



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, OKWENGU, & SICHALE, JJA.)

CIVIL APPEAL NO. 6 OF 2014

BETWEEN

DWIJENDRA KUMAR T/A

RAFKINS COLLEGE.....APPELLANT

AND

THE REGISTERED TRUSTEES OF

NATIONAL UNION OF KENYA MUSLIMS

COAST PROVINCE TRUST FUND..... RESPONDENT

(Being an appeal against the judgment and decree of the High Court of Kenya at Mombasa (Ibrahim, J.) dated 24th August, 2012

In H.C.C.A. No. 147 of 2007)

JUDGMENT OF THE COURT

[1] Litigation giving rise to this appeal commenced through a Plaintiff dated 13th May, 2004, filed at the Chief Magistrates' Court at Mombasa in which *Dwijendra Kumar T/a Rafkins College* (the appellant herein) sued the *Registered Trustees of National Union of Kenya Muslims Coast Province Fund* (the respondent herein). The respondent a corporate entity registered under the Trustees (Perpetual Succession) Act *Cap 164* of the Laws of Kenya, was at all material times the owner of premises known as *Mombasa/ Block XXI/43* (hereinafter referred to as the suit property). The appellant was a tenant operating a college on the suit premises. In the plaintiff the appellant sought orders as follows:

- a) *An injunction restraining the defendant, its agents, servants or all persons acting for or through it from levying, charging, or the (sic) demanding from the plaintiff rent or levying distress for rent for four years from June 2003 in respect of the premises rented by the plaintiff in Mombasa/ Block XXI/ 43.*
- b) *A declaration that the defendant is bound by the agreement dated 17th April, 2003 particularly clause 1 and 6 thereof.*

c) *Costs of the suit.*

[2] The appellant's suit was anchored on a written agreement dated 17th April, 2003 between him and the respondent, according to which, the respondent undertook not to levy, charge or demand rent from the appellant for a period of four years from the date of receiving vacant possession of part of the premises then rented by the appellant (constituting five classrooms on the first floor of the suit premises). The appellant contends that he handed over vacant possession of the 5 classrooms to the respondent as agreed, but that contrary to the agreement the respondent was demanding rent and had threatened to levy distress for rent against the appellant. The appellant therefore filed suit urging the court to apply the doctrine of proprietary estoppel and stop the respondent's inequitable conduct by granting the relief sought.

[3] On its part, the respondent filed a defence dated 14th June, 2004, in which the respondent admitted the existence of the agreement dated 17th April, 2003 but alleged that the moratorium extended to the appellant was subject to a consideration which was the appellant extending and/ or building classrooms on the rooftop of the existing building, in addition to the appellant handing over vacant possession of 5 classrooms it occupied at the time; that the appellant failed to extend or build the classrooms, and thus occasioned the respondent great loss of income, prompting the respondent to distress for rent. The respondent thus contended that the appellant was the one in breach of the agreement and his claim cannot succeed as the doctrine of proprietary estoppel does not apply. The respondent therefore urged the court to dismiss the appellant's suit with costs.

[4] The hearing of the suit proceeded before Resident Magistrate (*T. Nzioki*), who upon hearing the evidence for each party, and the submissions by the counsel, delivered a judgment on 30th August, 2007, dismissing the appellant's claim with costs for want of merit. Being dissatisfied with that outcome the appellant lodged an appeal before the High Court in Mombasa, which appeal was heard and also dismissed by *Ibrahim J.* (as he then was). This is what has led to the present appeal, being a second appeal.

[5] In his memorandum of appeal the appellant has attacked the judgment of the High Court on 10 grounds. In a nutshell the grounds raised are that the learned judge erred in: relying on none existent evidence and or misinterpreting the evidence adduced at the trial; failing to find that the surrender of vacant possession of the five classrooms constituted adequate consideration for the agreement; failing to find that the terms of the agreement were binding on both parties; failing to find that the respondent gained valuable consideration in the transaction as it rented the 5 rooms handed over by the appellant at a rent greater than that originally paid by the appellant; failing to find that it was the respondent who had breached the contract and not the appellant, failing to find that there was no justification for claim for rent or distress for rent as long as the contract was in operation; and interpreting the contract as well as the law governing it erroneously.

[6] The appellant prayed for the appeal to be allowed, the judgment of the High Court set aside together with part of the trial court's judgment dismissing the prayer for injunction, and orders of injunction issued as sought by the appellant in his plaint. By leave of court granted on 8th May, 2014, the parties were allowed to proceed with the appeal through written submissions, with the matter later coming up for highlighting of the submissions on 16th October, 2014.

[7] In his submissions the appellant reiterated that the only consideration required on its part was the surrender of the 5 classrooms in exchange for the rent moratorium, and that the appellant having handed over the 5 classrooms, the moratorium was already in force at the time the respondent demanded for the rent and threatened to levy distress. The appellant faulted the judge for failing to find that there was consideration for the moratorium, and maintained that failure by the appellant to build the extra classrooms was not part of the consideration. In addition, that even if the appellant had the duty to build the extra classrooms, the same was subject to a condition precedent- that the space for the said classrooms had to be demarcated and plans thereof approved by the respondent and the relevant authorities; that the respondent failed to facilitate this exercise thus, making it impossible for the appellant to construct the additional classrooms. The appellant faulted the learned judge for adopting an interpretation that in effect

amounted to re-writing the contract between the parties.

[8] For the respondent, it was contended that the impugned judgment was sound as the court had a duty to pay homage to the true intentions of the parties; that the appellant's allegation that the learned judge did not re evaluate and re analyze the evidence was without basis; and that since no issues of law had been raised, the Court should dismiss the appeal in its entirety.

[9] We have considered this appeal, the entire record of appeal and the submissions of the parties. We are mindful of the fact that this being a second appeal, this Court's jurisdiction is limited to dealing with matters of law only, and that this Court is obliged to pay homage to the concurrent findings of fact by the two lower Courts. For as this court has previously held, it will not interfere with the findings of fact of the two lower courts unless it is clear that the magistrate and the judge have so misapprehended the evidence that their conclusions are based on an incorrect basis (*Onyango & Another v Luwayi* [1986] KLR 513 applied in *Agnes Kwamboka Ombuna v. Bisira Kerubo Ombuna* [2014] eKLR)

[10] It was common ground that the appellant was a tenant of the respondent and occupied the first and second floor of the building on the suit property prior to 17th April 2013; and that an agreement dated 17th April 2013 was signed between the parties, pursuant to which the appellant surrendered to the respondent 5 classrooms on the first floor; that in the agreement the respondent authorized the appellant to carry out extension and construction of classrooms on the roof of the building at his own costs, but subject to the approval of building plans by the respondent and the Mombasa Municipal Council Engineer; and that the respondent also undertook not to demand rent from the appellant for a period of four years from the date the appellant handed over vacant possession of the 5 classrooms.

[11] The two lower courts made concurrent findings that although the appellant surrendered the 5 classrooms to the respondent, the appellant did not extend or construct classrooms on the roof of the building. Consequently the respondent demanded rent from the appellant and threatened to levy distress. The issues for determination in this appeal is whether in demanding rent the respondent was in breach of the agreement entered into between it and the appellant, and whether the appellant is entitled to the orders sought. Both the trial magistrate and the learned judge addressed this issue. That issue gives rise to the auxiliary question whether the construction of the classrooms on the roof of the building was a material term of the agreement signed by the parties which the appellant was obliged to perform. This was an issue that was addressed by the learned Judge as follows:

“The Landlord was to receive vacant possession from the tenant. What was the consideration moving from the tenant in support of the agreement? This is the gist of the appeal. Is the memorandum of agreement ambiguous as to require an elaborate interpretation as contended by counsel for the appellant. It is important to appreciate that the respondent was the owner of the premises. As a tenant, the appellant was contractually bound to pay rent for the five classrooms that he was occupying on first floor. The memorandum of agreement does not state why the appellant was surrendering the five classrooms. The agreement must be read as a whole to ascertain the intention of the parties. As prudent business men the respondent desired to have five classrooms on the first floor and the appellant needed more space in the form of classrooms. The respondent states he does not have money to build the classrooms now. The appellant offers to build the classrooms in consideration that he recovers the costs by way of offsetting from the rent that he would have otherwise paid to the respondent. They took into account the cost of the project and they agreed on a period of four years as sufficient for the appellant to have recouped costs of the project. They reduced the agreement into writing. The contention by the appellant that the surrender of the 5 classrooms was in consideration of rent waiver does not make commercial sense..... Why would a landlord allow a tenant to occupy premises for free for three years? Such an interpretation does not give commercial efficacy to the agreement. It is unreasonable (sic) interpretation that I am satisfied the respondent would not have agreed to. The agreement if interpreted as contended would mean that the appellant would stay four years without paying rent and leave without construction and that the respondent would

be contractually helpless to do anything about it. Consideration must be something of value. It need not be adequate but it must move from the promisor to the promisee. If the appellant was not paying rent for the 5 class rooms on the first floor, then one would understand that the respondent was gaining by the surrender of the 5 class rooms and the appellant was losing But such is not the contention...”

[12] Like the trial magistrate the learned Judge found that by not constructing the additional classrooms the appellant was in breach of the agreement and was not therefore entitled to the equitable remedy of injunction. We concur with the learned judge that the interpretation of the agreement depended on consideration of the agreement as a whole and not consideration of an isolated clause, and that the intention of the parties was clear from the facts established by the concurrent findings of the lower courts.

[13] **The appellant sought to convince this court that the handing over of the 5 classrooms constituted adequate consideration on its part and that by failing to hold as much, the learned judge in essence erroneously re wrote the contract. However as rightly stated by the first appellate judge, consideration need not be adequate. It only needs to be something of value that moves from the promisee. The agreement not only provided for the handing over of the 5 classrooms by the appellant but also the extension and construction by the appellant of classrooms on the roof of the building. Thus although the clause concerning the extension and construction of classrooms was worded in a permissive rather than a mandatory language, the facts established, that the parties took it into account and intended it to form part of the obligation to be performed by the appellant. The issue of re writing the contract does not therefore arise as the clause regarding the extension and construction of classrooms was part of the agreement entered into by the parties.**

[14] **The allegation that it was the respondent, who made it impossible for the appellant to construct the classrooms by failing to avail the building plans, is a matter of fact that is not open for our consideration. Suffice to note that the agreement signed by the parties provided at clause 4 of the agreement:**

“That the tenant shall bear all the costs for the preparation of the building plan and approval thereof and for the extension and construction of the new classrooms on the top of the roof of the building”

[15] **The clause implies that it was the responsibility of the appellant to procure the building plans and all necessary approvals. The essence of frustration of an agreement is that it should not be due to the act or election of the party seeking to rely on it. A contracting party cannot rely on self induced frustration, that is, frustration due to his own conduct or to the conduct of those for whom he is responsible. Frustration may be self induced where the alleged frustrating event is caused by a breach or anticipatory breach of contract by the party claiming that the contract has been frustrated. (Chitty on Contracts, Vol. 1, General Principles, 28th Edition at paragraph 24-059 as cited with approval in Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another [2014] eKLR). That was the position herein and thus the appellant could not rely on his own breach to escape his obligations under the contract.**

[16] Further the orders sought by the appellant in his suit involved the exercise of judicial discretion. An appellate court can only interfere with the exercise of such discretion where the trial judge misdirected himself in some matter and as a result arrived at a wrong decision or where it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been some injustice (Mbogo & Another v Shah [1968] EA 93; Chotram v Nazari [1984] KLR 327). In this case there was nothing to show that the trial judge exercised his judicial discretion wrongly or whimsically. To the contrary, the judgment of the trial magistrate and the learned Judge show that appellant was undeserving of the exercise of such discretion.

[17] For the above reasons we come to the conclusion that this appeal lacks merit. It is accordingly dismissed with costs

Dated and delivered at Mombasa this 12th day of March, 2015

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR