Willy v Nyama (Civil Appeal 44 of 2018)
[2025] KEHC 1094 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1094 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 44 OF 2018

EM MURIITHI, J

FEBRUARY 27, 2025

BETWEEN

CHARLES GITHINJI WILLY ..... APPELLANT

AND

GABRIEL HIUHU NYAMA ..... RESPONDENT

JUDGMENT

1. Before this Honourable Court is an appeal against the judgment of Honourable Y.M.Barasa delivered on 18 July, 2018 in Kerugoya Cc 315 Of 2012. The appeal is based on the following grounds:

    1. The learned Resident Magistrate went wrong and misdirected himself in fact and that he failed to properly keep complete record of all the proceedings which admission is indication of judicial bias.

    2. The finding and judgement of the learned Resident Magistrate are contrary to evidence adduced before him.

    3. The learned Resident Magistrate erred in law and in fact in failing to consider the fact that the Respondent refused to be refunded Kshs 87,360 with interest on 12th October, 2012.

    4. The learned Resident Magistrate erred in law and in fact in failing to consider the fact that at the time the appellant filed the suit the Respondent had refused and/or failed to vacate.

    5. The learned Resident Magistrate erred in law and in fact in turning to the issue of counter claim not supported fully being paragraph 7 of the lease agreement.

    6. The learned Resident Magistrate erred in law and in fact in putting full reliance of an agreement to arrive at his decision where such agreement was ignored by the respondent.

    7. The learned Resident Magistrate mis-directed himself on burden of proof in civil cases.

Brief Background

2. The Appellant herein instituted Kerugoya Civil Case 315 Of 2012 against the Respondent herein vide the Plaint dated 15th November, 2012 and filed in court on 16th November, 2012 seeking a permanent injunction against the Respondent, his servants, agents and anyone under him to interfere with 800 tea bushes and costs of the suit.

3. It was his claim that he is the legal owner of 800 tea bushes in Mutira/kaguya/831. On or about 5th November, 2009 him and the Respondent herein entered into a lease agreement whereby he leased out 800 tea bushes for a period of 10 years at a consideration of Kshs 12/= per bush making total sum of Kshs.96,000/=. He acknowledged receipt of entire amount upon execution of the agreement. After the Respondent herein utilized the tea bushes for a period of 3 years the Appellant herein and his entire family resolved to repossess the 800 tea bushes from the Respondent herein and were willing to refund the total amount of the remaining period of 7 years calculated at the rate of Paragraph 7 of the Lease Agreement. It was his claim that he tried on numerous occasions to pay the Respondent herein the amount for the remaining period but the Respondent herein remained adamant.

4. On his part the Respondent herein filed a Statement of Defence and Counterclaim dated 25th November, 2012 whereby he admitted that they entered into a lease agreement for a period of 10 years and as the Appellant herein evicted him from the lease property on 17th November, 2012 before the lapse of the lease period.

5. The Kshs 6,400/= that the Respondent herein claimed in the Counterclaim dated 25th November, 2012 was for fertilizer that he had bought for the tea bushes but had not utilized the same. He produced a receipt for the purchase of fertilizer dated 11th October, 2012.

6. The matter proceeded for hearing with each party calling one witness and on 18th July, 2018 Honourable Y.M. Barasa delivered the judgment. He entered judgment for the Respondent herein as against the Appellant/plaintiff herein as follows:

7. The Appellant's/plaintiff's herein suit is dismissed with costs.

8. The Appellant herein to refund the Respondent herein Kshs. 85,000/ plus 30% interest to be calculated from 5th November, 2009 to the date of judgment.

9. The Respondent is awarded costs of the counterclaim plus interest.

Appellant's submissions

10. The appellant submits that the Respondent through his counter claim prayed the trial court for a refund of the lease price for 7 years and 3 months of 69,600 at the rate per Ksh. 9,600/= per year, Ksh. 6,400/= being the cost of unutilized fertilizer applied on the said leased tea bushes, interest a (a) and (b) as stated at the rate of 30% per annum from 5th November 2009 till payment in full and cost of the suit.

11. However, the trial court proceeded and misled itself by awarding the respondent all what was not pleaded for as follows:

12. Ksh. 9,600/= per year for 8 years and 3months, plus Ksh.6,400 on fertilizer. And its multiplier and totals to 85,600 plus interest at 30% to be calculated from 5th November, 2009 to the date of the said Judgment. In fact, all what was awarded was not pleaded in the said respondent's counter claim dated 25th November, 2012.

13. The appellant's computation of the money the appellant is supposed to refund to the respondent:

14. The lease price per year was totalling to Ksh.9,600/= multiply by 7 years being the remaining lease period which totals to Ksh. 67,200/= plus 6,400/= for the said unutilized fertilizer totalling to Ksh. 73,600/= but not Ksh. 85,000/= as awarded by the trial court in the said judgment dated 18th July 2018. Further the trial court proceeded to award the interest of 30% which was calculated from 5th November, 2009 up to the date of the said Judgment which added up awarding 8 years and 9months. Wherein the tax officer multiplied the award with 9 months as it is calculated in the decree dated 15th November 2018.

15. In the case of: Kenneth Munene Chuaga v Sanduku Waraba Gravin (suing as legal representative of estate of Silas Waraba Deceased) cited the authority in the case of Butt vs Khan (1981) KLR 198 where court held as follows:

> " It is trite law that an Appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It is must be shown that the judge proceeded on wrong principle, or that he misapprehended the evidence in some material respect, and so Arrived at a figure which was either inordinately high or low".

16. The appellant submits that the trial court went further relying on unfounded pleadings and mislead its by awarding the respondent interest which run from 5th November, 2009 to the date of the Judgment that was 18th July, 2018.Infact this was contrary to what was pleaded in the said counterclaim and without considering the 3 years that the respondent had enjoyed the fruit of the whole appellant's 800 tea bushes. Actually, this amounts to miscarriage of justice.

Respondent Submissions

17. It is respondent's submissions that the Appellant herein acknowledged that he breached the terms of the lease agreement dated 5th November, 2009. If he chose to breach the terms of agreement, then he must bear the consequences of breaching the agreement.

18. Paragraph 7 of the Lease Agreement dated 5th November, 2009 provided as follows:

> " If the lessor terminates this Agreement before the agreed period he shall refund the consideration paid for the remaining period and reimburse the lessee all the expenses pursuant to this Agreement with an interest at the rate on 30% p.a. all-inclusive calculated from the date hereof provided that if such termination is initiated by the lessee, only the consideration paid shall be refundable."

19. The Respondent herein paid a sum of Kshs. 96,000/= for the tea bushes for a period of 10 years with effect from 5th November, 2009 but only utilized them for 3 years.

20. The 2nd term of the Lease Agreement dated 5th November, 2009 provided as follows:

> " The lease period shall be for 10 years with effect from 5th November, 2009 and a grace period 9 months hence the lease period shall end on 5th August, 2020"

21. The respondent submits that parties to a contract are bound by terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. It is not the business of courts to rewrite such contracts made by parties.

22. In the case of National Bank of Kenya Limited v Pipe Plastic Samkolit K Ltd [2002] 2 503 [2011] eklr At 507, the court had this to say:

23. “A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.”

24. The respondent submits that since the Appellant herein failed to honour his part of the bargain he must therefore reimburse the Respondent herein the consideration paid for the remaining period and the Respondent's expenses with an interest at a rate of 30% p.a. as agreed in the Lease Agreement.

25. Issues

    a. How much money the appellant was supposed to refund to the respondent as per clause 7 of the said lease agreement dated 5th November, 2009.

    b. Whether the trial magistrates court award should be interfered or set aside.

Analysis

26. How much money the appellant was supposed to refund to the respondent as per clause 7 of the said lease agreement dated 5th November, 2009.

27. The appellant’s case is that the Respondent through his counter claim prayed the trial court for a refund of the lease price for 7 years and 3 months of 69,600 at the rate per Ksh.9,600/= per year,Ksh.6,400/= being the cost of unutilized fertilizer applied on the said leased tea bushes, interest a (a) and (b) as stated at the rate of 30% per annum from 5th November 2009 till payment in full and cost of the suit.

28. However, the trial court misdirected itself and awarded the respondent as follows:

> Ksh.9,600/= per year for 8 years and 3months, plus Ksh.6,400 on fertilizer. And its multiplier and totals to 85,600 plus interest at 30% to be calculated from 5th November, 2009 to the date of the said Judgment. In fact, all what was awarded was not pleaded in the said respondent’s counter claim dated 25th November, 2012.

29. The appellant submits that the trial court should have awarded the respondent as follows:

> The lease price per year was totalling to Ksh.9,600/= multiply by 7 years being the remaining lease period which totals to Ksh.67,200/= plus 6,400/= for the said unutilized fertilizer totalling to Ksh.73,600/=

30. The Respondent on his part submitted that he paid a sum of Kshs. 96,000/= for the tea bushes for a period of 10 years with effect from 5th November, 2009 but only utilized them for 3 years.

31. The 2nd term of the Lease Agreement dated 5th November, 2009 provided as follows:

> “ The lease period shall be for 10 years with effect from 5th November, 2009 and a grace period 9 months hence the lease period shall end on 5th August, 2020"

32. Further, Paragraph 7 of the Lease Agreement dated 5th November, 2009 provided as follows:

> “If the lessor terminates this Agreement before the agreed period he shall refund the consideration paid for the remaining period and reimburse the lessee all the expenses pursuant to this Agreement with an interest at the rate on 30% p.a. all-inclusive calculated from the date hereof provided that if such termination is initiated by the lessee, only the consideration paid shall be refundable.”

33. In the case of National Bank of Kenya Limited v Pipe Plastic Samkolit K Ltd [2002] 2 503 [2011] eklr At 507, the court had this to say:

> " A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved."

34. The trial court held that the Appellant/plaintiff herein to refund the Respondent herein Kshs.85,000/ plus 30% interest to be calculated from 5th November, 2009 to the date of judgment. The trial court, however, computed a multiplier of the remaining lease period as 8 years and 3 months instead of 7 years and 3 months. This would appear to have been to compensate for the 9month grace period that the Respondent lost on account of the breach by the appellant.

Whether the trial magistrates court award should be interfered or set aside

35. The appellant submits that the trial court relied on unfounded pleadings and mislead its by awarding the respondent interest which run from 5th November, 2009 to the date of the Judgment that was 18th July, 2018.

36. The appellant argues that the respondent should have been awarded Kshs 73,000 and not Kshs 85,000.

37. In the case of: Kenneth Munene Chuaga v Sanduku Waraba Gravin (suing as legal representative of estate of Silas Waraba Deceased) cited the authority in the case of Butt vs Khan (1981) KLR 198 where court held as follows:

> " It is trite law that an Appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It is must be shown that the judge proceeded on wrong principle, or that he misapprehended the evidence in some material respect, and so Arrived at a figure which was either inordinately high or low".

38. The amount in dispute in this case is Kshs12,000 plus interest at 30%.

39. However, the lease agreement had granted the respondent a grace period of 9 months. The respondent did not utilize the grace period since the lease was terminated by the appellant.

40. The amount awarded to the respondent is not inordinately high to compel the court to disturb the damages awarded by the trial court on the principles of Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. AM. Lubia and Olive Lubia (1982 –88) 1 KAR 727 at p. 730 Kneller J.A.:-

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango V. Manyoka [1961] EA 705, 709, 713; Lukenya Ranching and Farming Co-Operatives Society Ltd V. Kavoloto [1970] EA 414, 418, 419. This Court follows the same principles."

41. The Court does not find error of principle or that the trial court took into account an irrelevant matter or failed to take a relevant factor or that the award is inordinately low or high as to warrant appellate interference.

Orders

42. Accordingly, for the reasons set out above, the Court finds that there is no merit in the appeal and it is dismissed.

43. The appellant shall pay the costs of the appeal to the Respondent.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kamuga for the Appellant.

Mr. Asiimwe for Mr. Magee for Respondent.