Shirbrook (K) Limited v Nakuru Industries Ltd & another (Civil Appeal 56 of 2018) [2022] KECA 759 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 759 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 56 OF 2018

DK MUSINGA, HM OKWENGU & MSA MAKHANDIA, JJA

JUNE 24, 2022

BETWEEN

SHIRBROOK (K) LIMITED ..... APPELLANT

AND

NAKURU INDUSTRIES LTD ..... 1ST RESPONDENT

DIRECT O SERVICES ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (Anyara Emukule, J.) dated 12th April 2013 in HCCC No. 277 of 2009)

JUDGMENT

1 This appeal arises from the judgment and decree delivered by Anyara Emukule, J. in Nakuru High Court Civil Case Number 277 of 2009 dated 12th April 2013. The judgment and decree arose from a suit filed by the appellant by way of a plaint dated 5th October 2009 in which it sued the respondents jointly and severally praying for a permanent injunction to restrain them from distraining for rent or otherwise from interfering with its quiet enjoyment of its tenancy over the land parcel LR NO. 11265 or the premises situate thereon ("the suit premises") and leased to it by the 1st respondent; general damages for trespass, costs of the suit plus interest.

2 In the plaint, the appellant claimed that it had a controlled tenancy between it and the 1st respondent and that the 1st respondent had no authority to instruct the 2nd respondent to levy distress for rent against it without leave of the Business Premises Rent Tribunal established under section 6 of the *Landlord and Tenant (Hotels, Shops and Catering Establishments) Act,* "the Act". It was further averred that the 1st respondent had no legal right to increase the rent and to claim any arrears thereof without the permission of the said tribunal.

3 The brief facts as gleaned from the record with regard to the suit are that the appellant's Managing Director, Amritlal Motichand Shah, also known as Amu Shah, was once an employee of the 1st respondent as the accountant. He is the founding director of the appellant, a garment manufacturing and sales company. The appellant was set up with the assistance of the 1st respondent who even went out of its way to procure the machinery for the manufacture of the garments. As part of that assistance the 1st respondent leased the appellant a go-down on the suit premises measuring approximately 769 sq. ft. at a monthly rent of Kshs. 1000/= from the year 1974 to 1994. Though the rental was revised by the 1st respondent to Kshs. 24,000/= per month from 1994 to 1998, it was reversed to Kshs. 12,000/= per month because of the difficult economic circumstances, and which sum the appellant kept paying the 1st respondent.

4 The 1st respondent, being dissatisfied with the very low rental income, and commissioned a valuation of the suit premises by Chrisca Real Estates Ltd, which returned a rental assessment of Kshs. 127,000/= per month. However, the appellant refused to go along with the recommendation. The appellant, having declined to accept earlier demands of rent increases from 24,000/=, 65,000/= and 85,000/=, the 1st respondent instructed the 2nd respondent to distrain for rent for the sum of Kshs. 8,004,000/= and hence the suit.

5 In their joint defence and counterclaim, the respondents contended that the suit was malafide, frivolous and vexatious and an abuse of the court process; that the suit was misleading for want of disclosure of other existing suits before the lower courts and the Business Premises Tribunal; that the proper forum to sanction the respondents to levying distress for rent was the Business Premises Rent Tribunal, and not the court; that the initial rent of Kshs. 12,000/= was increased to Kshs. 65,000/= but the appellant continued to pay Kshs. 12,000/= after 1998 and failed to sign the new tenancy agreement; that the sum of Kshs. 12,000/= was accepted on a without prejudice basis; that contrary to the appellant's claims that it was not in arrears of rent, it was indeed in arrears in the sum of Kshs.I,070,000/= calculated at Kshs. 65,000/= per month for the period December 1998 to 2009. Consequently, the respondents counterclaimed against the appellant arrears of rent of Kshs. 9, 265,000/= comprising:

1. Rent arrears prior to December 2009 Kshs. 8,670,000/=

2. Rent in respect of the period January to July 2010 Kshs. 595,000/= Total Kshs. 9,265,000/=

6 In its reply to the defence and defence to the counterclaim, the appellant denied the respondents' claims and maintained that the rent was always agreed at Kshs.12,000/= for the entire period, and further denied the counterclaim in the sum of Kshs. 9,265,000/= and prayed that the defence and counterclaim be struck out with costs and judgment entered for the appellant as prayed in the plaint.

