



REPUBLIC OF KENYA



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**Sambu v Wandeto (Environment and Land Appeal 74 of 2019)
[2024] KEELC 81 (KLR) (15 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 81 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 74 OF 2019
EK WABWOTO, J
JANUARY 15, 2024**

BETWEEN

PHILIP KIPKORIR SAMBU APPELLANT

AND

BRIDGET NYAMBURA WANDETO RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. K.I Orange (Mr.)
SRM dated 13th September, 2019 in MILIMANI CMCC NO. 960 OF 2017)*

JUDGMENT

1. This Appeal arises from the Judgment of the lower Court delivered on 13th September 2019 in Civil Suit No. 960 of 2017 wherein the Learned Magistrate held that the Plaintiff (Now Respondent) had proved her case and entered Judgment in her favour for Kshs. Payment of the sum of Ksh 258,000/- plus costs and interest. The court further directed the sum of Ksh 31,519/= being costs of repairs be deducted be deducted from the sum of Ksh 258,000/- that had been granted.
2. The Appellant being dissatisfied with the judgment filed this Appeal vide a Memorandum of Appeal dated 4th October 2019. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal;
 - i. The Trial Magistrate erred in law and in fact by failing to consider the principles enunciated in Order 21 rule 4 of the *Civil Procedure Rules*, 2010 by framing the issues for determination and giving reasons for his finding thus plucking the sum of Ksh 258,000/- from the Respondent's pleadings and submissions.
 - ii. The trial magistrate misdirected herself and erred in law and fact in holding that there was no clear statement of account presented by the Appellant as regards the rent received from the Respondent despite the Appellant presenting a clear tabulation of all the amounts received from the Respondent or Mr. Kamau Ndegwa Joseph on behalf of the Respondent.



- iii. The trial magistrate erred in law and in fact by proceeding to dismiss the Appellant case on grounds that there was disparity in the way the Appellant kept its records and/or issued the receipts but failed to consider the fact that the Respondent did not settle her rent on due time and the accounts had to be submitted in the manner presented by the Appellant.
 - iv. The trial magistrate erred in law and in fact in finding that the Respondent moved out of the Appellants premises in June 2017 and failed to take into account that on the 14th March 2017 he granted an injunction and made an order that the Respondent continues to settle rent of Ksh 25,000/- in court and the same had not been settled.
 - v. The learned trial magistrate erred in law and in fact in failing to consider the Appellant's case and the counterclaim thus arriving at a wrong finding.
3. The Appellant sought for the following prayers: -
- a) The Appeal be allowed and the Judgment of 13th September 2023 be set aside.
 - b) This Honourable Court do make such order as it deems just and fit to meet the ends of justice.
 - c) The Appellant's do have the cost of this Appeal.
4. At the hearing of the appeal, the parties took directions to have the same canvassed by way of written submissions.

The Appellant's Submissions

5. The Appellant filed his written submissions dated 24th January 2023. In respect to ground 1 of the appeal, the Appellant submitted that the trial magistrate fell short of the *Bangalore Principles of Judicial Conduct*, 2002 in particular on value number six(6) relating to competence and diligence.
6. It was submitted that upon receiving the typed proceedings and following up with the Chief Magistrates Court, the short hand writings of the trial magistrate were not placed on record. It was also submitted that the trial magistrate failed to frame the issues for determination as guided by Order 21 Rule 4 of the *Civil Procedure Rules* 2010 and further the Magistrate failed to give his findings and just landed on the figure of Kshs. 258,000/= as pleaded in the amended plaint.
7. In respect to grounds 2,3,4 and 5, the Appellant submitted that the trial magistrate failed to frame the issues for determination and to analyze the evidence presented before Court. It was also submitted that the Respondent was not entitled to Judgment of Kshs. 258,000/=, and since the amended Plaint only pleaded for a sum of Kshs. 261,000/=, It was also submitted that cheque no. 2414 and cheque no. 2481 both of Kshs. 20,000/= were not credited and receipt not issued as those cheques were not banked. In respect of the sum of Kshs. 96,000/=, it was submitted that the Respondent did not bother to tender any evidence and demonstrate how the same was an overpayment and the burden was upon the Respondent to do so. It was also submitted that the trial magistrate did not capture his own orders on the record which required the Respondent to deposit the rental amount in Court. It was also submitted that while the Respondent pleaded that there was an over payment of Kshs. 96,000/= She did not specifically plead in the amended plaint how the figure of Kshs.96,000/= was arrived at. The Appellant also proceeded to demonstrate how the said sum of Kshs. 96,000/= was not an over payment as follows:-



Date	Cheque No.	Amount	Analysis/comment
21 st July,2016	002422	20,000	The amount was accounted for via receipt No.46 and on the summary of tabulation.
24 th March,2015	MPESA	8,000	Only received Kshs 40,000.00 and not 58,000/-
3 rd & 10 th November,2016	002538 & 002539	18,000	The amount was accounted for via receipt No. 48 and on the summary of tabulation.
23 rd October,2013	Receipt No.21	20,000	The amount was accounted for via receipt No. 21 and on the summary of tabulation.
20 th June,2012	Receipt No. 9	9,000	The amount was accounted for via receipt No.9 and on the summary of tabulation.
17 th September,2012	Receipt No. 11	8,000	The amount was accounted for via receipt No. 11 and on the summary of tabulation.
2 nd September,2015	Receipt No. 36	5,000	The amount was accounted for via receipt No. 36 and on the summary of tabulation.

8. In respect to ground 6, the Appellant submitted that the trial magistrate failed to consider his counterclaim save for addressing the issue of repair costs. It was submitted that the Appellant had proved the sum of Kshs. 335,843/= was rent arrears and judgment ought to have been entered in his favour for the said sum pleaded in the counterclaim. It was further submitted that as at February 2017, the rent arrears as per the Appellant's accounts stood at a sum of Kshs. 235,843/= in March 2017 and



that when the Respondent filed an application before the trial magistrate resisting the proclamation notices the trial court on 14th March 2017 ordered the Respondent to deposit the rent of Kshs. 25,000/= in Court, the Respondent did not do so and vacated the premises in July 2017 and the rent for March, April, May and June 2017 being Kshs. 100,000/= was never paid. The Appellant reiterated that the Respondent did not produce any evidence to demonstrate that she settled any amount that were not captured in the statement of accounts at pages 120 and 122 of the Record of Appeal.

9. The Court was urged to set aside the judgment of the Trial Court and allow the appeal with costs to the Appellant.

The Respondent's Submissions

10. The Respondent filed written submissions dated 8th February 2023. It was submitted that during trial the Respondent tendered evidence to show that indeed she had over paid Kshs 258,000.00 to the Appellant and that the explanation of how the Respondent arrived at an amount of Kshs. 258,000/= was clear and the Appellant cannot allege that the said money was just plucked from the air.
11. On whether or not the Court's decision was bias and wrongly arrived at, it was submitted that the Court was able to frame its issues as follows; was the plaintiff in rent arrears? did the defendant keep proper books of accounts? did the defendant issue receipt and did the plaintiff prove her case.
12. The respondent further submitted that in respect to the appellant's statement of accounts, the trial court had observed that there were discrepancy in the evidence tendered by the appellant, page 126(7) Record of Appeal-Receipt No. 13 reads rent for August & September,2012Kshs 50,000 while Receipt No.23 (Page 10) defendants list of documents reads Rent for September ,2012. It was also submitted that Page 130 Record of Appeal – Receipts No. 26 & 27 for Kshs 50,000.00 each read rent of January, February, March and April, 2014 while the Respondents rent during this period was Kshs 21,000.00 therefore rent for four months ought to have been Kshs 84,000.00.
13. The respondent submitted that there was no dispute as to when the rent has increased from Kshs 21,000 to Kshs 25,000.00 since the same was increased in the month of May,2014. Page 132(13) Record of Appeal -Receipt No.32 reads Rent for October & November 2014 for Kshs58,000.00 while rent for two months ought to have been Kshs 50,000.00. Further Page 133(14) Record of Appeal -Receipt No.36 for Kshs 30,000.00 while rent for the month ought to have been Kshs 25,000.00 while Page 136 (17) Record of Appeal -Receipt No.39 for Kshs 50,000.00 reads Rent for the month of February & March 2016 while Receipt No.49 Page 137 Record of Appeal reads rent for February2016 for Kshs 20,000.00. It was also submitted that on the same page (137) is Receipt No. 48 for Kshs 40,000.00 rent for April ,2016 while the cheques were for Kshs 21,500.00 each totaling to Kshs 43,000 and taking the whole amount as rent for the amount as rent for the month of April 2016. Page 145 (24) Record of Appeal Receipt No. 50 for Kshs 30,000.00 reads, Rent for May,2016 with remarks “wrong entry” without giving any explanation as to why it's a wrong entry and the appellant credits it all as rent for May,2016 while Rent was Kshs. 25,000.00, how would it have been wrong entry while it was direct transfer to the bank from the respondent's Agent. The respondent argued that was a discrepancy that was pointed out at the trial court.
14. In respect to the sum of Ksh 165,000.00, the respondent argued that the same was proved as outlined the following matrix to confirm the same;



Date	Cheque No.	Amount	
1/8/2013 15/8/2013	001102	25,000.00	<p>The appellant could have banked the cheque in a different account, not before court.</p> <p>It is not possible that rent for July & August 2013 was paid in the month of November, 2013 vide Receipt No. 22 (page 129 Record of Appeal), Five months later without any notice to call for late payments.</p>
8/8/2014	001456	25,000.00	<p>The appellant admitted that the cheque was deposited- receipt No.27 shows the amount as Kshs 50,000.00 and not Kshs 25,000.00 as per the cheque issued by the respondent.</p>
9/10/2014	001558	25,000.000	<p>Receipt No.28-page 61 record of appeal cannot be for the cheque No.001558- The receipt is dated 13th September 2014 & the cheque is dated 9th October 2014.</p>
19/12/2014	001654	50,000.00	<p>Receipt issued by the appellant receipt No.30 does not indicate the cheque No. and therefore unreliable.</p>
3/7/2016	002414	20,000.00	<p>The appellant could have deposited the</p>



			cheque in an account not before Court.
30/8/2016	002481	20,000.00	The appellant could have deposited the cheque in an account not before Court.

15. It was also submitted that the appellant's allegations that cheque No.1102, 2414 and 2418 were not banked could not be verified, as the appellant could have banked them in an account not before Court.
16. The respondent reiterated that from the evidence that was tendered by the appellant it was clear that the appellant could receive the cheques, bank them at his own will and issue receipts at his own will and the following cheques were flagged out to demonstrate the same; -
 - a. Page 129 Record of Appeal-Receipt No.23 is dated 24th January 2014 cheque banked on 6th February 2014.
 - b. Page 130 Record of Appeal -Receipt No.24 is dated 24th March 2014 and cheque banked on 11th February 2014.
 - c. Page 136 Record of Appeal-Receipt No.39, cheque banked on 4th April 2016 & 18TH April 2016 respectively under receipt issued on 29th April 2016.
17. In respect to the appellant's counterclaim, it was submitted that the appellant's summary of rent payment since 2010 doesn't reflect the prayers sought in the Counterclaim owing to the irregularities which were highlighted in the respondent's submissions.
18. In respect to the order requiring the respondent to deposit rent in Court it was submitted that the respondent filed an Appeal against that ruling and the appellant filed a preliminary objection which proceedings were later withdrawn with no orders as to costs.
19. In respect to the decree issued on 9th June 2022, it was submitted that the judgment of the Court was that the repairs done by the appellant be catered for by the deposit paid by the respondent. It was argued that the Respondent paid a deposit of Kshs. 21,000/= while repairs done were for Kshs. 31,519/= and that the amount to be deducted from the judgment of the trial court was Kshs. 10,519/= and not Kshs. 31,519/= as reflected in the decree. It was also argued that the distress for rent was illegal, and the appellant was not entitled to the auctioneer's fees of Kshs. 45,000/=. The respondent urged the Court to dismiss the Appeal.

The Evidence Tendered Before The Lower Court

Respondent's Evidence

20. From the proceedings before the trial court which this court has perused the same, the respondent relied on her witness statement and the list of documents filed as her evidence in Chief. She also denied owing the appellant any rent. She also stated that she was not aware of the sum of Kshs. 31,000/= and further stated that she paid rent deposit which was never refunded.
21. When cross examined, she stated that the monthly rent was Kshs. 21,000/= until July 2014 when it was increased to Kshs. 25,000/=. She conceded of not having any evidence that the cheques of payment of rent were cleared and she also conceded that not all cheques were banked. She also conceded that she



left the house in February 2017 after paying the rent for that month thought she removed her items from the house in June 2017. She also stated that the repairs were done by the the defendant (now appellant) even though she had made an over payment of Kshs. 96,000/=.

Appellant's Evidence

22. The Appellant equally relied on his Witness Statement and documents filed on record. He further added that the rent was Kshs. 25,000/= from July 2012. He also stated that he did the repairs and deducted the deposit to cover the costs of repairs.
23. Upon cross examination, he stated that he issued a receipt for Kshs. 68,000/= for payment made in 2010 to the respondent but didn't have the copy of the said receipt. He stated that he was seeking rent arrears for January and February 2017 and that the said rent was to be paid up to June 2017. He also stated that he had sent the auctioneer to proclaim the amount that was due. He further stated that he never penalized the tenant when the cheque bounced.

Analysis and Determination

24. The Court has considered the entire record of appeal and submissions filed by the parties. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In *China Zhongxing Construction Company Ltd vs Ann Akuru Sophia* [2020] eKLR it was stated as follows:

“The appropriate standard of review established in these cases can be stated in three complementary principles:

- a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.”

25. The Court in the *China Zhongxing Construction Company Ltd case* (supra) cited the Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An 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; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt –vs-Thomas* (1), [1947] A.C. 484.”

26. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.



27. The issues which arise for determination can be summarized as follows: -

- i) Whether the Learned Trial Magistrate erred in dismissing the Appellant's case and or Counterclaim.
- ii) Whether the Learned Trial Magistrate erred in law and fact in not framing the issues for determination and giving reasons for his findings.
- iii) What are the appropriate relief to grant in respect to this appeal.

This court shall now proceed to sequentially and critically examine the issues raised in the appeal taking into account the evidence recorded before the learned trial magistrate.

Issue No. (i); Whether The Learned Magistrate Erred In Dismissing The Appellant's Claim.

28. The appellant's case before the trial Court was that the respondent was his tenant at House No. 140/86/20 Nyayo Estate Embakasi since August 2010, the initial montly rent was Ksh 21,000/- and that sometimes in July 2012 it was mutually agreed that the rent payable be increased to Kshs. 25,000/= to reflect the current market rate. The respondent did not raise any objection to the said increment.
29. It was also the appellant's case that the respondent fell into arrears and became inconsistent in payment of rent. It was the appellant's case that in October 2016 and September 2016, the respondent made payment of Kshs. 50,000/= and Kshs. 20,000/= vide cheque Nos. 2475, 2476 and 2471 but which cheques were dishonoured and that the respondent fell into arrears to the tune of Kshs. 235,843/= as at February 2017. This included the rent arrears, water bill and penalties for dishonored cheques. It was also the Appellant's case that despite the Court Order that was issued by the trial court that the respondent continues to pay rent while the matter was being determined the respondent vacated the house in June 2017 without informing the appellant and failed to pay rent of Kshs. 100,000/= which was rent for the months of March, April, May and June 2017. The appellant averred that the actions of the respondent prompted him to engage auctioneers and he further utilized Kshs. 31,519/= in carrying out the repairs of the premises.
30. The respondent on the other hand testified that the appellant never issued her with receipts yet she had made payment of the rent vide various cheques copies of which were produced in evidence. She denied being in rent arrears amounting to Kshs 335,843/=. She also stated that she was not given an opportunity to carry out the repairs by the sppellant and further stated that the appellant was not entitled to the auctioneer's fees of Kshs. 45,000/=. She also disputed the summary of rent payment produced by the Appellant as the same was inconsistent and incredible.
31. Having considered the foregoing, It is trite law that whoever alleges must prove. The appellant filed a Counterclaim before the trial court. The Counterclaim sought for the following reliefs;
 - a) Payment of Kshs. 335,843/= being the sums due and owing for rent arrears.
 - b) Payment of Kshs. 31,519/= for repair costs.
 - c) Payment of Kshs. 45,000/= for Auctioneers.
 - d) Costs of the suit.
 - e) Interest on (a), (b) and (c) at Court rate until payment in full.
 - f) Any other relief this Court deems fit to grant.



32. A counterclaim is a suit and ought to be proven to the required standard. The relief sought in the appellant's counterclaim dated 26th July 2018 were in their nature akin to a liquidated claim since it was a claim for a specific amount. This in essence ought to be specifically proved.
33. From the analysis of the evidence that was adduced, the appellant in cross examination conceded of not having receipt of payment made by the Respondent in 2010. He also conceded that there were differences in receipt that were filed. The Respondent on the other hand conceded that she did not have evidence that the cheques of the payments made were cleared.
34. The Court notes that from the testimony that was adduced before the trial court it was evident that the appellant's summary of rent payment that was filed was not backed by the evidence that was adduced. There was no evidence that he indeed issued receipts as to what rent was paid and hence there is uncertainty as to what exactly was the arrears due. It is also in my view that after analyzing the evidence of the two contesting sides and the submissions by the learned counsel for the parties that the accounts and or records adduced during the material time were not accurate to have enabled the trial court conclusively determine the actual rent arrears due.
35. In respect to the Auctioneers fees that was sought being Kshs. 45,000/= this Court having considered that there was uncertainty as to exact amount of the outstanding rent arrears, there was no basis on seeking proclamation of the same. In the circumstances, there is no basis for awarding the said sum of Kshs. 45,000/= being auctioneers fees.
36. In view of the respect to the sum of Kshs 100,000/-, the evidence on record clearly showed that the respondent was ordered to continue paying monthly rent of Kshs 25,000/- when the suit was filed pending the determination of the suit. However, the respondent without any notification to the appellant vacated the premises in July 2017 failing to pay the rent of March, April, May and June 2017 amounting to Ksh 100,000/-. The evidence was not controverted by the respondent and in the circumstances the same if for granting.
37. In respect to the repair costs, the same was admitted by the respondent. The cost of repairs amounted to Ksh 31,519.00 and hence the Appellant was entitled to recover the same.
38. In view of the foregoing and having considered the facts and evidence adduced during trial, it is the finding of this court that the trial magistrate erred in dismissing the Appellant's case and counterclaim in its entirety. It is the finding of this court that the appellants claim ought to have partially succeeded to the sum of Ksh 100,000 being outstanding rent arrears of March, April, May and June 2017.

Issue No. (ii); Whether The Trial Magistrate Erred In Law And Fact In Not Framing The Issues For Determination And Giving His Reasons For His Findings.

41. The Appellant submitted that the trial magistrate failed to frame and determine issues in the suit. Order 21 rule 5 of the *Civil Procedure Rules* enjoins the court to state its issues, findings or decisions with reasons upon each decision on each issue. Framing of issues is an important step in determination of a case as it defines the areas of controversy and narrows down the scope of inquiry. In the case of *Haj Ibrahim Mohamed Saeed vs AL-Haj Othman Kaid Saliam* [1962] EA 149 the court restated the importance of framing issues by the trial court stating that failure to do so misleads the trial court in its consideration. Were it that the trial court had failed to frame issues, this court can still evaluate the evidence and give its own findings. However, failure to frame issues is not necessarily fatal as was



held in the case of *Norman vs Overseas Motor Transport (Tanganyika) Limited* Civil Appeal No. 88 of 1958-1959 EA 131 where the court held that;

“If though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the court and the court decides the point, as if there was an issue framed on it, the decision will not be set aside on appeal on the ground that merely no issue was framed...”

42. In this case, the learned magistrate in her judgment did not specifically point out the issues for determination but analyzed the evidence that had been adduced before issuing the decision of the court. The respondent while submitting on this ground of appeal argued that the following issues emerged; whether the Respondent was in arrears, whether the appellant kept proper records and whether the respondent had proved her case. From the said judgment it is evident that indeed the trial court made a determination addressing itself on those issues before making its decision. The appellant suffered no prejudice because the trial court failed to specifically frame its issues and, in the circumstances, the said ground of appeal fails.

Issue No. 3; What Are The Appropriate Reliefs To Grant

43. This court having addressed itself on the earlier issues framed herein and further having found that the trial magistrate erred in dismissing the appellants case in its entirety, it will proceed to set aside the said judgment of the lower court and grant the appellant the sum of Ksh 100,000/- that the appellant was entitled to. The court also notes that the appellant incurred a sum of Ksh 31,519.00 as repair costs which shall be deducted from the rent deposit of Ksh 20,000/- that was paid. The appellant is therefore granted a sum of Ksh 11,519.00 being the said balance of repair costs after deducting from the same from the rent deposit that was paid.

Final Orders

44. In conclusion, the appellant’s appeal partially succeeds and the judgment of the lower court is hereby set aside and substituted with the following orders;

- a. Payment of Ksh 100,000/- to the appellant being the sums due and owing rent arrears for March, April, May and June 2017.
- b. Payment of Ksh 11,519.00 as balance for repair costs.
- c. Interest on the above from the date of judgment of the trial court until payment in full.
- d. Each party to bear own costs of the appeal and costs of the trial court.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF JANUARY 2024

E.K. WABWOTO

JUDGE

In the presence of

Mr. Change for the Appellant.

