Samaki Industries (K) Limited v Kenya Ports Authority (Civil Appeal E104 of 2021) [2024] KECA 794 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 794 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E104 OF 2021

SG KAIRU, AK MURGOR & KI LAIBUTA, JJA

JULY 12, 2024

BETWEEN

SAMAKI INDUSTRIES (K) LIMITED ..... APPELLANT

AND

KENYA PORTS AUTHORITY ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (C. K. Yano, J.) dated 13th September 2021 and delivered on 27th September 2021 in ELCA No. 33 of 2020)

JUDGMENT

1. By a plaint dated 30th January 2003, amended on 31st May 2003 and further amended on 20th March 2015, the appellant, Samaki Industries (K) Limited, sued the respondent, Kenya Ports Authority, in the Chief Magistrate's Court at Mombasa Civil Case No. 307 of 2003 praying for: an injunction to restrain the respondent from evicting them or levying distress, or in any way interfering with the appellant's quiet possession of plot No. Mombasa/Block XXXI/3 (the suit premises); an order that the lease over the suit premises be extended from the date of the final determination of the suit with an improved site value of Kshs. 35,000; a declaration that the appellant should rightfully and legally occupy the suit premises; damages of Kshs. 20,000,000; and costs of the suit.

2. The appellant's case was that it entered into a lease agreement with the respondent on 4th February 1982 in respect of the suit premises at a quarterly rent of Kshs. 2,500 for a term of 25 years from 1st April 1976; that the respondent had the right, at every 5th year, to raise the rent to a figure equivalent to one-twentieth part of the unimproved value of the land as at the date of such revision; that the respondent acted in breach of the said agreement by wrongfully increasing the rent payable and claiming erroneous sums from the appellant; by interrupting the appellant's peaceful and quiet possession of the premises; and by purportedly terminating the lease agreement.

3. According to the appellant, the respondent's refusal or neglect to renew the lease led to the appellant's inability to secure an overdraft from the Standard Chartered Bank in consequence of which, the appellant suffered loss and damage as particularised in its further amended plaint.

4. In its further amended defence and counterclaim dated 3rd April 2013, the respondent denied the allegations set out in the appellant's amended plaint and averred that it was within its right to revise the rent payable by the appellant every five years; and that the appellant acknowledged and accepted the revised rent payable in the sum of Kshs. 84,600 vide its letter dated 29th June 1999. The respondent counterclaimed that the appellant had breached the lease agreement by refusing and/or neglecting to pay quarterly rent as it became due. It claimed Kshs. 719,000 on account of rent arrears and prayed for vacant possession of the suit premises; mesne profits from 1st April 2001 to the date of delivery of vacant possession together with interest at court rates; and costs of the suit.

5. In its reply to the further amended defence and counterclaim dated 19th September 2014, the appellant claimed to have overpaid the respondent and that, therefore, it was not bound to make further payments until its payments made on account were exhausted; that it was not a trespasser on the suit premises; and that the respondent was not entitled to any of the reliefs sought. It prayed that the respondent's counterclaim be dismissed with costs.

6. By its judgment and decree dated 28th November 2019, the trial court (E. K. Makori, CM.) dismissed the appellant's suit with costs to the respondent and allowed the respondent's counterclaim with costs. The learned trial magistrate also directed the appellant to yield vacant possession of the suit premises to the respondent within 90 days thereof and, in any event, on or before 2nd March 2010; to pay to the respondent Kshs. 719,100 on account of rent arrears due and payable up to the month of March 2003; and to pay to the respondent Kshs. 84,600 per month from April 2003 and on every succeeding month until payment in full together with interest thereon at court rates.

7. The salient findings of the trial court were that:

    21. From the chronology of events the leased was determined on 31/3/2001. It was not renewed. It followed then that the plaintiff ought to have vacated the premises of the defendants. The court cannot be in a position to renew lease agreement for the parties.

    22. The lease having determined the continued stay of the plaintiff at the Defendants premises stands illegal and amounts to trespass.

    23. What follows next is that the plaintiff abandoned the premises altogether.... The premises are not in use by anybody."

8. Dissatisfied with the trial court's decision, the appellant moved to the ELC on appeal in Mombasa ELCA Case No. 33 of 2020 faulting the trial magistrate for: (i) finding that the appellant was a trespasser on the suit premises; (ii) allowing the appellant's counterclaim notwithstanding the fact that there was no verifying affidavit thereon; (iii) condemning the appellant to pay the alleged arrears of rent notwithstanding the absence of a valid lease; (iv) finding that the respondent was entitled to mesne profits notwithstanding the fact that the respondent declined to renew the subject lease; (v) disregarding the appellant's submissions and authorities; and (vi) for failing to consider the legal provisions and relevant issues in question to the appellant's detriment.

9. Delivering its judgment dated 13th September 2021 on 27th September 2021, the ELC (C. K. Yano, J.) dismissed the appellant's appeal with costs. In so doing, the learned Judge observed:

> "24. The continued stay of the appellant on the suit premises without a lease was illegal and amounted to trespass. The appellant had no consent from the respondent to continue occupying the suit premises. Instead of vacating the suit premises at the expiry of the lease, the appellant closed shop and locked down the premises. Since the appellant continued holding over the premises despite not being a tenant, it was obligated to pay compensation for use and occupation of the premises."

10. Aggrieved by the learned Judge's decision, the appellant lodged an appeal to this Court on a battalion of 26 grounds set out in its memorandum of appeal dated 11th November 2021, but which were reduced to 18 vide its amended memorandum of appeal dated 8th June 2022. We need not overemphasize the fact that the whopping 18 grounds of appeal advanced by the appellant offend the provision of rule 88(1) of the Court of Appeal Rules, 2022 which enjoins litigants to ensure that a memorandum of appeal concisely sets forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying:

    a. the points which are alleged to have been wrongly decided; and

    b. the nature of the order which it is proposed to ask the Court to make.

11. In support of the appeal, learned counsel for the appellant, M/s. Khaminwa & Khaminwa, filed written submissions and list of authorities dated 25th July 2022, supplementary submissions and a supplementary case digest dated 8th September 2022. In all, counsel cited 9 judicial authorities and 6 statutory authorities which we have duly considered.

12. On their part, learned counsel for the respondent, M/s. A. B. Patel & Patel, also filed written submissions and case digest dated 26th August 2022 citing 5 judicial authorities which we have taken to mind.

13. We need to point out right at the outset that most of the grounds were not pleaded, raised, or considered at the trial or on 1st appeal to the ELC. The new grounds sought to be introduced this late in the day are not for us to determine.

14. We form this view mindful of this Court's decision in Kenya Hotels Limited vs. Oriental Commercial Bank Limited [2018] eKLR set out the governing principles in considering new grounds raised on appeal and observed that:

> "Where the applicant seeks to introduce an entirely new point, there are well known structures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first-instance determinations without the benefit of the input of the court from which the appeal arises ...."
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> Due to these fundamental concerns, the Courts have developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Openda v. Ahn, (ca 42/1981) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case;

the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court." [Emphasis added]

15. This is a second appeal in respect of which our mandate is limited, and on which we purpose to confine ourselves to points of law pleaded and raised for determination at the trial and on 1st appeal.

On the Court's jurisdiction on a second appeal, this Court had this to say in the case of Charles Kipkoech Leting vs. Express (K) Ltd & another [2018] eKLR:

> "Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or, looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

16. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on 5 main points of law raised before the trial court and on 1st appeal to the ELC, namely: (i) whether the appellant was a trespasser on the suit premises; (ii) whether the appellant was bound to pay the alleged arrears of rent notwithstanding the absence of a valid lease; (iii) whether the respondent was entitled to mesne profits notwithstanding the fact that the respondent declined to renew the subject lease; (iv) whether the learned Judge disregarded the appellant's submissions and authorities; and (v) whether the learned Judge failed to consider the legal provisions and relevant issues in question to the appellant's detriment.

17. With regard to the last two issues, we can only say that they are feebly posited in the nature of blanket statements often raised when learned counsel, in all diligence, run short of issues and seek cover under general statements in the hope of unearthing a point of law however strenuous to sustain. With all due respect, neither in the record of appeal nor in submissions by counsel for the appellant do we trace the submissions made and authorities cited by the appellant that were allegedly disregarded by the learned Judge, or the legal provisions and relevant issues which the learned Judge failed to consider to the appellant's detriment. Accordingly, we need not say more on the two issues save that they are inconsequential, and that the appeal fails on that score.

