Soud & another v Sheikh (Environment & Land Case E019 of 2023)
[2024] KEELC 7464 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7464 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E019 OF 2023

SM KIBUNJA, J

NOVEMBER 13, 2024

BETWEEN

ABDULMAJID RASHID SOUD ..... 1ST APPELLANT

SOFIA AHMED FAMAU ..... 2ND APPELLANT

AND

ABDULWAHAB ABRAR SHEIKH ..... RESPONDENT

(An appeal from the judgement of Hon. D. Mburu, SPM, delivered on 20th July 2023 at Kitui, in Mombasa CMCC ELC No. E065 of 2023)

JUDGMENT

1. This appeal was commenced through the memorandum dated the 17th August 2023, raising 23 grounds summarized as follows:

    a. That the learned trial magistrate erred in law and in fact in altering the issues raised by the respondent from demolition of the house without land to renovation and partitioning, and reaching to an erroneous decision.

    b. That the learned trial magistrate erred in law and in fact in failing to find that no demolition had occurred even after visiting the locus and confirming the house was repartitioned.

    c. That the learned trial magistrate erred in law and in fact in failing to find that the respondent had consented to the appellant to undertake the repair and renovation works of the house.

    d. That the learned trial magistrate erred in law and in fact in finding that the appellants and respondent had entered into a sale agreement over the Swahili house, without appreciating that the respondent's involvement in the agreement was as the owner of the land not house.

e. That the learned trial magistrate erred in law and in fact in failing to appreciate that the appellants only reorganized and repartitioned the rooms in the Swahili house leading to an increase of their number, without interfering with its structure.

f. That the learned trial magistrate erred in law and in fact in finding that the appellants had breached the conditions in the agreement of 25th February 2016, by repartitioning and renting out the suit property.

g. That the learned trial magistrate erred in law and in fact in finding that the Swahili house was being used for business when it was being used for residential purpose.

h. That the learned trial magistrate erred in law and in fact by awarding general damages for breach of contract to the respondent.

i. That the learned trial magistrate erred in law and in fact by failing to dismiss the respondent's claim for demolition and eviction orders.

2. The appellants therefore prays for:

a. Appeal to be allowed with costs.

b. The lower court decision to be varied as follows;

i. Orders (a) to (e) of the judgement of 20th July 2023 be set aside in their entirety.

ii. The respondent's suit be dismissed in its entirety.

iii. The costs of the suit be awarded to the appellants.

c. That the costs of this appeal to the appellants.

3. The learned counsel for the appellants filed and served the record of appeal and supplementary record of appeal dated the 27th March 2024 and 22nd May 2024, respectively.

4. The appeal was canvassed through written submissions as agreed on 27th May 2024. The learned counsel for the appellants and respondent filed their submissions dated the 12th July 2024 and 29th July 2024 respectively, which I have considered. The issues set out for determinations by the two counsel are as follows;

1. Appellants' Issues:

i. Whether the Swahili house was demolished and constructed afresh.

ii. Whether the learned magistrate erred in law and in fact in holding that the renting the rooms on the suit premises amounted to conversion of the premise from residential to commercial purposes.

iii. Whether the learned magistrate erred in awarding general damages.

2. Respondent's Issues.

i. Whether the learned trial magistrate erred in law and in fact in holding that the renting of the suit premises amounted to conversion of the premises from residential to commercial purposes.

ii. Whether the learned trial magistrate erred in awarding general damages.

iii. Whether the appellants' right to the house without land can override the respondent's right to enjoy use of his land.

iv. Whether the appeal is competent.

The appellants' issues (ii) and (iii) are similar to respondent's issues (i) and (ii).

5. The court has found the following to be the issues for determinations in the appeal:

a. Whether the appellants had breached the conditions in the agreement of 25th February 2016, by repartitioning the house leading to an increase of the number of rooms.

b. Whether the learned magistrate erred in awarding general damages.

c. Who pays the costs?

6. The court has carefully considered the grounds on the memorandum of appeal, record of appeal and supplementary record of appeal, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following determinations:

a. That from the pleadings filed before the trial court that are in the record of appeal, including the plaint and defence, it is clear the respondent had sued the appellants seeking for inter alia, their eviction from the suit property, and demolition of their semi-permanent house, comprising of ten bedsitter room; outstanding ground rent of Kshs.216,000, and accrued arrears from date of filing the suit to determination; general and special damages; costs and interests. The basis of the respondent's claim is set out at paragraphs 9 to 13 of the plaint. Simply put, the respondent posit that contrary to the consent he gave the appellants' to undertake minor repairs or renovate the Swahili house, that was supposed to be done with the same quality of materials, they instead demolished the house and built a permanent one with ten be-sitters, without his consent which they rented out. That in October 2020 he notified the appellants or the review of ground rent from Kshs.1,200 to Kshs.36,000 with effect from 1st January 2021 but they declined to pay and hence the arrears. The appellants responded to the claim through their statement of defence insisting that the ground rent agreed was Kshs.1,200. They denied demolishing the Swahili house and building a ten bed-sitter permanent one without consent, that they have rented out. That though they were notified of the ground rent review, it had not been agreed upon at the time of transfer of he premises. That respondent has refused to receive ground rent of Kshs.1,200 from 2021 demanding Kshs.36,000 instead.

b. The copy of the typed proceeding before the trial court was filed through the supplementary record of appeal. In his judgement that is in the record of appeal, the learned trial magistrate summarized the pleadings by the respective parties and their testimonies. The court then identified three issues for determinations that are:

i. Whether the defendants, who are now appellants, are in breach of contract for partitioning and renting out the suit property.

ii. Whether the plaintiff has made a case for change of ground rent.

iii. Whether the plaintiff is entitled to the relief sought.

The court then proceeded to analyse the above issues sequentially, and in respect to the first one, found at paragraph 20 and 21 that in converting the Swahili house to ten bed-sitters, the appellants went against the conditions for transfer, and were in breach of the contract. On the second issue, the learned trial magistrate found the respondent could not have

unilaterally increased the ground rent payable and at paragraph 24 declined to allow the claim for Kshs.216,000 in outstanding arrears. On the third issue, the trial court found the contract between the parties was fundamentally breached, and cannot be further performed, and that the prayer for eviction and demolition had been established. General damages of Kshs.50,000, order for OCS to provide security and costs were also allowed.

c. The role of this court as a first appellate court is to re-evaluate and reconsider the evidence and come to its own conclusions, with the caution that it did not see or hear the witnesses first-hand. In the case of Kenblest Kenya Limited v Musyoka Kitema [2020] eKLR the court held that:

> " As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis but bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand. This is captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' This was buttressed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR where it was held that:
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> "We have also, as we are duty bound to do, as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGui V Republic, (1984) KLR 729 And Susan Munyi V Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported)."

The learned counsel for the respondent referred the court to the case of Abok James Odera t/a A. J. Odera & Associates versus John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR, where the court similarly held that;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2 EA 212, where the Court of Appeal held inter alia that:
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> "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not introduce extraneous matters not dealt with by the parties in the evidence."

Parties are bound by their pleadings, and what the respondent sought to be demolished through his prayer in the plaint is clearly described as "semi-permanent house". Though in his testimony in court he talked about a permanent house having been constructed, and during the site visit stated the house was made of stones, the appellants disputed and testified that they only plastered both the interior and exterior walls. The appellants agreed repartitioning the house increasing the rooms from eight to ten each, with its toilet facility from one shared toilet facility. The photographs availed by the respondent during the trial that are in the record of appeal appear to me to be of plastered walls.

d. This court must, as required in the decisions above, give allowance to the fact it did not observe the demeanour of the witnesses testifying. I dare add, that this court has not visited the locus as the learned trial magistrate did, and definitely that played a part in forming or shaping his conclusions about the structure in dispute and its use. This is important because there are no photographs availed of the structure before the appellants worked on it. The respondent's pleadings and evidence is that the structure/house was of mud/earth walls by the time the appellants bought it, and the consent he gave them was for minor repairs. The appellants' claim that the works they did on the house was in conformity with the respondent's consent has been denied by the later. I do not find any basis to fault the learned trial magistrate finding that the conversion of the eight-roomed Swahili house with a shared toilet to a ten bedsitter each with toilet facility house amounted to a breach of the conditions of contract.

e. Indeed, the role of courts is to interpret and enforce contracts between parties before it, and not to rewrite the terms of the contract. By the appellants carrying out works on the Swahili house that went beyond the authority given by the respondent, who is the land owner, the former breached the terms of the agreement that they were aware of. I therefore find no reason to go against the learned trial magistrate's finding that the contract between the parties herein had been fundamentally breached and cannot further be performed. Of course the parties would still be at liberty to renegotiate and explore the possibility of entering into a new contract that reflect the current reality.

f. The quantum of general damages at Kshs.50,000 was in exercise of the trial magistrate's discretion after considering the applicate case law. I do not find any evidence of misapplication or misapprehension of the applicable principles in the way the learned trial magistrate exercised his discretion, and I find no basis of interfering with that award.

g. Considering that section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the events unless where otherwise ordered by the court for good reasons, and as the respondent had substantially succeeded in his claim, then I find no reasons to disturb the order on costs.

h. Flowing from (g) above, as the appellants have failed in their appeal, they will pay the respondent's costs.

7. In view of the foregoing determinations, the court finds and orders as follows:

a. That the appellants appeal against the learned trial magistrate's judgement of 20th July 2023 in Mombasa CM ELC NO. E065 of 2023 is without merit and is hereby dismissed.

b. The judgement of Hon. D. Mburu, SPM, learned trial magistrate, of 20th July 2023 is confirmed in its entirety.

c. The respondent is granted costs in the appeal.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 13TH DAY OF NOVEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Appellants : Mr Khalid Salim

Respondent : Mr Tolo

Leakey – Court Assistant.