Githua v Muhia & another (Environment and Land Appeal E010 of 2023) [2024] KEELC 4973 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4973 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E010 OF 2023

JG KEMEI, J

JUNE 24, 2024

BETWEEN

JAMES KARU GITHUA ..... APPELLANT

AND

ISAAC NJOROGE MUHIA ..... 1ST RESPONDENT

TIMOTHY OTIENO AWUOR T/A NAIROBI CONNECTION SERVICES AUCTIONEERS ..... 2ND RESPONDENT

JUDGMENT

1. In the trial Court the Appellant filed suit against the Respondents seeking among other things; a permanent injunction against the Respondents from being evicted from the rented premises known as Mugutha House and a declaration that the costs of renovation be adjusted against the rent due to the landlord and in the alternative the landlord be ordered to reimburse the Appellant the full costs of the renovations.

2. It was the Appellants case that he rented the premises in 2020 at the monthly rent of Kshs. 50,000/- and in order to make the premises habitable for his family, and with the oral agreement of the owner, he carried out repairs in the sum of Kshs. 527,211/- which costs he had proposed to the landlord that it be recovered either from the rent payable or through reimbursement. That as he awaited the concurrence of the landlord, the 2nd Respondent levied distress for rent upon the Appellant hence the filing of the suit in the trial Court.

3. In denying the Appellant's claim the Respondents filed an amended defence and counterclaim dated the 7/3/2023. In the counterclaim it was contended that the 1st Respondent is the owner of the rented premises situate in Ruiru. That the Appellant rented the house from January 2021 upto November 2022 at the monthly rent of Kshs 50,000/- including utility bills being water and electricity. That despite demand, the Appellant duly paid the rent until February 2021 from which time he stopped to

remit the rent to the 1st Respondent for no good reason at all. In addition that the Appellant failed to pay accrued utility bills for water and electricity risking permanent disconnections to the premises.

4. That before moving out of the premises in November 2022, the Appellant maliciously damaged the premises for which the 1st Respondent claims damages for malicious destruction. The 1st Respondent sought the following orders in the counterclaim;

    a. An order that the defendant pays the accrued rent arrears that will be due at the time of the Judgement of this Court.

    b. An order that the defendant settle the pending electricity and water bills

    c. General damages for breach of tenancy agreement and the destruction of the rental premises.

    d. Any other relief as the Court may deem fit to grant.

5. Upon hearing the parties, the trial Court found the Appellants suit unmerited and dismissed it while partially granting the 1st Respondent's counterclaim as far as the outstanding rent of Kshs. 850,000/- was concerned. This decision provoked this appeal in which the Appellant has raised 7 grounds as follows;

    a. That the learned Magistrate after correctly reaching a finding that the residential house lease agreement between the first Respondent and the Appellant was oral, erred in law by setting a higher standard of proof than on a balance of probability for the Appellant in his suit; but a contrary standard for the first Respondent in his counter-claim thus occasioning injustice to the Appellant.,

    b. That the learned Magistrate after correctly reaching a finding that the agreement between the first Respondent and the Appellant was oral, erred in law by entertaining the first Respondent's the counter-claim which was expressly statutory barred by dint of Section 3 of the Law of Contract Chapter 23.

    c. That the Learned Magistrate exhibited bias in framing issues for determination.

    d. That the Learned Magistrate erred in law and in fact by failing to appreciate the evidence put forward by the Appellant which proved his case against the first Respondent to the required standard.

    e. That the Learned trial Magistrate erred in law and in fact by failing to reach any finding on the Appellant's household goods estimated at Kshs. 600,000/- that were attached by the second Respondent.

    f. That the Learned Magistrate erred in law and in fact in arriving at a finding that the rent owed by the Appellant to the first Respondent was Kshs. 850,000/-.

    g. That the Honourable Magistrate erred in law and in fact by failing get the right definition for "agreement or contract" thus occasioning the Appellant injustice.

6. The Appellant sought the following orders on appeal;

    a. That the sum of Kshs. 850,000/- to the 1st Respondent with costs on his counterclaim be set aside and it be substituted with an order dismissing the counterclaim with costs to the Appellant.

    b. An award of monies expended on the renovation to the Appellant

c. A declaration that the 1st Respondent's counterclaim was expressly statutory barred by dint of Section 3 of the *Law of Contract Act*.

d. An order of release of the Appellant's attached household goods by the 2nd Respondent.

The written submissions

7. The firm of Bw'oigara, Getange & Company Advocates filed submissions dated 30/4/2024 on behalf of the Appellant. On ground 1 of the appeal, the Appellant assailed the trial Court's Judgment for setting a higher standard of proof for the Appellant for a written contract as opposed to an oral contract. Further that the Court set a higher standard of proof on the Appellant and a lower standard of proof for the 1st Respondent. That this Court can exercise its powers under Section 78 of the *Civil Procedure Act* to evaluate the entire evidence and arrive at a different conclusion.

8. Regarding the import of Section 3(3) of *Law of Contract Act*, the Appellant quoted the case of Leo Investment Ltd Vs. Estuarine Estate Ltd [2017] eKLR in which the Court cited the Court of Appeal decision in Kukal Properties Development Vs.Tafazzal H Maloo & 3 Others [1993] eKLR on unenforceability of a contract that was signed by one party only.

9. The Appellant further summed up ground numbers 3, 4 and 5 on bias on the part of the trial Court. That the Court disregarded the Appellant's evidence on his goods that were attached by the 2nd Respondent whose value was estimated at Kshs. 600,000/-. Specific reference was made to the Court's findings as contained at pages 77 – 78 of the Record of Appeal on the Appellant's character. That the Court disregarded the Appellant's evidence on renovations of the house by way of receipts totalling Kshs. 527, 211/=.

10. In relation to ground No. 6 of the appeal, the Appellant posited that the Court's finding on rent arrears was founded on wrong principles and unsupported by evidence. That the Court erred in computing arrears from October 2020 as opposed to February 2021 contrary to the 1st Respondent's pleadings.

11. In conclusion the Appellant addressed Ground no 7 as revolving on the definition of the term 'agreement'. That the Hon Magistrate misconstrued the same since it is not defined in the Law of Contract. Reliance was placed on the Mitra's Legal & Commercial Dictionary fifth edition that '... every promise and set of promises, forming the consideration for each other, is an agreement.' He urged the Court to find the appeal merited and allow it.

12. On the other hand, the Respondents through the firm of Isolina Kinyua & Co. Advocates filed submissions dated 6/6/2024.

13. The Respondents pointed out that the Record of Appeal as filed is defective for omission of the 1st Respondent's witness statement and list of documents. That such an omission is detrimental to the 1st Respondent and accordingly the Record of Appeal should be struck out. Rehashing the duty of an appellate Court as established in the case of Abok James Odera T/A A. J. Odera & Associates Vs. John Patrick Machira T/A Machira & Co. Advocates [2013]eKLR.

14. Similarly, the Respondents opposed the appeal on grounds of the appeal as contained in the Memorandum of Appeal. The Respondents stated that the 1st ground raises no arguable point because the oral lease agreement and monthly rent of Kshs. 50,000/- was undisputed. That by the Appellant's own admission of the lease and rent payable which was uncontroverted, the Court could not arrive at any other different finding. Concerning the receipts for the alleged renovations, the Respondents submitted that the Court found that they did not bear the Appellant's name nor did they relate to the 1st Respondent's premises. That the Appellant duly remitted the rent of Kshs. 50,000/- as agreed to the

1st Respondent's Stima Sacco account. That unfortunately the Appellant has omitted that evidence and that of Whatsapp correspondence to that effect from the Record of Appeal filed.

15. Notably in respect to ground No 2, the Respondent submitted that the issue of oral agreement being statutory barred was never raised in the trial Court and the Appellant is estopped from raising it now on appeal. That it is trite that parties are bound by their pleadings as enumerated by the Court of Appeal in D E N v P N N [2015] eKLR.

16. On ground numbers 3, 4, 5, 6, 7 and 8 the Respondent maintained that the trial Court findings are all factual and do not demonstrate any bias. That the claim for rent arears of Kshs. 850,000/- was properly calculated and the appeal should be dismissed with costs.

Analysis and Determination

17. On ground No. 1 of the Appeal, the Appellant faulted the trial Court for setting a higher standard of proof on the part of the Appellant but a contrary standard for the 1st Respondent on his counterclaim. It is trite that the standard of proof in civil cases is pegged on a balance of probability. The claim of the Appellant is contained in the Plaint filed on 6/7/2022 in which he sought inter alia a permanent injunction against the Respondents from eviction from the suit premises, declaration that the monies expended towards repair works be adjusted for rent outstanding and in the alterative he be reimbursed the cost of the repairs. On the other hand, the 1st Respondent's cause of action is found in the amended counterclaim dated 22/3/2023 in which he sought orders for the payment of accrued rent arrears, utility bills, general damages for breach of tenancy agreement and destruction of rental premises.

18. The Appellant testified and stated that he rented the house from the month of October 2020 at a monthly rental of Kshs. 50,000/-. That on entry he discovered that the house was in a deplorable state with electric and water systems being faulty. That the perimeter wall was also collapsing and needed repair. That he requested permission from the 1st Respondent to attend to the repairs and fencing of the wall which permission he graciously granted. That he spent in excess of Kshs. 527,211/- to carry out the works. That he proceeded to discuss with the 1st Respondent how the cost of the repair works was going to be treated. That the 1st Respondent mutually agreed that he will either reimburse the expenses or have it adjusted to the rent for the house. That later the 1st Respondent on 2/2/2022 issued him a notice to vacate. That the said notice to vacate was intended to harass and torture his family notwithstanding the huge expense that he had incurred in repairing the house and the perimeter wall. Later the 2nd Respondent proclaimed goods from his house contrary to the law that exempts such personal properties from being levied under the *Distress for Rent Act*

19. The standard of proof in civil cases is on a balance of probability. Having found that the claims of the Appellant and that of the 1st Respondent are civil in nature the standard of proof applicable is on a balance of probability. The 1st Respondent testified and stated that he is the owner of the rental house erected on Plot No. 3636 in Mugutha in Ruiru. That he rented the house to the Appellant from January 2021 and as at 10/5/2022 the Appellant had defaulted in rent and electricity payments and that despite issuing several demands the Appellant continued in default until he vacated the house in November 2022. He also added that the Appellant maliciously destroyed most of the interiors of the house occasioning him loss and damages. He stated that the Appellant entered the house in good and habitable state and there was no need for repairs or renovations. In addition, he stated that the tenancy agreement between himself and the Appellant was verbal and the rent was agreed at Kshs. 50,000/- per month.

20. In cross examination the Appellant informed the Court that though their agreement was not in writing allowing the repairs of the house, he had produced a bundle of receipts in support. He also admitted

that he was in arrears in rent payment which he had hoped to set off against the cost he expended in renovations/repairs. As to whether there was a valid tenancy agreement between the parties, the Court found that there is no dispute between the parties with respect to the tenancy agreement. It is commonly accepted by the parties that the tenancy agreement was not reduced into writing. The relationship between the Appellant and the Respondent was therefore one of a month to month tenancy. It was also not in dispute that the rent agreed between the parties was Kshs. 50,000/- per month.

21. The Court therefore finds that there existed a valid and enforceable tenancy agreement between the Appellant and the 1st Respondent.

22. Notwithstanding the absence of a written agreement, the obligations of the parties can be implied from their conduct. For starters the 1st Respondent being the landlord put the Appellant in possession of the suit property on tenancy basis. It can be implied from the oral tenancy agreement that the duty of the Appellant was to pay rent and applicable utilities consumed in the rented premises and the 1st Respondent had the duty to allow the Appellant peaceful and quiet enjoyment of the premises subject to payment of the rent.

23. The Appellant duly admitted in evidence owing rent to the 1st Respondent. It was the Appellant's case that he entered the suit premises in October 2020 while the 1st Respondent led evidence that the tenancy commenced from January 2021 upto November 2022. That the Appellant defaulted in payment of the rent from February 2021 until he vacated the premises in November 2022. I have perused the evidence led by the Appellant in the trial Court and I find that the Appellant has not challenged the claim of the 1st Respondent save to state that the amount in default ought to be offset with the cost of repairs.

24. The next question is whether the permission of the 1st Respondent was obtained before the alleged repairs were carried out. It is the case of the Appellant that he sought and obtained permission to carry out the repairs however the 1st Respondent has refuted granting any permission to the Appellant. The Court has examined evidence in form of WhatsApp communication between the Appellant and the Respondent during the subsistence of the tenancy. The four (4) page WhatsApp communication adduced in evidence by the 1st Respondent mainly comprises of discussions on rent default and promises by the Appellant to clear the rent.

25. Clearly, according to the said communications parties agreed that the rent was in default from February 2021. The communications also attest to the fact that the Appellant entered into the premises from October 2020 but the issue of default appear to have occurred from February 2021. A close scrutiny of the communication between the parties does not show any evidence of discussions, approvals or even permission for the Appellant to carry out any repair/renovation works in the rented premises. So much so that the 1st Respondent sought the concurrence of the Appellant (as a sitting tenant) to have a landscaper come into the premises to plant grass and conclude landscaping works in the compound. The 1st Respondent also undertook to carry out some rewiring in the house with the permission of the tenant/Appellant.

26. The Court agrees with the trial Court that the alleged repairs were not sanctioned by the 1st Respondent.

27. Did the Appellant incur the sum of Kshs. 527,211/-? It is the Appellant's case that he expended the sum towards repair and renovation of the house and he adduced several receipts allegedly being the cost of material during the trial. A simple mathematical tabulation of the receipts adduced falls below the amount claimed by the Appellant. The Court finds that the sum of Kshs. 527,211/- is not supported

in evidence. A close perusal of the receipts adduced in evidence do not demonstrate any nexus between the Appellant and or the rented premises.

28. The Appellant having not sought and obtained permission from the 1st Respondent to carry out the works, and having failed to adduce evidence in support of the renovation costs the Court finds that the claim is fictitious at best and is for disallowing.

29. On the question of electricity bills, evidence was adduced by the 1st Respondent in form of electricity bill statement from the service provider in the sum of Kshs. 105,296/- being outstanding as at 8/11/2022. The Court found that the Appellant did not challenge this amount and therefore the Court finds that it is payable by the Appellant to the 1st Respondent. I say so because the Appellant did not adduce any evidence of payment of electricity bills while in occupation of the house for a period of two (2) years. It is expected that he must have been supplied with electricity as confirmed by the electricity statement of 8/11/2022. Since there is no cross appeal the same is not under consideration.

30. With respect to outstanding water bills the Court noted that the 1st Respondent failed to adduce evidence before the Court in support of that limb. Consequently, the same is disallowed.

31. The 1st Respondent has sought general damages for the malicious damages occasioned to the house before the Appellant vacated the premises. This was tabled in form of photographs which show some visible damage. That said it is the duty of a party to proof its claim for special damages as pleaded. It is not enough to simply put before the Court copious number of pictorials and expect it to read figures into them. A party minded to convince the Court that it has suffered damages of the kind pleaded by the 1st Respondent ought to table cogent evidence in form of a valuation or assessment of the damages by an expert clearly detailing the replacement value costs or such other formulas used in the building industry. In this one I am guided and echo the sentiments of the Court in the case of BID Insurance Brokers Limited Vs. British United Provident Fund (2016) eKLR.

32. On the question of outstanding rent, the trial Court held as follows;

> "On the counterclaim, I note that the 1st Defendant gave the Plaintiff vacant possession of the suit premises. The Plaintiff in his evidence confirmed having moved into the said rental premises. The 1st Defendant stated categorically that there was no such agreement regarding renovation of the suit premises by the Plaintiff. But the Plaintiff accumulated rent arrears that he declined, refused and neglected to pay. This resulted into the auctioneer been instructed to proclaim the Plaintiffs' household goods "PExh. 2." I note that the Plaintiff entered into the suit premises in October, 2020 and he was issued with notice to vacate on February, 2022 that was seventeen (17) months without paying rent. I hold that the Defendant has proved on balance of probability that the Plaintiff failed to remit the monthly rent of Kshs. 50,000/- per month for the seventeen months that he occupied the said rent premises as earlier agreement between them. In the circumstance, the Plaintiff is ordered to remit Kshs. 850,000/- to the Defendant being rent arrears owed."

33. I find that the learned trial Court did not err in arriving at a figure of Kshs 850,000/- .

34. The Appellant contends that the claim of the 1st Respondent having been based on an oral tenancy agreement is time barred. I have carefully perused the pleadings and the evidence led in the trial Court and I fail to find any plea on time bar. The same having not been pleaded the Appellant is estopped from raising it at the Appellate stage. This ground is disallowed.

35. Was the Learned Magistrate biased against the Appellant? The Court of appeal in the case of Kaplana H. Rawal Vs. Judicial Service Commission & 2 Others [2016] eKLR relied on the decision in Magill

Vs. Porter (2002) 2 AC 357, where the House of Lords modified the test to whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Judge was biased. In the case of The East Africa Court of Justice adopted the same test in Attorney General of Kenya Vs. Prof Anyang' Nyong'o & 10 Others EACJ Application No. 5 of 2007 when it stated:

> "We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially. Needless to say, litigant who seeks disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."

36. Further the Supreme Court of Canada expounded the test in the following terms in R. Vs. S. (R.D.) [1977] 3 SCR 484:

> "The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through - conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the Judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."

37. It was the Appellants case that the Hon Learned Magistrate was biased in the manner he framed the issues in the case. The issues that were framed by the Learned Magistrate are set out in page 4 of the Judgement. My view of the said issues, upon evaluation of the pleadings and the evidence led in the trial Court is that the issues were drawn from the case before the Court and in my considered view I find no ground to fault the learned trial Magistrate on ground of bias.

38. Besides, this issues was not raised in the trial Court and I find that it cannot be entertained at this stage.

39. On the question of the treatment of proclaimed goods, the Appellant has faulted the trial Court for failing to make a finding on his goods that were attached in the sum of Kshs 600,000/- by the 2nd Respondent. The Appellant adduced a schedule containing household items worth Kshs 158,000/- but there was no evidence that the said goods were sold. In any event the Appellant did not lead evidence on the same.

40. The appeal is dismissed with costs to the 1st Respondent.

41. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF JUNE 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Bw'oigara for Appellant

1st and 2nd Respondents - Absent

Court Assistants – Phyllis/Oliver