Gogni Rajope Construction Company v Dennis (Environment and Land Appeal E002 of 2022) [2025] KEELC 684 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 684 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL E002 OF 2022

BN OLAO, J

FEBRUARY 20, 2025

BETWEEN

GOGNI RAJOPE CONSTRUCTION COMPANY ..... APPELLANT

AND

KUJAJU NDIGIRO DENNIS ..... RESPONDENT

(Being an appeal arising from the Judgment and decree of Hon. Lucy Ambasi Chief Magistrate delivered on 11th January 2022 in Busia Chief Magistrate's Court Civil Case No 432 of 2014)

JUDGMENT

1. Kujaju Ndigiro DenniS (the Respondent herein) was the Plaintiff in Busia Chief Magistrate's Court Civil Case No 432 of 2014 where he sought Judgement against Gogni Rajope Construction Company Ltd (the Appellant herein) in the following terms:

    1. Kshs.235,500 being arrears of rent from 1st June 2013 to 1st October 2014 in respect of the property known as Bunyala/Bulemia/3638.
    2. Mense profits.
    3. Damages.
    4. Costs of interest.

    The basis of the Respondent's claim was that the Appellant having rented from the Respondent the property on the land parcel NO BUNYALA/BULEMIA/3638 (the suit property) failed to pay the rent due or to repair the damage to the house thereon.

2. The Appellant filed a defence in which it pleaded, inter alia, that the tenancy agreement between the parties was discharged and no longer existed and therefore it had no tenancy obligations. With regard

to the damage to the wall of the store, the Appellant pleaded that it had offered to repair the wall which it admitted to have damaged. However, the Respondent refused.

3. The suit was heard by Hon. Lucy Ambasi Chief Magistrate. In a judgment delivered on 11th January 2022, the trial magistrate found that the Respondent had proved his case. The trial magistrate accordingly entered judgment for the Respondent in the following terms as against the Appellant:

    a. Mesne profits at Kshs.672,000.

    b. Repair charges at Kshs.230,000.

    c. General damages at Kshs.500,000.

    d. Costs of the suit.

    e. Interest on (a) and (b).

4. Aggrieved by that judgment, the Appellant filed this appeal seeking the following orders:

    1. The appeal be allowed.

    2. The judgment of the lower Court in BUSIA CMCC NO 432 of 2014 be set aside and in it's place, judgment be entered dismissing the Plaintiff's suit with costs to the Defendant.

    3. The Respondent be ordered to pay the costs of this appeal.

5. The following sixteen (16) grounds of appeal have been proffered:

    1. The learned Trial Magistrate erred in law and fact by importing, suo moto, a requirement for a written notice of termination yet the tenancy agreement was un-written and no such notice was provided for or contemplated by the parties.

    2. The learned Trial Magistrate erred in law and fact by finding that the tenancy could only have been terminated by a written notice issued by the Appellant in disregard of the parties' conduct and contemporaneous evidence.

    3. The learned Trial Magistrate erred in law and in fact by finding that the absence of a notice of termination ipso facto extended the tenancy to 30th November 2018 whereas the parties conduct, the totality of the evidence and authorities cited by the Appellant proved the contrary.

    4. The learned Trial Magistrate erred in law and in fact by placing undue weight on the Respondent's evidence while failing to take into account or pay proper regard to the Appellant's clear, uncontroverted evidence that it vacated the premises in or about October 2012.

    5. The learned Trial Magistrate erred in law and in fact by failing to apprehend that the tenancy was terminated by forfeiture in when the Respondent locked the Appellant out of the premises with effect from 1st January 2013.

    6. The learned Trial Magistrate misapprehended the proper application of the "without prejudice rule", misdirected herself and wrongfully excluded (suo moto), congent and pertinent evidence already admitted by consent of the parties.

    7. The learned Trial Magistrate erred in law and in fact by conflating "tenancy", "actual possession", "pre-handing over inspection of repairs" and "actual occupation", thereby acting on wrong principles and arriving at contradictory findings irreconcilable with the evidence on record and the governing law.

8. The learned Trial Magistrate erred in law and in fact by disregarding binding authorities cited before her and proceeding to include the period between October 2014 and 2018 when the matter was pending in Court, in reckoning the length of the disputed tenancy.

9. The learned Trial Magistrate fundamentally misapprehended and misapplied the principle of "mitigation of losses", failed to properly construe the purport of the evidence before the Court and the Appellants submissions resulting in grave errors of law and fact.

10. The learned Trial Magistrate erred in law and in fact by finding that the Appellant proved repairs valued at Kshs.109,680 on the premises but failing to discount the same from the repair costs awarded to the Respondent thereby conferring a profit upon him.

11. The learned Trial Magistrate erred in law and in fact by assessing and awarding the Respondent excessive and punitive general damages of Kshs.500,000 yet the Appellant was not a trespasser.

12. The learned Trial Magistrate erred in law and in fact by awarding excessive and un-merited mesne profits of Kshs.672,000 computed at Kshs.14,000 per month yet it was not in dispute that the Appellant had surrendered part of the premises and rent would inevitably reduce.

13. The learned Trial Magistrate erred in law and in fact in awarding mesne profits of Kshs.672,000 and general damages of Kshs.500,00 which awards are punitive and amount to double compensation and profit for the Respondent.

14. The learned Trial Magistrate erred in law and in fact by failing to evaluate or to properly evaluate the issues raised by the Appellant in it's witness statement, testimony and written submissions.

15. The learned Trial Magistrate erred in law and in fact by dismissing the Appellant's entire defence despite the same being supported by clear and cogent evidence.

16. The learned Trial Magistrate erred in law and in fact by issuing a judgment contrary to established legal principles and incongruent with binding precedents cited before her.

6. The appeal has been canvassed by way of written submissions. These have been filed by Mr Ogola Instructed By The Firm Of Ochieng, Ogola & Company Advocates for the Appellant and by Mr Juma instructed by the firm of J. V. Juma & Company Advocates for the Respondent.

7. This is a first appeal and as is required under Section 78 of the *Civil Procedure Act*, I am obligated to re-consider, re-evaluate and re-examine the evidence which was adduced before the trial Court together with the relevant law and make my own independent conclusions on the issues raised in this appeal. In doing so, however, I must bear in mind that I neither saw nor heard the witnesses as they testified in the subordinate Court and give due allowance to that. That is the principle which was set out in the case of Selle & Another -v- Associated Motor Boat Company Ltd 1968 EA 123. In addition, this Court exercising it's appellate jurisdiction should only interfere with the trial magistrate's findings, of fact if they are predicated on wrong principles, on no evidence or on misapprehension of the evidence. That is the route which Courts in this country have continued to follow – Mkube -v- Nyamuro 1983 KLR 403, Peter M. Kariuki -v- A.g 2014 eKLR and Peters -v- Sunday Post Ltd 1968 EA 424 among others. I shall be guided by the principles set out in those cases among others.

8. Grounds NO 1, 2 and 3 of the Memorandum of Appeal can be considered together. The Trial Magistrate is faulted for importing suo moto, the requirement of a written notice to terminate the tenancy yet the same was not written and also for ips facto extending that tenancy to 30th November 2018. It is common ground that the tenancy agreement between the parties was not written. It was

therefore a controlled tenancy which is defined in Section 2(a) of the Landlord And Tenant (shops, Hotels And Catering And Establishments) Act Cap 301 as a tenancy:

a. "Which has not been reduced into writing; or ..."

Section 4(2) of the same Act provides that:

2) "A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoined by the tenant under such tenancy, shall give notice in that behalf to the tenant in the prescribed form."

On the issue of notice, the trial magistrate said as follows in the impugned judgment a page 115 of the record of appeal (paragraph 22 of the judgment):

> "If the Defendant insist the tenancy ended in 2013, nothing could have been easier than to prove the written termination of the tenancy. None was produced and the only evidence of termination is the letter dated 6/12/2018 by the Plaintiffs advocating (sic) affirming the handover of the demised premises on 30th November 2018."

In paragraph 19(b) of his submissions, counsel for the Appellant has said:

(b) "The fact that the tenancy was un-written meant that the parties themselves had not contemplated or provided for such a written notice of termination. As such, the Learned Trial Magistrate in effect wrote for the parties, suo moto, and introduced a contractual term requiring such a notice. By doing so, she offended that now long-standing and hallowed principle that parties to contract are bond by its own terms and conditions and it is not the business of the Court to re-write contracts for them. The Appellant relies on National Bank Of Kenya -v- Pipe Plastic Sankolit (v) Ltd 2002 E.A 502 [2011]..."

From my reading of the impugned judgment on the issue of notice, I do not see the Trial Magistrate introducing any contractual term suo moto. It is clear from Sections 2(c) and 4(2) of the Act that where a tenancy is not in writing, as was the position in this case, the landlord who is the Respondent herein, was still obliged to issue a notice to terminate the same by law. So the issue of notice was not the creation of the Respondent. It is a legal requirement. When he was cross-examined by MR OGOLA counsel for the Appellant during the trial, the Respondent stated at page 100 of the record of appeal thus:

> "We started the ease (sic) on 2011 and ended on 30/11/2018. There was no tenancy agreement. We were in agreement. The last payment was made as rent was 28/6/2013. The tenancy extended to 2018. For 5 years, no rent was aid but there was a tenancy."

It must also be noted that a Director of the Appellant did not testify during the plenary hearing. Only WILBER OMONDI the Appellant's Finance and Administration Manager testified and could not rebut the Respondent's testimony with regard to the tenancy. All he could confirm as per his undated statement was that although they utilized the Respondent's premises for use during the construction of a road, they had rental arrears of Kshs.112,000 for August 2013 to September 2014 and also acknowledged that they owed the Respondent Kshs.34,810 for the repair of a damaged wall.

9. I see no merits in grounds 1, 2, and 3.

10. In grounds 4, 6, 7, 9, 14 and 15, the Appellant has taken issue with the Trial Magistrate for placing undue weight on the Respondent's evidence, filing to construe the evidence or evaluate it and dismissing the Appellant's defence which was supported by clear and congent evidence. I have looked at the record of appeal and the impugned judgment. Other than on the decision to award both general damages and mesne profits which I shall address shortly, I am not persuaded that the Trial Magistrate

failed to evaluate the evidence on record. To the contrary, the Trial Magistrate property considered all the evidence before her.

11. Those grounds also collapse.

12. In ground 5, the Trial Magistrate is faulted for failing to comprehend that the tenancy was terminated by forfeiture when the Respondent locked the Appellant out of the premises with effect from 1st January 2013. Among the documents produced herein was a letter dated 20th May 2017 addressed to the Respondent's counsel by the Appellant's counsel it reads:

> " Your letter of 16/5/2017 refers.
>
> Please note that our client vacated the premises a letter dated 7/7/2012 and received by the landlord on same date! As far as our client is concerned the premises was handed over to your clients way back in 2012. Kindly take instructions and revert"

In response to that letter, counsel for the Respondent by a letter dated 30th May 2017, replied as follows:

> " We acknowledge receipt of your letter dated 20/5/2017.
>
> If your clients handed over the premises to our client as alleged, then why are the premises still locked by your clients.
>
> You have not handed over the keys to the premises."

13. In a subsequent letter dated 2nd May 2018, counsel for the Respondent addresses the Appellant's counsel as follows in paragraphs *2*, *3*, *4*, *5*, *6* and *7*:

> " The undersigned personally visited the site and confirmed that our client had let to your client 3 rooms one of which was your client's office, the other was used as a laboratory while the third was the store.
>
> Your client handed over the room used as a laboratory to our client. There is nothing pending over this room.
>
> The room used as an office by our client remains locked by your client. It has never been handed over. The monthly rent still accrues. The office rent is 8,000 while the rent for the store is Kshs6,000 making a total of Kshs.14,000 per month.
>
> At the time of filing suit 1st October 2014 the arrears were Kshs.235,500 which sum was paid through the Court. The rent due as from 2nd October 2014 to 30th April 2018 is 42 months x 14,000/= per month (sic) = Kshs.588,000/=."

In it's defence dated 25th May 2016 to the suit in the subordinate Court, the Appellant had pleaded as follows in paragraph *3*:

> 3: "In reply to paragraph 3 of the plaint, the Defendant avers that the tenancy relationship between the Plaintiff and the Defendant was discharged and no longer exists in respective to the units. The Defendant concluded its tenancy obligations and the Plaintiff is invited to strict proof."

The evidence on record suggests that there was no such discharge of the tenancy.

14. The other grounds of appeal can be considered together. It is pleaded, inter alia, that the Trial Magistrate awarded un-merited mesne profits of Kshs.672,000 computed at Kshs.14,000 per month

yet it was not in dispute that the Appellant had surrendered part of the premises and rent would inevitably reduce, the award of Kshs.672,000 being mesne profits and Kshs.500,000 being damages were punitive, that the repair costs of Kshs.109,680 should have been discounted and by disregarding binding authorities to the effect that the period between October 2014 and 2018 when the matter was in Court should have been excluded and also that the Respondent should have mitigated his losses.

15. The disposal orders in the impugned judgment read as follows:

a. "mesne profits at Kshs.672,000".

b. "Repair charges at Kshs.230,000".

c. "General damages in the sum of Kshs.500,000".

d. "Costs of this suit".

e. "Interest on (a) and (b) above at Court rates from the date of this judgment".

As correctly submitted by counsel for the Appellant, it was improper for the trial Court to award both mesne profits and general damages at the same time. In the case of KENYA HOTELS PROPERTIES LTD -V- WILLESDEN INVESTMENTS LTD C.A. CIVIL APPEAL NO 149 of 2007 [2009 eKLR], the Court of Appeal having cited and English authorities from the Privy Council went on to add thus:

> " Our understanding of the above persuasive authorities is that once the learned judge made the award under the subhead 'mesne profits' there was no justification for him awarding a further Kshs.10 million under the 'subhead trespass' since both mean one and the same thing".

Similarly, in the case of Maina Kabuchwa -v- Gachuma Gacheru 2018 eKLR, it was held that:

> " It is trite law that where a party claims for both mesne profits and damages for trespass, the Court can only grant one and not both. Mesne profits which is defined as the profit of an Estate received by a tenant in wrongful possession ..."

And in the case of Peter Mwangi Msuitia & Another -v- Samson Edin Osman 2014 eKLR, the Court of Appeal held that:

> " As regards the payment of mesne profits, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded ..."

The same situation arises in this case. The Respondent vide his plaint dated 23rd October 2014 sought judgment against the Appellant in the following terms:

1: "Kshs.235,000"

2: "Mesne profit"

3: "Damages"

4: "Costs and interest"

No specific sum was pleased as mesne profits and therefore the award of Kshs.672,000 was not justified. This Court must interfere with the award of Kshs.672,000 as mesne profits for the reasons cited above.

16. With regard to the sum of Kshs.230,000 which the Trial Magistrate awarded as repair charges, the Respondent had in his plaint in paragraph *3* pleaded thus:

3: "The Plaintiff's claim against the Defendant is for the sum of Kshs.235,000 being the arrears of rent from 1st June 2013 to 1st October 2014 in respect of the premises of the Plaintiff occupied by the Defendant at Nambengele in Budalangi being Bunyala/bulemia/3638 the full particulars whereof are well known to the Defendant."

In paragraph 4 of the same Plaint is where the Respondent pleaded for damages in respect of the damage caused to the suit property. He said:

4: "The Plaintiff further claims damages against the Defendant in respect of the damage caused by the Defendant to the Plaintiff's house. The Plaintiff will crave leave of the Court to adduce the particulars after the surveyor complete their assessment."

It is clear from the plaint that the repair charges where not quantified in the sum of Kshs.230,000 which the Trial Magistrate awared or indeed in any sum at all. Yet, the sum was in the nature of a special damage claim which must be specifically pleaded and proved – Hahn -v- Singh C.a. Civil Appeal No 42 Of 1983 [1985 Klr 716]. See Also Coast Bus Service -v- Murunga & Others C.a. Civil Appeal No 192 of 1992 where it was held that:

> " It is now trite law that special damages must first be pleaded and then strictly proved."

As is clear from paragraph 3 of the plaint, the sum of Kshs.235,000 was pleaded as arrears of rent. It was not pleaded as repair charges and even if a receipt for that sum was produced during the trial, the plaint ought to have been amended to specifically plead it. The record shows that the Respondent admitted that he had infact been paid the sum of Kshs.235,000 as rent arrears. This is what he said in his evidence in chief on 4th February 2021:

> " The rent arrears was Kshs.235,000 and the money was paid to me through the Court as rent arrears but they continued in occupation until 30/11/2018 when the hand over was done their advocate and mine present."

Counsel for the Respondent cannot therefore be correct when he submits at paragraph (ii) of his submissions thus:

(ii) "Repair charges of Kshs.230,000. This too cannot be faulted. The Plaintiff produced in evidence invoice and receipt for Kshs.230,000 pages 41 & 42 of the record of Appeal. These were carried out after the Appellants had failed to do so despite agreeing to do so on the 30/11/2018 when the premises were handed over. The Plaintiff's further list of documents shows the history of the contempt the Appellant treated the Respondent in this whole saga.

It is claimed that the repair charges were not pleaded. This is not true. Paragraph 4 of the plaint is self-explanatory. The Appellant did not object when evidence of repairs was being led."

It matters not that the Respondent produced receipts for Kshs.230,000 as repair charges. As is clear from the authorities cited above, that sum ought to have been specifically pleaded first being a special damages claim.

17. The Trial Magistrate erred in awarding it and this Court must interfere and set it aside.

18. This Court will not interfere with the award of Kshs.500,000 being general damages which this Court finds to be reasonable in the circumstances.

19. On the issue of mitigation of loss, the damage to part of the suit property was done on 3rd October 2012. The trial Magistrate having found that the suit property was only handed over on 30th November

2018 and which this court has affirmed, it cannot be correct for the Appellant's counsel to submit, as he has done in page 7, that:

> " On the issue of mitigation of losses your Honour, we implore you to consider the case of African Highland Produce Ltd -v- Kisorio 2001 1 E.A 1 in which the Court stated that it is the duty of the Plaintiff to take all reasonable steps to mitigate the loss sustained as a result of the Defendant's wrongful act. The Plaintiff cannot claim damages for any sum which is due to their own neglect".

I have looked at the above judgment in which the Court of Appeal addressed itself as follows on the issue of mitigation of loss:

> " The guiding principle of law in mitigation of losses is as follows. It is the duty of the Plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a Plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the Defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimize the damages, or embark on dubious litigation. The question what is reasonable for a Plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the Defendant." Emphasis mine

On this issue, counsel for the Appellant has submitted as follows at paragraphs 23 and 24:

23: "The Appellant submits that, had the Learned Magistrate properly analyzed the question of mitigation of losses in light of the binding authorities cited by the Appellant and the evidence before her, she ought to have found that it was unreasonable for the Respondent to either wait indefinitely for repairs to be done or frustrate them, inflate the costs or watch helplessly while the premises were vandalized and deteriorated, all the while insisting on a joint inspection and handing over".

24: "The Appellant urges Your Lordship to find that the Respondent ought to have immediately repossessed the premises, repaired them and looked for another tenant. He did not mitigate his losses to the extent that he failed to do so and remained adamant of prolonging the extinguished tenancy with the Appellant."

In the impugned judgment, the Trial Magistrate addressed the issue of mitigation of losses in paragraphs 26 and 28 thus:

26: "The works to be done were enumerated in the letter aforementioned dated 6.12.2018. Further, that parties were scheduled to meet on 16th June 2018 but no such meeting took place (cf letter of 27.8.2018). However, the Defendant did write on 1st October 2012, and was unequivocal that they were releasing the first rooms used as a store but since they were setting up a laboratory, they wished to extend the tenancy."

28: "Be that as it may, the correspondence exchanged between the parties pro se clearly indicate that it was the Defendant who failed to fix the damage. From 3rd October 2012 to early 2013, the same was not repaired and thus the subsequent vandalism and structural damage. The blame lies square with the Defendant".

Given the above circumstances, it is difficult for this Court to fault the Magistrate as there was very little which the Respondent would have done to mitigate his losses when the Appellant was still retaining part of the suit property. The suggestion by the Appellant's counsel "that the Respondent ought to have immediately repossessed the premises, repaired them and looked for another tenant" would have been inimical to good orderliness and a recipe for chaos given the circumstances of this case. It was more prudent for the Respondent to await the handing over which was eventually done in 2018.

20. Finally, on the ground that the Trial Magistrate erred in law and in fact by disregarding binding precedents and by dismissing the Appellant's entire defence despite the same being supported by clear and cogent evidence, I find that other than for the error in awarding both mesne profits and general damages, and the award of Kshs.230,000 being repair charges, the Trial Magistrate considered the evidence by both parties and arrived at the correct decision.

21. Ultimately therefore and having considered all the evidence and submissions in this appeal, I issue the following disposal orders:

    1. The appeal partly succeeds.

    2. The judgment in the lower Court is set aside and substituted with the following orders:

        a. General damages Kshs.500,000.

        b. Costs.

        c. Interest.

        d. The Appellant having succeeded only partly, it will have half costs here and in the Court below.

BOAZ N. OLAO

JUDGE

20TH FEBRUARY 2025

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 20TH DAY OF FEBRUARY 2025 WITH NOTICE TO THE PARTIES.

Right of Appeal

BOAZ N. OLAO

JUDGE

20TH FEBRUARY 2025