18. Turning to the 1st issue on a point of mixed law and fact as to whether the appellant was a trespasser on the suit premises, counsel for the appellant contend that, even though the lease expired in 2001, the respondent billed the appellant for "rent arrears" from 2001 to 2003 and that, therefore, the appellant was not a trespasser; and that the appellant continued to pay rates in respect of the suit premises in view of the fact that it is still registered as lessee in the County Government's records. According to counsel, the appellant was not a trespasser within the meaning of the *Trespass Act*, Cap. 294. On their part, learned counsel for the respondent contend that whether or not the appellant was a trespasser is

a matter of fact that does not fall to be determined on 2nd appeal. We take to mind the words of the learned Judge, who concluded that:

> "24. The continued stay of the appellant on the suit premises without a lease was illegal and amounted to trespass. The appellant had no consent from the respondent to continue occupying the suit premises."

19. The Court of Appeal in Muthiora vs. Marion Muthama Kiara (Suing on behalf of the Estate of Erastus Muthamia Kiara – Deceased) [2022] KECA 28 (KLR) held that:

> " 53. Trespass is described under the *Trespass Act* Cap 294 to mean "any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without consent of the occupier thereof". [Emphasis ours]

20. The lease under which the appellant took possession of the suit premises having expired on 31st March 2001, its continued occupation thereof without the respondent's consent constituted it a trespasser within the meaning of Cap. 294. Accordingly, we find nothing to fault the learned Judge for reaching that conclusion and, therefore, the appeal fails on that score.

21. On the 2nd and 3rd issues as to whether the appellant was bound to pay the alleged arrears of rent notwithstanding the absence of a valid lease; and whether the respondent was entitled to mesne profits notwithstanding the fact that the respondent declined to renew the subject lease, we hasten to observe that it is common ground that the respondent declined to renew the lease. The fact that the lease pursuant to which the appellant entered into the suit property expired on 31st March 2001 is not in contest. The question is whether the appellant was bound to pay "rent" or mesne profits on account of its continued occupation without the respondent's consent.

22. We need not belabour the fact that "rent" becomes due and payable by a person in occupation of leased premises under a lease or tenancy agreement. On the other hand, any trespasser or lessee remaining in occupation of such premises on expiry of such lease or tenancy agreement, and without the consent of the proprietor, is obligated to pay mesne profits.

23. In this case, the demand by the respondent of rent arrears or payment of "rent" for any period during which the appellant remained in occupation of the suit premises after the lease had expired, and without the respondent's consent, ought to have been properly demanded as "mesne profits". To our mind, any erroneous reference thereto as "rent" did not by any means negate the status of the appellant as a trespasser thereon, and on account of which the respondent was entitled to compensation by way of "mesne profits".

24. The High Court of India at Bombay in Purificacao Fernandes vs. Hugo Vincente de Perpetuo Socorro Andhrade, AIR 1985 Bom. 202 correctly defined mesne profits thus:

> " The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore,liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession." [Emphasis ours]

25. In the same vein, the Court of Appeal in Christine Nyanchama Oanda vs. Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR held that:

> " It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case of Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR, this Court held as follows:
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> "As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded …."

26. In the case of Inverugie Investment vs. Hackett (Lord Lloyds [1995]3 All ER 842, it was held thus:

> "Our understanding of the above persuasive authority is that once the learned Judge made the award under the subhead "mesne profits" there was no justification for him awarding a further Kshs.10 million under the subhead "trespass" since both mean one and the same thing…"

27. While the respondent had the right to recover rent arrears (if) for the period during which the subject lease was in force, and compensation by way of mesne profits during the period the appellant remained in on expiry of the lease, those accruals did not by any means defeat the respondent's right to recover possession together with compensation as aforesaid. In any event, Mr. Ongego, learned counsel for the respondent, submitted that the appellant ultimately vacated the suit premises.

28. Having considered the record of appeal, the impugned judgment, the rival submissions of learned counsel, the cited judicial authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY, 2024

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR