



**Waynays Africa Limited v Bewa Farmcare Limited (Civil Appeal E086 of 2022)  
[2025] KEHC 16441 (KLR) (Civ) (14 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16441 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E086 OF 2022**

**H NAMISI, J**

**NOVEMBER 14, 2025**

**FORMERLY KIAMBU HC CIVIL APPEAL NO. E 086 OF 2022**

**BETWEEN**

**WAYNAYS AFRICA LIMITED ..... APPELLANT**

**AND**

**BEWA FARMCARE LIMITED ..... RESPONDENT**

*(Being an Appeal from Judgement of Hon. Wanyanga, Senior Resident  
Magistrate in Thika Civil Suit No. E027 of 2021 delivered on 28 April 2022)*

**JUDGMENT**

1. The parties entered into a commercial relationship governed by two primary contracts both dated 1 July 2017. The first was a Lease Agreement, wherein the Respondent let to the Appellant a portion of the premises known as Bewa Farmcare Plaza, situate on LR. No. 4953 432, Thika, for a term of six years. The rent was Kshs. 495,000 - per quarter (Kshs. 165,000 - monthly) for the third year (1 July 2019 to 30 June 2020) and escalated by 10% to Kshs. 544,500 - per quarter (Kshs. 181,500 - monthly) for the fourth year (1 July 2020 to 30 June 2021).
2. The second contract was a Sale Agreement, by which the Respondent sold to the Appellant a feed mixed and hammer mill, located on the premises for a total consideration of Kshs 500,000 =.
3. It is common ground that the Appellant's business was affected by the COVID -19 pandemic, and it fell into arrears on its rent payments from May 2020. This precipitated a dispute. The parties' directors, PW1 (Stephen Wainaina Kamondia for the Appellant) and DW1 (Michael Mbugua Wanyoike for the Respondent), held a reconciliation meeting on 19 November 2020. Prior thereto, on 18 August 2020, the parties had executed a handwritten "Agreement to Vacate Premises" (produced as Defendant's



- Exhibit 5), which provided, inter alia, that the lease would be terminated and the Appellant would vacate the premises on or before 31 December 2020.
4. The central factual dispute arises from the events of 19 December 2020. It is admitted by the Respondent that on this date, 12 days prior to the agreed vacation date, DW1 went to the premises and caused the gates to be welded shut, effectively evicting the Appellant and locking in its property, including vehicles and tools. The Respondent's justification for this action was that DW1 had received information that the Appellant was attempting to vacate the premises with the aforesaid mixer and hammer mill, for which the Respondent alleged a balance of Kshs 330,000 - was still outstanding.
  5. The Appellant then filed the suit in the trial court, pleading these facts and praying for an order of accounts and general damages for the unlawful disruption of its business. The Respondent defended the suit and filed a counterclaim seeking a total of Kshs. 1,136,794.84, which it particularized as rent arrears (Kshs. 615,000), balance for the machine (Kshs. 330,000 =), and unpaid utility bills (Kshs. 180,923.84 for electricity and Kshs 10,871 = for water).
  6. After hearing the parties, the trial magistrate delivered the impugned judgement. His key findings, which form the basis of this appeal, were as follows:
    - i. On Rent Arrears: The Magistrate calculated the rent due from May 2020 to November 2020 (Kshs. 330,000 = + Kshs. 907,500 =) and added a prorated sum for the 19 days of December 2020 (Kshs. 111,242 =), arriving at a total rent liability of Kshs. 1,348,742 =.
    - ii. On Utility Bills: The Magistrate similarly prorated the outstanding water and electricity bills for 19 days, finding the Appellant liable for Kshs. 6,663 = (water) and Kshs. 110,889 = (electricity).
    - iii. On the Machine Balance: The learned Magistrate, after noting the "poor record keeping," rejected both the Appellant's claim of full payment and the Respondent's claim for a Kshs. 330,000 = balance. Instead, he found that the Appellant had paid a total of Kshs. 340,000 =, and thus owed a balance of Kshs. 160,000 =.
    - iv. Final Calculation: The magistrate aggregated these debts (1,348,742 = + 117,552 = + 160,000 =) to find a total liability of Kshs. 1,626,294 =. He then deducted the total payments made by the Appellant, which were agreed to be Kshs. 1,205,000 = (comprising Kshs. 705,000 = paid between June and October 2020, and Kshs. 500,000 = paid via a court order in January 2021). This calculation resulted in the final decree of Kshs. 421,294 = in favour of the Respondent.
    - v. On the Appellant's Claim: The learned Magistrate made no finding, awarded no relief, and indeed made no mention whatsoever of the Appellant's primary prayer for general damages for business disruption.
    - vi. On Costs: The Magistrate ordered each party to bear its own costs, citing the "pedestrian way" the parties transacted and the Respondent's own "breach of its... agreement" by evicting the Appellant prematurely.
  7. Aggrieved by the judgement, the Appellant lodged this appeal on the following grounds:
    - i. That the learned Magistrate erred in fact in failing to appreciate the simple math that was contained in the computation presented by the Appellant in its submissions with concrete figures backed by bank statements, bank deposits and the parties' pleadings including the Respondent's.



- ii. That the learned Magistrate completely ignored the Appellant's prayer for compensation for loss of business and did not even as much as mention it in his entire judgement;
  - iii. That the learned Magistrate completely ignored the Appellant's submissions and pleadings and instead based his judgement on conjecture and suppositions;
  - iv. That the learned Magistrate gave his judgement against the weight of the evidence and pleadings.
8. The appeal was canvassed by way of written submissions.
  9. The Appellant submits that the trial court erred by failing to appreciate the math. This argument posits that the Respondent's own witness statement admitted a total debt (rent plus machine) of Kshs 945,000 = as of May 2020. As the Appellant subsequently paid Kshs 1,205,000 =, it is the Appellant's submission that it overpaid the Respondent by Kshs 260,000 =.
  10. The Appellant's most significant ground of appeal is that the trial court erred in law by completely ignoring the Appellant's prayer for compensation for loss of business, despite this claim being pleaded, supported by evidence, and canvassed in submissions. The Appellant prays that the issue be remitted for retrial.
  11. Finally, the Appellant argues that the trial court erred in finding it liable for any utility bills, as the Respondent's unlawful eviction on 19 December 2020 frustrated the Appellant's ability to settle the same.
  12. On its part, the Respondent contends that the machine balance is definitely Kshs 330,000 =. It is submitted that the Sale Agreement was for Kshs 500,000 = and the evidence on record shows only one payment of Kshs 170,000 -. The Respondent argues that this is corroborated by the Rent Payment Schedule and the Reconciliation Statement, which were not disputed.
  13. The Respondent does not deny locking the premises on 19 December 2020, but submits that this action was justified as the Appellant was attempting to leave the premises with the machine that had not been paid for. The Respondent maintains that the Appellant is liable for all utilities. It is argued that the Appellant had sub-let the premises without written consent, in breach of paragraph (r) of the Lease. Therefore, any utility consumption by the sub-tenants after 19 December 2020 falls squarely on the Appellant.

### **Analysis and Determination**

14. The duty of a first appellate court is well settled. It entails revisiting, re-evaluating and considering afresh the evidence presented before the trial court for the appellate court to make its own independent conclusions bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. This was set out in the case of *Selle & Another vs Associated Motor Boat Company Limited*, [1968] EA 123.
15. It is trite that though an appellate court has mandate to interfere with findings of fact made by a trial court, this mandate should be exercised cautiously and only when it is clear that the trial court's decision or finding of fact was not based on any evidence or was based on a misrepresentation of the evidence or on wrong legal principles.
16. Having carefully re-evaluated the record of appeal and the submissions, the appeal shall be determined upon the following 4 issues:
  - i. The state of accounts



- ii. The legality of the eviction
- iii. Failure to adjudicate the claim for damages
- iv. costs

The state of accounts

17. The Appellant's primary contention is that the trial court ought to have found an overpayment of Kshs 260,000 =. This Court has re-examined the evidence underpinning this specific argument. The Appellant's submission is entirely predicated on the assertion that DW1, in his witness statement, admitted a total debt of Kshs 945,000 = as at May 2020. Upon re-examining DW1's statement, this Court finds this assertion to be a clear and material misrepresentation of the evidence. The Respondent's claim for rent arrears of Kshs 615,000 - was unequivocally stated to be as at December 2020. The Appellant's entire theory of overpayment is, therefore, built upon a false premise and the trial court was correct to disregard it. This ground of appeal, therefore, fails.
18. The failure of the Appellant's argument, however, does not absolve this Court of its duty to re-assess the trial court's calculations. The trial court found a balance of Kshs 160,000 =. The court arrives at this figure by stating: "It is however clear that the only amount Plaintiff authoritatively claimed to have paid was Kshs 340,000 =." This finding is a palpable misapprehension of the evidence on record. The Respondent's evidence, supported by the reconciliation statement (Defendant's Exhibit 3) was consistent that only one payment of Kshs 170,000 = was ever made. PW1 made a bare assertion of payment in full, but failed to produce a single receipt or bank statement to substantiate this claim.
19. The trial court, having noted the poor record keeping, proceeded to invent a second payment of Kshs 170,000 - which neither party had alleged. This is not a finding of fact based on evidence; it is conjecture. Under section 109 of the *kenya Evidence Act 1963*, the burden of proof as to a particular fact lies on the person who wishes the court to believe in its existence. The Appellant alleged payment, and the burden was on him to prove it. He failed to discharge this burden. The Respondent, conversely, produced a reconciliation statement, showing a balance of Kshs 330,000 =, which it claims was not disputed at the time of its creation.
20. The trial court's finding that on the machine was based on a wrong principle and is hereby set aside. This Court finds that the Appellant failed to prove any payment beyond the admitted Kshs 170,000 =. The balance outstanding on the machine was, therefore, Kshs 330,000 =.
21. Regarding the rent arrears, the trial court correctly calculated the rent due from May 2020 to November 2020 as Kshs 1,237,500 =. However, the court also awarded pro-rated rent for 19 days in December 2020. The legality of this finding is inextricably linked to the legality of the eviction.

### **The legality of the eviction**

22. This is the central legal question of the appeal. The facts are not in dispute. The parties mutually agreed that the Appellant would vacate by 31 December 2020. The Respondent admitted in his testimony that he welded the premises shut on 19 December 2020. The Respondent's justification, that he feared the Appellant would abscond with the unpaid machine, is irrelevant in law. A landlord's right of re-entry, even where reserved in the lease for non-payment of rent, does not entitle him to resort to self help measures to evict a tenant who is in physical possession. A landlord's remedy for breach of covenant or non-payment of rent is to seek orders from a court of competent jurisdiction. The Court of Appeal has repeatedly and unequivocally affirmed this principle. In the *locus classicus* case of *M S Gusii Mwalimu Investment Co. Ltd & 2 Others V M S Mwalimu Hotel Kisii Ltd* [1996] KECA 69 (KLR), Shah, JA



held that unless a tenant consents or has abandoned the premises, a landlord must obtain an order of a competent court or statutory tribunal to obtain possession. Any other method, including changing locks or welding gates, is an illegal eviction.

23. This Court finds that the Respondent's actions of 19 December 2020 constituted a fundamental, repudiatory breach of the Agreement to Vacate (Defendant's Exhibit 5) and a breach of the Appellant's right to quiet enjoyment. It was, simply put, an unlawful eviction.
24. The illegality has a direct domino effect on the Respondent's monetary claims. Firstly, on liability for December 2020 rent, the trial court erred in awarding pro-rated rent for 19 days. A party cannot benefit from his own illegal act. The Respondent, by unlawfully evicting the Appellant, frustrated the contract. The Respondent cannot claim rent for a period where it was in fundamental breach. The claim for the December 2020 rent of Kshs 112,242 = fails and is hereby set aside.
25. Secondly, on liability for utility bills, the trial court's award for pro-rated utilities of Kshs 117,552 = is also set aside. The eviction on 19 December 2020 made it impossible for the Appellant to occupy the premises or settle its final bills. The electricity bill became due on 24 December 2020, after the Appellant was locked out. Most significantly, DW1 admitted under cross examination that there were sub-tenants in the premises who continued to occupy the premises after 19 December 2020 who shared the same power supply. The Respondent's argument that these sub-tenants were the Appellant's responsibility is perverse. The Respondent, having unlawfully taken possession, is estopped from claiming utility costs from the Appellant for a period when he allowed third parties to remain and consume utilities.

