



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT THIKA

ELCC APPEAL NO. 20 OF 2018

(Formerly Kiambu HCC Appeal No.121 of 2017 and Nairobi HCC Appeal No.494 of 2015)

DANIEL K GITAU T/A CAMP DAVID PLAZA.....APPELLANT

-VERSUS-

LUCY WANGARI MAINA.....RESPONDENT

(Being an appeal from the Judgment of Hon M.W. Mutuku, Senior Principal Magistrate (as she then was) in Thika CMCC Number 1037 of 2010 delivered on the 3rd day of July 2015)

JUDGMENT

1. This appeal was provoked by the Judgment of Hon Martha W Mutuku (Senior Principal Magistrate, as she then was) in Thika CMCC Number 1037 of 2010 delivered on 3rd July 2015 whereby the said learned trial magistrate held that the plaintiff (Hereinafter referred to as the respondent) had proved her case against the defendant (hereinafter referred to as the appellant) on a balance of probabilities. The trial court awarded the respondent a sum of Kshs 1,000,000/= as general damages for breach of contract as well as costs and interest of the suit.
2. The instant appeal being the first appeal from the trial court, this court is obliged to reconsider and re-evaluate the evidence on record and draw it's own conclusion bearing in mind that it has neither seen nor heard the witnesses of the case; See **Williamson Diamonds Limited-vs-Brown (1970) EA1** and **Kamau-vs-Mungai and another (2006)1 KLR 150.**
3. In the case of **Peters-vs-Sunday Post (1958) EA 424 at page 429,** Sir Kenneth O' Connor, President of the then East African Court of Appeal, rendered himself thus;

“The appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution.”
4. It must be appreciated therefore that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless those findings are based on no evidence at all or on a misapprehension of the evidence or the court is shown demonstrably to have acted on wrong principles in reaching the findings; see **Mwanasokoni-vs- Kenya Bus Services Ltd (1982-88) 1 KLR 278.**
5. The appellant is represented by the firm of Webale B. Advocates. The respondent is represented by Gachie Mwanza and company Advocates.

6. The respondent's claim before the trial court was commenced by way of a plaint dated 7th October 2010 wherein the respondent sued the appellant for the following reliefs:

a) A permanent injunction order restraining the appellant whether by himself or through his servants, agents or workmen from doing any of the following acts, that is to say evicting, harassing, intimidating, denying access, disrupting power and water supply or in any other manner whatsoever interfering with the respondent's quiet use, occupation, possession and enjoyment of all those demised premises known as Shop No. GF2 in CAMP DAVID PLAZA, JUJA.

b) Damages for breach of covenant for quiet enjoyment.

c) Costs of the suit and interest.

d) Any other relief that the Honourable Court may deem fit to grant.

7. The respondent claimed that by a lease agreement made on 3rd February 2010, the appellant demised to her the suit premises namely shop No. GF2 Ground Floor at Camp David Plaza Plot No. 21096/170 for a term of six years at an initial monthly rent of Kshs 11,000/=. The respondent was to have quiet enjoyment of the suit premises further to an implied term of the lease. She occupied the suit premises from where she operated as a miller of flour. In furtherance of her business and with the consent of the appellant, the respondent installed a three (3) phase meter and connected electricity to the suit premises at her cost in order to avert any inconvenience to other tenants in the premises.

8. The respondent further claimed further that in breach of the covenant or lease, the appellant, inter alia, on or about 5th October 2010 disconnected power to the suit premises. As a result, the respondent suffered loss leading to closure of business since September 2010 as pleaded at paragraph 9 of the plaint thus precipitating the suit before the trial court.

9. The appellant's response to the respondent's claim before the trial court was by way of statement of defence and counterclaim dated 8th March 2011 wherein he denied the respondent's claim. He also counterclaimed against the respondent for Kshs 253,300/= for loss and damage caused by the respondent's improper use of the posho (flour) mill. He pleaded particulars of loss suffered including extensive cracks on the ground and first floors of the suit premises at repair cost of Ksh 96,300 and loss of rental income of Ksh 157,000/= in respect of seven tenants each paying Ksh 7,500/= monthly rent for three (3) months.

10. Wherefore, the appellant sought in the counterclaim that;

a) The respondent's suit be dismissed with costs to the defendant.

b) Judgment be entered for the appellant against the respondent for Kshs. 253,300/=

c) Costs of the suit and applications made herein and interest thereon at Court rates.

d) Any further relief as this Honourable Court may deem just to grant.

11. In her reply to defence and defence to counterclaim dated 16th March 2011, the respondent reiterated the contents of her plaint and denied the appellant's counterclaim which she termed an afterthought. That the loss allegedly suffered by the appellant was misplaced and unsupported by any iota of evidence. She sought dismissal of the defence and the counter claim with costs and that judgment be entered in terms of her plaint.

12. The evidence of the respondent (PW1) was that she was paying monthly rent of Kshs 11,000/= as a tenant of the appellant who knew that she was to operate the flour mill in the suit premises. She relied on

various documents including a lease agreement (P Exhibit1), bank pay -in slip showing Ksh 22,400/= paid on 17.5. 2010 for a three phase metre to Kenya Power and Lighting Company (P Exhibit 2), statement of account in respect of a loan taken for the purchase of the flour mill (P Exhibit 4) and loan statement of account (P Exhibit 6). That she incurred losses due to the appellants' actions.

13. The appellant (DW1) adduced evidence that a tenancy agreement (D Exhibit 1) existed between the respondent and himself in respect of the suit premises and that the respondent defaulted in payment of rent for December 2010. He stated further that other tenants complained of vibrations and emission of dust from the respondent's flour mill on the suit premises. DW1 made reference to letters by tenants MFID 2(a) and (b).

14. The appellant relied on bundle of photographs (D Exhibit 3), invoice and voucher (D Exhibits 1 and 2 (a) and (b)). He also relied on an architectural report (D Exhibit 4) produced by architect Francis Nganga Mbugua (DW2) and a report (D Exhibit 8) by Engineer Robert Luonyo Ngige (DW3) in support of his statement of defence and counterclaim.

15. The trial court having heard the evidence of PW1, DW1, DW2 and DW3, found that PW1 and DW1 were bound by the tenancy agreement (PEXhibit1 and or DEXhibit1). The learned trial magistrate arrived at a finding that prayer (a) of the plaint had been overtaken by events and awarded Ksh 1,000,000/= general damages for breach of the covenant for quiet enjoyment as well as costs and interest of the suit in favour of the respondent.

16. On 28th July 2017, this appeal was transferred from Nairobi High Court to Kiambu High Court. Again, it was transferred from Kiambu High court to Thika Environment and Land Court on 13th June, 2018.

17. The instant appeal is anchored on grounds 1 to 10 of the memorandum of appeal dated 23rd October 2015 being part of the record of appeal dated 20th November 2015. The grounds include that:

a) The learned trial magistrate erred in law and fact in awarding general damages of Kshs 1,000,000/= for breach of covenant for quiet enjoyment which are excessive, punitive and exorbitant given that no evidence or records of income statements were adduced at the hearing.

b) The learned trial magistrate misdirected herself in entering judgment against the appellant as she did and did not consider the entire evidence of the appellant as to consequences of respondent continued use of posho mill on the premises.

c) The learned magistrate misdirected herself in finding that the professional advice from architects, engineers and the municipal council were an afterthought and should have been done before the respondent's entry to the premises when the impact of her business would not have been known at the time.

d) The learned trial magistrate erred in law and fact in finding that the respondent was not to blame for the cracks or damages caused to the appellant's premises as outlined in the counter claim. The respondent found the premises with no cracks when she entered and cracks were everywhere in the premises when she left.

18. On 24th October 2018, this appeal was admitted accordingly. The respondent was to be served by the appellants' counsel for hearing of the appeal during the service. At the hearing, the court directed that the appeal be heard by written submissions.

19. Learned counsel for the appellants filed submissions dated 4th December 2018 in support of the appeal. The submissions exceeded 10 pages as provided for under practice direction number 33 (b) of this court's Practice Directions, 2014. Nonetheless, I do consider the submissions in the spirit of Article 50 (1) of the Constitution of Kenya, 2010 as read with Article 23 (c) of the same Constitution. In future,

Counsel is advised to comply with the Practice Directions accordingly. Counsel cited authorities including **Siree-vs-Lake Turkana El Molo Lodges Limited (2000) 2 EA 521 (CAK) and Kanu National Elections Board –vs- Salah Yakub Farah (2018), eKLR among others, in favour of the appeal.**

20. By ten (10) paged submissions dated 12th March 2018, learned counsel for the respondent opposed the appeal. Counsel urged the court to dismiss the appeal for want of merit. He relied on, inter alia, **Owners and Masters of Motor Vessel “Joey”-vs-Owners and Bachelor Bakery Limited –vs- Wetlands Securities Limited (1982) KLR 316** in support of the instant appeal.

21. I note from the record herein that the respondent(PW1) testified in part as follows

“The accused owed me money for the deposit and power metre. He gave me a cheque of Kshs 17,000 after I repainted the house and vacated..... the loan was deducted from guarantors to the tune of Ksh 227,610.90 (PExhibit 6)”

22. During cross examination, PW1 stated that;

“The lease had not been prepared. “ I do not have a copy of statement of account to show the court that I lost.”

23. It is abundantly clear that the learned trial magistrate appreciated and relied on the entire evidence of PW1 and his witnesses. Quite clearly, the appellant (DW1) referred to and relied on the tenancy agreement (D Exhibit 1), D Exhibits 3, 5, 7 and 12 (a) and (b) to fortify his testimony.

24. DW1 stated in cross examination that he did not know the tenants. That he did not have receipts or reports relating to the tenancy.

25. DW2, Francis Nganga Mbugua, an architect stated that he prepared a report D Exhibit 4. He testified, inter alia:

“If heavy vibration continued, there could have been extension of hairline cracks and collapse of the building”.

26. DW2 did only technical aspects of building. He noted extensive cracks on the floor of ground floor and hairline cracks on the beams caused by floor mill vibration thereof.

27. A civil engineer Robert Luonyo Ngige (DW3) relied on D Exhibit 8. He noted substantial cracks on the building upon its inspection to ascertain the effect of the floor mill. He issued a notice to close the business on the building to avoid total collapse.

28. On the ground of the trial court’s jurisdiction over the dispute, I am guided by the Court of Appeal decision in the case of **Samwel Kamau Macharia and another -vs-Kenya Commercial Bank and two (2) others (2012) eKLR** that jurisdiction of a court or for tribunal flows from either the Constitution trial or statute or both. Considering the terms in P Exhibit 1 and D Exhibit 2 vis-à-vis the prescribed jurisdiction of the Business Premises Rent Tribunal under the Landlord and Tenant (shops, Hotels and catering establishments) Act Cap 301, I find that the trial Court had jurisdiction to entertain the dispute between the appellant and respondent.

29. With regard to the issue of lease agreement between the respondent and the appellant, P Exhibit 1 and D Exhibit 1 reveal that there was a tenancy agreement between the parties in respect of the suit premises. The learned trial magistrate held that the parties were bound by the agreement. In view of the decision in **Bachelors Butchery case (supra) and the doctrine of equity under Article 10 (2) (b) of the Constitution of Kenya, 2010,** P Exhibit 1 and D Exhibits 1 remain valid and binding between the parties.

30. In respect of professional advise by experts, I note the testimonies of DW3, who authored and relied

on D Exhibit 4 and 8 respectively. DW2 and DW3 carried out route supervision and inspection of the suit route premises, hence the trial magistrate's court consideration of their evidence was very relevant and sound in the circumstances.

31. On general damages, the trial court observed that the appellant (DW1) frustrated the respondent, disconnected her power supply, did not give her three (3) months notice and evicted her from the suit premises. The learned trial magistrate held, inter alia;

“I find that damages that resulted on defendants property is not a fault of the plaintiff and there is no evidence that the seven (7) months remained unoccupied because the plaintiff was operating a posho mill”

32. On that basis, the trial court dismissed the defendants counter claim with costs to the plaintiff/respondent (PW1). I find that the learned trial magistrate properly directed herself to the facts of the matter and the law in arriving at the informed conclusion for an award of general damages in favour of the respondent (PW1) against DW1.

33. Admittedly, the award of general damages in a suit is within the discretion of the court and depends on circumstances of each case; see **Mumias Sugar Company Limited-vs- Wanalo (2007) KLR 74.**

34. In view of the nature and circumstances of the instant case, the sum of Kshs 1,000,000 (one million) awarded as general damages is out rightly excessive and unfair in the circumstances of the case. I am inclined to disturb the awarded sum in the interest of justice which is the ultimate goal of this court in the matter. All that the respondent is entitled to is a modest and just sum in respect of general damages. I am of the considered view that an amount of Kshs. 200,000/- (two hundred thousand) would be appropriate in the present case and I award the same in lieu of the sum of Ksh.1,000,000/- (one million only) awarded by the trial court.

35. In view of the foregoing, I find the instant appeal partially merited. Accordingly, I make the following final orders:

(a) The appeal be and is hereby partially dismissed

(b) The judgment of the learned trial magistrate delivered on 3rd July, 2015 is hereby confirmed save for the amount of general damages which I hereby reduce to Ksh. 200,000/- (two hundred thousand).

(c) By dint of proviso to section 27(1) of the Civil Procedure Act (Cap 21), the decision in Samwel Kamau Macharia case (supra) and the circumstances of this case, each party to bear their own costs of this appeal and those of the trial court below.

Signed, Dated at Migori this 11th day of May, 2019

G.M.A ONGONDO

JUDGE

Signed, Dated, and delivered at Thika this 14th day of JUNE 2019

L.N.GACHERU

JUDGE

In the presence of:

1. M/S Mwangi holding for Mr. Nakhone for appellant
2. Mr. Owade holding brief for Mr. Gachie for respondent
3. Lucy – Court Assistant