Korado v Mungatana (Commercial Appeal E080 of 2022)
[2025] KEHC 9043 (KLR) (Commercial and Tax) (27 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9043 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E080 OF 2022

BM MUSYOKI, J

JUNE 27, 2025

BETWEEN

PAMELA AKINYI KORADO ..... APPELLANT

AND

EDWARD MUNGATANA ..... RESPONDENT

(Being appeal from judgment and decree in milimani chief magistrate's commercial suit number 7910 of 2018 (Kagoni E.M. PM) delivered on 31st August 2021)

JUDGMENT

1. The appellant was a tenant in the respondent's house number G5-2 situated at Kenya Pipeline Estate Muthagia North in Nairobi (hereinafter referred to as 'the suit premises') vide lease dated 10-06-2014 which was to run for two years but was later extended with the appellant vacating on 28-02-2018. The respondent filed suit in the lower court claiming rent arrears, value of utility bills, cost of repairs and lost rental income all mounting to Kshs 4,053,238.56. The appellant filed defence in which she admitted the tenancy but denied being liable for the claim put forth by the respondent.

2. The respondent's case was that by a tenancy agreement dated 10-06-2104 the appellant rented the suit premises which tenancy was to last for two years. The tenancy was preceded by engagements between the parties on the sale of the suit premises which did not go through. When the tenancy lapsed on 30-06-2016, the appellant sought for an extension to the end of 2016 which the respondent granted but towards the end of the year, the appellant went to the Rent Restriction Tribunal and filed case number E1498 of 2016 where she got a reprieve but at the end of the case which took a year, the appellant was ordered to vacate the suit premises which she did on 28-02-2018.

3. The respondent averred that the appellant breached some terms of the tenancy in that she accumulated rent arrears of Kshs 1,020,000.00 and structurally altered the suit premises materially by demolishing and removing various fittings in which occasioned damage to the premises.

4. The respondent testified further that he engaged a quantity surveyor to assess the cost of restoring the suit premises to the state it was in prior to the appellant's occupation. The quantity surveyor returned a report of Kshs 2,027,956.00 as the cost of repairs and renovations. The respondent added that he needed a period of six months to complete the repairs which occasioned him loss of anticipated rental income which he attributed loss to the appellant. The respondent added that the appellant left behind utility bills of Kshs 103,000,00 for electricity and Kshs 2,282,56 for water. He averred further that he paid the bills whose refund he was claiming from the appellant. He maintained that the improvements and developments done by the appellant in the suit premises was done without his consent.

5. The respondent called one Edigar Lupao, an estate agent as PW2. Edigar told the court that, he managed the suit premises where the appellant was a tenant at monthly rent of Kshs 150,000.000 per month. The rent was payable in their account and all payments were reflected in their statement. He testified further that there were two statements in respect of the tenancy. The first statement did not have all payments because sometimes, the appellant would deposit through other people without narration while in some other times there were bouncing cheques. The second statement was a product of audit and reconciliation which showed that the arrears were Kshs 1,020,000.00.

6. PW2 added that when the appellant vacated, they found the suit premises vandalized as shown in the report which was produced as exhibit 5. He stated that the defects shown in the report were not the normal wear and tear and the landlord had to repair the suit premises. He also stated that when the appellant moved out, there was electricity bill of Kshs 100,0000.00.

7. In cross examination, he said that there was no addendum agreement and that there was adjustment of the rent to Kshs 150,000.00 which was communicated verbally. He identified a letter dated 10-11-2016 where he had demanded rent arrears of Kshs 750,000.00 and added that he did the inspection of the suit premises and found it to be in inhabitable condition. He maintained that he was the agent of the suit premises in the entire period of tenancy. He also stated that he did not quantify the damage and that all he did was to send the inspection report to the landlord and his lawyers.

8. The respondent's third witness was Lennox Kojo who said that he was an assistant architect employed by Koronet Consultants Limited and that he knew the plaintiff. He was instructed to check whether the suit premises had been done according to the approved plans following which he did a repair report dated 7-12-2018 which he produced as exhibit 9. He confirmed that the suit premises was repaired as per approved plans.

9. When he was cross-examined by Mr. Cheboi for the appellant, the witness stated that his report was in relation to one prepared by a quantity surveyor known as Samuel Mwangi. He added that his report indicated that the defects seen in March 2018 had been rectified and the suit premises handed over to the client. He stated further that he supervised the work and ensured that it was done as per the bill of quantities. He admitted that the appellant was not present when they conducted the inspection.

10. When the appellant took the witness stand, she told the court that when she took up the tenancy, the agreed rent was Kshs 85,000.00 at which time the respondent was living in USA. The initial agreement was for the sale of the suit premises which did not go through. She stated that the suit premises had many defects which she was to repair. The respondent gave her a go ahead to repair and some of the costs of repairs were to be deducted from the rent payable. She proceeded to repair and sent all the repair costs to the respondent through an email and that the agent was copied in what she was doing.

She added that when the agent came on board, the rent was paid in his office through cash, mpesa and bank account. She denied owing any rent and added that the issue of rent was handled and determined by the Rent Restriction Tribunal.

11. The appellant stated further that the letter dated 1-11-2016 which asked her to move out showed that the rent as at then was Kshs 150,000.00 being rent for November. The letter also asked her to make arrangements to settle rent for December 2016 before vacating. She then sought protection from the Rent Restriction Tribunal which matter was concluded in February 2018. She claimed that she paid rent in time for the entire period she was in occupation save for rent for January 2018 which she did not because the landlord was holding her deposit. She denied vandalizing the house for the seven years she was in occupation. She stated that the house was inspected before she vacated and report sent to her through email by Mr. Lupao.

12. In cross-examination by Mr. Khayega for the respondent, the appellant said that she was negotiating purchase of the suit premises when she was in occupation and that there was no agreement that she should stop paying rent pending negotiations. She added that the tribunal ordered reconciliation of accounts and they could not agree on the reconciliations because the respondent did not have proper accounts. She stated further that, most of the payments were through mpesa although she did not generate mpesa statements. She insisted that her sister handed over the suit premises to another tenant in her absence and that the same was handed over in good condition. She also admitted that the repairs which were required to be done were not done. She also stated that the landlord was responsible for internal repairs and that the improvements she did in the suit premises were approved by the landlord and she did not have proof of the costs she incurred. She also did not have statements for utilities in proof that she had paid them and admitted that the photos produced by the respondent reflected the condition the house was in at the time she vacated and that they were internal defects the landlord was to deal with.

13. In re-examination, she added that she had no problem in settling the due utility bills. She added that the statement produced by the respondent was not accurate and that most of the time, she was out of the country and would send third parties to pay rent on her behalf. She insisted that the damage to the house was normal wear and tear.

14. This appeal was disposed of by way of written submissions. The appellant filed submissions dated 14th July 2022 while the respondent filed his dated 6th June 2023. I have read the submissions of the parties, the memorandum of appeal and the proceedings of the lower court together with the exhibits produced therein

15. The proceedings show that before the matter took off on 11-05-2021, the parties were in agreement of the following;

    1. There indeed existed landlord/tenant relationship.
    2. The lease was for 2 years from 1-07-2014 to 31-06-2016.
    3. The appellant vacated the premises on 28-02-2018.
    4. The appellant requested for extension of the lease.
    5. Rent was paid monthly at Kshs 150,000.00.
    6. The utility bills were disputed.

16. I discern from the above and the submissions of the parties that the only issues for determination in this appeal are; whether there were any rent arrears, whether the appellant had duty to refund money

paid for utility bills and whether the repairs were done as claimed by the respondent and whether the appellant was liable for the same.

17. The appellant has argued that the respondent did not prove that the rent was in arrears as pleaded. It is agreed between the parties that the monthly rent between 30-01-2016 to 28-02-2018 was Kshs 150,000.00. The respondent claims that the burden to proof that the amount was owed lied with the respondent and that the same was not discharged. It is true that the respondent had the burden to prove his case but it should also be understood that the appellant had a duty to controvert the evidence produced by the respondent. Once the respondent laid ground enough for the court to find it more probable than not that the rent was owed, the onus to disprove that shifted to the appellant. Sections 108 and 109 of the *Evidence Act* provides that;

    108 The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

    109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person."

18. I have looked at the second statement of account which shows that the rent after reconciliation was Kshs 1,020,000.00 as claimed in the plaint. In my view, once the respondent produced such statement, the onus shifted to the appellant to controvert the same. The appellant was the one who wanted the court to believe that she had paid the rent and she would obviously be the one to lose if no evidence of payments was led.

19. The appellant stated that she had paid in cash, mpesa and through bank. She did not allege that there was an amount she paid which was not acknowledged or accounted for. This for me would have been a very simple exercise by the appellant which she would have done by producing her mpesa statement and bank account showing that payments were done or at least flagging out the payments which were omitted in the statement produced by the respondent. Failure to do so in my view meant that all the payments were captured in the statement. I do not think that such would be shifting the respondent's burden to the appellant. I therefore take position and I find that the respondent proved on a balance of probabilities that the rent was in arrears as pleaded.

20. The second issue is whether the appellant had a duty to refund the money for utility bills. The appellant argues that the utility bills were payable to the service providers and not the respondent. According to the appellant, the utility bills are borne out of contract between the appellant and the service providers. I find this argument both interesting and lame. The utility bills are tied to the suit premises as much as it is to the owner. The suit premises could not be used in isolation or exclusive of the utilities.

21. The appellant does not dispute that she consumed the electricity and water as billed. In fact, in her evidence, she stated that she had no problem settling the utility bills. I take judicial notice that once the service providers disconnect supplies to a specific property for failure to pay, the same cannot be reconnected or connected with a different account without the previous bills being settled. Without the services, the premises would not be tenantable or attract tenants at the same rate as when the services are connected thus rendering it uninhabitable.

22. The respondent cannot escape what she spent in connection and tied to her occupation and use of the suit premises. The appellant testified that she left the bills disconnected because she found them disconnected. I have not been provided with the original lower court file and the record of appeal seem to be missing the electricity and water bills. I note that the bills were produced as exhibits if the appellant's list of documents dated 15-08-2018 is anything to go by. The lower court had the

advantage of having taken the evidence of the parties first hand and this being the first appellate court on this matter, it must give due allowance to the fact that the trial court took first hand evidence of the parties and observed the demeanour of the witnesses. When the Court of Appeal was faced with similar circumstances where it found itself unable to determine which of the parties it would believe in Pius Machafu Isindu v Lavington Security Guards Limited [2017] KECA 225 (KLR)it held as follows;

> " The evidence of those officers was not seriously challenged and it remained a matter of credibility of the witnesses. The trial court chose to believe the respondent's witnesses and on that it was the better judge as it saw and heard them.'

23. The appellant averred that he paid the bills which are missing in the record of appeal. The respondent did not show that she paid the said bills and she admitted that she did not have receipt or statements in proof of payment of the said bills. The tenancy agreement provided that the appellant shall pay all the utility bills. In these circumstances, I am satisfied that the trial court was justified in awarding the amount claimed for the utility bills.

24. The last issue is that of repairs. The submissions of the appellant are in some instances at variance with what the she told the court. For instance, she told the court that she made what she referred to as improvement with the consent and approval of the respondent but in the submissions, she urges that she never made any alterations. Secondly, she said in her testimony that she left the premises needing some repairs which were supposed to be done by the appellant but in her submissions, she argues that the suit premises was in good condition when she left.

25. In my assessment, the Honourable Magistrate was right when he observed that, the photographs which the applicant admitted reflected the state of the suit premises at the time she vacated, showed that it indeed was in need of major repairs that were beyond the obligations of the respondent. The respondent called a quantity surveyor and tan architect who were able to show that the respondent incurred the amount to restore the suit premises to its former state and condition.

26. The appellant admitted that the inspection report was sent to her by the agent through email. There was no suggestion or evidence to show that she raised any protest or objection to the report. She did not demand or call for joint inspection before she left the house despite knowing that the same was in a dilapidated status. Nevertheless, she said in her evidence in chief that the house was inspected before she vacated and the report sent to her via email by the agent. This is the same report that was produced as the respondent's exhibit 5 and it is the same report the respondent used to engage the architect who supervised the repairs and restoration of the suit premises to the condition the appellant had found it. The report contained photographs which the appellant admitted represented the condition of the house when she left.

27. In the premises, I do not see any error the Magistrate made in finding that the claim for repairs was proved on a balance of probabilities.

28. The upshot of the above is that, I find this appeal lacking merits and I proceed to dismiss the same with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Kerubo for the appellant and Miss Ade for the respondent.