7 In support of its case, Amu Shah testified. In a nutshell, he maintained that the rent was agreed at Kshs. 12,000/= for the entire period, 1996 to date, and that the respondents had never taken procedural steps or given statutory notice to increase the rent, and was shocked by the proclamation to levy distress for rent in the sum of Kshs. 8,004,000/=. It contended that the action was motivated by malice, as it had declined to pay the rent proposed by the respondents, and maintained that its prayers in the plaint be granted, and the respondents' counterclaim be dismissed with costs.

8 Opposing the suit, Raj Shah, the 1st respondent's Managing Director, testified and reiterated what it had averred in its defence and counterclaim. He maintained that the 1st respondent was duly owed the amount in the counter-claim as well as the VAT thereon @ 16%. He added that when the lease period expired in 1998 the monthly rent payable as per the lease agreement duly signed by the appellant

was Kshs. 24,000/=. However, the appellant did not vacate the suit premise, instead he held over, but refused to pay the rent aforesaid.

9 The trial court after hearing the dispute concluded thus: -

> In making that determination, I shall consider the parties pleadings, submissions and only tenancy agreement duly signed between the defendant and plaintiff and draw conclusion thereon in light of the law, and in particular the Landlord and Tenants (Shops, Hotels & Catering Establishments) Act and the registered Law Act (Cap 300 Laws of Kenya."

10 The trial court then proceeded to pronounce itself as follows: -

> ***...the last rental payable for the period between December 1-31st 1998 was Kshs. 24,000/- per month.... Being a controlled tenancy any alteration of the terms of the holding over were subject to the jurisdiction of the Business Premises Rent Tribunal and the defendant could not unilaterally increase the rent from Kshs. 24,000/- to Kshs. 50,000/- or Kshs. 65,000/- or Kshs. 85,000/-.***
>
> ***However, being a tenant holding over under the expired tenancy agreement of 10th January 1994, the Plaintiff was under both a legal and contractual obligation to pay the same rent for the holding over period at the rate at which it was liable to pay in terms of the expired lease. The plaintiff obligation was to pay Kshs. 24,000/- per month, for the year 1998. The rental payable from 1.01.1999 was therefore Kshs. 24,000/- per month, from then to the current time, a period in my calculation of 173 months (1.10.1998 to 31.05.2013) works out at 173 x 24,000/- = Kshs. 4,152,000/-. I therefore hold and find the plaintiff liable to the defendant in the sum of Kshs. 4,152,000/- less the sums which the Plaintiff has paid (if any).***

11 Lastly, the trial court ruled that the 1st respondent had to take appropriate steps in order to regain and obtain an economic or market rate of rent for its premises. These steps envisaged by the trial court were; -

i. There be appointed forthwith a valuer acceptable to both the Plaintiff and the Defendant to carry out a valuation of the premises occupied by the Plaintiff for the purposes of establishing a fair market rental. In default of such valuer be appointed by the chair-person of the Rift Valley Law Society at the instance of either party and such valuer to render his report within 30 days of appointment.

ii. There be a formal lease between the Plaintiff and Defendant at a rental recommended by the valuer or as thereafter agreed by the parties hereto in writing.

iii. In default of such agreement within 120 days from the date hereof the plaintiff to vacate and hand over the suit premises to the defendant within 45 days of such default.

For those reasons, there will be an order of injunction for 120 days against the defendant from taking any other action save as stated above. The Plaintiff claim for a permanent injunction, general damages and costs of the suit are dismissed with costs to the defendant. The Defendant's counter-claim is therefore allowed to that extent."

12 Aggrieved by the above judgment and decree, the appellant filed the instant appeal on seven grounds to wit; that the trial court erred in law: in dismissing the appellant's case without evaluating the evidence that was adduced by both parties which irresistibly established that the appellant had been duly paying current applicable rent and had no arrears thereon and consequently that the distress levied by the

respondent was illegal in holding that the rent payable at the material time was Kshs. 24,000/= and on the basis thereof allowing the counter claim when the 1st respondent had not kept Rent Card and or Book as required by the Act, and when the evidence was overwhelming that from 1999, the rent payable was Kshs. 12,000/=; finding that the subject tenancy was controlled and therefore protected by the provisions of the Act without jurisdiction and directed parties to undertake events or activities which inevitably led to the alteration of the terms or termination of the subject tenancy other than as provided for by the Act; in coercing parties to enter into an agreement in manner not sanctioned by the law and in default of such coerced agreement effectively terminated a protected tenancy other than as provided by the law; in rendering a judgement that is ambiguous and not conclusive in its determination of the dispute; in abdicating its responsibility and delegating the same to the Chairman of Rift Valley Law Society, a regional association of Lawyers that has no jurisdiction or status and without any safeguards and without proper terms of reference, and finally; in not properly evaluating the evidence and thereby coming to conclusions of fact that are not supported by the evidence on record.

13 The appeal was canvassed wholly by way of written submissions.

14 The appellant started off its submissions by pointing out the role of a first appellate court which is to re-examine the evidence tendered in the trial court and reach its own independent conclusions. For this proposition we were referred to the celebrated case of *Selle & Another Vs. Associated Motor Boat Co. Ltd Others* E.A 123.

15 The appellant went on to submit that in 1994 the tenant/landlord relationship between the 1st respondent and the appellant was formalized through a written agreement entered into on 1st January 1994 for five years, renewable subject to agreed new rent. After expiry, the appellant continued to occupy the premises under the previous terms. This is commonly referred to as holding over. That before the agreement, the monthly rent payable was Kshs. 12,000/= and during the hold over it continued to pay the previous rent which was always accepted by the 1st respondent. That in January 1999, the 1st Respondent demanded that the appellant start paying rent of Kshs. 65,000/= up from 12,000/- which was objected to by the appellant. In 2003 the 1st respondent's advocate took over collection of rent and always receipted Kshs. 12,000/- and there was no indication that the same was either part payment or not. That parties are bound by their pleadings and the trial court ought to have followed what the parties had presented in court as evidence. That throughout the tenancy of 35 years, the rent payable had been Kshs. 12,000/- and there had been no departure. That the 1st respondent was therefore estopped from altering the amount of rent payable in terms of Section 120 of the *Evidence Act*. That the trial court thus erred in holding that the monthly rent due and payable was Kshs. 24,000/-. It was submitted that the 1st respondent had conducted himself in a manner that did not suggest that it was interested in recovery of rent but was determined to evict the appellant from the suit premises at all costs so that it could put up modern go-downs and the distress for rent of Kshs. 8,004,000/- was meant to achieve that purpose.

16 The appellant submitted that the proposal by the 1st respondent to have the rent increased, was objected to by the appellant, who sought the intervention from the Business Premises Rent Tribunal via tribunal case No. 69 of 2009 after the appellant received a notice to terminate the tenancy dated 1st October 2009. The appellant submitted that if there was need to alter any aspect of the tenancy, the provisions of Section 4 of the Act which deals with termination and or alteration of terms and conditions of controlled tenancy should have been invoked. That the respondents did not provide any evidence to show that the rent arrears which they claimed was sanctioned by the Business Premises Tribunal as envisaged by the Act. That the trial court's reference to the *Registered Land Act* Section 47 was misguided in law as the Act enjoyed supremacy compared with other statutes applicable in

controlled tenancies as provided for under Section 2(3) & 4(i) of the said Act. Thus, the directions by the trial court meant that the terms of the agreement had been altered. Further, it was the appellant's submission that by referring the dispute to the Rift Valley Law Society, the trial court abdicated its judicial functions. In any event the trial court had became functus officio upon delivery of the judgment.

17 The appellant relied on the cases of *R Vs. Government of Brixton Prison, ex-parte Enahovo* (1963) 24 B and this Court's decision of *Telkom Kenya Limited Vs. John Ochwada* [2014] eKLR to buttress the issue of abdication of judicial function which is not permissible. The appellant thus prayed that the appeal be allowed.

18 The respondents in opposing the appeal submitted that the agreement had been executed by the parties and in the said agreement the rent due was agreed at Kshs. 24,000/- per month, which amount was confirmed by the appellant's director under cross examination. As such, the trial court only used the last agreement as a reference point for rent that would apply after the term of the lease had lapsed, based on Section 52 (1) of the repealed *Registered Land Act.* The respondent submitted that any assertion that there was any variation to the agreement could not stand as that would be tantamount to introduction of extrinsic evidence to vary the terms of a written contract contrary to section 97 of the *Evidence Act*. The respondent relied on the case of *Fidelity Commercial Bank Limited Vs. Kenya Grange Vehicle Industries Limited* [2017] eKLR to buttress the argument regarding extrinsic evidence. It was the respondents' position that parties cannot imply terms into a contract where there are express terms in the same and especially when the implied terms contradict the express written terms as was held in the case of *Tom Otieno Odongo Vs. Cabinet Secretary Ministry of Labour Social Security Services Another* [2013] eKLR.

19 That even in the *Central London Property Trust Ltd. Vs. High Trees House Ltd* [1947] K-B. 130 (1946) (the "High Trees Case") which the appellant relied on, there was a written agreement to reduce the agreed rent which was not the scenario in the current case. On estoppel, it was the respondents' submission that there was no representation by the respondents that the appellant allegedly relied on to its detriment. That the concept of estoppel depends on first asserting a position that another party relies on to his detriment, and there was no evidence that had been adduced to show that the 1st respondent clearly asserted a position that even though the rent set in the written agreement was Kshs. 24,000/- per month, it would be less.

20 It was pointed out that the appellant vacated the suit premises in 2017, thus a determination on the question of tenancy would be an academic exercise.

21 The respondent thus prayed for the appeal to be dismissed with costs.

22 The duty of the first appellate court was explained in the case of *Mwangi Vs. Samburu* [1984] KLR 453 as follows:-

> A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial
>
> Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

23 We have considered the record of appeal, the submissions by learned counsel, the authorities cited and the law. The issues we have identified for determination are as follows: Whether: the tenancy between the parties was a "controlled tenancy" in terms of the Act; whether by its judgment, the trial court varied and altered the terms of the tenancy; and whether the respondent's counter-claim was proved.

24 Under Section 2(1) of the Act, a controlled tenancy is defined as follows:

> For the purposes of this Act, unless the context otherwise requires—
>
> "controlled tenancy" means a tenancy of a shop, hotel or catering establishment—
>
> a. which has not been reduced into writing; or
>
> b. which has been reduced into writing and which—
>
> i. is for a period not exceeding five years; or
>
> ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or..."

25 The agreement produced in evidence by the parties dated 10th January 1994 was duly executed by the parties. The agreement provided for the amount of rent, period, renewal of the lease, notice to vacate as well as for payment of utility bills. There is no contention therefore that this was a controlled tenancy in terms of Section 2(1)(ii) of the Act for the simple reason that it was restricted to five (5) years and was renewable. We do not hesitate therefore to hold, just like the trial court did, that this was a controlled tenancy. The appellant's submission therefore that the trial court erred in imputing a controlled tenancy in the controversy without jurisdiction has no basis at all.

26 Section 4 of the Act provides the procedure that needs to be followed by a party wishing to terminate or alter the terms and conditions of a controlled tenancy. That section provides:

> 4. Termination of, and alteration of terms and conditions in, controlled tenancy.
>
> 1. Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no terms or condition in, or right or service enjoyed by the tenant of any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.
>
> 2. A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term of condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form."

27 The issue that arises from the above is whether the tenancy between the parties continued after the initial period had lapsed and parties could not agree on the renewal due to the new rent demanded by the 1st respondent. As at the time of the expiry of the lease, the rent payable was Kshs. 24,000/= per month. The appellant continued to occupy the suit premises for a considerable period of time thereafter. In the circumstances the appellant could only be referred to as a tenant holding over as rightly held by the trial court. The effect of holding over and continued collection of rent by the 1st respondent from the appellant after the lease expiry was to create yet another controlled periodic

tenancy of month to month between the parties in line with section 60 (2) of the *Land Act*, 2012 which provides, *inter alia*;

> A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land or as having given up on the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease and if the lessor continues to accept rent from a tenant who remains in possession for two months after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force."

28 A similar situation obtained under section 52 (2) of the repealed Registered Land Act. This is the concept commonly referred to as "holding over". In this regard, we revert to the unbinding decision of *Aroko Vs. Ngotho & Another* [1991] eKLR where it was observed as follows:

> The Landlord has not denied that the rent was renewed with his instructions and has not denied receipt of that rent. Prima facie, it is clear that the Tenant held over in terms of section 52(1) of the Registered Land Act and is deemed to be a month-to-month tenant entitled to one-month notice before termination. Section 52(2) of the Registered Land Act makes it absolutely clear that the Landlord's acceptance of rent after the expiry of the notice to vacate by 1/7/1990 should be taken as evidence of the Landlord's consent to continued occupation by the Tenant."

29 Upon the grant of a lease or tenancy, both the landlord and tenant are in general estopped from denying the validity of the transaction. In the instant case, neither the appellant nor the respondent are permitted to assert that the tenancy which they created is invalid as claimed by the 1st respondent. It follows that the appellant was obligated to pay monthly rent of the last amount that it used to pay until such a time when it could vacate or convince the 1st respondent to enter into another long term lease. We find no reason to think otherwise as the reasoning of the trial court on this aspect was sound. It cannot be said that the trial court re- wrote a new tenancy agreement for the parties and introduced new terms. The monthly rent adverted to by the trial court was directly from the lease agreement that both parties had signed and produced as exhibit before court. Indeed, even the appellant's witness conceded to this fact under cross examination by counsel for the respondents. According to the said agreement, the last rent payable was Kshs. 24,000/= and which the trial court rightly held that, that was the rent to be paid throughout the period claimed by the respondents. We are unable therefore to appreciate the appellant's submission that the respondents are estopped from demanding the monthly rent of Kshs. 24,000/=.

30 As to whether the trial court erred in law in coercing parties to enter into an agreement in a manner not sanctioned by the law and effectively terminated a protected tenancy other than as provided by law, it is our view that what existed was a protected tenancy but whose period had lapsed. Having lapsed therefore, the trial court did rightly refer to the existing relationship as holding over and also rightly made reference to the lease agreement as to the rent that was being paid by the appellant. This was in no way rewriting a new tenancy agreement between the parties. The subsequent directions issued by trial court at the tail end of the judgment should also be seen in that light. In any event, the directives were an exercise in discretion and this Court has held in several decisions as to when and how it may interfere with such exercise. As was espoused in the case of *Mbogo & Another Vs. Shah*,[1968] EA, p.15;

> An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and

> as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

31 We have gone through the entire judgment and we are of the view that the directions are sound and based on sound legal principles and we find no reason to interfere with the same since they were aimed at effectively determining once and for all the issues in dispute.

32 On the issue of the court being functus officio, we wish to point out that the doctrine of functus officio was considered by this Court in *Telkom Kenya limited Vs. John Ochanda (suing on his own behalf and on behalf of 996 former employees)* [2014] eKLR,where it was held that –

> Functus officio is an enduring principle of law that prevents the re- opening of a matter before a court that rendered the final decision thereon--
>
> The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazarire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions."

33 The Supreme Court of Kenya in the case of *Raila Odinga & 2 Others Vs. Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 and rendered itself thus: -

> Section 99 of the Civil Procedure Act provides exceptions to the doctrine of functus officio in the following terms-
>
> "Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

34 It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued. From the judgment and the entire record, and even in view of the directions, there is no indication that the trial court entertained or would entertain anything after the judgment for the doctrine of functus officio to apply. What the trial court did was to give a time frame within which certain actions could be done and if not, it foresaw the danger of the matter coming back for failure to comply thus proceeded to direct the Rift Valley law society to intervene when and if there was a stalemate. We see nothing wrong with that at all and there is therefore no connection between what the trial court directed and the doctrine of functus officio. Nor can it be said that the trial court rendered an ambiguous judgment on that basis.

35 Further, by seeking to have the appointment of the valuer by the Law Society of Kenya, the trial court did not in any way cause any abdication of judicial responsibilities. This order was made after the trial court considered the best way possible to have the matter solved in case parties did not agree. The Law Society of Kenya is an organization mandated to advise and assist members of the legal profession, the government and the larger public in all matters relating to the administration of justice in Kenya. This is a body recognized by the law and there was nothing wrong in referring the dispute to it in the event that the parties did not agree.

36 On whether the counterclaim was proved, we cite the dicta by Lord Halsbury in *Jacob Vs. Booths Distillery Co.* 85 LTR at 262, where he statedthat "there are some things too plain for argument". The appellant was indebted to the respondent in rent arrears on account of holding over. The amount of rent payable per month as we have already held was Kshs. 24,000/= and was payable from 1st January 1999 as per the last lease agreement. What happens when a tenant does not pay rent but occupies premises? Should the landlord be condemned again after failing to receive rent from the tenant? Our answer is no. We are satisfied that the trial court was right in holding that, the appellant being a tenant holding over was obligated to pay monthly rent for the period which it utilized the 1st respondent's premises. We are satisfied, just like the trial court, that the rent due from the date the lease expired was Kshs. 24,000/= per month and started accruing from 1st January 1999.

37 We have no doubt that the respondents proved their counterclaim and we have no reason to find otherwise.

38 In the end, we find that this appeal has no merit and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

D. K. MUSINGA, (P)

..... JUDGE OF APPEAL

HANNAH OKWENGU

..... JUDGE OF APPEAL

ASIKE-MAKHANDIA

..... JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR