REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CIVIL APPEAL NO. 88 OF 1993

LEONARD KIMEU MWANTHI.....APPELLANT

VERSUS

F.M. IMANENE.....1ST RESPONDENT

S.K. MWITHIMBU.....2ND RESPONDENT

(An appeal from the Judgment of the Hononourable Business Rent Tribunal Chairman Mr. Kanyotu in Nairobi Business Rent Tribunal case No. 137 of 1992 delivered on 15/10/1993)

J U D G M E N T

BACKGROUND

This is an Appeal arising from the Judgment of the Hounorable Rent Tribunal Chairman Mr. Kanyotu (As he then was) in Nairobi Business Rent Tribunal case No 137 of 1992 delivered on 15/10/1993. The Respondent who were Plaintiffs in the said Business Rent Tribunal Case No. 137 of 1992 (Meru) had moved the said Business premises Rent Tribunal vide a Chamber Summons dated 27th July, 1992 for leave to levy distress against the Appellant who was the Defendant Dr. Leaonard Kimeu Mwanthi. That application was supported by the affidavit of S.K. Mwithimbu sworn on 24th July 1992. The Respondents were seeking to recover rent arrears in the sum of Kshs. 205,000/= After hearing the parties by way of viva voce evidence the Learned Chairman delivered the tribunals decision on 15/10/93 in which the Plaintiff/Landlord was allowed to levy distress to recover the arrears of rent amount to Kshs 205,000/=. The Appellant was also ordered to pay the Respondent/Landlord costs of Kshs 10,000/=. That decision aggrieved the Appellant who on 2/11/1993 file a memorandum of Appeal on the following grounds:-

1) The Chairman of the Tribunal erred in holding that the tenant was in arrears of Kshs. 205,000/=.

2) The Chairman of the Tribunal erred in not giving any credit to the tenant of any payment done by him and exhibited in the tribunal.

3) The tribunal erred in holding that the tenant had not paid any rent since 1988 which was contrary to evidence on record.

4) The Respondent and the Court Broker erred in closing the Appellant premises which is contrary to the orders of the tribunal.

On 29/10/2015, this matter had come for mention for directions when the Court allowed the application by the Appellant dated 19/12/2011 and ordered the Appellant to file and serve amended memo of Appeal within 14 days. The Appellant was also granted leave to adduce further evidence during the Appeal which evidence was to be within the parameters that the Court will consider necessary in disposing of this Appeal. On 12/06/2017, the parties through their legal counsels agreed that the additional evidence be adduced by way of affidavit evidence with the Respondent being granted leave to file their response to the additional evidence within 14 days. On 29/06/2017 the appellant filed their affidavit evidence and also compiled their supplementary record of Appeal the same day. On 14/07/2017 the Respondent filed their Replying affidavit.

When this Appeal came up for hearing on 27/9/2017, the parties agreed by consent that the additional evidence contained in the affidavit filed by the parties to form part of the record of Appeal to be determined by way of Written Submissions. It is imperative to note that when the Appellant was allowed to file and amend the memorandum of Appeal by consent of the parties on 29/10/2015 he gave the following nine (9) grounds of Appeal:-

1)

a) The Hon. Chairman of the tribunal erred in law and in fact in holding the Defendant /Appellant was in rent arrears of Ksh. 205 000/= which was not the case at all.

b) The Hon. Chairman of the tribunal erred in law and in fact in holding that the Appellant/Defendant was the Plaintiff's/ Respondent's tenant in Block 11/173 Meru Municipality, while the actual tenant was a different entity.

c) The Hon. Chairman of the Tribunal erred in law and in fact in finding the Appellant and Meru Medical stores Co. Ltd were one and the same while the latter is a separate registered entity with capacity to sue and be sued in court.

2. The Honourable Chairman of the Tribunal erred in Law and in fact in not giving any credit to the appellant of any payments made to the Plaintiff/Respondent by M/S Meru Medical stores Co. Ltd and exhibited on the tribunal hearing.

3. The Honourable Chairman erred in Law and in fact in holding that the tenant Appellant/Defendant had not paid any rent since 1988 which was contrary to evidence on record.

4. The Respondent and the Court brokers erred in law in closing the appellant's premises known and trading as Meru Medical stores Co. Ltd (also known as the suit premises which is/was contrary to the orders of the tribunal.

5. The Honurable tribunal Chairman erred in law and in fact by allowing the Respondent through their advocates to stealthily, illegally and irregularly introduce additional and inadmissible evidence long after closure of submissions by the parties sand failed/ignored granting corresponding leave to the Defendant to rebuilt the said inadmissible evidence, thereby seriously prejudicing the Defendant's defence.

6. The Hon. Tribunal Chairman erred in law and in fact by erroneously recording that the appellant had admitted that the Defendant/alleged tenant personally owed the Plaintiffs any rent arrears while the Defendant had never been the Plaintiff's tenant in the first place.

7. The Hon Tribunal Chairman erred in Law and infact by not dismissing the Plaintiff's case since the Defendants evidence was overwhelming weightier that that of the Plaintiff.

8. Leave to adduce further evidence at the hearing of this Appeal was granted on 29/10/2015.

RESPONDENT'S /PLAINTIFF'S CASE

The Plaintiff/Respondent in his evidence before the Hon. Tribunal Chairman stated that he is a business man owning two properties being Block 112/173 and 112/174. He stated that the Appellant/Defendant is one of his tenants in Block 11/173 since April 1979 at an agreed rent of Kshs. 4500/= per month. When he gave the Defendant /Appellant an offer to let the suit premises the said Defendant /Appellant wrote and accepted the offer. He produced the two letters as P Exhibits 1&2 respectively. He gave the Defendant the rent book/card but refused to take the same. He said that the rent was outstanding from June 1978 to September 1992 which amounted to Kshs 218,000 after giving him a credit for Kshs. 4,120/= for July and part of August. In cross examination by counsel for the Defendant/Appellant, the Plaintiff/Respondent admitted having received rent of Kshs 36,000 being rent from May 1979 to December 1979. The plaintiff admitted that he filed cases No. 16/80 and 133/81 before the tribunal. He also admitted that there was another case No. 10 of 89 where he was ordered to pay Kshs. 3400 to the Appellant/Defendant. He denied that there was a Court order reducing the monthly rent agreed at Kshs. 4500/= to Ksh. 4000. He stated that the Appellant/ Defendant owed him Kshs. 188, 780/=.

DEFENDANT/APPELLANTS CASE

The Appellant who was the Defendant before the Honouble tribunal court testified and stated that he was the tenant and also the Managing Director of Meru Medical stores Ltd. He stated that the tenancy between Meru Medical stores and the Landlord started sometime in January 1980 soon after he registered the company. He produced the certificate of registration as D. Exhibit No. 1. He said that the rent was agreed at Kshs. 4500 but later reduced to Kshs. 4000/= vide Case No. 2/80 delivered on 4/4/89 and backdated to January 1980. The Defendant produced a record of payments of a schedule of rent he prepared as d Exhibit No. 3. He stated that the payments were made through the bank account of the Landlord/Plaintiff. In cross examination the Defendant /Appellant admitted that he never paid the Plaintiff/Respondent rent for 34 months which came to a total Of Kshs 153,000. He also stated that he paid rent through the Landlord's bank account at the bank in the sum of Kshs. 4500/= per month. The Defendant/Appellant also stated that he had no receipt as prove that the Landlord/Respondent received money from him.

The Appellant in addition to that filed a supplementary Record of Appeal which introduced new evidence pursuant to an order of the Court issued on 29/10/2015 and the subsequent consent order of 12/06/2017. Those new evidence include the following:-

i. An order given on 20/05/1992 in Meru BPRT Case No. 42 of 1991.

ii. Valuation of livestock attached by M/s Shelter Auctioneers.

iii. Valuation of family goods attached by M/S Shelter Auctioneers.

iv. The 1st Respondent's Replying Affidavit dated the 30th day of December, 1991.

v. An order dated the 20th day of may 1992 in Meru BPRT Case No. 42 of 1991.

vi. Copies of Cheques issued by Meru Medical stores Co. Ltd in favour of the Respondents.

vii. Certificate of incorporation of Meru Medical Stores Co. Ltd and requisite licences for operation and form CR 12.

APPELLANTS SUBMISSIONS

The Appellants Advocate filed initial Submissions and further submissions in which he submitted that the Appellant was not the Respondent's tenant. He submitted that the Court ignored the Certificate of incorporation as produced alleging that it did not bear the name of directors. He submitted that the Respondent's tenant was Meru Medical Stores Co. Ltd and not the Appellant. It is also submitted that the cheques drawn in favour of the Respondents are clear proof that the tenant was the said company and not the Appellant. Counsel for the Appellant also submitted that the Respondent's Advocate filed further Written Submissions wherein a report by mike and willy was sneaked into courts record purporting to shed light on shop payment from 1978-1993 after the close of pleadings and without corresponding leave of Court to rebut the evidence so produced. The Counsel for the Appellant also submitted that the procedure of distress was never followed as there was no proclamation no advertisement and no sale was done by the Respondents agents. The counsel for the Appellant cited numerous decision in support of this Appeal

RESPONDENTS SUBMISSIONS

The Respondent through his Counsel submitted that the Court should not rely on the record of Appeal but should ensure that the same corresponse with the Court file as relying on the record of Appeal alone could be misleading since there are no rules on what should be contained in the record of Appeal in the high court. It is also submitted that though there was no formal lease agreement, it could appear that the Appellant Dr. Mwathi & Co. with another Dr. Mwathi then calling himself Dr. Mwathi approached the Respondents in November1978 and agreed to take the premises on rent. The rent paid by the tenant had receipt issued in the name of the appellant as reflected in the receipts attached to the Replying Affidavit. On the issue of Appeal it was submitted that the meaning of Appeal by the Appellant is against the Judgment of the Tribunal in BPRT No. 137 of 1992 delivered on 15/10/1993. That Judgment gave the Respondent the go ahead to levy distress for rent arrears in the sum of Kshs. 205,000/= plus costs assessed at Ksh10,000/=.

As regards the leave to amend the Memorandum of Appeal Counsel for the Respondent's submitted that the Appellant abused and took a different turn where the Appellant is not only seeking to set aside the Judgment of the Honourable Tribunal but seeks orders which were not subject of the case before the tribunal. Counsel submitted that although this is a first Appeal, it does not give this Court sitting as an appellate Court original jurisdiction but gives the Court the mandate to look at the pleadings and the defence offered before the trial Court and thereafter reconsider the evidence and evaluate itself and draw its own conclusions. It is submitted that the Court is being asked to stray from its responsibility as an appeal court and deal with matters which were not pleaded or part of the issues before the trial Court. On the issue of leave to introduce and adduce new evidence the Learned Counsel submitted that the leave so granted was abused by going to forge and create evidence. The evidence so forged and created is to help the Appellant make Money. It is further submitted that this Honorouble Court sitting as an appeal court has no jurisdiction to deal with the issues being introduced by the Appellant or award damages which were not subject before the trial Tribunal. It is submitted that the issue of wrong attachment should have been raised with the trial Tribunal immediately. The Appellant should have filed objector proceedings before the tribunal. It was submitted that this Honorable Court opened a Pandora box/ can of worms when it allowed the memorandum of Appeal to be amended and further evidence to be adduced. The Learned Council submitted that this court should confine itself to its role of an Appellant Court and refuse to be misguided by the Appellant. The Respondent's Counsel finally cited numerous Sections of Cap 21 Laws of Kenya Cap 301 Laws of Kenya. Numerous Authorities were also cited in opposition to this Appeal.

ANALYSIS AND DETERMINATION

This being an appellate Court the Courts jurisdiction has to be exercised with caution to what extend the decision of the trial Court should be interfered with. In PETERS VS SUNDAY POST LIMITED [1958] EA at Page 424, the Court held as follows:-

> **"Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial Judge should stand, this jurisdiction is exercised with caution. If it there is no evidence to support a particular conclusion, or if is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to so decide".**

The Respondent who was the Plaintiff in the case before the learned Chairman, Business premises Tribunal Hon. Kanyotu and the Appellant who was the Defendant testified and were examined in Chief and cross-examined before being re-examined by their respective counsels. The Appellant in his Memorandum of Appeal dated 02/11/1993 and filed the same day raised four grounds as follows:-

1) The Chairman of the Tribunal erred in holding that the tenant was in arrears of Kshs 205,000/=

2) The Chairman of the Tribunal erred in not giving any credit to the tenant of any payment done by him and exhibited in the tribunal.

3) The Tribunal erred in holding that the tenant had not paid any rent since 1988 which was contrary to evidence on record.

4) The Respondent and the Court Broker erred in closing the Appellant premises which is contrary to the orders of the tribunal.

Before I comment on the Amended Memorandum of Appeal pursuant to leave granted by this court on 29/10/2015, I wish to deal with the

four grounds of Appeal as contained in the initial memorandum of Appeal filed on 2nd November, 1993 one by one as follows:-

In the first ground of Appeal the Appellant faults the trial Court for holding that the Appellant was in arrears of rent in the sum of Kshs. 205,000/=. In his sworn testimony the Plaintiff/Respondent stated on oath that the Defendant /Appellant has not paid him rent from June 1988 until September 1992 except a sum of Kshs 4,120 for July and part of August which the Appellant was given credit. When the Appellant/Defendant gave his side of the story in evidence he stated that he has always paid the Respondent rent as and when the same is due and payable and that he made payments through the Respondent/Plaintiff's bank account. He produced a schedule of payments which was Marked as D. Exhibit No. 3. I have looked at the exhibit and find that there was no corresponding record of evidence from the bank reflecting that those payment indeed went through. The Appellant did not produce any bank statement or banking slips showing that the alleged payments were credited to the Respondent's bank Account. It was incumbent upon the Appellant to show those record of payments as the law beholves he who alleges to proof. It was not enough for the Appellant to prepare a schedule of payments without bank statements demonstrating that such payments were credited to the Respondent's account. On the second ground of Appeal, it is clear from the record that the schedule of record of payment of rent alone without corresponding evidence of bank statement showing that there was credit to the Respondent's account is not proof of payment. A bank statement is a prima facie evidence of payment and not a schedule of record. On ground No. 3 I find and hold that the burden of proving payment of rent lies with he who alleges that payments were made. The Respondent is the Landlord and the Appellant is the tenant. If the tenant/Appellant paid rent to the Landlord/ Respondent, the burden of proving such payments is incumbent upon the Tenant/Appellant. The same cannot shift to the Landlord. The Appellant has admitted that he was paying the Respondent rent through his bank account. It is therefore upon the Appellant to produce records of such payments.

On the fourth and last ground the Appellant is accusing the Respondent and the Court brokers for closing the suit premises. If the suit premise were closed pursuant to the leave granted by the Court to levy distress then the Appellant's remedy lies elsewhere. Court brokers are professionals in their own right and if they contravened the law in the course of execution of Court orders then they can be dealt with in another forum. The Breach of his professional duties by the Court brokers who are not even parties in this appeal is not a serious ground.

As regarding the Amended Memorandum of Appeal pursuant to the leave of this Court granted on 29/10/2015, I wish to state that the grounds being raised therein are new issues which were not raised and canvassed by the parties during the hearing before the Learned Chairman of the Business premises tribunal. The same apply to the record of Appeal dated 17th May, 2017. That record of Appeal contained documents and new evidence which were not raised during the hearing and subjected to cross examination by Counsel for the opposite side. This Court is an appellate court and cannot sit as a trial court. I can only analyze and evaluate the evidence which were dealt with by the trial Court. What the Appellant has attached in the new record of appeal are new matters which were not raised or produced before the trial court and the same subjected to the rigours of cross examination. In FIBRE LINK LIMITED. –VS-STAR TELEVISION PRODUCTION LIMITED [2015] eKLR, the Court held as follows:-

"Generally, appellate courts have been very reluctant to allow parties to adduce additional evidence on appeal except where there are exceptional circumstances. The principles for adduction of new evidence on appeal were set out in TARMOHEMED & ANOTHER –VS-LAKHANI & CO. [1958] EA 567 where the Court of Appeal in adopting the judgment of lord Denning in LADD –vs- MARSHALL [1954] (WLR) 1489, the Court of Appeal for Eastern Africa stated that:

> **"except in cases where the application for addition evidence ….is based on fraud or surprise;**
>
> **"to justify reception of fresh evidence or a new trial, three conditions must be fulfilled; first, it must be sworn that the evidence could not have been obtained with reasonable diligence for use at the trials secondly, the evidence must be such that if given it would probably have an important influence of the result of the case through it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, through it need not be incontrovertible".**

IN WANJIE & OTHERS –VS –SAKWA & OTHERS [1984] KLR 275 The Court of Appeal considered at length the rationale for the obvious restriction of reception of additional evidence in Rule 29 of the Court of Appeal Rules Chesoril JA observed at page 280.

> **"This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weal points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunal and fitting in gaps in evidence. The appellate court must fine the evidence needful. Additional evidence should not be admitted to enable a Plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing …..the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence".**

Hancox JA (as he then was in the same case above stated as follows:-

> **"The requirement for reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly".**

I find and hold that the additional evidence adduced by the Appellant was inappropriate and the same is hereby rejected as inadmissible documents in this case.

The same applies to the Amended Memorandum of Appeal which is also rejected. For all the reason, I have given this Appeal fails and the same is hereby dismissed with costs to the Respondent. The costs of the Tribunal case will also be borne by the Appellant.

READ AND DELIVERED IN THE OPEN COURT THIS 16TH DAY OF FEBRUARY, 2018

Hon. Justice E.C CHERONO

ELC JUDGE

In the presence of:

M/S Muuga for Respondent and Mr. Karuti H/B

Thangicia for Appellant