



China Wu Yi (Kenya) Company Limited v Ms Advocates LLP (Civil Appeal E058 of 2023) [2024] KEELC 14033 (KLR) (17 December 2024) (Judgment)

Neutral citation: [2024] KEELC 14033 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL E058 OF 2023
JA MOGENI, J
DECEMBER 17, 2024**

BETWEEN

CHINA WU YI (KENYA) COMPANY LIMITED APPELLANT

AND

MS ADVOCATES LLP RESPONDENT

(Being an appeal from the ruling and or orders of Honorable Chairman A. Muma at Business and Rent Tribunal delivered on 16th September 2022)

JUDGMENT

1. The Appellant is the Landlord of the Respondents, in their premises, located at Kawangware. The agreed monthly rent payable by the Appellant was Kshs.16,000/-. By notice to alter terms of tenancy dated 1/11/2021, the Appellant gave notice to the Respondent of its intention to increase rent for the premises from Ksh.16,000/- to Ksh.45,000/- per month for the reason that the rent the Respondent was currently paying was uneconomical in view of the prevailing market rate of the properties in the same region where the suit property is situated.
2. At the same time on 10/12/2021 after the expiry of the notice period, the Appellant issued a notice to terminate tenancy despite the Tribunal having dismissed the same notices to terminate and increase rent by its ruling on 10/12/2021 via case number E524 of 2021.
3. On 25/04/2022 the Honorable Chairman issued an order upholding the tenant's application allowing the tenant to continue with his business without interruption and restraining the LandLord from interfering with the tenant's quiet occupation of the suit premises.
4. Aggrieved by the ruling the Appellant appealed to this court on the following main grounds of appeal:
 1. That the Tribunal erred in law and in fact in holding that the Tenant ought not to pay rent between the date of signing of the Agreement to the date the negotiations collapsed being from



30th November 2029 to 24th August 2020 despite having found at paragraph 19 of the Ruling that the Agreement for Sale did not materialize.

2. That the Tribunal erred in law and in fact in taking as gospel truth the averment by the Tenant that the Tenant had entered a gentleman's agreement with the Landlord that it would not pay rent during the period of negotiations in spite of the Landlord clear averments that it was a stranger to such an agreement.
 3. That the Tribunal erred in law and fact in failing to appreciate that the non-payment of the rent, if any, was pegged on the condition of the Agreement for Sale between the Landlord and the Tenant materializing, thus since the said Agreement did not materialize, it is precipitate on the Tenant to pay the rent for the period the Tenant was in occupancy of the Landlord's premises especially since the Tenant did not produce any written agreement to the contrary.
 4. That the Tribunal at paragraph 20, erred in law and in fact in assuming wrongly that the fact that the Landlord did not demand for rent payment from the Tenant during negotiations of the Agreement for sale, is a prima facie evidence that the Landlord had agreed to non-payment of rent by the Tenant during the said negotiations.
 5. That the Tribunal in paragraph 24 thereof noted that the rent arrears owed to the Landlord by the Tenant accrued as per the terms of the tenancy and went a step further to contradict itself by holding that the Tenant should not pay rent from the date when the signing of the Agreement for sale up to the date when negotiations, yet the Tenant had not given written evidence of an agreement not to pay rent during the said period between the Landlord and the Tenant.
 6. That the Tribunal erred in law and in fact by entertaining the Tenant's reference to vary terms of the tenancy when the tenancy had already lapsed on instigation of the Tenant.
 7. That the Tribunal erred in law and in fact by varying the rent payable when the actual rent payable by the Tenant was in fact set at the average market rate for rental apartments in the locality where the Landlord's premises is situate.
 8. That the Tribunal erred in law and in fact by applying its orders retrospectively when the tenancy had already determined.
 9. That the Tribunal erred in law and in fact by proceeding with the case yet its jurisdiction determined the moment the Tenant ended the tenancy and vacated the premises
5. He thus sought the following orders from the court:
- a. That the Appeal be allowed.
 - b. That the Ruling of the Business Premises Rent Tribunal dated 16th September, 2022 be set aside ex debito justitiae.
 - c. That the ruling be substituted thereof with an order that the tenant pays rent arrears of Kshs.2,074,000.00.
 - d. That the costs of this Appeal be awarded to the Appellant in any event.
6. On the 15/06/2024, the court directed the parties to file written submissions.
7. At the time of writing this judgment the Appellant had filed their submissions dated 10/07/2024 through their advocates Wambugu Kariuki and Company Advocates, while the Respondent had filed their submissions dated 20/08/2024 through their Advocates, MS Law Advocates LLP. The Appellant



submitted that there was an existing tenancy agreement from August 2016 to November 2019 where the Appellant had proposed to change to Lease Agreement. The terms for the change were agreed over gentleman's agreement waiting modalities of offsetting balance.

8. It was Appellant's contention that it was the intention of the Landlord to create a good environment for negotiations for the Agreement for Sale and therefore he chose not to ask for rent. He contends that the Tenant who is the Respondent never provided any agreement to show that there was a gentleman's concession not to pay rent. He has relied on Section 107 and 108 of the Evidence. Further the Tribunal did not have jurisdiction in issuing the orders of payment of the rent since the decision was based on an expired tenancy agreement.
9. That the agreement was premised on the legal work the respondents undertook for the appellant and that a sale of two other units which was meant to cushion the agreement fell through. That whereas the respondents has been told orally not to pay the rent of the quarter leading to the end of the tenancy agreement, with the lapse of the sale agreement of the two units the respondent now were required by the respondent to pay rent and served them with a demand for Kshs. 1,395,500 backdated to November 2019. This was rent for the quarter that the appellant had waived rent payment pursuant to an oral agreement pending finalization of the Sale Agreement. To enable the respondents purchase the demised premises.
10. They submitted that the appellant failed to repair the suit premises leading to leakages that necessitated their moving out of the suit premises upon making an application before the Tribunal in order as evidenced by annexure NEA-5.
11. They submitted that the Tribunal was correct by find that the Landlord was estopped from going back on his word having offered the Respondents the chance to purchase the suit property. Further that the finding of waiver of rent in the negotiation period was correct since the parties had mutually agreed to hold off demands for rent. That the finding by the Tribunal that they pay rent of Kshs. 140,245.00 is correct since it was based on a valuation done by Respondent's Valuer as per annexure NEA-7.
12. On the Respondent's part, he submitted that the central issue is to establish whether there was an oral agreement that the respondents should not pay rent. He contended that despite the fact that the agreement was oral it is not always the case that agreements are written.
13. He further stated that parties had moved from the then agreement that had lapsed and the parties had moved to the oral agreement which showed the parties were willing to be bound.
14. The respondent submitted that when negotiations for the sale of the suit premises fell through that is when the appellant demanded for payment of rent putting the demand at Kshs. 1,550,000 and both parties filed suits at the Tribunal. On seeking for determination of a reference to terminate the tenancy and the other seeking to vary the terms of the then periodic tenancy. The Tribunal found in favour of the tenant/respondent noting that the tenant/respondent continued paying rent before being forced out by the appellant.
15. Further that the Tribunal after examining the reports that had been submitted by the valuers and cross-examining the makers came to the inevitable conclusion that the rent payable was Kshs 140,245 per month and the same had been complied with apart from the refund owed to the tenant by the Landlord. The respondent contends that they relied on the Appellant's word that words and deeds that he would not collect rent from the respondents for the period of the negotiations. The respondent submitted that they relied on the doctrine of estoppel.



16. The respondent also submitted that the Tribunal had power to vary the terms of the tenancy allowing the tenant to vacate the suit premises before repair because according to the Respondent the Landlord could not repair the premises unless it was vacant.
17. The respondent relied on several cases in advancing its case and in its submissions including Kenya Credit Traders Limited vs James Kahungu Kuria [2002]eKLR, Anyona vs Wells Oil Limited & 2 Others (Civil Appeal E091 of 2022) [2023] KEHC 26833 KLR and Carol Construction Engineers Limited & Another vs National Bank of Kenya [2020]eKLR.
18. He also referred to Section 12(1) (b) of Cap 301, LandLord and Tenant’s Act and submitted that the Tribunal had powers to alter the terms of and that the doctrine of lis pendens properly clothes the Tribunal with power to adjudicate over the tenancy since the tenants did not vacate the suit premises of their own free will. The appellant on their other had submitted that the Tribunal could not adjudicate matters touching on the tenancy since the tenancy had lapsed.
19. Having re-appraised and evaluated the evidence tendered both by the appellant and respondent, the learned Magistrate found for the respondent holding: “Consequently, I will allow the Tenant’s application in terms of prayers 3, 4, 5 and 6 of the application dated 7th January 2022”

Analysis and Determination

20. The Appellant has filed the Appeal under Section 13 (2) (d) of the Environmental and *Land Act*, Order 43, rule 2 & 3 of the Civil Procedure Rules, sections 79G, of the *Civil Procedure Act*, 2010 and the Inherent Jurisdiction of the Court. The Appellant alleges that the tenant should pay rent the period that the Landlord and the Tenant were negotiating for purchase of the suit property which however fell through. The Tenant on their other hand alleges that there was a gentlemanly agreement for tenants not to pay rent for the negotiation period.
21. The issue for determination therefore is whether there was a tenancy agreement between the Appellant and the Respondent to warrant payment of rent.
22. I have carefully considered the record, the rival written submissions by the parties, the authorities relied upon and the law. The appeal before me being a first appeal my obligation is as was set out in the case of *Selle -vs- Associated Motor Boat Co. Ltd & others* (1968) EA 123 where the court stated:-

“An appeal to this court from a trial by the high court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court evaluate it itself 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 this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or impression based on the demeanor of a witness is inconsistent with the evidence in the case generally: *Abdul Hameed Saif -vs- Ali Mohamed Shelan* (1955) 22 EACA 270”.
23. Taking into account the nine grounds of appeal set out in the memorandum of appeal, it is my view that only one issue falls for determination in this appeal that is whether the court should set aside the decision made by the Chairman of the Tribunal and allow the appeal.



24. The court has examined the reliefs that the Appellant had sought in its suit before the subordinate court. From the pleadings filed, the Landlord and Tenant entered into a tenancy agreement that was for a period of two years and it was renewed in 2018 and 2020. When this period lapsed, the parties did not formally extend the lease but instead entered into negotiations to convert the same to a Sale and Purchase agreement.
25. The sale and purchase agreement failed to take off and the Landlord then resorted to demanding for rent arrears from the Tenant and served them with a notice to terminate tenancy dated 27/08/2020. It is as a result of the notice that the tenant moved the Tribunal vide the reference dated 20/09/2020.
26. The Tribunal allowed the reference and found that the Tenant should pay rent based on a valuation report filed by the tenant at the rate of Kshs. 140,245.00 and that there was no rent payable from the date of signing the sale agreement to the date the negotiations for sale collapsed which was from 30/11/2019 to 24/08/2020. The Landlord being dissatisfied with the Tribunal's ruling filed this Appeal.
27. As demonstrated, the Appellant's suit was pegged on a lease that was for a term of 2 years from January 2016 and the terms was lapsing on December 2018. The term was further extended for a further 2 years and lapsed sometime in February 2020 and the parties did not formally extend the lease but they opted to convert the lease to a sale and purchase of the suit premises on agreed terms and conditions.
28. The parties herein had been in an advocate-client transaction of sale of a separate set of villas in the Bogani villas and the Landlord had proposed being the vendor that the monies due to the Advocate Tenant be put towards the deposit of the purchase price for the suit premises and thereafter the parties were to agree on the modalities of the payment of the balance of the purchase price. It is the tenant's claim that despite rendering their services and having expectations for the Landlord to honor their agreement this did not materialized.
29. According to the tenant there was a gentleman's agreement for non-payment of rent during the negotiation period pending a formalization of the oral contract in writing but this was never to be since the sale of one of the villas by the tenant did not succeed.
30. It is the tenant's contention that the Landlord cannot base its claim for rent on the tenancy agreement since the same had lapsed. Thus on the first issue, the tenant holds the view that there was a gentleman's agreement that absolved the tenant from paying rent. On its part, the Landlord holds the view that there is no gentleman's agreement in the tenancy but further states in the replying affidavit that the condition given to the tenants to stop paying rent for the period of the negotiation was to create a conducive environment or the negotiations. The Landlord has not explained how the creation of an enabling environment where the tenants were required not to pay fees was again vacated. In its own admission therefore it is the Landlord who created the situation requiring the tenants not to pay rent. However, the period leading to collapse of the negotiations is not aptly captured in the "gentlemanly" agreement of not paying rent. It therefore follows that at the collapse and any subsequent stay in the premises the tenants were required to pay rent.
31. From the evidence presented by the tenants at the Tribunal the rent payable was pegged on the valuation undertaken by the tenants' valuers. The Tribunal stated that the rent payable was Kshs 140,245.00. This was reached after the Tribunal considered the valuation report and indeed having heard both parties on the gentlemanly agreement. On this first issue I am persuaded from the Landlord's own admission and the evidence presented before the Tribunal that the period leading upto the collapse of the sale agreement the tenants had been absolved from paying rent.



32. At the same time, the rent payable as per the decision of the Tribunal is pegged on the valuation presented and examined by the Tribunal which is placed at Kshs 140,245.00 for the period the tenants occupied the suit premises. I am aware that the tenants vacated the suit premises on the directions of the Tribunal and based on their application before the said Tribunal which elaborated the loss and damage that the tenants stood to suffer due to leakages of water getting into the suit property. This information is not denied by the Landlord.
33. Now the lease herein expired in February 2020 and the tenants only vacated the suit premises in May 2021. The lease having expired the substratum of the suit disappeared and there was nothing left for the suit to stand on. Thus the Landlord cannot of right claim for rent for a tenancy that does not exist.
34. Now Order 42 rule (1) of Civil Procedure Rules provides the procedure and manner to plead issues which is by way of a memorandum of appeal to give an opportunity to the other party to be aware of the case in advance. Through the Appeal the appellant has asked this court to set aside the decision of the Chairman of the Tribunal.
35. The court identified only one issue for determination which whether the court should set aside the decision made by the Chairman of the Tribunal and allow the appeal.
36. The applicant seeks to have the order of the Tribunal set aside stating that the Chairman erred in law and fact in arriving at the decision of allowing the tenant/respondent to continue running their business in the suit premises and restraining the Landlord from interfering with this occupation.
37. Setting aside of a regular decision, ruling and or judgment of a court involves the court discretion upon sufficient grounds. The Appeal does not disclose what I would consider to be sufficient grounds of setting aside the ruling made by the Learned Chairman of the Tribunal except that the appellant is unsatisfied with the findings of the Chairman of the Tribunal.
38. The Appellant before me does not claim that there was any concealment of any material facts which, if they had been brought before the Court before that decision was arrived at, the orders would not have been granted. Rather it is clear that the appellant is simply unhappy with the Orders made by this Chairman of the Tribunal and seeks with the very same facts earlier put before the Tribunal to get different results.
39. I have considered the pleadings, the submissions and the authorities proffered by the parties in support of their veritably incongruent assertions. As the principles enunciated by the authorities the parties have proffered have been fully elaborated upon in the parties' submissions. I do not find it necessary to regurgitate the authorities. They are all good authorities in their facts and circumstances. I have taken them into consideration when arriving at my determination in this appeal.
40. Also having carefully gone through the proceedings in the Tribunal and perused the pleadings filed by each party and also having perused the impugned ruling of the Chairman of the Tribunal, it is my finding that the learned Chairman considered all pertinent issues and on a balance of probability arrived at a well-reasoned ruling. In the circumstances, I enter judgment for the respondent against the appellant in the following terms:
 - i. Grounds 1 to 3 in the appeal are dismissed.
 - ii. Costs shall follow the event and are awarded to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF DECEMBER, 2024.



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MOGENI J

JUDGE

Judgment read in virtual court in the presence of:

Mr. Eredi for the Appellant

Ms. Akello for the Respondent

Ms. Judith Adhiambo - Court Assistant.

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MOGENI J

JUDGE

