Wanyoike v Wang'ombe (Civil Appeal 3 of 2023)
[2025] KEHC 15713 (KLR) (3 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15713 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 3 OF 2023

RC RUTTO, J

NOVEMBER 3, 2025

(FORMERLY KIAMBU HIGH COURT CIVIL APPEAL NO. 115 OF 2023)

BETWEEN

PETER KUNGU WANYOIKE ..... APPELLANT

AND

MICHAEL WANG'OMBE ..... RESPONDENT

(Being an appeal from the judgment delivered by Hon. S. Atambo (CM) on 28th March 2023 in Thika Chief Magistrates Court No. 1126 of 2015)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Thika Chief Magistrates Court Civil Case No. 1126 of 2015. The genesis of the suit is a Plaint dated 29th October 2015, through which the Respondent sued the Appellant for breach of contract. The Respondent averred that the Appellant was his landlord while he operated a restaurant on the Appellant's premises known as Kahawa Wendani Plot No. 5/58 (the premises). He stated that they agreed he would undertake improvement works on the premises, including renovations and partitioning to suit his business model, and that the Appellant would reimburse him the cost of the improvements upon expiry or early termination of the tenancy. It was further agreed that if the Appellant failed to reimburse the said costs, the Respondent would be at liberty to sell the improvements to the incoming tenant.

2. The Respondent averred that he incurred a total of Kshs. 171,400/= in respect of materials and labour and that he personally supervised the works, using his motor vehicle registration number KAE 144K to commute from his home in Pangani, thereby incurring Kshs.30,000/= in fuel expenses at the rate of Kshs.1,000 per day. He further stated that he opened the restaurant to the public on 20th September 2014, and that the business was profitable, recording an average daily profit of Kshs.5,000/= between October and November 2014. However, at the beginning of December 2013 up to March 2014, the

Appellant blocked the service door between the bar and the extension, thereby restricting access to the leased premises.

3. The Respondent consequently sued the Appellant for summarily terminating his tenancy without reason or notice, frustrating his business operations by blocking the service door, and confiscating and retaining his business equipment and apparatus for a period of six months.

4. The Respondent then sought general damages for summary termination of tenancy, confiscation of equipment and loss of profits, special damages totaling to Kshs.201, 400/=, interest at court rates and the costs of the suit.

5. In a response, the Appellant denied any agreement for renovation of the premises as had been alleged by the Respondent and he further denied the particulars of breach of contract.

6. During the hearing, only the Plaintiff testified while the Defendant closed his case without calling any witness. After hearing and analysis of the evidence presented before court, the trial court entered judgment against the Appellant herein as follows;

    a. Kshs.500, 000/= as general damages for the unlawful eviction.

    b. Kshs.161, 525/= as special damages pleaded and proved.

    c. Interest at court rates for (a) and (b) above.

7. Aggrieved by the decision of the trial court, the appellant lodged the this appeal on the grounds that the Learned Trial Magistrate erred in law and in fact in finding that there was an oral agreement between the Appellant and the Respondent; holding that the Respondent had proved his case on a balance of probability; awarding damages which were inordinately high against the evidence on record; failing to apply the principle of comparing awards hence arrived at an exorbitant award of damages and disregarding the appellant's defence.

8. Reasons whereof, the appellant prayed that the appeal and the Judgment of the trial court delivered in 28th March 2023 be set aside with costs and that the costs of the appeal be borne by the Respondent.

9. The Appeal was canvassed by way of written submissions. The Appellant's filed their submissions dated 18th September 2024 while the Respondent's submissions is dated 14th November 2024.

Appellant's Submissions

10. The Appellant begins his submission with an overview of the dispute between parties and a set out the background of the matter.

11. The Appellant identified five issues for determination that is a) whether there was an oral agreement between the Appellant and the Respondent; b) whether the Respondent proved his case on a balance of probability; c) whether the general damages awarded by the trial court were inordinately high; d) whether the judgment delivered on 28th March 2023 ought to be set aside and e) who is to bear the costs.

12. On the first issue, the Appellant contends that no oral agreement existed between him and the Respondent. He argues that the Respondent failed to provide any evidence to support the existence of such an agreement. The Respondent had claimed that he rented the premises from the Appellant in July 2013 at a monthly rent of Kshs.20,000/=, having paid a deposit of Kshs.60,000/=. He presented rent receipts issued under the name Carling Becks and signed by one Ngugi. The Appellant notes that the trial court correctly observed that the Respondent did not conduct a search on the suit property to ascertain the identity of its registered owner.

13. The Appellant further submits that the trial court rightly acknowledged that the Respondent's claim that the Appellant was his landlord had been expressly denied. Therefore, the burden of proof lay with the Respondent. However, the Appellant argues that the trial court erred in concluding that the receipts were signed by him, Ngugi, and in finding that Ngugi and the Appellant were the same person. He argued that this erroneous finding led the trial court to wrongly conclude that the Respondent had proved his case on a balance of probabilities and that an oral tenancy agreement existed between the parties under which rent had been paid.

14. The Appellant submitted that the Respondent merely alleged without providing evidence, that he had given the Appellant a copy of his Identity Card and PIN Certificate, which the trial court noted in its judgment, yet the Respondent did not produce these documents in evidence. The Appellant argues that, in the absence of such proof, the trial court could not properly conclude that Ngugi was the Appellant or that he was the one who signed the receipts issued by Carling Becks. The Appellant therefore maintained that no oral tenancy agreement existed between the parties, and that the trial court's finding should be set aside.

15. On the second issue, which flows from the first, the Appellant argues that the trial court erred in its analysis of the issue of termination of the tenancy agreement. He submits that the trial court wrongly concluded that the Respondent was a protected tenant under a controlled tenancy, that he had not been issued with the requisite notices to vacate the premises, and that the locking of the Respondent's premises was unlawful and amounted to constructive eviction. The Appellant clarified that he does not dispute the legal principles on controlled tenancies, but asserts that the court should not have addressed the issue at all, as no tenancy agreement existed and he was not Respondent's landlord.

16. The Appellant further claimed that the trial court was biased against him for not calling any witnesses. He notes that the held that "the Respondent's evidence that there was an oral tenancy agreement between him and the Appellant entered into in July 2013 was uncontroverted." In support of his position, the Appellant cited Civil Appeal No. 305 of 2016, Margaret Wanjiru Ndirangu & 4 Others v Attorney General [2020] eKLR, submitting that failure to adduce evidence does not absolve the Respondent from proving his case on a balance of probabilities. He maintained that the Respondent failed to meet this burden and that the trial court erred in its finding.

17. On the third issue, the Appellant referred to Civil Appeal No. 44 of 2017, Omar Gorham v Municipal Council of Malindi (County Government of Kilifi), to reiterate that there was no oral tenancy agreement existed between the parties. He argues that, in the absence of such an agreement, the issue of general damages should not to have arisen. The Appellant further contended that, even if a valid oral tenancy were found to existed, the award of Kshs. 500,000/= as general damages was inordinately high. He faults the trial court for failing to refer to comparable awards in similar cases, arguing that the amount was arbitrarily and awarded without evidential or legal basis.

18. The Appellant also notes that the rent receipts produced by the Respondent only covered the period from July to December 2013 and included a three-month deposit. No rent was paid for the months of January to March 2014, during which the Respondent allegedly suffered loss of profits. He argues that the claim of summary eviction was unsubstantiated and that the responsible landlord was not the Appellant. The Appellant maintained that, even assuming general damages were properly awardable, the trial court failed to apply the principle of comparable awards, as there was no indication in the judgment as to how the figure of Kshs..500,000/= was determined. In support of his position, he relied on Civil Appeal No. 4 of 1984, Chege Kimotho & Others v Maria Vesters & Another [1988] eKLR, submitting that, the award lacked justification.

19. In conclusion, the Appellant submits that the judgment should be set aside and the appeal allowed and costs awarded to him.

Respondent's Submissions

20. Like the Appellant, the Respondent briefly restated the background facts of the case before addressing the grounds of appeal raised.

21. On the question of whether an oral tenancy agreement existed between the parties, the Respondent submitted that he produced a receipt dated 10th July 2013 for Kshs.60,000/=, being three months' rent deposit, along with several other rent receipts. He explained that the receipts were issued under the name Carling Becks Restaurant rather than the Appellant's name, because the Appellant had identified himself as the owner of the premises and had provided a copy of his Identity Card and PIN Certificate to facilitate payment for electricity connection. The Respondent stated that he paid rent directly to the Appellant, who would then directed him to his manager, Ngugi, to issue and sign receipts on his behalf.

22. The Respondent further submitted that during the hearing, he was able to identify both the Appellant and Ngugi, who were present in court on the day he testified. He also called two witnesses, PW2 and PW3, who were labourers involved in the improvement works on the premises. They confirmed that they had worked on the suit premises and identified it as the same premises where the Respondent operated his restaurant. The Respondent also produced photographs of the premises to support his testimony. He argued that his evidence remained uncontroverted, as the Appellant neither testified nor produced any evidence to challenge his account. He added that the proceedings did not show any protest or objection from either the Appellant or Ngugi when he identified them in court. The Respondent urged the court to consider that he had no control over the form or name under which the receipts were issued, as long as they correctly reflected the payments made and his details. He contended that the Appellant could not now rely on the use of a business name to deny the existence of the tenancy relationship between them.

23. The Respondent further argued that if, as alleged, the receipts produced were forgeries or Ngugi's signature had been falsified, the Appellant would have raised the issue in his defence or reported the matter to the police, which he did not. While citing Nkuve v Nyamiro [1983] KLR 403, the Respondent maintained that the Appellant had failed to demonstrated that the trial court's finding on the existence of an oral tenancy agreement was based on no evidence, on a misapprehension of the evidence, or on wrong principles of law.

24. On whether he proved his case on a balance of probabilities, the Respondent submitted that the trial court correctly found in his favour, as already discussed under the first issue. Regarding the Appellant's claim that the trial court was biased because he was not allowed to testify, the Respondent described that assertion as far-fetched and misleading. He noted that the Appellant was at all times represented by counsel, who made a conscious decision not to file a witness statement or any documentary evidence. The Respondent further submitted that when the Appellant later sought to testify after the close of the Plaintiff's case, an objection was properly raised on the ground that he had not filed and served a witness statement. The court subsequently delivered a ruling on 19th December 2017, holding that the purpose of pre-trial directions is to inform the opposing party of the evidence that will be relied upon. The court found that permitting the Appellant to testify without prior compliance would have gravely prejudiced the Respondent, who had already closed his case. The Respondent therefore maintained that the trial court acted properly, impartially, and consistent with the procedural rules.

25. On the issue of whether the general damages awarded by the trial court were inordinately high, the Respondent submitted that, the trial court awarded Kshs..500,000/= as general damages after

considering the evidence presented. The court relied on the case of Mattarella Limited v Michael Bell & Another [2018] eKLR, where the damages of Kshs.200,000/= were awarded for constructive eviction. The Respondent argued that, the assessment ofgeneral damages, is a discretionary exercise by the judicial officer based on the evidence and the particular circumstances of each case. He further relied on Kenya Women Microfinance Limited v Martha Wangari Kamau [2021] eKLR and Kemfro Africa Limited t/a Meru Express Services & Another v Lubia & Another (No. 2) [1985] eKLR, submitting that the Appellant had not demonstrated that the trial court's award was based on incorrect principles, lacked evidentiary support, or involved consideration of irrelevant factors.

26. The Respondent also submitted that the Appellant had not shown how the award of Kshs.500,000/= was excessive, especially in view of the uncontroverted evidence that the Respondent had made substantial improvements on the premises, operated a profitable business earning approximately Kshs.5,000 per day, and suffered financial loss and inconvenience due to the Appellant's unlawful interference with his tenancy and subsequent eviction. He added that his business equipment and stock were detained in the premises for several months, further aggravating his loss.

27. In conclusion, the Respondent submitted that he had proved his case against the Appellant to the required standard before the trial court and prayed that this court uphold the judgment in full, with costs to him.

Analysis and Determination

28. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of Selle v Associated Motor Boat Company Ltd (1968) EA 123 and Peters v Sunday Post Limited [1985] EA 424).

29. Upon careful analysis of the record of appeal and the parties' submissions the following issues arise for determination:

    a. Whether there existed an oral tenancy agreement between the Respondent and the Appellant

    b. Whether the Appellant proved his case on a balance of probabilities

    c. Whether the trial court erred in awarding general damages of Kshs. 500,000/= for unlawful eviction.

Whether there existed an oral tenancy agreement between the Respondent and the Appellant

30. The Respondent's case before the trial court was that he entered into an oral tenancy agreement with the Appellant in July 2013 concerning premises located at Kahawa Wendani Plot No. 5/58. He claimed that pursuant to this agreement, he paid rent and a deposit amounting to Kshs.60,000/= and undertook renovations on the premises with the understanding that he would either be reimbursed or permitted to sell the improvements to the incoming tenant. The Respondent produced rent receipts issued under the name Carling Becks Restaurant and signed by one Ngugi, whom he identified as the Appellant's agent or manager. He further testified that the Appellant personally introduced him to Ngugi, provided his ID and PIN to facilitate utilities connection, and that he, subsequently took possession, renovated the premises, and operated a restaurant business.

31. The Appellant, in response, denied any relationship with the Respondent or entering into any agreement between him. He denied the authenticity of the receipts and alleged that he was not

"Ngugi." However, the Appellant did not file a witness statement or present any evidence at trial to support his denial.

32. The record shows that on 19th December 2017, the trial court delivered a ruling declining the Appellant's request to file a witness statement after the Plaintiff had already closed his case, holding that doing so would prejudice the Plaintiff. That ruling was never appealed, and remains binding. As a result, the Appellant's defence remained unsubstantiated since they relied solely on pleadings and submissions.

33. Upon re-evaluation of the record, this Court finds that the trial magistrate's conclusion that an oral tenancy agreement existed was not without evidentiary basis. The receipts, photographs, and corroborating testimony of PW2 and PW3 (who undertook renovations) constituted credible circumstantial and direct evidence of possession and landlord-tenant relations between the parties.

Whether the Appellant proved his case on a balance of probability

34. The burden of proof as per Section 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlined as follows;

> "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."

35. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M. Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

> "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. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
>
> > "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.
>
> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
>
> > "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 that fact shall lie on any particular person."

36. The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

> "Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes

that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

37. Accordingly, the duty of proving the averments contained in the plaint lay squarely with the Respondent.

38. This court is also guided by the provisions of section 78 of the *Civil Procedure Act* which mandates it to re-evaluate and reassess the evidence in order to reach its own conclusions. The appellate Court is not bound by the trial Court's findings if it appears that the trial Court failed to consider relevant circumstances or probabilities, or if the impression of a witness's demeanor is inconsistent with the evidence generally.

39. The Appellant argued that the trial court erred in finding that the Respondent had proved his case merely because the Appellant did not testify.

40. Indeed, the legal burden remains with the plaintiff throughout, under Sections 107–109 of the *Evidence Act* (Cap 80). However, once a party adduces credible, unrebutted evidence, the evidential burden shifts. If no rebuttal is offered, the court is entitled to accept the uncontroverted version as true, provided it is not inherently improbable. In this case, the record shows that following the trial court's ruling of 19th December 2017, the Appellant neither filed nor serve a witness statement and thus was therefore precluded from testifying or calling witnesses. Consequently, several material facts testified to by the Respondent and his witnesses (PW2 and PW3) stood uncontroverted, including that in July 2013, the Respondent entered into an oral tenancy arrangement with the Appellant for the premises known as Kahawa Wendani Plot No. 5/58; that pursuant to the said arrangement, the Respondent paid a sum of Kshs.60,000/= as deposit and continued to pay monthly rent through receipts issued under the name Carling Becks Restaurant, signed by one Ngugi, whom the Appellant had introduced as his agent or manager; that the Appellant provided his his Identity Card and PIN Certificate to facilitate electric connection; the Respondent undertook renovations and partitioning works, incurring expenses totalling Kshs.171,400/=, corroborated by PW2 and PW3; that the Respondent operated a restaurant business on the premises and was earning an average daily profit of about Kshs.5,000/=; that in December 2013, the Appellant blocked the service door connecting the bar and the extension, thereby restricting access and frustrating the Respondent's business; and that the Appellant subsequently locked the Respondent out of the premises, confiscating his business equipment for approximately six months.

41. None of these facts were challenged through cross-examination of any defence witness, nor did the Appellant offer any alternative explanations evidence. The Appellant's denial in his statement of defence and submissions alone did not amount to proof.

42. Accordingly, the trial court properly found that the Respondent's evidence, being consistent, corroborated, and unchallenged, met the threshold of proof on a balance of probabilities. The Appellant's failure to present rebuttal evidence left the Respondent's version of events as the only credible account before the court.

43. I therefore find that the Respondent proved his case on a balance of probabilities and the trial court's finding on this issue was sound and supported by the evidence presented.

Whether the award of general damages was inordinately high

44. Having found that the Respondent proved his case on a balance of probabilities, it follows that he was entitled to appropriate relief in damages. The trial court awarded Kshs.500,000/= as general damages for unlawful eviction and Kshs.161,525/= as special damages.

45. The Court of Appeal in Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its won for that awarded by the court below simply because it would awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

46. Similarly in Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 the court held that:-

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

47. The assessment of damages is a matter of judicial discretion. An appellate court can only interfere if the award is shown to be inordinately high or low, or if the trial court acted on wrong principles.

48. In the present case, the Respondent led evidence showing that he had undertaken improvements to the premises, was operating a profitable business, and was locked out without notice or justification, amounting to constructive eviction. The trial court relied on Mattarella Limited v Michael Bell & Another [2018] eKLR where Kshs.200,000/= was awarded for constructive eviction.

49. The Appellant argued that the award of general damages was inordinately high and that the trial court failed to compare awards in similar cases. However, beyond asserting that the amount was excessive, the Appellant did not provide any comparative authorities or material to assist the court in evaluating what an appropriate award would have been. Nor did he adduce any evidence before the trial court to rebut the Respondent's evidence of the loss suffered or to demonstrate that the eviction complained of was justified.

50. In assessing general damages, the trial court took into account the Respondent's controverted evidence that he had invested substantial sums of money in improving the premises. It also took into account that the Appellant unlawfully blocked access to the service door and subsequently locked him out actions that were unlawful, tortious and amounted to constructive eviction. Furthermore, this court takes note that the precedent is several years old, and given the prevailing economic conditions and inflation. In addition, this court also takes note of the age of the case relied upon by the trial court and the inflation, the award of kshs.500,000/= was reasonable and proportionate to the loss suffered.

51. The trial court therefore correctly found that the Respondent had been unlawfully deprived of his quiet possession and business operation and was deserving of compensatory damages.

52. Moreover, the Appellant's bare assertion that the award was "plucked from the air" is untenable.

53. Accordingly, I find that the trial court properly exercised its discretion in awarding general damages, the amount awarded was commensurate with the loss suffered, and no material has been presented to justify interference with that award.

54. I am satisfied that the learned trial magistrate correctly determined the matter as she did, and I see no reason to interfere with the trial court's findings. Therefore, the appeal fails.

55. On the issue of costs, under Section 27 of the *Civil Procedure Act*, costs follow the event unless the court orders otherwise. The Respondent, having succeeded before the trial court and on this appeal, is entitled to the costs.

56. In light of the foregoing, I find no merit in the appeal and thus proceed to dismiss it with costs to the Respondent.

57. Orders accordingly

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF NOVEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

..... for Appellant

..... for Respondent

Selina Court Assistant