Gisaga v Kiruja (Environment and Land Appeal E008 of 2023)
[2024] KEELC 6325 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6325 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT AND LAND APPEAL E008 OF 2023

CK YANO, J

SEPTEMBER 25, 2024

BETWEEN

ABDALLA MUTEMBEI GISAGA ..... APPELLANT

AND

PATRICIA KATHURE KIRUJA ..... RESPONDENT

JUDGMENT

Introduction

1. This Appeal is in respect to the judgment of Honourable P. May (Vice Chair) delivered on 3rd March, 2023 Business Premises Rent Tribunal Case NO. 47 of 2020 (Meru) consolidated with Case No. 21of 2021. The Appellant as landlord filed a reference dated 4th August 2020 which sought for vacant possession, payment of outstanding rent arrears, water and electricity bills. The respondent as tenant subsequently filed a reference dated 23rd March, 2021 where she sought for enjoyment of quiet possession and reconnection of water. Both references were consolidated and heard together.

2. Upon considering the matter, the Business Premises Rent Tribunal found in favour of the respondent and made the following orders:

    1. The tenant is successful in his claim for refund on the cost incurred in renovations and is awarded Kshs. 1,650,000/=.

    2. The tenant is awarded the unutilized rent for 7 months totaling Kshs. 112,000/=.

    3. The Landlord shall settle utility bills.

    4. Deposits made to the Tribunal accounts shall be released to the Tenant.

    5. Rent payments made to the Landlord for January to August 2022 to be refunded to the Tenant as the Landlord was not entitled to those payments.

6. The tenant is awarded the costs of the reference assessed at Kshs. 175,000/=.

3. The appellant was aggrieved by that judgment and filed this appeal on the following grounds:-

1. That the Vice Chair of the Business Premises and (sic) Rent Tribunal erred in Law and fact and/or misapplied the law in arriving at an erroneous decision and without due regard to and/or without considering the very crucial evidence by the Appellant.

2. The Vice Chair of the Business Premises and (sic) Rent Tribunal misdirected himself into using wrong principle of the Law in arriving at an erroneous decision when there was clear evidence tendered by the Appellant in support of his case.

3. That the Vice Chair of the Business Premises and (sic) Rent Tribunal erred in Law and in fact by awarding the Respondent the cost incurred in renovations at Kshs. 1,650,000/= whereas the invoices for purchasing building materials adduced to support the same are for Marine Park and not for his premises.

4. That the Vice Chair of the Business Premises and (sic) Rent Tribunal erred in Law and in fact by considering and or accepting the invoices adduced by the Respondent which are highly biased as the same would amount to construction of a new house, whereas mine was just renovation of an already well-constructed house.

5. That the Vice Chair of the Business Premises and (sic) Rent Tribunal erred in Law and in fact by not well considering the Rent Inspector's report where it was not indicated the amount that the Respondent used in his renovations.

6. That the Vice Chair of the Business Premises and (sic) Rent Tribunal erred in Law and in fact by not considering the fact that the respondent is still in occupation of the suit property, which he has locked with his own padlock and even upon the visit by the rent inspector, he is the one who opened and later closed.

7. That the Vice Chair of the Business Premises and (sic) Rent Tribunal erred in law and in fact by relying on extraneous considerations and inferences and/or misapprehended the law in arriving at an erroneous decision against and without considering the evidence on record.

8. That the Vice Chair of the Business Premises and (sic) Rent Tribunal erred in law and in fact by not considering that the respondent never adduced any certificate or letter from the county engineer as the renovation conducted amount to over one million and further there was no bill of quantity adduced to the tribunal over the same.

9. That by relying on extraneous considerations and inferences, the Vice Chair of the Business Premises and (sic) Rent Tribunal erred in law and in fact because by relying on such inferences, the same had high chances of misleading the tribunal to arriving at wrong findings, determinations and orders.

10. That the Vice Chair of the Business Premises and (sic)Rent Tribunal misdirected himself into using wrong principles of the Law in arriving at an erroneous decision whereas there was clear evidence tendered by the appellant in support of his case or interests.

11. That the Vice Chair of the Business Premises and (sic) Rent Tribunal further misdirected himself by not considering and/or sticking to the pleadings tendered by the appellant herein.

12. That the Vice Chair of the Business Premises and (sic) Rent Tribunal erred in Law and in fact by grossly misdirecting herself against the very clear evidence adduced by the appellant

and thereby arriving at an erroneous decision against the very elaborate and clearly legitimate interests of the appellant.

13. That the Vice Chair of the Business Premises and (sic) Rent Tribunal totally misdirected himself into applying unknown and/or wrong principles of the Law in arriving at an erroneous and injudicious decision.

4. The appellant prayed for the appeal to be allowed, that the judgment of the Vice Chair of the Business Premises Rent Tribunal in BPRT Case No. 21 of 2020 (Meru) delivered on 3rd March, 2023 and the subsequent orders thereto be set aside and that the appellant be awarded the costs of the Appeal.

5. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 10th June, 2024 in person while the respondent filed hers dated 8th July 2024 through the firm of C.B. Mwongela & Co. Advocates.

Appellant's Submissions

6. The Appellant gave a brief background of the appeal and identified three issues for determination, namely whether the Business Premises Rent Tribunal erred in Law and in fact in misapplying the law, whether the Honourable Chair of the BPRT delivered an erroneous decision contrary to the law and the evidence availed and who will bear costs of the suit.

7. It is the Appellant's submission that at no time did the tribunal consider the evidence adduced by the Appellant herein. That the tribunal relied on the evidence of the assessor who was to visit the business premises so as to give the state of the premises. That the assessor conducted the assessment report on a weekend which was not a working day while both parties had agreed that the assessor was to visit the premises on 7th October, 2022 yet she visited the premises on 8th day of October, 2022. That the assessor was in company of the Respondent/Tenant herein and the Appellant was not informed of the said timeline changes yet he had done all his part of the obligation in paying the fees for the said suit.

8. The Appellant submitted that there was malice on the part of the assessor since she conducted the said assessment without the Appellant's attendance which is tantamount to being condemned without being heard. That there are no other plausible explanations to justify that, other than to note that the said assessor was in a well-defined tactic to injure the rights of the Appellant.

9. The Appellant beseeched the Court to seek answers to the following questions in a bid to discover the illegalities therein; whether the assessor found the premises renovated, whether the premises were locked or not, whether the goods were there and if so, what conditions they were, what was the value of the renovations and what types of renovations were carried out if any, and whether the assessor was objective in conducting the report.

10. In answering the above issues, the appellant submitted that all points to the conclusion that the assessor was compromised. That there is no reason why he was never involved in the process of assessment yet he had interest and stake in the said premises. That considering the principles of natural justice and fair administrative action, the assessment report by the assessor led the tribunal to rely on it hence occasioning injustice upon the Appellant. That the assessment was not done in the day it was slated for, but at a later day to which the appellant was not informed about for reasons well known to the assessor and the Respondent.

11. The Appellant submitted that when he was in a bid to raise the issues of unfair hearing in the tribunal, he was denied audience. That contrary to the law, the tribunal denied the Appellant a chance to cross-examine the said assessor on the documents relied on which was fatal to justice and the rule of law. The

Appellant cited Article 50(2)(k) of *the Constitution* and relied on the case of Karan Vs. Ochieng & 2 Others (Peti*tion 36 of 2018*) [2018] KESC 4 (KLR) (21 December 2018).

12. The Appellant submitted the assessor was biased for among others, not able to disclose who opened the premises for inspection, the kind of goods that were in stock and tell if they were expired or not, failing to produce any photos/supporting evidence to show the state of the property that she assessed so as to guide the tribunal in arriving at the correct value of the renovations. That in light of that, the tribunal blatantly disregarded the requisite procedure during the trial which contradicts the principles of fair administrative action of fairness and the right to fair hearing as envisaged in *the Constitution* of Kenya, 2010 and hence the Court should set aside the decision of the Business Premises Rent Tribunal (Meru).

13. It is the Appellant's submission that whereas the assessor articulated that the tenant/Respondent herein took vacant possession of the premises in June 2020, this contradicts the averments of the respondent who posits that she took possession of the premises on 1st March, 2020. The appellant submitted that the assessor also contradicted her report by stating that by the time of closing the premises, the respondent had only operated for a cumulative period of 3 months. That this demonstrates that the assessor was sly or that the authenticity and neutrality of the assessor was compromised, yet the tribunal considered the report, which was marred with unclear issues to the detriment of the Appellant. The appellant faulted the assessor for not being objective and the tribunal for flouting the rules governing the adducement of evidence, which is a blatant disregard of the rule of law. The appellant urged the court to quash the impugned decision of the Honourable tribunal.

14. It is also the Appellant's submission that the assessor failed to inform the tribunal how the tenant left the premises. That the tenant/Respondent posits that she vacated the premises, yet the premises remain locked. That if one has vacated the premises, the same ought to be left vacant for the occupation by the landlord and that the assessor did not articulate in her report any legal instrument that showed that the tenant and the landlord had attested on the premises being left vacant which clearly is a disregard of the rule of law and principles of natural justice.

15. The Appellant further submitted that the Respondent opines that there was an oral agreement between the landlord and the tenant in regard to renovating the premises which the appellant argued are mere lies since the laws that govern tenancy provides that in matters that regard renovating business premises, the agreement should be in writing and not oral. The Appellant relied in the case of *Yusuf Mohammed Jiwa t/a Jiwa Properties & Another Vs. Mwangi & 2 Others (Civil Appeal E014 of 2021*) [2024] KECA 38 (KLR) (26 January 2024.).

16. It is the Appellant's submission that the tribunal contradicted itself in the impugned judgment and the ruling dated 13th October, 2021 with regard to utility costs and rent arrears. That while the ruling was in favour of the appellant, the judgment was in favour of the respondent. The Appellant submitted that it is common practice that equity aids the vigilant and not those who slumber on their rights yet the Respondent in her application for stay did not adduce any evidence to guide the tribunal in entering a judgment that would counter the earlier ruling which entered in favour of the Appellant. That the tribunal also erred in law and facts since they issued an order which the Respondent never pleaded nor asked for which contradicts the maximum of equity aids the vigilant and not on those who slumber on their rights. The Appellant relied on the case of Caltex Oil (Kenya) Limited Vs. Rono Limited (2016) eKLR.

17. It is the Appellant's submission that the agreement purported as the lease agreement which was tabled before the tribunal attributes that respondent gave the Appellant a cheque and cash in presence of the Appellant's wife, uncle and the respondent's husband, yet the agreement produced did not show

where the witnesses who were present attested, hence pointing to the conclusion that the purported agreement was a forgery and it was what the respondent had averred in the supplementary affidavit dated 27th August, 2021.

18. The Appellant submitted that the respondent adduced the sales summary of Europa Enterprises from October, November and December whilst the premises were never opened in November, hence the tribunal considered the respondent's evidence which was marred with inconsistency, ambiguities and thus not credible. That the tribunal should have raised doubts as to where the respondent got the sales of October when she claimed that her business was closed in October. Further, that the invoices that were presented before the tribunal were not in the name of Europa Enterprises, but Marine Part Resort and that the invoices did not indicate the months, which the business was operated. That the renovations was said to have consumed 200 bags of cement, yet the premises are 20 ft. by 20 ft. That this shows the respondent exacerbated the amount which was Kshs.1,650,000/=. That in addition, the respondent did not adduce any bill of quantity, letter of approvals from the county engineers and the signed bill of costs with the appellant as it is a prerequisite of law that when renovating business premises, one must acquire the aforementioned letters, before starting renovation of that magnitude.

19. The Appellant further submitted that the tribunal erred in law and in fact by relying on the evidence of one Mr. Ogeto a manager who posited that he did not know whether the respondent gave the appellant the cheque and that he never saw any monies change hands and that he was the one supervising the unlawful renovations, yet he could not tell how many bags of cement were used. That additionally, the witness claimed in the tribunal proceedings that he was the manager of Europa but contradicted himself further by articulating that he was working at Marine Part Resort as a stock controller. That he also stated that there were other agreements between the tenants and the landlord with no proof.

20. The Appellant also submitted that the tribunal erred in law and fact by relying on the evidence of one Alexus Njue, husband to the respondent who posited that he is the one who paid the cheque at Marine Park Resort Hotel in Ndagani while the agreement was drawn at the same hotel contrary to the evidence of Mr. Ogeto who had stated that the agreement was drawn at advocate's office in Chuka Town in presence of Alexus Njue and that the respondent was not there. That the witness also indicated that the signed agreement did not show his signature. The appellant relied on the case of Richard Apella Vs. Republic (1981)EACA 945 and urged the court to find that contradictory statements cannot be relied on.

21. The Appellant further submitted that the tribunal erred in law and in fact by relying on the averment of the respondent. That the tribunal also erred in law and fact by indicating that the appellant settles the utility bills while not considering the evidence tendered by the appellant that his Bill by January 2020 from the year 2019 was reading negative. That moreover, the respondent did not prove with evidence in the form of a receipt from the service provider how she used to pay her bills of water and electricity for the duration she stayed at the premises. That the Kenya Power meters and the Nithi Water (Service provider) meters are always registered in the name of the tenant. That what tenants gets in the meter number to be channeling the payment.

22. The Appellant submitted that the Respondent should be ordered to pay rent, electricity and water arrears from March to June 2020 totaling to Kshs. 249,000/=, rent arrears from September 2020 to December 2020 totaling to Kshs. 48,000/=, rent arrears from January 2024 up to June 2024 totaling to Kshs.96,000/=. That in addition, cumulative total is 969,000/= only plus costs and interest as per the court rate.

23. The Appellant submitted that pursuant to Section 27 of the *Civil Procedure Act* that provides that costs generally follow the event, he should be awarded the costs.

Respondent's Submissions

24. The respondent also gave a background of the matter and identified the sole issue for determination to be whether the Appeal is merited. On whether the Tribunal erred in awarding the tenant the refund on the costs incurred in renovations, the respondent's counsel referred to the proceedings that form part of the record of appeal and the evidence adduced by the respondent. It was submitted that the appellant consents that the respondent carried out renovations, but alleged that the amount awarded was extraneous and exaggerated. It was submitted that it is trite law that he who asserts must prove his case. That the burden of proof lies with whoever wants the court to find in support of what he claims. The respondent's counsel relied on Section 107, 109 and 112 of the *Evidence Act* Cap 80 Law of Kenya, and relied on the case of Susan Mumbi Vs. Kefala Grebedhin Nairobi HCCC No. 3321 of 1993 (unreported). That the Appellant who alleges that the costs used in renovation of the premises were exaggerated and highly biased had the onus to prove the same. It was submitted that the appellant did not discharge that burden and that the learned Vice Chair of the tribunal did not error in his decision.

25. Regarding the issue whether the Vice Chair of the Business Premises Rent Tribunal misdirected herself into using the wrong principles of the Law in arriving at an erroneous decision whereas there was clear evidence tendered by the Appellant in support of his case or interests, the respondent's counsel referred the court to page 339 of the record of appeal and submitted that the tribunal was within the confines of the law when it relied on Section 12 of the Landlord & Tenant (Shops, Hotels & Catering Establishments) Act. That the Vice Chair of the tribunal made findings based on the evidence tendered and therefore the conclusions reached by the Vice Chair are based on her appraisal of the evidence presented before the tribunal.

26. As to whether the Vice Chair of the Business Premises Rent Tribunal erred in Law and in fact by finding that the respondent was not in occupation of the suit property, the respondent submitted that on 30th August, 2022, the tribunal slated 7th October 2022 a site visit to the premises and that on the said date, a rent assessor Rebecca Kalolia visited the premises where both parties were present or represented and a report dated 18th October 2022 was filed in court. That the report concluded that the tenant took possession of the premises in June 2020 and the landlord disconnected electricity and closed the premises. That at the time the premises were closed, the tenant had only operated for three months and vacated the premises in February 2021 and is no longer in occupation of the premises. It was submitted that it was incumbent upon the appellant to prove any allegations to the contrary.

27. As to whether the learned Vice-Chair of the tribunal erred in considering and/or accepting the invoices adduced by the respondent which are alleged to be highly biased as the same would amount to construction of a new house whereas the Appellant's was just renovation of an already constructed house, it was submitted on behalf of the respondent that the Vice Chair relied on the evidence by the rent assessor to decide on the amount awarded to the respondent. That it is noteworthy that there is no contention that the respondent conducted renovations on the appellant's premises, hence the tribunal cannot be said to have erred in making the decision when there was no evidence provided by the appellant to dispute the extent of renovations conducted. The respondent relied on the case of Walter Enock Nyambati Osebe Vs. Independent Electoral & Boundaries Commission & 2 Others (2018) eKLR.

28. Regarding the issue as to whether the Learned Vice Chair of the tribunal erred in Law and in fact by not considering the rent inspector's report where it was not indicated the amount that the respondent used in her renovations, it was submitted on behalf of the respondent that the tribunal has the powers to send its representative for a site visit and to file a report to that effect. The respondent's counsel referred the court to Section 12 (3) of the Landlord & Tenant (Shop, Hotels & Catering Establishments) Act.

It was pointed out that on 30th August 2022, the tribunal slated 7th October, 2022 for a site visit to the premises. That on the said date, a rent assessor Rebecca Kalolia visited the premises in the presence of the respondent's advocate and the appellant and a report dated 18th October 2022 was filed in the tribunal. It is the respondent's submission that the duty of the rent assessor is to write a report of the observations and leave the Tribunal to independently decide. The respondent urged the court to find that this ground is unmerited.

29. As to whether the Learned Vice Chair of the Tribunal erred in Law and in fact by not considering that the respondent never adduced any certificate or letter from the County Engineer since the renovation conducted amounted to over one million shillings, and further that there was no bill of quantity adduced to the tribunal over the same, the respondent's submission is that parties are bound by their pleadings and it is not open for the Appellant to urge a different case from that which he pursued before the tribunal. That it was incumbent upon the Appellant to prove the allegations he made before the tribunal to the required standard but failed to do so. The respondent's counsel relied on the case of Twaher Abdulkarim Mohamed Vs. Independent Electoral & Boundaries Commission (IEBC) & 2 Others (2014) eKLR.

30. The respondent submitted that in the tribunal, there was no assertion by the Appellant that the respondent be mandated to avail a certificate or letter from the County engineer. That the pleading has been crafted at the appeal and was not placed before the tribunal and a finding made. It is submitted that a higher court is limited to issues canvassed in the court below. That if this court puts the issue as a point of determination, there is no law requiring county approvals in renovations.

31. Regarding the issue as to whether the tribunal erred in law and in fact by awarding the respondent the cost incurred in renovations at Kshs. 1,650,000/= whereas the invoices for building materials adduced to support the same are for Marine Part and not for the appellant's premises, the respondent reiterated that parties are bound by their pleadings and submitted that this limb should fail.

32. It is the respondent's submission that the appeal lacks merit and should be dismissed with costs to the respondent.

Analysis And Determination

33. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities relied on by the parties to buttress their rival positions. This being a first appeal, it is trite law that this court has the duty and obligation to reconsider the evidence, evaluate it and draw its own conclusions, bearing in mind that this court has neither seen nor heard the witnesses and therefore will make due allowance in this respect. The issues for determination in this appeal as I can deduce from the grounds of appeal are whether the decision of the Tribunal was against the weight of the evidence and the law and whether the appeal is merited or not.

34. It is not contested that there was a landlord-tenant relationship between the appellant and the respondent. Each of the parties filed his/her own reference and which were subsequently consolidated and heard together. On her part, the respondent testified that she had entered into an agreement dated 18th February, 2020 with the appellant over the demised premises comprising of a front shop and behind room at an agreed monthly rent of Kshs. 16,000/=. She stated that due to renovations that were to be done on that premises, it was not until June 2020 that she began her business operations and that her business was subsequently closed in February 2021 and therefore it was no longer tenable for her to operate the business. The respondent stated that she carried out renovations to the tune of Kshs. 1,650,000/= which she prayed that the Tribunal do order for the refund of the same. On his part,

the appellant stated that the agreed rent was Kshs. 27,000/=. He also contested the authenticity of the written agreement, even though he agreed that the signature in the said agreement was similar to his.

35. The record indicates that there was a site visit on 8th October, 2022 by one Rebecca Kalolia, a rent assessor at the tribunal who filed a report dated 18th October, 2022. Among the findings of the report were that the tenant (respondent herein) conducted major renovations, took possession of the premises in June 2020 and that the appellant disconnected electricity and closed the premises, and that the respondent was no longer in occupation of the premises.

36. The appellant challenged the reliance by the Tribunal on the evidence of the assessor, arguing that the assessor conducted the assessment report on a weekend which was not a working day. I have perused the said report. I note that the assessor was accompanied by both parties and their representatives as well as the advocate for the respondent. There is no evidence to show that the appellant, who was present himself during the site visit, objected to the same day. In any case, the appellant has not demonstrated what prejudice he suffered when the assessment was conducted on a weekend and not a working day. In my considered view, there was no prejudice suffered by any of the parties on the basis that the assessment was conducted on a weekend and not a working day. The findings could have remained the same, irrespective of which day of the week the exercise was conducted. Moreover, the assessment was conducted in the presence of all the parties and their representatives and therefore none was condemned unheard. It is my conclusion that the tribunal made findings based on the evidence tendered and that was obtained in the presence of both the parties.

37. In this case, the appellant disputed having signed the agreement dated 18th February, 2020. However, when he was cross-examined, the appellant admitted that the signature on the said agreement was similar to his. The appellant does not deny that he leased out the suit premises to the respondent. Whereas the appellant stated that there was only a "gentleman" agreement, his admission that the signature in the written agreement produced by the respondent makes it more probable that the agreement was in writing and not otherwise.

38. It is also clear that the rent payable was in dispute. Whereas the respondent stated that the rent payable was Kshs. 16,000/=, the appellant contended that the same was Kshs. 27,000/=. The court has already found that the agreement was in writing. The said agreement indicates that the rent payable was Kshs. 16,000/=. As rightly found by the tribunal, it is also my finding that the monthly rent payable was Kshs. 16,000/= as shown in the agreement and not Kshs. 27,000/= as alleged by the appellant.

39. In this case, it was also not in dispute that renovations were carried out on the demised premises by the respondent during the subsistence of the tenancy. The respondent stated that the costs of renovations was Kshs. 1,650,000. The rent assessor's report confirmed that the respondent carried out major renovations. I find that the tribunal's conclusion that the appellant was not convincing in alleging that he carried out the renovations and incurred the attendant costs to be correct. It is my finding that the respondent has demonstrated on a balance of probabilities that she indeed carried out the said renovations and incurred a cost of Kshs. 1,650,000.

40. The appellant has also alleged bias on the part of the tribunal. However, having perused the material on record, I have not seen any evidence of bias and none has been proved by the appellant.

41. It is my view that based on the evidence that was adduced before the Tribunal, the Tribunal was justified in arriving at the decision it made. The findings and holdings by the Honourable Vice Chair of the Tribunal were well founded and I find no basis to interfere with the same.

42. In the same result, I find no merit in the appellant's appeal and the same is dismissed with costs to the respondent.

43. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH SEPTEMBER, 2024

In the presence of:

Court Assistant – Moses

Appellant – Present in person

Ms. Anguche for Respondent

C.K YANO,

JUDGE