#### **Failure to adjudicate the claim for damages**

26. The Appellant's ground of appeal that the learned Magistrate completely ignored the Appellant's prayer for compensation for loss of business is borne out by the record. The Appellant's Plea clearly prays for general damages as per paragraph 17. The judgement of the trial court is entirely silent on this prayer. The trial court's focus was exclusively on the Respondent's counterclaim.
27. It is a fundamental duty of a trial court to address and make a determination, one way or another, on all issues and prayers that are pleaded by the parties and supported by evidence. A failure to do so is a clear misdirection in law and a reversible error, as it denies the party their right to a fair hearing under Article 50(1) of *the Constitution of Kenya 2010*. The Appellant's suit was not dismissed on its merits; it was simply never adjudicated. Given this Court's finding on the issue of the unlawful eviction, the Appellant's claim for general damages was not frivolous and was deserving of judicial consideration.
28. The Appellant, in its submissions, prays for this matter to be remitted to the subordinate court for retrial on this issue. This is the correct procedural remedy. This Court, as an appellate court, is not the proper forum to assess general damages in the first instance, as this would deny both parties the right of appeal on that specific assessment. This part of the appeal, therefore, succeeds.

#### **Costs**

29. In its discretion, the trial court ordered each party to bear its own costs. The principles for awarding costs are governed by section 27(1) of the *Kenya Civil Procedure Act 1924*, which grants the court full discretion, with the proviso that costs shall follow the event unless the court, for good reason orders otherwise.



30. An appellate court may not interfere with a trial court's exercise of discretion unless it is satisfied that the court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest that the judge was clearly wrong. This principle was famously set down in *Mbogo & Another vs Shah* E.A 93.
31. In this case, the trial court provided good reason for the order. The court stated:
- “In this case, both parties transacted in (for lack of a better word) a 'pedestrian way'. There was no proper record keeping. Plaintiff failed to pay rent regularly. Defendant on its part breached its own agreement with the Plaintiff...”
32. This reasoning is sound and judicious. The Appellant, while wronged by the illegal eviction, was in significant arrears, which precipitated the conflict. The Respondent, while owed money, resorted to unlawful self-help. Denying both parties their costs was a valid and balanced exercise of judicial discretion. This Court finds no reason to interfere with the trial court's order on costs.
33. In view of the foregoing, the appeal is found to be partially successful. I make the following orders:
- i. The appeal is hereby partially allowed;
  - ii. The judgement and decree of the Hon. Wanyanga, Senior Resident Magistrate dated 28 April 2022 ordering the Appellant to pay the Respondent the sum of Kshs 421,294 = is hereby set aside;
  - iii. In substitution thereof, judgement is hereby entered for the Defendant against the Plaintiff on the counterclaim in the sum of Kshs 362,500 =, which shall attract interest at court rates from the date of filing suit until payment in full;
  - iv. The Plaintiff's suit, specifically prayer (b) of the Plaint dated 21 December 2020 seeking general damages for unlawful eviction and business disruption, is hereby remitted to the Chief Magistrate's Court at Thika for hearing and assessment of damages de novo before any Honourable Magistrate other than Hon. O. Wanyanga, SRM.
  - v. For avoidance of doubt, the learned trial Magistrate's order dated 28 April 2022, directing that each party shall bear its own costs of the suit in the subordinate court (Thika CMCC No. E27 of 2021), is hereby affirmed.
  - vi. The Appellant, having substantially succeeded on the major legal points of this appeal, is awarded the costs of this appeal assessed at Kshs 50,000 =.

**DATED AND DELIVERED AT THIKA THIS 14 DAY OF NOVEMBER 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered virtually in the presence of:

For Appellant: Ms Khisa

For Respondent: Mr. Mburu

Court Assistant: Lucy Mwangi

