidence as presented by the appellant, a contract being a source of primary legal obligations contains ambiguities and vagueness decreeing not specific performance of it and the failure to perform for the court to qualify it in monetary terms.

However, one of the main feature of the contract was the failure by the parties to articulate those contractual terms with sufficient care and clarity. In the case of **Nairobi Homes Ltd v Major Bastur Kalyan Civil Appeal No. 30 of 1985** the court observed:

> ***"Where the agreement is uncertain on the fundamental term on the payment of purchase price, in that it does not provide for the time within which the balance of the purchase price is payable or secure the payment. It makes the entire agreement void for uncertainty and neither party can be held to be in breach of the agreement or to be entitled to any damages from the abortive agreement."***

In the instant case, the absurdity of the situation is that the plain terms to the agreement remain unclear as to what was agreed to be let out and what came of them that an eviction order had to take effect. The Court of Appeal in England on one occasion held in **Hillas & Co v Arcos Ltd 1932 ALL ER 494, 499** where Lord Tom Lin postulated that:

> ***"The dealings of men may as far as possible be treated as effective and that the Law may not incur the reproach of being a destroyer of bargains."***

If any definite meaning can be extracted from the parties dealings, Judges will not be deterred by mere difficulties of interpretation **(See Cohen v Mason {1961} QD R518)**:

> ***"If an agreement is intelligible in its main features it will be protected by the courts even if it is of an unfamiliar type, leaves in doubt details as to the manner of performance and fails to anticipate problems which are likely to lead to controversy and litigation."(See Leroy v Herrenschmidt {1876} 2 V.L.R. 189)***

Squarely according to the appellant in his case as already noted there was a problem of reconciliation and uncertainty between the express and implied terms of the contract. That in one way or another the implications of it made the contract voidable.

Whether a binding contract existed between the appellant and the respondent is moot. I quite agree with the proposition in **Thorby v Goldberg {1921} V. L. R. 37** where the court stated:

> ***"There is no binding contract where the language used is so obscure and incapable of any precise or definite meaning that the court is unable to attribute to the parties any particular contractual intention."***

In this appeal, the Learned trial Magistrate could not have plucked out of the air a figure as representing the appellants claim annual profitability or the period he was put out of business in operating the school.

In my view, the appellant in the court below placed reliance on the Minutes of the Municipal Council which intimated the need to lease the school on certain terms to him at a given period. It is also however a fact that the original proprietor had not fully transferred title or interest to the Municipal Council. As matters evolved Muyeye Community for reason that the school was located within their locality pressed for the Municipal Council to give them a first priority to manage the school for the benefit of the pupils who hail within the community.

The picture that emerges from the present case on damages actions for breach of contract is the aspect that no specific legal basis exists on the conditions relied upon by the appellant to bring a successful damage claim against the respondent. The greatest obstacle here generally

seems to stem from lack of clarity on the tenancy agreement to create conditions for liability.

The correct rule on contracting parties and liability was stated in **Baltic Shipping Co. v Dillon** that:

> ***"the institution of contract, by which parties are empowered to create a charter of their rights and obligations interest, can operate effectively only if the parties, at the time of consideration they create their charter, can form some estimate of liability in the event of default in performance."***

The appellant seeks to draw an analogy from the minutes of a committee for the court to allow a claim for quantum merit in respect of the loss of earnings pursuant a lease agreement which was rendered unenforceable by the respondent.

In this case the trial court having heard the witnesses for the parties found that the appellant did not prove his case and without any doubt whatsoever dismissed the entire claim on breach of contract and award of damages.

I see no reason to interfere with the Judgment of the trial court. The purported lease and vacant possession on the ground that the parties had entered into a legally binding contract was a mistake of Law. In **Hadley v Bavendale {1845} 9 EXCH 341,** the court held interalia:

> ***"Damages cannot be awarded since this cannot be said to have been reasonably supposed to have been in the contemplation of both parties at the time, they made the contract as the probable result of the breach of it."***

In that case, the appellant kept on mentioning of a lease agreement, but on perusal of the record and on appeal no such lease has been annexed laying the terms and conditions of occupation. **Black's Law Dictionary 5th Edition, at 800 and 1313:**

> ***"Tenancy means an interest in reality, which passes to the tenant one who holds or possesses land or tenements by any kind of right or title etc."***

To justify an award of damages, the appellant had to sufficiently establish existence of a valid lease agreement. One further matter should be mentioned that: ***"it is trite Law that special damages cannot be recovered unless specifically pleaded and specifically proved (See Registrar of Buildings v Bwogi 1980 – 1989 EA 487."***

The issue before me by the appellant was purely that on the facts the Learned trial Magistrate finding of fact cannot be supported on the evidence which was before her. This court being a first appeal is entitled to take judicial notice that the Learned trial Magistrate had the advantage of hearing and seeing the witnesses testify before her. It is true this court has no such advantage **(Peters v Sunday Post Limited {1958} EA 424).** I also have the duty to decide if the Learned trial Magistrate ought or ought not to have allowed the claim on general damages**. Lord Bowen in Ralchffe v Evans 1892, 2QB 524 said at page 533:**

> ***"In all actions accordingly on the case, where the damage done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these 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 inserted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and 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."***

With this now, I quite agree that in terms of the principles in **Mbogo v Shah 1968 EA 93** which state that:

> ***"The duty of this court in an appeal against the exercise of that discretion is not to interfere unless the Judge has exercised his or her discretion wrongly in principle or perversely on the facts of the case."***

The appellant on his part has not brought himself within the ambit of this dictum. That being the view, I take of the matter, my order must be this appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

.....

R. NYAKUNDI

JUDGE

<u>In the presence of</u>

1. Ms. Mwania holding brief for Kibara for the respondent