Diamond Homes Limited v Shapi (Civil Appeal 118 of 2021)
[2024] KECA 1161 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1161 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 118 OF 2021

SG KAIRU, KI LAIBUTA & GV ODUNGA, JJA

SEPTEMBER 20, 2024

BETWEEN

DIAMOND HOMES LIMITED ..... APPELLANT

AND

RAILA SHAPI ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (W. A. Okwany, J.) delivered on 9th September 2020 in HCCA No. 60 of 2018)

JUDGMENT

1. By a plaint dated 10th October 2011 and amended on 2nd December 2013, the respondent sued the appellant in the High Court of Kenya at Mombasa in HCCC No. 27 of 2011, but which was subsequently transferred to the Chief Magistrate's court at Mombasa as CMCC No. 380 of 2014.

2. The respondent's claim as pleaded in the amended plaint was that the appellant was the proprietor of the commercial development erected on a parcel of land known as plot No. 3425/II/MN christened Hajjra Towers (the property); that, on or about the years 2010 and 2011, she contracted with the appellant to let office space in the property for a term of 5 years and 3 months in the offices marked and identified as G12 and G13 (the demised premises) for the purposes of carrying on business as a restaurant; that, with the appellant's consent, the respondent embarked on various substantive modifications on the demised premises so as to suit the intended purpose; that the modifications cost the respondent Kshs. 803,220/= and that it was an implied term of the lease agreement that the appellant owed a duty of care to the respondent and her business.

3. The respondent further averred that, sometime in April 2011, the property collapsed due to structural and latent defects therein, which was as a result of negligence on the part of the appellant, particulars whereof were set out in the amended plaint; that the appellant's actions and inactions were in breach of its contract with the respondent, particulars whereof were likewise set out in the amended plaint;

and that, due to the appellant's negligence and breach of contract aforesaid, the respondent suffered loss and damage. In view of the foregoing, she prayed for:

"a) A declaration that the Defendant is wholly culpable for the loss occasioned to the Plaintiff.

b. Special damages of KShs. 803,220/-.

c. Interest of (b) above.

d. General damages for loss of future earnings."

4. In its "Defence to the Amended Plaint," the appellant admitted that it entered into a contract with the respondent to let office space in the property, but denied that it ever entered into a lease agreement with the respondent. It also denied all allegations set out in the amended plaint and, in particular, being negligent and/or being culpable for any defects in the structure or construction of the building as particularised in the plaint.

5. The appellant averred that it had never been the owner of the development subject of the suit or the proprietor of the property where it stood; and that the contract between itself and the respondent was for rental of office space, and that the user of the premises thereby let to the respondent was not commonly understood to be that of a restaurant business. According to the appellant, if the collapse of the building was as a result of any negligence, the same was attributable to an independent contractor and, therefore, the appellant could not be held liable whether vicariously or otherwise. It prayed that the respondent's suit be dismissed with costs.

6. In its judgment dated 23rd March 2018, the trial court (Hon. F. Kyambia, SPM) allowed the respondent's claim and entered judgment against the appellant for Kshs. 803,220, costs and interest. According to the learned Magistrate: a contractual relationship existed between the appellant and the respondent; that the mere collapse of the building of itself denoted some fault in its construction; that the respondent attributed it to the appellant for engaging ordinary masons; that the respondent's evidence in proof of negligence was unchallenged and, therefore, there was no need to call expert evidence in that regard; that the respondent had proved the particulars of negligence on a balance of probability; and that, while the appellant denied liability on the grounds that it was not the owner of the property, which it alleged to be owned by one Fuad, it failed to join Fuad as a third party or otherwise call evidence to show that it was not the owner thereof. In view of the foregoing, the learned Magistrate was satisfied that the special damages pleaded were specifically proved on the required balance.

7. Dissatisfied by the decision of the learned Magistrate, the appellant lodged an appeal to the High Court in HCCA No. 60 of 2018 faulting the learned Magistrate for: holding that the appellant was liable in negligence; not appreciating that the appellant was merely a letting agent in respect of the premises subject of the respondent's tenancy on which her claim was founded; failing to appreciate the burden of proving negligence in the circumstances lay with the respondent, who did not attempt to discharge it; and for failing to appreciate that the case before him did not come within a claim under the Occupiers Liability Act (Cap. 34).

8. In its judgment dated 9th September 2020, the High Court (W. A. Okwany, J.) dismissed the appellant's appeal with costs. As observed by the learned Judge:

> " 10... The main issue for determination is whether the trial court erred in finding that the Appellant was liable for the damages arising out of the collapse of the suit building ....

12. The Appellant attributed negligence for the collapse of the building to the 'owner' who it stated was one Fuaad Mohamed Mahmoud. In advancing the argument, the Appellant made reference to the testimony of the Respondent, during cross examination, to the effect that the said Mahmoud was the owner of the building...

14. During examination in chief, however, the Respondent testified that:

'I did make payments to Mr. Fuaad Mohammed Mahmoud – he is the official of the defendant company.'

17. Respondent produced the Letter of Offer dated 21st February 2011 in support of her assertion that she entered into a lease agreement with the Appellant. A perusal of the said letter of offer shows that it was signed by Fuaad Mohamed Mahmoud in his capacity as the Appellant's Director. My finding is that the letter of offer in question constituted a valid contractual relationship between the Appellant and the Respondent herein ....

20. My further finding is that the Letter of Offer speaks for itself and cannot be interpreted to have any other meaning other than what it spells out. I find that it is not in doubt that the Appellant was the Lessor/Owner of the suit building and it cannot be seen to shift liability to any other person at this stage of the appeal. Moreover, I note that the Appellant had indicated in its Statement of Defence that it would, at an opportune time, take out Third Party proceedings to enjoin the party liable for the negligence to the suit. It is noteworthy that no such Third Party Proceedings were instituted....

21. I find that if indeed the suit building was owned by another party other than the Appellant, nothing would have been easier than for the Appellant to furnish the court with documentary evidence of such ownership. I am not persuaded that the suit building was owned by a different party other than the Appellant. I find that the Respondent proved her case against the Appellant on a balance of probabilities."

9. Aggrieved by the learned Judge's decision, the appellant moved to this Court on 2nd appeal faulting the learned Judge for: upholding the trial court's determination on the appellant's liability to the respondent arising out of the collapse of the rental premises whereon the respondent carried on business when the record was such that the respondent had testified to the owner of the premises being an entity or person other than the appellant; dismissing the appellant's appeal the effect of which was to uphold the trial court's finding on the appellant's liability arising from the collapse of the premises which finding flew in the face of the principles inherent in the *Occupiers' Liability Act*; and in failing to properly exercise her powers as a first appellate court and thereby failing to analyse or properly appreciate the evidence on record. It urged us to allow the appeal with costs.

10. In support of the appeal, learned counsel for the appellant, M/s. Moses Mwakisha & Company, filed written submissions dated 4th April 2023 citing the cases of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, highlighting the duty of the 1st appellate court; and Jabale vs. Olenja [1986] KLR 661, highlighting the scope of the jurisdiction of the court on 1st appeal to interfere with the findings of the trial court.

11. Opposing the appeal, learned counsel for the respondent, M/s. Bowyer Mahihu & Co., filed written submissions dated 16th April 2024 citing 6 judicial authorities, namely: Jacob Wekesa Bokoko Balongo vs. Kincho Olokio Adeya & Another [2020] eKLR, highlighting the principles that guide this Court on 2nd appeal; Kukal Properties Development Limited vs. Tafazzal H. Maloo & 3 Others [1993]eKLR; and Kenya Commercial Bank Limited vs. Popatlal Madhavji & Another [2019] eKLR, submitting that the letter of offer signed by Mr. Fuad Mohamed Mohamoud constituted a valid contractual relationship between the appellant and the respondent; and Eldo City Ltd vs. Corn Products Kenya Ltd & Another [2013] eKLR for the proposition that, in determining contractual disputes, it is the court's duty to give effect to the intention of the parties, and that the parties' intention is discernible from the documents and conduct of the parties.

12. In addition to the foregoing, counsel cited the cases of Ram International Ltd vs. Masai Mara University [2021] eKLR; and Chon Jeuk Suk Kim & Another vs. E. J. Austin & 2 Others [2013] eKLR, for the proposition that, where a director of a company executes an agreement on behalf of a company, the company cannot wriggle out of its obligations under the agreement.

13. Unless otherwise provided, this Court's mandate on 2nd appeal is limited to points of law. Section 72 (1) of the *Civil Procedure Act* provides that:

> 72. Second appeal from the High Court
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> (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—
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> a. the decision being contrary to law or to some usage having the force of law;
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> b. the decision having failed to determine some material issue of law or usage having the force of law;
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> c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

14. In Stanley N. Muriithi & another vs. Bernard Munene Ithiga [2016] eKLR, this Court held that:

> " We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law."

15. In the same vein, this Court held thus in Kenya Breweries Ltd vs. Godfrey Odoyo [2010] eKLR:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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. In the case of Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:
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> 'We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 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 as holdings of law or mixed 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 the decision is bad in law.'"

