IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & MURGOR, JJ,A)

CIVIL APPEAL NO. 23 OF 2012

BETWEEN

SIMON NDUNGU MUNGAI.....1ST APPELLANT

PASTOR VINCENT MUNGAI

T/A OVERCOMERS CHRISTIAN

CENTRE & LIVELINK COMMUNICATIONS.....2ND APPELLANT

AND

MUNICIPAL COUNCIL OF KIAMBU.....RESPONDENT

(Appeal from judgment and decree of the High Court at Nairobi (Musinga, J) delivered 31st January 2011 in

HCCC No 67 of 2008)

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JUDGMENT OF THE COURT

By a lease agreement dated 1st February 2005 ***the respondent***, the ***Municipal Council of Kiambu*** leased to the appellants, ***Simon Ndungu Mungai*** and ***Pastor Vincent Mungai,*** both clergymen trading as ***Overcomers Christian Centre & Livelink Communications, the appellants,*** the Main Hall of the community centre, *(the Hall)* for a period of two years renewable at a monthly rent of Kshs. 15,000 payable effective from 1st April 2005. The agreement expired on 31st March 2007, and thereafter the appellants became month to month tenants.

The appellants were said to have undertaken extensive renovations and repairs, and converted the Hall for use as a church, library, printing press, broadcast production studio and a community upgrading centre.

Subsequent thereto, they claimed that on 30th June 2007, the respondent unlawfully evicted them from the premises, and closed down the

Hall, alleging that there was outstanding rent; that on 31st August 2007, the respondent broke the padlocks, entered into the Hall and removed the appellants' equipment and other goods, which it had refused to return, and damaged other goods beyond repair. As a consequence the appellants particularized their loss and damage as;

a) a sum of Kshs 1,430,305 being the value of the renovations;

b) loss of business for printing, broadcast production and recording of Kshs. 5,753,000;

c) value of the lost and damaged goods of Kshs. 16,651,950.

In the result, they prayed for;

a) an order for inspection, verification and release of the appellants confiscated goods and equipment pending the hearing and determination of the suit;

b) the value of the goods as well as loss of business in the sum of Kshs. 22,404,950;

c) compensation for the renovations of Kshs. 1,440,305;

d) general damages for breach of contract; and

e) costs of the suit and interest.

The respondent admitted having entered into a lease with the appellants, but denied that they had renovated the Hall, or that they were evicted or that they had taken the appellants' goods and had refused to release them, or that the appellants had suffered any loss. It was their contention that the appellants were merely requested to pay the outstanding rent arrears upon expiry of the lease.

The appellants filed a plaint on 6th March 2008 and on 16th April 2008, the respondent filed its defence. The plaint was subsequently amended with the leave of the court on 12th March 2008.

When the respondent failed to file a response to the amended plaint, the appellants thereafter requested for judgment to be entered against the respondent. And on 9th April 2010, the Deputy Registrar *(Hon. Ominde)* entered judgment in favour of the appellants.

When the suit came up for formal proof, the hearing proceeded with the testimony of the Pastor Vincent Mungai, the 2nd appellant, after which, the appellants closed their case. As the respondent did not offer any witnesses for the defence, the proceedings were closed, whereupon both parties filed written submissions.

In its judgment, the High Court (*Musinga, J*, (as he then was)) set aside, the interlocutory judgment entered by the Deputy Registrar, reasoning that it was wrongly entered, as the respondent had filed a defence which effectively denied the appellants' claims.

The court went on to find that a month to month tenancy had come into existence following the lapse of the two year lease, and concluded that the appellants were as a consequence, entitled to one month's notice of termination of the tenancy, which was not given. With respect to the eviction, the court found that it was unlawful as the appellants were not notified of the termination of the tenancy on account of arrears of rent, and further no court eviction order was produced.

In considering the sums claimed, the learned judge declined to award the claim for renovation of the Hall, as he concluded that the amounts were not proved. Also not awarded was the claim for compensation for the renovations of the Hall, as the trial court found that no provision was made in the lease agreement for such reimbursement.

On the question of quantum of damages payable, the court was not satisfied that the award of Kshs. 23,835,255 was proved. Instead, the court awarded the appellants a sum of Kshs. 2,000,000 in general damages.

Aggrieved by the trial court's decision, the appellants have brought this appeal on grounds that the learned judge erred in setting aside the interlocutory judgment of the court particularly as the respondent had not applied to have it set aside; in wrongly interpreting ***Order VIA*** of the ***Civil Procedure Rules***; in failing to appreciate that he had no jurisdiction to set aside the interlocutory judgment; in refusing to grant special damages of Kshs.23,835,255 for which judgment had already been entered; in rejecting the appellants' evidence on the amount of loss suffered; in wrongly assessing general damages at Kshs. 2,000,000, instead of at a higher sum; in writing a judgment in respect of a non-existent interlocutory judgment and in determining the suit to the appellants' prejudice against the weight of the evidence.

In the submissions before us, learned counsel for the appellants, ***Mr. Maruja*** appearing with Mr. Macharia and holding brief for Mr. Muraguri submitted that despite the learned judge's finding that the appellants were unlawfully evicted, the court wrongly declined to grant the sum of Kshs. 23,835,255 claimed which had been proved by the attached inventory, specifying the amount of loss as Kshs. 23, 835,255.

On his part ***Mr. Cheserek,*** learned counsel for the respondent opposed the appeal and submitted that the interlocutory judgment was irregularly entered as the respondent had filed a defence, and that the fact of not having filed an amended defence could not render the suit undefended under the rules. Counsel further argued that, the court had jurisdiction to address the issue.

On the issue of special damages, counsel pointed out that no documents or receipts were produced to support the claim for Kshs. 23,835,255. It was contended that since the losses were not specifically proved, the sums were not capable of being awarded.

In respect of general damages, counsel conceded that the amount of Kshs. 2,000,000 was reasonable, and as the appellants had not provided any justification for demanding a higher sum, counsel urged us not to disturb the award in respect of general damages.

We have carefully considered the pleadings, the appellant's submissions and the evidence before the trial court and are of the view that the main issues for our consideration are;

i) Whether the learned judge had jurisdiction to set aside the interlocutory judgment;

ii) Whether in finding that the respondent had filed a defence the learned judge rightly set aside the interlocutory judgment;

iii) Whether the judge wrongly declined to award the special damages claimed; and

iv) Whether the learned judge rightly awarded the sum of Kshs. 2,000,000 in general damages.

This is a first appeal and it is our duty to re-evaluate the evidence and come to our own conclusion on the facts. But in so doing, we must remain cognisant of the fact that we have not seen or heard the witnesses that were before the trial court. See ***Mwanasokoni vs Kenya Bus Limited [1985] KLR 931.***

As the jurisdiction of the High Court to set aside the interlocutory judgment has been impugned, we consider this an essential place to begin our analysis. The appellants' contention is that it was not the prerogative of the court to determine the issue, as the respondent had not at any time challenged the judgment or sought to have it set aside.

The interlocutory judgment was in terms *interalia*;

> ***"The defendant herein, MUNICIPAL COUNCIL OF KIAMBU, having been duly served with copies of amended plaint and having failed to file defence to the amended plaint within the prescribed period of time and upon application by the plaintiff's advocate dated 1st April 2010, is entered judgment as prayed.***
>
> ***The award of costs shall await judgment when the suit shall be set down for formal proof."***

In setting aside the interlocutory judgment, the learned judge stated thus;

> ***"Since the defendant did not file an amended defence it follows therefore that it relied on it in answer to the amended plaint and in terms of Order VI rule 10(2) there was a joinder of issue in the pleadings last filed. The defendant had denied the plaintiffs claim in its totality and averred that the suit is frivolous, vexatious and an abuse of the court process. In the circumstances, the interlocutory judgment was wrongly entered by the Deputy Registrar and is hereby set aside ex debito justiciae".***

Whether the learned judge had jurisdiction to set aside the interlocutory judgment, requires that we consider the relevant provision which is ***order IXA rule 10*** of the retired rules**.** It provides;

> ***"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms that are just."***

In other words, the provision empowers the court to set aside the judgment on terms that are just. There is no requirement under that provision that any party must make a formal application. This provision is dissimilar for instance to, a related provision namely, ***order IXB rule 8*** on the hearing and consequence of non-attendance by a party. ***Rule 8*** provides;

> ***"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just". (emphasis ours).***

Clearly, there is a difference between the two provisions, as the former does not require a party to apply to have the judgment set aside, while the latter expressly specifies that such application be made.

We have considered the record, and find that it is true that at no time did the respondent apply for a review of the decision or to have it set aside. This notwithstanding, the provision sufficiently empowered the court to set aside the interlocutory judgment on just terms, and we so find.

That said, we find that the court had the necessary jurisdiction to hear and determine the suit which leads us to the next issue of whether the leaned judge rightly found that the respondent's defence was sufficient to answer the charges incorporated in the amended defence. As seen above, the learned judge found that in terms of ***order VI rule 10 (2),*** there was a joinder of issue of the denials in the respondent's defence to the issues raised in the amended plaint, and therefore the failure to file an amended defence did not negate the denials.

When the initial plaint is compared to the amended plaint, what becomes apparent is that the latter merely sought to provide additional details pertaining to the alleged confiscation of the appellants' goods, of which some were hired out to generate income and which the respondent had refused to return. Considered alongside the defence, at paragraph 9 the respondent stated;

> ***"The Defendant denies refusing to release the Plaintiffs goods and puts the Plaintiffs to strict proof thereof".***

Having specifically denied retaining the appellants' goods, we agree with the learned judge that these specific denials were an effective response to the amended plaint, and therefore did not require to be denied once again in an amended defence. In law, amendments to pleadings go back to the original pleading. See ***Shiraz Shabudin Sayani vs Mrs. I. Rajput [2001] eKLR.*** There was thus one and not two plaints to respond to in the suit. We therefore find that the respondent's defence was sufficient to address the claims as set out in the appellants' suit, and the learned Deputy Registrar erred in entering the interlocutory judgment notwithstanding the existence of the respondent's defence.

We next turn to the claims for renovation costs and for loss of business for printing, broadcast production and recording. These are claims of special damages, all totaling to Kshs. 23, 835,255. Regarding such claims, it is trite that special damages must be specifically pleaded and

proved. In the case of ***Hahn vs Singh [1985] Kenya Law Reports 716***, this Court stated thus,

> ***"…special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves."***

A consideration of the amended plaint does not disclose that special damages were specifically pleaded. What was referred to was Kshs. 1,430,305 for the value of the renovations; loss of business for printing, broadcast production and recording of Kshs. 5,753,000 and the value of the lost and damaged goods of Kshs. 16,651,950, all totaling Kshs. 23, 835,000. No itemized valuation or breakdown was provided in respect of the items set out in the plaint.

Furthermore, besides stating that, *"We suffered loss and damage amounting to Kshs, 23,835,225 as per paragraph 14 A of the amended plaint…,"* Pastor Mungai's evidence did not provide anything further to establish or fortify the appellants claims for special damages.

Beginning with the renovation costs, the learned judge found that these were not proved, because there was no evidence to show how much was spent on the renovations. The evidence shows that, a bill of costs was produced that indicated in the first instance a sum of Kshs. 855,305. This figure was later revised to Kshs. 1.4 million. The appellants did not produce any contract.

In sum, the evidence did not disclose the cost of, or the actual sums paid towards the renovation of the Hall leading to the conclusion that the cost of renovation was unknown, and therefore not proved. As to whether the sums were reimbursable, the learned judge observed that the tenancy agreement clearly stated that the *"Overcomers Christian Centre would not seek refund of the money spent"*, which coupled with the fact that the sum was not proved, meant that the sums were not due to the appellants. Consequently, this claim fails.

As concerns the loss of business for printing, broadcast production and recording, it is apparent that the issue was not addressed by the learned judge. On our own assessment as the first appellate court, we find that there was no specific pleading or quantification of the loss. Nor was there supporting or a documentary evidence tendered, and the reason for this could be that no such losses were quantified or proved by either oral or documentary evidence. As such, this claim also fails.

As to whether there was any evidence to support the value of the lost and damaged goods, our attention was drawn to the inventory which provided a list of the goods and equipment alleged to have been confiscated. No valuation or receipts or any other documentary evidence was supplied to support these claims.

In view of the aforegoing, we find that the learned judge rightly found that the appellants had not made out a case for an award of special damages, and likewise, we so find.

Turning to the issue of general damages, the appellants have faulted the learned judge for awarding an amount of Kshs. 2,000,000, which they considered to be far below expectation when their losses are taken into account.

In awarding general damages, the learned judge stated thus;

> ***"Considering the nature and loss and/or damage that the plaintiffs were put into as a result of the defendant's unlawful acts, I assess the damages payable for unlawful eviction at Kshs. 2 million which I award the plaintiffs."***

Whether the award was appropriate or not, we would have thought that the appellants would have advanced specific reasons for finding the award insufficient. None was provided.

It is further appreciated that this Court will only interfere with the damages awarded by the High Court where it is established that the judge took into account some erroneous principle or that he misapprehended the evidence.

In the case of ***Butt vs Khan [1981] 1KLR 349*** Law LJ stated;

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on some wrong principles, or that he misapprehended the evidence in some material respect, and s arrived at a figure which was inordinately high or low."***

In ***Henry Hidaya Ilanga vs Manyema Manyoka [1961] EA 713,*** the predecessor of this Court applied the rule laid down by the ***Privy* Council** in ***Nance vs British Columbia Electric Railway Co Ltd (4), (1951) AC page 613*** when discussing the parameters to be observed by an appellate court in deciding whether to disturb an award of damages by a trial judge, when it observed that;

> ***"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at the first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

The appellants have not specified in what way the learned judge applied a wrong principle of law or took into account some irrelevant factor or leaving out of account some relevant one; or in what way the amount awarded was so inordinately low that it must be a wholly erroneous estimate of the damage.

In our view, the amount awarded was fair and reasonable having regard to the circumstances of the case, and therefore we have no basis upon which to interfere with that award.

In the result, the appeal is without merit and is hereby dismissed. The respondent shall have the costs of the appeal.

It is so ordered.

Dated and Delivered at Nairobi this 22nd day of February, 2019.

P.N. WAKI

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR