REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E566 OF 2021

ZEBRA LOUNGE LIMITED……1ST APPELLANT

VENKATA SATHYA

NARAYANA VASUABOTULA……2ND APPELLANT

SRUNGARAPU RAJA SEKHAR…… ……3RD APPELLANT

VERSUS

MODWAY INVESTMENT LIMITED…… RESPONDENT

(Being an appeal from the judgement of Honourable A.M. Obura (Mrs) Chief Magistrate delivered on the 16th August 2021)

JUDGEMENT

1. The appeal herein arises from a breach of terms of a lease agreement whereby the Respondent sought to recover Kshs. 12,586,387.58 from the Appellants for failure to pay rent due, service charge, promotional fund, electricity costs for common areas and incidental expenses for number I.R 56640/106 via a Plaint dated 20th December 2017. The Appellants denied the claim by making a counter claim for the security deposit of Kshs. 1,016,194.00. It was their contention that although it had been withheld by the Plaintiff, it had not been factored in the computation of the total amount owed. However, the court found that the appellants had failed to rebut the Respondent's claim nor prove the counterclaim to the required standard of proof. As a result, judgment was entered for the Respondent against the Appellants for a sum of Kshs. 12,586,387.58 plus costs and interests thereon at court rates.

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2. Aggrieved with the decision of the trial court, the Appellants lodged the instant appeal via a Memorandum of Appeal dated 1st September 2021 urging the following grounds:

i. The learned trial magistrate erred in fact and in law by holding that the Respondent had proved its case on a balance of probabilities;

ii. The learned magistrate erred by failing to apply the security deposit of Kshs. 1,016,194.00 held by the Respondent to offset part of the rent arrears owed by the Appellants;

iii. The learned magistrate erred in law and fact by finding that the sum of Kshs. 12,586,387.58 demanded by the Respondent was not in excess of what was due and owing from the Appellants;

iv. The learned magistrate erred by finding that the Appellants had not demonstrated that the sum of Ksh. 12,586,387.58 demanded by the Respondent was in excess of what was due and owing from them;

v. The learned trial Magistrate erred by finding that the Respondent had paid a sum of Kshs. 95,880.00 for preparation of surrender of lease

3. As a result, the Appellants prayed for orders that:

i. The appeal be allowed;

ii. The judgement of honourable A.M Obura, Chief Magistrate delivered on the 16th August 2021 be discharged and set aside, and the orders made therein be vacated;

iii. The honourable court be pleased to substitute the orders of the lower court with an order dismissing the suit filed by the Respondent with costs; and that

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iv. Costs of the appeal be borne by the Respondent.

4. PW1 testified on behalf of the Respondent where she stated that she is an Employee of the Respondent duly authorised to testify on its behalf. She adopted her witness statement and sought to rely on the bundle of documents attached to the pleadings. She testified that the Appellants had a 1st lease for 1st June 2009. However, they renewed the lease in 2015 for the period ending 30th September 2016 when the Appellants requested to surrender the lease. Accordingly, the Respondent wrote to the Appellants requesting that they clear the premises in preparation for another tenant. However, they failed to do so as requested.

5. As a result, the Respondent engaged auctioneers who collected the abandoned goods. The members of the public were duly notified before the goods were auctioned. The auction was undertaken two years after the Appellants left the premises. The Respondent denied receiving any demand letter from the Appellants. Also, she denied using the Appellant's goods for their own business. She reiterated that the claim was for recovery of Kshs. 12,586,387.58, an amount which the Appellants had by themselves admitted via an email which was attached to the Respondent's bundle of documents.

6. On cross examination, she testified that the Respondent opted to use the security deposit and therefore the same was not factored in the claim before the honourable court. Regarding the legal fees claimed, PW1 maintained that the Respondent paid the sums despite the fact that it was the Appellants who were supposed to bear the legal fees for the surrender of lease. While emphasizing that the Appellants admitted the debt, PW1 stated that the Appellants, in fact made a proposal for payment of the

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amount owed. PW1 affirmed that the surrender of lease was friendly and was executed on 2nd February 2017.

7. The Appellants never called any witness to testify.

8. By directions of the court, the appeal was canvassed through written submissions.

9. The appellant submissions were premised on three grounds of appeal. They combined grounds 1, 3 and 4 while ground 2 and ground 5 were argued singly.

10. Regarding the question whether the sum of Kshs. 12,586,387.58 was due and owing from the Appellants, It was submitted that the Respondent failed to prove the amount owed to the required standard. The Appellant maintained that although it was alleged that the amount owed had been admitted pursuant to the emails attached on pages 368 and 369 of the Record of Appeal, the Appellants denied owing the Respondent via their amended statement of defence and counterclaim dated 16th March 2018. Therefore, the Respondent had the legal burden of proving the debt owed.

11. Towards this end, the appellant contended that the learned magistrate erred in placing the burden of proof on the Appellants to show that they had indeed paid the outstanding sums. Reliance was placed on the case of ***Hellen Wangari Wangechi vs Carumera Muthoni Gathua [2015] eKLR*** to urge the position that whoever asserts a fact is under an obligation to prove it in order to succeed.

12. On whether the learned magistrate erred by failing to apply the security deposit if Kshs. 1,016,194.00 held by the Respondent to offset part of the rent arrears owed by

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the Appellants. It was submitted that pursuant to the lease agreement between the 1st Appellant and the Respondent, the 1st Appellant was required to pay security deposit equivalent to one quarter's rent before taking possession of the premises. Since the Respondent acknowledged receipt of the security deposit of Kshs. 1,016,194.00, he was to use the security deposit to make payment of any sums falling due that the Appellants and failed to pay. Therefore, the Respondent's contention that the deposit was to be offset on the clearance of the outstanding sums was incorrect. As a result, the learned magistrate erred in fact and in law in failing to factor in the security deposit while computing the sums owed to the Respondent.

13. Citing the case of ***Stanley Maira Kaguongo vs Isaac Kibiru Kahuthia [2022] eKLR***, the Appellants urged that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he asserts must prove that those facts exist.

14. It is further submitted that the Respondent failed to prove that it had indeed paid the sum of Kshs. 95,880.00 as leal fees towards the preparation of the Surrender of Lease. as a result, the Respondent was not entitled to such an award as the same had not been proven by evidence. Therefore, there was no basis for the learned magistrate to make such an award as no receipt was availed in support of such an expenditure.

15. The Respondent submitted that it had duly discharged the legal burden of proof. The failure by the Appellants to call any witness to rebut the evidence adduced by the Respondent worked in favour of the Respondent as they were unable to impeach the evidence that he had adduced in support of the claim. Reliance was placed on the case of ***Motex Knitwear Limited V Gopitex Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002***, where Lesiit

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J as she then was observed that failure by the Defendant to call a witness not only rendered the Plaintiff's case unchallenged but also made the defendant's case unsubstantiated.

16. It was also submitted that it was the 1st Appellant who had requested that the security deposit be used to offset against the outstanding rental dues. Upon the Respondent adjusting the rent due having factored the security deposit, he communicated the same to the Appellant. Therefore, the learned magistrate duly took this into consideration in entering judgment for the Respondent in respect of the monies claimed.

17. The Respondent further submitted that he specifically proved the legal fees employed in preparing the surrender of lease to the required standard by availing the invoice from Daly and Inamdar Advocates. Overall, the Respondent submitted that the appeal ought to be dismissed with costs.

18. Both the Appellants and the Respondent highlighted their submissions. They urged the positions similar to those advanced in the written submissions. The Apellants insisted that the Respondent failed to discharge the burden of proof and therefore the learned magistrate erred in determining the case in his favour. The Respondent on the other hand maintained that the Appellants defence and counterclaim were unsubstantiated as they having failed to call any witness.

19. Under **Section 78(2) of the Civil Procedure Act**, the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted herein. Accordingly, the first Appellate Court should re-evaluate the evidence and make

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its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case ***of Selle & Anor v Associate Motor Boat Co. Ltd 1968 EA 123.***

20. Upon considering the pleadings, submissions and the supporting documents, the issues that commend themselves for determination are:

i. Whether the Respondent's case was proved to the required standard

ii. Whether the appeal is merited

21. Regarding the question whether the Respondent proved the amount owed by the appellants. **Section 107(1**) of the ***Evidence Act*** provides that:

> ***"Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."***

22. This refers to the legal burden of proof. There is, however, an evidential burden of proof which is captured in **Sections 109 and 112** of the ***Evidence Act*** as follows:

> ***109.The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.***
>
> ***112.In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.***

23. The two provisions were dealt with in the decision of Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi &

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Another [2005] 1 EA 334, in which this Court held as follows:

> *"**As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."***

24. The Appellant contends that the Respondent failed to prove that kshs. 12,586,387.58 was due and owing from the appellants. The Respondent on the other hand contended that the Appellants' failure to call any witness at the trial court worked in favour of the Respondent as they were unable to impeach the evidence that had been adduced by the Respondent.

25. It is settled that uncontroverted evidence is not automatic evidence. The burden on the Plaintiff to prove his case is in no way lessened because the Defendants did not adduce any evidence. This was succinctly expressed by the Court of Appeal in ***Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau [2016] eKLR*** where the Court stated as follows:

> *"**The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct…While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does***

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not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities. The Evidence Act is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”

26. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi M'Nabea vs David M. Wachira [2016] eKLR** stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”

27. In the instant case therefore, the Respondent bore the burden of proving that the Appellants owed the Kshs. 12,586,387.58. The Respondent claimed that the sum was made up rent, service charge, costs and expenses that the Appellants had failed to pay as well as interest at 2% per month due from the first lease which the appellants failed to honour as well as, rent, service charge, costs and expenses that the Appellants had failed to pay as well as interest at 2% per month due from the Second lease. Also, the sum is made up of the costs of preparing the lease and the surrender of lease at the cost of Ksh. 379,366.00 and Ksh. 94,840.00. This is because it was a term of the lease that the Lessee, the Appellant, was responsible for both parties’ legal costs incurred in the preparation, execution and registration of the Lease including Stamp Duty, registration fees and other disbursements.

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28. The Appellants' claim regarding the security deposit is also founded on the Lease as it provides that a security deposit, equivalent to one quarter's rent and service charge though payable was refundable without interest to the lessee after the expiry of the Lease and delivery up of the premises.

29. The Respondent's claim for kshs. 12,586,387.58 against the appellant was broken down as follows:

i. Outstanding balance as at 3rd September 2016 Ksh. 6,470,946.62
ii. Service charge for 2016 Ksh. 1,448,801.64
iii. Legal fees on preparation of 2nd Lease Ksh. 379,366.00
iv. Legal fees on preparation of surrender of Lease Ksh. 95,880.00
v. VAT on service Charge Ksh. 231,808.26
vi. Rent for 4th quarter Ksh. 1,855,383.55
vii. Interest on unpaid rent upto 30th September, 2016 Ksh. 2,104,201.52

30. The manner in which a written document, whether an agreement, contract and/or deed is to be interpreted, has been the subject of several decisions. It is now accepted that written contracts being self-contained can only be construed and interpreted on the basis of the contents therein. This was expressed by the ***Court of Appeal in Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited [2017] eKLR*** thus:

> ***"This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic***

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evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it….”

31. Equally, the Court of Appeal in the case of ***Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd (2017) eKLR*** stated thus:

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

32. The Respondent’s claim is that the Appellant was owing Kshs. 12,586,387.58 while the Appellant’s claim is that the amount in question has failed to factor both the security deposit owed to the Appellants and also failed to demonstrate proof of the amount claimed as legal fees.

33. Having considered the agreement, it is therefore evident that whereas the Respondent was entitled to costs of the rent and service charge due under the lease, as well as the costs of any legal fees incurred under the preparation and execution of the lease, the Appellant was entitled to a refund of the security deposit at the expiry of the lease and delivery up of the premises.

34. A perusal of the Respondent’s documents show that the Appellants had proposed and the Respondent accepted to offset the outstanding rental dues against the security deposit. This was communicated to the 3rd Appellant via email on 12th October 2016. Nevertheless, the Respondent while giving her testimony at the trial court categorically stated that the security deposit had not been factored in the computation of the amount due and owing form the Appellant. The use of the security deposit having been

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expressly agreed by the parties, it was incumbent upon the learned trial magistrate to factor it in while making any award in favour of the respondent. Failure to so was therefore in error.

35. Regarding the legal fees used in the preparation of the lease and the surrender, it was an express term of the Lease that the same was to be borne by the Appellants. It is trite that such an expense would need to be specifically pleaded and proven before being awarded. A perusal of the record demonstrates that the cheques paid to Daly & Inamdar advocates have been attached as part of the Respondents bundle of documents. I therefore find that the amount spent as part of the legal fees have been sufficiently proved to the required legal standard.

36. This being so, I find that the Respondent successfully proved the claim against the appellant, save for the fact that the security deposit ought to have been factored in the final computation of the amount due and owing since the same had been expressly consented to by the parties via the email dated 12th October 2016.

37. ***The upshot of the matter is that the appeal partially succeeds to the extent that the security deposit of kshs. 1,016,194.00is to be factored in the computation of the amount owed and owing. Each party to bear its own costs.***

38. Thirty (30) days stay of execution to apply.

DATED, SIGNED AND **DELIVERED** ELECTRONICALLY THIS **2ND OCTOBER**, 2025.

HON. T. W. Ouya

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