16. From our reading of the 3 grounds of appeal advanced by the appellant, we form the view that the appeal raises only two issues of mixed law and fact worthy of our inquiry on 2nd appeal, namely whether the appellant was liable at law for the loss and damage suffered by the respondent; and whether the respondent's claim was sustainable in tort, or whether it ought to have been brought under the *Occupiers' Liability Act*. The 3rd ground of appeal relates entirely on matters of factual evidence, which goes beyond our remit on 2nd appeal.

17. On the 1st issue as to the ownership of the collapsed property on which the demised premises were situate, and the related question as to who bore liability for the loss and damage suffered by the respondent, we hasten to observe that it was common ground that a lease agreement was entered into between the appellant and the respondent in respect of the demised premises known as G12 and G13 situate on the property known as plot No. 3425/II/MN, and a draft thereof exchanged between them; that the draft lease expressed the intention of the parties; that the preceding letter of offer dated 21st February 2011 was printed on the appellant's letterhead and executed by the respondent and one Fuad, who signed in the capacity of the appellant's Director; that the appellant was described in the draft lease agreement, which was intended to give effect to the letter of offer, as "lessor"; that the respondent took possession of the demised premises pursuant to the agreement and carried out the modifications pleaded in the amended plaint, and at the cost disclosed in her claim; that the subsequent possession of the premises was taken by the respondent with the appellant's consent; and that the offer and possession constituted a contract between the parties.

18. As Mabeya, J. correctly held in Eldo City Limited vs. Corn Products Kenya Ltd & another [2013] eKLR:

> " 12. It is trite law that in deciding disputes, it is the court's duty to give effect to the intention of the parties. The parties' intention is discernible from the documents and conduct of the parties. However, onerous a document or contract may be, the court's duty is to give effect to it. In the case of Smith – vs- Cook (1891) (1891) AC 297 at 303 the court held:-
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> 'The duty of the court is to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing upon the face of the deed.'
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> ...
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> 14. How does the Court then determine the intention of the parties? The Case of Storer v Manchester City Council [1974] 1 W.L.R. 1403 is instructive. In that case Lord Denning M.r. stated that:-
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> 'In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: "I did not intend to contract" if by his words he has done so. His intention is to be

found only in the outward expression which his letters convey. If they show a concluded contract that is enough.'"

19. In the circumstances, the appellant's denial of responsibility as owner or lessor of the property, and the contention that Fuad was the owner thereof, was a mere afterthought which flies in the face of clear evidence on the basis of which the two courts below correctly found for the respondent on liability against the appellant for the tort of negligence. The appellant having failed to adduce any evidence to disclaim ownership or lessor's interest, or to institute third party proceedings in the trial court to join the mystical owner, we find nothing on record to fault the learned Judge for affirming the trial court's finding on liability in favour of the respondent.

20. Turning to the 2nd issue as to whether the respondent ought to have brought her claim under the *Occupiers' Liability Act* (Cap. 34), we hasten to observe that it was within her choice to determine. Indeed, in her plaint dated 10th October 2011, the respondent pleaded in paragraph 4 that the appellant owed her, and her business, a duty of care "as they are occupiers of the building and also in line with the Occupiers Liability Act...".However, in paragraph 7 of her amended plaint dated 2nd December 2013, the reference to Occupiers Liability Act appears to have been crossed out....She elected to bring a claim founded on the tort of negligence and led evidence in proof thereof to the required balance. Moreover, the issue as to whether her claim ought to have been founded on Cap. 34 was casually alluded to for the first time in the appellant's submissions to the trial court and, thereafter, as a ground of appeal to the High Court. It is noteworthy that the same was not pleaded in its defence to the respondent's amended plaint in which her claim under Cap. 34 was abandoned.

21. It is trite law that parties are bound by their pleadings. In Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR, this Court cited with approval the decision of the Nigerian Supreme Court in Adetoun Oladeji (Nig) Ltd vs. Nigeria Breweries Plc S.C. 91/2002 where it was observed:

> "Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;
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> > "... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.'
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> Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;
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> > "In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.'"

22. Having neglected to raise any objection to the cause of action on which the respondent's claim was founded, the appellant was precluded from springing a surprise in its submissions by contending that the suit ought to have been brought under Cap. 34. In any event, it was not a matter for the appellant to determine.

23. Having carefully considered the record of appeal, the rival submissions as put to us, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed with costs

to the respondent. Consequently, the Judgment and Decree of the High Court of Kenya at Mombasa (W. A. Okwany, J.) delivered on 9th September 2020 is hereby upheld.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR