Kamau v John Chege & Partners (Environment and Land Appeal 2 of 2023) [2025] KEELC 618 (KLR) (19 February 2025) (Ruling)

Neutral citation: [2025] KEELC 618 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 2 OF 2023

JA MOGENI, J

FEBRUARY 19, 2025

BETWEEN

DANIEL KAMAU ..... APPELLANT

AND

JOHN CHEGE & PARTNERS ..... RESPONDENT

RULING

1. This matter arises out of the Judgment of Hon. P. May Mbichi Vice- Chairman Business Premises Rent Tribunal delivered on 13/06/2023 in respect of the tenant/Appellant Application and reference dated 31/01/2022. The Hon. Vice-Chairman made the following orders:-

    a. The Application dated 7/9/2022 is allowed in terms of prayers 2, 3 and 4 thereof.

    b. The Landlord is awarded costs assessed at Kshs. 35,000/-.

2. The Tenant/Appellant being dissatisfied with the decision filed an appeal to this Court on the following grounds:-

    a. The learned Vice-Chairperson erred in fact and in law in dismissing the Tenant's/Appellant's Notice of Motion Applicant and Reference dated 31st January 2022.

    b. The learned vice-chairperson erred in fact and in law didn't grant leave to the Appellant to oppose the alteration notice out of time i.e 14 days or 30 days by filing Reference under Section 6 of Cap 301 Laws of Kenya.

    c. The learned Vice-Chairperson erred in fact and in law didn't direct valuers to carry out valuation report on the rent payable as per current market value.

    d. The learned Vice-Chairperson erred in fact and in law allowed the Respondent to increase the monthly rent by more than 100% from Kshs. 2,500/- to Kshs. 15,000/-.

3. The Appellant prays that:-

   a. This appeal be allowed.

   b. The Ruling and decision of the BPRT Court made on 13/6/2023 be set aside

   c. The Notice of Motion Application and Reference dated 31st January 2022 be allowed and the Appellant be granted leave of 14 days to file Reference to oppose the alteration notice

   d. The costs of this Appeal and the BPRT Case No. E104 of 2022 be awarded to the Appellant

4. Together with the Memorandum of Appeal, the Appellant also filed a Notice of Motion seeking to appeal out of time against the decision of the Business Premises Rent Tribunal delivered on 13/06/2023 and a restraining order against the Respondent/landlord from levying distress against the Appellant among others. Hon. Lady Justice Mogeni granted the leave to appeal out of time and restrained the Respondent/landlord from levying distress on the Appellant and allowing him quiet possession vide the Ruling delivered on 16/05/2024.

5. When the appeal was listed for directions the Court on 08/10/2024 directed that the same shall be canvassed through written submissions.

6. The Appellant in his submissions gave a summary of how he came to be a Tenant on the demised premises and what led to the filing of a reference at the Tribunal which is reasons for this appeal. He alleged that he rented the business premises of the Respondent/Landlord. That he was served by the Respondent with legal alteration notice intending to increase the monthly rent from Kshs. 2,500/- to Kshs. 15,000/- of the suit premises which is more than 100%. The Appellant being dissatisfied with the proposed increase filed a reference and also simultaneously filed a Notice of Motion seeking appropriate restraining orders.

7. That he was granted restraining orders and that he has been a tenant occupying two shops since 1987 but due to arbitrary increase of rent he occupies one shop though he continues to pay rent for two shops.

8. That the Appellant does not owe any accumulated rent yet the Respondent is demanding for accumulated rent totaling Kshs. 232,000/- which emanates from the Vice-Chairperson's backdating of rent increase to 1/02/2022.

9. He contends that he paid the Respondent rent and he does not owe any outstanding rent. I have perused the Record of Appeal and noted that there are several KCB receipts which show utility payment of Kshs. Kshs. 2,500/-.

10. On his part the Respondent in its submissions stated that whereas the Appellant had filed an Application dated 31/01/2024 the Landlord filed another Application dated 7/09/2022 which sought to dismiss the Appellant's Application and also it sought to have the notice to terminate tenancy issued to the Appellant/Tenant take effect from 1/02/2022. It also sought to levy distress and collect rent. Since the Application of the Landlord was unopposed and the Appellant/Tenant did not appear in Court it was allowed.

11. Also that the Appellant/tenant did not prosecute his Application for over 11 months and that equity aids the vigilant.

12. It is the Respondent's contention that since the Appellant/tenant did not file a reference to oppose the rent increment then it would not have been prudent for the Vice-Chairperson under Section 6 (1) of

Cap 301 to have sought for valuers report since the tenant did not challenge the increment. That the notice was properly issued as provided for under the law of Section 4(5) of Cap 301.

13. It is the conclusion of the Respondent that the learned Vice-Chairman did not err either by fact or by law.

Analysis and Determination

14. This Court as a first Appellate Court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial Court. The role which guide a first Appellate Court was restated as follows in the case of Bwire *Vs. Wayo & Sailoki (Civil Appeal 032 of 2021*) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment):

> " A first appellate is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and arrive at its own independent Judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See Selle & another v Associated Motor Boat Co. Ltd.& others)."

15. Similarly, in the case of Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> " ... it is strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate Court might itself have come to a different conclusion ..."

16. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt Vs. Thomas [1947] A.C. 424 at page 429 – 430 as follows:

> " My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate Court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate Court has, of Court, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent

circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

17. In the case of Kapsiran Clan Vs. Kasagur Clan [2018] eKLR Obwayo J summarized the applicable principles as follows:

    a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. In reconsidering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before her; and

    c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time."

18. It is on record from the impugned Ruling the vice chairman indicated that the Appellants filed a reference opposing the tenancy notice but it was not heard meaning the Appellant was not given an opportunity to ventilate the issues in its reference. That the failure to hear and/or give the Appellant an opportunity to have the reference heard and determined is not only an affront to the rule of law but against the rules of natural justice and the Appellant's legitimate expectation to have a dispute that can be resolved by the Application of law decided in a fair and public hearing before a Court or if appropriate, another independent and impartial tribunal or body as enshrined under *the Constitution*. This was the position of the Court in the case of, among others, Nairobi Civil Appeal No. 190 of 2015 – Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu [2019] eKLR, Eldoret ELC Case No. 354 of 2016 – Samuel Kipkurgat Soi v John Kipkoech Soi [2019] eKLR and Nyeri ELCA No. 24 of 2015 Real Consult Agencies Ltd v Gerald Wachira Nguthi [2016] eKLR emphasizing on the right to be heard.

19. The Tribunal found that the tenant/Appellant did not respond to the notice within a month and additionally, they did not file an Application seeking for extension of time or that they be allowed to file the reference out of time. My reading of the Ruling indicate that the tenant filed the Application seeking restraining orders on 31/01/2022 against the Landlord's notice that was to take effect on 1/02/2022.

20. The Appellant filed an Application/Reference opposing the said notice but the reference was not heard, instead the Learned Vice Chairman chose to hear the reference filed by the Landlord which was filed nine months after the Appellant's reference.

21. The Appellant's reference is dated 31/01/2022 and the Landlord's reference is dated 7/09/2022 and was heard on 05/12/2022. Therefore, I agree with the allegation of the Appellants that their reference was not heard. In light of the above, it is my considered view that the Appellant was not granted time to be heard as is required in law and as is envisaged under Article 50(1) of *the Constitution* of Kenya.

22. In the final analysis and for the foregoing reasons, I find the appeal herein merited. I will allow the same on the following terms:-

    a. This appeal is allowed.

    b. The Ruling and decision of the BPRT Court made on 13/6/2023 is hereby set aside.

c. The Notice of Motion Application and Reference dated 31st January 2022 is allowed and the Appellant is granted leave of 14 days from the date hereof to file the reference to oppose the alteration notice.

d. Failure to file the said reference within 14 days will mean the order herein is vacated.

e. The costs of this Appeal are awarded to the Appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:

Mr. Daniel Kamau – Appellant in person

Ms. Mburukwa holding brief for Mr. Kinyua for the Respondent

Ms. Lillian – Court Assistant

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MOGENI J

JUDGE