REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 483 OF 2015

BEATRICE WANJIKU KAMAU.....APPELLANT

-VERSUS-

JOHN KROMODIMEDJO..... RESPONDENT

(Being an appeal from the ruling delivered by Honourable M. Chesang (Mrs.) (Resident Magistrate) on 21st September, 2015 in Civil Suit No. 4509 of 2014)

JUDGMENT

1. The appellant herein was the defendant in Civil Suit No. 4509 of 2014. The respondent filed a plaint on 5th August, 2014 together with accompanying documents and thereafter took out summons to enter appearance. The summons are said to have been served upon the appellant on 13th August, 2014 following which the appellant entered appearance through her advocates on 1st September, 2014.

2. The respondent thereafter requested for an interlocutory judgment against the appellant for failure to file her statement of defence. The interlocutory judgment was entered by Honourable Obulutsa on 26th September, 2014 prompting the appellant to lodge an application dated 10th June, 2015 seeking to have the same set aside and further seeking leave to file defence out of time.

3. The respondent opposed the said application by way of a replying affidavit. Parties thereafter filed their respective submissions. In her ruling delivered on 21st September, 2015, Honourable M. Chesang (Resident Magistrate) determined inter alia that there was nothing to show that service of the summons was improper or that the interlocutory judgment entered is irregular. The trial magistrate also held that the defence does not raise triable issues.

4. It is in respect to the above impugned ruling that the appeal has been lodged. The memorandum of appeal dated 19th October, 2015 lists ten (10) grounds.

5. The appeal was canvassed through written submissions. On the one hand, the appellant in her submissions argued that the trial magistrate failed to consider that the claim was not purely liquidated in nature since a prayer for general damages was made; that the trial magistrate in turn failed to appreciate the explanation given by the appellant that she failed to file her defence timeously due to the time taken to collect all necessary documents in support thereof; and that the trial magistrate erred in law and fact in finding that the appellant's defence does not raise triable issues. A number of authorities were cited.

6. On the other hand, the respondent contended inter alia that upon entry of the interlocutory judgment, the respondent set down the matter for formal proof and later on, opted to abandon his prayer for general damages. According to the respondent, this in no way required him to amend his plaint. The cases of ***Anastasia Wambui Ngari v Boniface Makari Miano [2013] eKLR*** and ***Anne Okwisa Omutere v Omukhango Andeta [2017] eKLR*** were refer red to, together with ***Order 3, Rule 4*** of the Civil Procedure Rules. As such, the respondent argued that he was at liberty to abandon the prayer for general damages.

7. It was thus the respondent's submission that the claim remained purely liquidated in the absence of the prayer for general damages and hence the interlocutory judgment was properly entered. In regards to the statement of defence, the respondent argued that the same was not only filed out of time but raises mere denials and no triable issues, and it is on this basis that the trial magistrate dismissed the same. Relevant authorities were cited. In turn, the Respondent argued that the appellant's defence is scandalous, frivolous, vexatious and an abuse of the court process. The respondent added that the appeal is intended to delay the respondent's right to enjoy the fruits of his judgment and in this way, the respondent stands to suffer prejudice.

8. Counsel for the respective parties advanced their oral arguments. *Mr. Thuku* for the appellant, while acknowledging that the defence was filed out of time, submitted that the trial magistrate erred in finding that the defence did not raise triable issues. Counsel argued that the balance of the security deposit was applied in repairing the premises and paying outstanding bills. As such, the defence raises triable issues that warrant a setting aside of the interlocutory judgment.

9. In her rival arguments, *Ms. Kahamba* for the respondent maintained that the claim for general damages was abandoned vide a letter to the Executive Officer and hence leaving only the claim for the Kshs.464,943.20/= which is the liquidated amount and that there was no need to amend the plaint. Further, that the trial magistrate was right in finding that the draft defence did not raise triable issues but instead raises mere denials and contradictions. That the trial magistrate acted correctly in refusing to set aside the interlocutory judgment since the same was entered in accordance with the law and the defence lacks merit. The advocate restated the point that the respondent will suffer prejudice as he will be denied enjoyment of the fruits of his judgment. That no sufficient reason was given for failure by the appellant to file her defence in good time.

10. In response thereto, *Mr. Thuku* emphasized that while it is not contested that the respondent had paid the deposit amount to the appellant, part of the balance was expended towards repairing the premises.

11. I have considered the grounds set out in the Memorandum of appeal and submissions by the respective parties, both oral and written together with the cited authorities. Whereas the memorandum of appeal sets out ten (10) grounds, it is my observation that the grounds encompass four (4) main grounds and I will deal with them as such.

12. The *first* facet of appeal concerns whether the claim was purely liquidated in nature so as to warrant an interlocutory judgment in the absence of formal proof. In considering the above, I make reference to the relevant authorities cited by the respondent, having noted that the appellant did not back her related arguments with judicial precedents. It is of great importance to first of all seek to understand what is meant by the term 'liquidated.' The respondent quoted ***Cimbria East Africa Limited v Kenya Power & Lighting Company Limited [2017] eKLR*** which I shall refer to. In this case, Honourable Justice Ochieng' sought to define the term as follows:

> ***"Black's Law Dictionary defines Liquidated Claim thus;***
>
> ***"1. A claim for an amount previously agreed upon by the parties or that can be precisely determined by operation of Law or by the terms of the parties' agreement…" "***

13. The learned judge went ahead to reason that:

> ***"A liquidated demand is in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand' but constitutes 'damages'…"***

14. Having considered the above, I now return to the matter at hand. The parties are in agreement that a tenancy agreement was entered into between themselves and a deposit amount paid, the specifics of which are not contested. It is similarly not in dispute that under the aforesaid agreement, the respondent would be entitled to a refund of the deposit upon expiry of the agreement. What appears to be in dispute is the specific deposit amount owed to the respondent since the appellant argued that the same was utilized in offsetting certain bills.

15. At this point in time, I make reference to a copy of the tenancy agreement constituted on *pages 14 to 20* of the record of appeal and in specific, clause (c) on the security deposit. Under the aforesaid clause, it is expressed that the appellant (being the landlord) is at liberty to apply the deposit towards the respondent's (being the tenant) obligations and that the balance thereof is refundable to the respondent without interest. The clause further stipulates that the deposit is refundable upon delivery of the premises in a tenable condition.

16. From the above, what comes out clearly is that the refund of the entire deposit was never automatic but conditional. On this basis, the deposit amount refundable to the respondent is disputed as the appellant alleged that the premises were not delivered in their original state upon termination of the agreement. Given the circumstances, it would be impossible to ascertain at first glance the amount to which the respondent is entitled. Instead, the court would be required to delve further into examining the evidence to be relied upon by the respective parties. In this sense, it would be reasonable to find that the claim does not fall within the 'liquidated claims' purview; it is an unliquidated claim.

17. I now turn to the interlocutory judgment, which the appellant submits was wrongly entered. The facts are clear that the respondent requested for the interlocutory judgment under Order 10, Rules 2, 4 (1) and (2), 9 and 10 of the Civil Procedure Rules and obtained the same on 26th September, 2014. The respondent thereafter moved to execute the interlocutory judgment.

18. Have already established that the claim is unliquidated in nature, I opine that the matter ought to have gone for formal proof and a final judgment obtained prior to execution; this did not happen. As such, the respondent had no basis on which to proceed with execution.

19. Furthermore, the above-cited provisions relied upon by the respondent does not apply since they relate to liquidated sums. The relevant provision would have been *Order 10, Rule 6* of the Civil Procedure Rules which stipulates as follows:

> ***"Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be."***

20. This being the case, I have reasoned that the interlocutory judgment was improperly entered. Grounds 1 and 2 of the appeal stands.

21. There is also the question on general damages. I have perused the file and confirmed that the matter had initially been set down for

formal proof but the respondent eventually abandoned his claim for general damages and informed the Executive Officer of the same vide a letter dated 30th January, 2015.

22. Having ultimately abandoned the prayer for general damages, there is need to determine whether the respondent was at liberty to do so without necessarily amending his plaint. In answering this, I refer to the cases quoted by the respondent, that is, ***Anastasia Wambui Ngari v Boniface Makari Miano [2013] eKLR*** and ***Anne Okwisa Omutere v Omukhango Andeta [2017] eKLR.*** I have studied both precedents and noted that the respective courts disregarded the prayers that had been abandoned. I am therefore guided by their reasoning and find that once a party has chosen to abandon any of the prayers sought, there is no need for the court to consider the same and it is not necessary for a formal amendment to be made. To my mind, the respondent was at liberty to abandon the prayer for general damages without burdening himself with an amendment, as long as he did not later on return to sue on the basis of the abandoned prayer as clearly envisaged in ***Order 3, Rule 4*** of the Civil Procedure Rules. As such, ground iii) of the appeal is untenable.

23. The *second* facet of appeal relates to whether or not the learned trial magistrate erred in finding that the appellant's statement of defence does not raise triable issues. In my analysis, I have taken into account the case of ***James Wanyoike & 2 others v C M C Motors Group Limited & 4 others [2015] eKLR*** cited by the appellant hand in hand with ***Mercy Nduta Mwangi t/a Mwangi Keng'ara & Company Advocates v Invesco Assurance Company Limited [2017] eKLR*** which have sought to define what amounts to a triable issue. From the definitions encapsulated therein, I have interpreted the term to mean an issue requiring further investigation and consideration by the court at the full hearing. Might I add that a triable issue is not one that must necessarily succeed, as long as it is arguable.

24. Having established so, I have taken it upon myself to peruse the defence that was filed out of time. It would appear that there are a few issues being raised that would require the examination by the court. The issues I am referring to include:

a) Whether or not the appellant had undertaken to refund the respondent the balance of the deposit unconditionally.

b) Whether or not the subject premises had structural/mechanical defects and if so, whether the same were instigated by the appellant or respondent.

c) Whether or not the respondent handed over vacant possession of the premises in their original condition.

d) Whether or not the appellant owes the respondent the deposit amount or balance thereof.

25. The above questions give rise to triable issues and I am inclined to agree with the appellant that the trial magistrate erred in finding otherwise. Grounds 5 and 6 of the appeal stands.

26. I will now deliberate on the *third* facet of whether or not the learned trial magistrate considered the appellant's submissions and authorities together with the principles and precedents on the setting aside of the interlocutory judgment. I have perused the ruling by the trial magistrate and seen that no specific reference was made to either of the parties' submissions or judicial authorities. I have likewise perused the parties' earlier submissions.

27. The appellant attempted to explain her reason for not filing the defence timeously by arguing that she needed to obtain the requisite documents in support of her defence before filing the same. Furthermore, she raised sentiments regarding the abandoned prayer for general damages and the fact that her defence raises triable issues. Reference was made to judicial precedents.

28. In her ruling, the learned trial magistrate made no mention of the appellant's submissions neither did she give sufficient explanation for her decision, particularly on the defence. To add on, it would seem the trial magistrate did not appreciate the triable issues arising from the defence yet this would certainly have been a valid ground on which to set aside the interlocutory judgment. I do agree with the appellant that the trial magistrate misapplied the principles on setting aside such judgment and her decision was arrived at without analyzing the issues in depth. Consequently, grounds 4, 8 and 9 stand.

29. In my opinion, while it is true that the defence was filed out of time and without leave of the court, a court of law ought to consider the interests of the parties and the ultimate pursuit of justice. I take cognizance of the case of ***James Wanyoike & 2 others (supra)*** wherein the court, in quoting various other authorities, arrived at the finding that an interlocutory judgment will not ordinarily be set aside unless there is evidence of a defence with merit. I am likewise required to consider the prejudice that will befall the parties. Whereas I appreciate that the respondent will be hindered from enjoying the fruits of his judgment, I am convinced the appellant by far stands to suffer a graver deal of prejudice as she will likely be condemned unheard. I am bound by the Court of Appeal case of ***Pashito Holdings Limited & Another v Paul Nderitu Ndungu & 2 Others [1997] eKLR*** cited by the appellant in her previous submissions, explaining that it is a rule of natural justice to hear the other party.

30. The *fourth* facet essentially concerns whether the learned trial magistrate erred in law and fact in finding that the summons to enter appearance were served on 18th August, 2014 and not 13th August, 2014. My view on this ground is quite simple: the issue of summons is neither here nor there since it is clear the appellant entered appearance on 1st September, 2014. The dispute is tied to the interlocutory judgment in default of the defence. It therefore matters not when the summons were served, really. Ground 7 cannot stand.

31. I am not satisfied that ground 10 of the appeal has been demonstrated in any way. The same fails.

32. In conclusion therefore, the appeal is allowed and the ruling delivered on 21st September, 2015 is hereby set aside. I make the following subsequent orders:

i) The appellant's statement of defence and accompanying documents are deemed as having been duly filed.

ii) The appellant is awarded the costs of the appeal.

Dated, signed and delivered at NAIROBI this 7th day of February, 2019.

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent