



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & SICHALE, J.J.A)

CIVIL APPEAL NO. 625 OF 2019

BETWEEN

POSTAL CORPORATION OF KENYA.....APPELLANT

AND

GERALD KAMONDO NJUKI T/A GEKA GENERAL SUPPLIES.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Milimani – Nairobi (**Ngetich J.**) delivered on 12th September, 2019 in **HC Tax & Commercial Division Cause No. 119 of 2017**)

JUDGMENT OF THE COURT

[1] This appeal arises from a suit which was initiated in the High Court by **Gerald Kamondo Njuki T/A Geka General Supplies** (respondent), against **Postal Corporation of Kenya** (the appellant herein). The respondent sought judgment for Kshs. 205,095,000, as damages for breach of contract, and interest at court rates.

[2] The respondent's cause of action was founded on a lease agreement dated 25th July, 2016, entered into between the respondent and the appellant, wherein the appellant leased its property known as Post office plot **LR. No. Thika/Mun/BLK 2/840** Madaraka (suit property), to the respondent for a term of 5 years and 3 months with effect from 1st September, 2016. The respondent paid a total sum of Kshs. 1,846,200 as rent for the first quarter, VAT at 16.5%, security deposits, legal fees and stamp duties.

[3] The respondent contended that in breach of the agreement, the appellant failed to hand over vacant possession of the suit property to him for a period of six months after the execution of the lease agreement. Subsequently, the appellant offered to refund the respondent the rent he had paid and the refund was done in February 2017. The respondent maintained that as a result of the appellant's breach of the contract and inability to give it vacant possession, it had suffered loss of business opportunity and unrealized gain of Kshs. 205,095,000.

[4] In its statement of defence, the appellant denied entering into a lease agreement with the respondent, but admitted having offered to lease a portion of an undeveloped part of its property to the respondent on the understanding that **Julius Mwangi Kuria and Edward Kuria Mwangi, T/A as Nationwide Distributors** (Nationwide Distributors), who were holding the demised premises under license, would vacate the premises pursuant to a notice of termination that had been issued by the appellant. However, Nationwide Distributors refused to vacate the premises and instead filed suits in Thika Chief Magistrate's Court and Kiambu Business Premises Rent Tribunal, and obtained orders restraining their eviction.

[5] The appellant contended that the respondent was a sub-tenant of Nationwide Distributors and was aware that the demised premises were not vacant when it entered into the lease agreement with the appellant. The appellant maintained that the letter of offer given to the respondent was only an intention to lease and was neither a lease nor could it create contractual obligations. In the alternative the appellant pleaded that the respondent failed to provide guarantors and did not accept the tenancy within the stipulated period of 14 days, and that in any case, it refunded at the respondent's request the monies received from the respondent. The appellant therefore contended that the respondent's claim was frivolous, vexatious and brought in bad faith merely to embarrass the appellant.

[6] Upon hearing the contending evidence adduced before her, and considering the pleadings and the submissions, the learned Judge found that the respondent had paid a total of Kshs. 1,846,200 to the appellant by two cheques, and that although the payment of rent for the 1st quarter was not paid within the required 14 days, the same was accepted by the appellant who recognized the respondent as its *bona fide* tenant. The learned Judge held that the appellant was in breach of the lease agreement as it failed to hand over vacant possession to the respondent on the commencement date of the lease. As concerns Nationwide Distributors who were in occupation, the learned Judge held

that it was the responsibility of the appellant to ensure that the premises were vacant by the time the respondent's lease was to take effect. The learned Judge found that the appellant kept the respondent's money for six months during which period, the respondent was unable to access the premises and was denied access to his money.

The Judge concluded that the respondent lost business opportunity and awarded him Kshs. 20,000,000 as damages.

[7] In its written submissions, the appellant identified five issues from the seven grounds which were set out in the memorandum of appeal. These were: whether the Judge erred in awarding the respondent general damages for breach of contract; whether there was a valid lease as between the appellant and the respondent; if the answer is in the affirmative, whether the said lease was admissible in evidence; whether the institution of the respondent's suit in the superior court was in compliance with the law, and if not, what orders should issue; whether there was breach of contract on the part of the appellant; and whether the respondent was entitled to claim damages.

[8] The appellant faulted the learned Judge for awarding general damages which are not recoverable in a claim for breach of contract; and for awarding damages when loss was neither quantified nor ascertained. The appellant contended that the respondent did not adduce any evidence to show payment of any requisite licences or approvals for the intended business, nor did he adduce any evidence of loss incurred or any projection of the purported lost business projects or opportunities. It was argued that the claim of loss of Kshs. 205,095,000 that was pleaded by the respondent in the plaint was in the nature of special damages, which ought to have been strictly proved.

[9] The Court was urged to find that the award of Kshs. 20 million as general damages for breach of contract was erroneous, as the respondent had pleaded the loss suffered and failed to discharge the onus of strictly proving the said loss. In support of these submissions, the appellant cited several authorities including Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Limited [2016] eKLR; Kenya Tourist Development Corporation vs Sundowner Lodge Limited [2018] eKLR; Kenya Power & Lighting Co. Ltd vs Abel M Momanyi Birundu [2015] eKLR.

[10] In addition, it was argued that there was no valid lease between the appellant and the respondent, as the agreement signed was only an agreement to lease, and was neither a lease nor registered as required under section 61(2) of the Land Act; and that the respondent failed to comply with the terms of acceptance of the lease offer. Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited (2017) eKLR was relied upon for this proposition.

[11] The appellant lamented that it had raised a preliminary objection with regard to the competence of the suit, which objection was not determined by the court. This was, that the respondent had failed to comply with **section 24** of the **Postal Corporation Act**, which requires that any legal proceedings shall not be commenced against the appellant until a written notice of one month is served upon it, containing all the particulars of the claim. It was argued that the respondent failed to serve the required notice and therefore this suit should fail as the requirement was mandatory. In this regard, Sumac Development Company Limited vs George Munyui Kigathi & 2 Others [2017] eKLR was cited.

[12] The appellant argued that the contract was frustrated when Nationwide Distributors who were expected to vacate the premises, declined to do so, and instead obtained orders from the court stopping their eviction. In this regard, Five Forty Aviation Limited vs Erwan Lanoe [2019] eKLR was relied on.

[13] On damages, the appellant maintained that the respondent demanded refund of his monies and unconditionally accepted the refund, thereby waiving his right to any other action. Relying on 748 Air Services Limited vs Theuri Munyi [2017] eKLR, it was argued that the respondent having been refunded his monies, he was restored to the position he was in prior to the signing of the agreement and was therefore estopped from making any fresh demands for damages.

[14] In his written submissions, the respondent pointed out that there was a letter of offer and a duly signed lease agreement, and the learned Judge was correct in finding that the appellant failed to give the respondent vacant possession after the respondent had completed payment; that the burden of evicting the appellant's former tenant was on the appellant; that having failed to obtain the demised premises, the respondent was unable to carry out its intended business and therefore suffered loss and damage, and that the appellant was therefore liable for breach of contract, as the contract was not mutually terminated.

[15] The respondent maintained that he had a legitimate expectation as he intended to carry on business, and had a projection of the expected earnings; that loss was pleaded at paragraph 14 of the plaint as Kshs. 205 million; that the trial court awarded Kshs. 20 million; and that the appellate court ought not to disturb that award as it was not so inordinately high or low as to represent an erroneous estimate. On the preliminary objection, the respondent argued that the same was not raised during the trial and the Judge cannot be blamed for failing to make any determination on a matter not raised before her. The Court was urged that the appellant admitted receiving the consideration of Kshs. 1,846,200, and was bound by the terms of the contract that it had signed, and that the contract was terminated when the appellant reimbursed the respondent the contractual amount, having failed to perform its part of the contract.

[16] This being a first appeal, we are under an obligation to consider and re-evaluate the evidence that was adduced before the trial court and come to our own conclusion. We must however take into account that the trial Judge had the advantage of seeing and assessing the demeanor of the witnesses. (Selle & anor v Associated Motor Boat Co. Limited & others [1968] EA 123).

[17] In accordance with the duty imposed upon us, we have carefully considered the record of appeal, the rival submissions and the authorities cited. We discern three main issues for our consideration. That is, whether there was a valid lease agreement between the appellant and the respondent; if so, whether the appellant was in breach of the agreement; and if so, whether the Court should interfere with the damages of Kshs. 20 million that was awarded to the respondent.

[18] It is not disputed that there was a letter dated 2nd August, 2016 that was written by the appellant to the respondent, wherein the appellant offered to lease the suit property to the respondent, and enclosed a letter dated 25th July, 2016 duly signed by its General Manager,

Legal Services/Corporation Secretary, setting out the terms and conditions of the proposed lease. The respondent signed the letter, confirming acceptance and agreeing to the terms and conditions of the lease that had been provided. It is also not disputed that in accordance with the letter of 25th July, 2016, the respondent paid the required consideration of Kshs. 1,846,200 which included payment for legal fees and stamp duty. This amount was admittedly paid late but was accepted by the appellant. It is clear that there was an offer and an acceptance followed by payment of consideration, but no formal lease was signed or registered.

[19] In **Mega Garment Limited v Mistry Jadva Parbat & Co.(Epz) Limited** [2016] eKLR, this Court discussing the status of an unregistered lease, stated as follows:

“The time-honoured decision of this Court in Bachelor’s Bakery Ltd v Westlands Securities Ltd (1982) KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter partes even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law hold true in this case.”

[20] In light of the documents exchanged and signed between the appellant and the respondent, and the consideration paid, there was a contractual legal relationship as between the appellant and the respondent. The respondent having even paid legal fees and stamp duty for the lease, it was the responsibility of the appellant to ensure that a formal lease agreement was drawn and registered. The appellant cannot therefore wriggle out of the agreement by relying on its own default. Moreover, the appellant waived its right to rescind the lease agreement due to the failure by the respondent to make payment within the required time, when it accepted the payment after the required time and recognized the respondent as its bona fide tenant.

[21] According to the terms that were agreed by the parties, the lease was to commence from 1st September, 2016, which means that the respondent was to get vacant possession by that date. It is not in dispute that this did not happen, and that six months down the line, the respondent demanded to be refunded the rent he had paid. The appellant maintained that the contract was frustrated because Nationwide Distributors, the outgoing tenants, refused to vacate the premises and obtained court orders restraining their eviction. The appellant having entered into a lease agreement with the respondent, it was its responsibility to ensure that the premises were available. The fact that it was unable to grant the respondent vacant possession was a clear indication of its breach of the agreement. Indeed, contrary to the agreement, the appellant shifted the burden of obtaining vacant possession from its outgoing tenant, Nationwide Distributors, to the respondent. We are satisfied that the learned Judge was right in finding that the appellant was in breach of the lease agreement.

[22] On the issue of assessment of damages, in his plaint, the respondent prayed for damages of Kshs. 205,095,000 as well as damages for breach of contract. The learned Judge only awarded a sum of Kshs. 20 million which she considered sufficient to compensate the respondent. The learned Judge did not make any order regarding the damages of Kshs. 205,095,000 that was sought by the respondent. It is noteworthy that although the respondent claimed a specific sum of Kshs. 205,095,000 which he claimed to be damages arising out of lost business opportunity and unrealized gain, no specific particulars of this loss were pleaded nor did the respondent adduce evidence in proof of the alleged loss.

[23] In his evidence the respondent stated that he expected to put up rental containers from which he expected to get a sum of Kshs. 3,360,000 per month for the period of the lease. However, there was no evidence of any containers that he had procured or any professional evidence regarding the comparable income from such rental containers. It is clear that the claim for Kshs. 205,095,000 was not properly pleaded nor established, and the learned Judge ought to have made a specific order dismissing the same. As was stated in **David Bagine v Martin Bundi** [1997] eKLR, it has been held time and again by this Court that special damages must be pleaded and strictly proved, and a party cannot expect that damages will be awarded on their word without any proof.

[24] As regards the award of damages of Kshs. 20 million, the amount was awarded as compensation to the respondent. It is not clear what the respondent was being compensated for, nor is there any justification for the quantum adopted by the trial Judge. The respondent having prayed for damages for breach of contract, we can only assume that the award of compensation was in regard to that breach.

[25] In **Kenya Tourist Development Corporation v Sundowner Lodge Limited** [2018] eKLR this Court had this to say regarding general damages for breach of contract:

“...as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication....

The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent “had suffered serious damages” (sic).

What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove.”

[26] Likewise, the respondent claimed the sum of Kshs. 205,095,000 as the loss that he claimed to have suffered out of the appellant’s breach. It was a duplication of his claim to seek an award for general damages. In any case, having failed to prove his claim for Kshs. 205,095,000 there was no basis for the learned Judge awarding him the sum of Kshs. 20 million. We come to the conclusion that the learned Judge misapprehended the law in making the award.

[27] For these reasons, we allow this appeal, set aside the judgment of the trial court and dismiss the respondent's claim. In the circumstances of this case, we do not find it appropriate to make any order for costs. Those shall be the orders of this Court.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MARCH, 2021.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR