Gichaba v Lexis Investment Limited (Civil Appeal 131 of 2019)
[2024] KEHC 479 (KLR) (29 January 2024) (Judgment)

Neutral citation: [2024] KEHC 479 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 131 OF 2019

RE ABURILI, J

JANUARY 29, 2024

BETWEEN

WESLEY ROBINSON GICHABA ..... APPELLANT

AND

LEXIS INVESTMENT LIMITED ..... RESPONDENT

(An appeal arising out of the Judgement of the Honourable A. Odawo in the Chief Magistrate's Court at Kisumu delivered on the 23rd October 2019 in Kisumu CMCC No. 411 of 2016)

JUDGMENT

Introduction

1. The respondent herein sued the appellant for breach of contract seeking Kshs. 986,969 in arrears inclusive of rent and generator charges, punitive/aggravated damages for breach of contract, as well as general damages for necessary repairs and refurbishment of the demised property.

2. In his defence, the appellant denied the averments made by the respondent but admitted to owing some rent arrears that stood at Kshs. 551,104 as at the time of the eviction but that the same could be offset through the deposit and monies that had been paid to the respondent and that the respondent further owed the appellant Kshs. 393,422 which he indicated he would counterclaim in due course and at the right jurisdiction.

3. The trial court in its judgement found that the appellant had breached the tenancy agreement between himself and the respondent. The trial court proceeded to enter judgement in favour of the respondent to the tune of Kshs. 986,969, Kshs. 200,000 for aggravated damages, general damages of Kshs. 100,000 as well as costs and interest of the suit.

4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 20th November 2019 raising 17 grounds of appeal that are summarised as follows;

a. That the learned honourable magistrate erred in law and in fact by failing to appreciate the import and tenor of the provisions of clause 3 (a) of the lease agreement which clearly stipulated when the lease shall determine and the same was determined on October 24, 2014.

b. That the learned honourable magistrate misdirected herself and erred in law and fact in awarding aggravated damages of Kshs. 200,000 without any proper pleading, cause of action and any iota of evidence thus leading to injustice.

c. That the learned honourable magistrate erred in law and fact in awarding general damages for repairs of Kshs. 100,000 which were never pleaded and proved in law thus leading to injustice.

d. That the learned honourable magistrate erred in law and fact in entering judgement for the respondent for Kshs. 986,969 without any prove by adduction of evidence.

e. That the learned honourable magistrate erred in law and in fact in failing to appreciate that a set off is a good defence (just as a counterclaim) and its independent and can stand on its own.

f. That the learned honourable magistrate erred in law and fact in completely ignoring the appellant's in her evidence in her judgement to the detriment of the appellant and treated the respondent's case as if it was unopposed.

5. The parties argued the appeal by way of written submissions.

Appellant's Submissions

6. The appellant submitted that Clause 3(e) of the agreement between the parties herein provided for Arbitration as a means of resolving any dispute between the parties herein and thus by dint of this clause, the court's jurisdiction was ousted. Reliance was placed on the cases of *Meshack Kibunja Kaburi & 3 others v Kirubi Kamau & 5 others; Central Highlands Tea Company Limited (Interested Party)* [2021] eKLR.

7. It was further submitted that the issue herein concerned a building and as at the time the suit was filed, the subordinate court was not a court as envisioned under *ELCA*2011 and thus the trial court did not have jurisdiction.

8. It was submitted that there was evidence that the Appellant was not in the premises after October, 2014 as the Respondent was not able to deliver any of its letters to the Appellant as confirmed on cross-examination of PW1 and thus the lease determined in October 2014.

9. Further, the appellant submitted that in a breakdown dated 17.08.2015, the Respondent confirmed the rent arrears as at August 1, 2014 was Kshs. 551,104 and that the new invoices for November, 2014 to January, 2015, being invoice No.1155 related to a period when the Appellant was not a tenant and had been evicted as the lease had been determined.

10. The appellant submitted that there was no evidence adduced to support the award and further that nowhere did the court determine or even assess the awards. It was submitted that there was no reasoning for the awards and thus no justification for the two awards and as such they were to be dismissed.

11. It was submitted that the case before the court was contractual and nowhere did it meet the threshold for grant of exemplary damages as set out in the case of *The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo* [2018] eKLR and *George Ngige Njoroge v Attorney General* (2018) eKLR.

12. The appellant submitted that the court cannot and erred in awarding general damages in a claim based on contract and as a specific amount is sought as was held in the case of *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2021] eKLR.

13. It was submitted that the Respondent did not substantiate the sum of Kshs. 986,969 to the court as it did not give evidence to court as how it came up with that colossal sum of money specifically denied by the Appellant in his pleadings.

14. The appellant submitted that the Honourable Magistrate erred in law and fact in completely ignoring the Appellant`s evidence in her judgment to the detriment of the Appellant and treated the Respondent`s case as if it was unopposed and further that the Honourable Magistrate erred in law in failing to appreciate the place of set-off in pleadings. He submitted that set– off is a good defence (just as a counterclaim) and it is independent and can stand on its own as the Set-off comes in when there is an amount claimed against a party.

15. The appellant submitted that in its entire judgment, the court failed and indeed ignored the lease agreement which was the basis of the claim thus relying on extraneous matters that were irrelevant to the matter at hand.

The Respondent's Submissions

16. The respondent submitted that the suit was instituted for recovery of arrears of rent following the determination of the appellant's tenancy of the respondent's premises upon his abandonment of the leased premises after he had fallen into arrears and thus the suit was a commercial claim instituted in the court of appropriate pecuniary jurisdiction and was not a suit for the determination of an interest in land.

17. It was submitted that the appellant raised this issue as a preliminary point before the trial was commenced and determined by a ruling rendered on the 26th July 2017 dismissing the preliminary objection from which no appeal was instituted but instead, the appellant acquiesced to the court's jurisdiction by fully participating in the hearing that ensued and therefore, this ground of appeal on jurisdiction lacked merit and the appellant was estopped by conduct from pursuing this ground at the stage of an appeal from the final judgment of the court.

18. The respondent submitted that the appellant's tenancy was determined by his breach of the tenancy agreement upon his failure to pay rent and thereafter his abandonment of the premises without notice to the respondent did not constitute the termination of his tenancy thus rent continued to accrue until the date the respondent regained possession.

19. It was submitted that the sum of Kshs. 986,989.00 was proved by the respondent and shown in the documents PExhibits 3, 4, and 5 produced in evidence. That the appellant had received delivery of the rent invoices was proved by his clerk's acknowledgement signature on the respondent's delivery book produced as P-Exhibit 7.

20. The respondent submitted that the appellant's claim that his deposit paid of Kshs. 107,712.00 was misconstrued by the court as being for three months' rent and that it was refundable, is contradicted by the receipt No. 1647 which describes it as being payment for 'three months' rent deposit' wherefore it would have been refundable had the appellant not fallen into arrears.

21. It was submitted that the explanation as to the payment of Kshs. 186,814.00 to the respondent's advocates, for which a receipt No. 2455 was issued, was cogently explained at the trial and accepted by the trial magistrate as rent received upon distress for rent.

22. The respondent submitted that the appellant's complaint that his set-off was not considered has no merit as the same was based upon his claimed value of Kshs. 650,000.00 of the partitions he left in the premises he abandoned whose value were not proved by his witness, the carpenter contracted to construct the partitions, who produced no receipts or vouchers to establish that the partitions constructed were of that value.

23. It was submitted that actual evidence, and not the mere testimony of a litigant, must be adduced to prove expenses as was held in the case of *Sriram Bharatam and Anor v Laura Akunga and Anor* [2019] eKLR and *Elecon Engineering (K) Limited v Jipa Oil Company Limited* [2019] eKLR.

Analysis and Determination

24. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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."

25. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] KLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

26. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, it appears to this court that there exists a preliminary point for determination before it which would have the effect of determining this suit. This court has to determine;

    i. Whether the trial court had jurisdiction to entertain the claim before it in light of the Arbitration Clause in section 3 (e)of the Lease Agreement dated 8th May 2012.

    ii. Whether the respondent was entitled to general damages

    iii. Whether the respondent was entitled to aggravated damages

    iv. Whether the trial court failed to consider the appellant's set-off

Whether the trial court had jurisdiction to entertain the claim before it in light of the Arbitration Clause in section 3 (e)of the Lease Agreement dated 8th May 2012.

27. Section 6(1) of the *Arbitration Act* No. 4 of 1995 is key. It provides: -

> " (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step

in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

28. The provision is mandatory but has a limitation. It is expressly provided that if the arbitration agreement is "null and void, in operative or incapable of being performed," and "where there is no dispute between the parties with regard to matters agreed to be referred to arbitration." Further, it is clear that the matter in such a case shall only be referred to arbitration upon application by one of the parties not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings. Where a party alleges these matters and they are proved, the court will not stay the proceedings and refer the matter to arbitration.

29. The *Arbitration Act* provides for both the substantive and procedural law for the arbitration. Further, section 10 has the all-important provision that:

" Except as provided in this *Act*, no court shall intervene in matters governed by this Act."

30. The clear intention of the statute is that the court is to be involved in a consensual arbitration only under the limited circumstances prescribed in the Act or the Rules made under the *Act*. In other words, where court intervention is desired or anticipated, provision is made for it. Section 10 of the *Arbitration Act* is clear on the extent of court intervention; it states as follows:

" In matters governed by this Law, no court shall intervene except where so provided in this Law."

31. The arbitration clause in the lease agreement between the parties herein reads as follows: -

Save as may be specifically provided all questions hereinafter in dispute between the parties hereto and any claim for compensation or otherwise not mutually settled and agreed between the parties hereto shall be referred to arbitration by a single arbitrator assisted by such assessors or professional advisors as the arbitrator shall deem necessary to appoint to sit with in default of agreement between the lessor and lesee of a mutual arbitration, an arbitration shall be appointed by the Chairman for the time being of the Institute of Chartered Arbitrators and every award made under this clause shall be expressed to be made under *Arbitration Act* or Acts for the time being in force in Kenya in relation to the Arbitration. And the lessee hereby accepts this lease subject to the covenants conditions provisions stipulations and agreements contained or implied therein.

32. The clear intentions of the parties were that if any dispute arises they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration. This in line with Judicial Authority, under Article 159(2)(c) of the *Constitution* which provides that:

> "In exercising Judicial authority courts and Tribunals shall be guided by the following principles –
>
> > "alternative forms of dispute resolution including reconciliation, mediation, arbitration --- shall be promoted."

33. The court will therefore promote other forms of dispute resolution where the circumstances of the case so allow and the parties have agreed to an alternative mode of dispute resolution other than the court.

34. My understanding of Article 159(2) (c) of the *Constitution* as read together with Section 6(1) of the *Arbitration Act* is that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement.

35. In *Paul Chemunda Nalyanya v Messina Kenya Ltd*[2015]eKLR It was held that:

> "Parties cannot ignore a valid arbitration clause in their contract, and rush to court seeking adjudication, in a dispute which is clearly subject to arbitration. The court must uphold the parties positive rejection of its jurisdiction."

36. Even though the above quoted case related to an arbitration clause contained in a contract of employment, I find that the reasoning and principle behind the holding that the court lacks jurisdiction is the same and applicable in this case.

37. The arbitration clause specifically deals with complaints arising out of compensation or any claims not settled by either of the parties herein as is the dispute in the instant case.

38. It is my finding that in the circumstances of the case herein, the parties needed to first deal with the matter through arbitration.

39. However, Once a defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment of advocates filed on its behalf and prior thereto or contemporaneously with such of the notice of appointment or entering of appearance, files an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration as provided in the arbitral clause in the Agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6(1) of the *Arbitration Act*.

40. It should be noted, however, that the right to seek and obtain stay of proceedings under section 6(1) of the *Arbitration Act* is lost the moment a defence is filed in the proceedings. By dint of the defence, the party filing it subjects itself to jurisdiction of the court and cannot thereafter resile from that position. See the Court of Appeal decision in *Adrec Limited v Nation Media Group Limited* [2017] eKLR.

41. The Court of Appeal similarly in the case of *Fairlane Supermarket Limited v Barclays Bank Ltd* NBI HCCC No.102 of 2011, the court held that –

> "The option to refer to the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of *Corporate Insurance Company v Wachira* (1995-1998) IEA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance

and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence ...

any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration."

42. I thus find that the trial court had jurisdiction to entertain the suit before it

Whether the respondent was entitled to general damages

43. Having determined on the issue of jurisdiction of the lower court, I now turn to the substantive arguments advanced by the parties herein. It is not in dispute that the appellant was a tenant in the premises owned or managed by the defendant respondent herein and that the appellant fell into rent arrears. The testimony of PW1 was that the appellant was to pay rent for the suit premises quarterly as agreed vide the lease agreement dated October 18, 2012 and that having entered the premises on the May 1, 2012, the appellant only paid rent for that quarter after which he defaulted. She further testified that as per the rent account statement adduced as PEX3, the appellant was in arrears of Kshs. 551,104 which amount the appellant had admitted and that in total he had arrears of Kshs. 986,969 which was inclusive of rent and generator services as per Invoice statement adduced as PEX5. She testified that the invoices were duly received by the appellant or his representatives as was evidenced from their signatures in the delivery books produced as PEX 7a, 7b and 7c.

44. Regarding the partitions in the suit premises, PW1 testified that the appellant upon vacating the said premises, informed the respondent that he would negotiate with the incoming tenant on the said partitions.

45. In his defence, the appellant testified that as at October 2014, he was in default of the lease agreement. Regarding the partitions, he stated that they were of no use to him and thus there was no need to pick them up.

46. It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as the "Burden of Proof" and is encapsulated for by Section 107 of the *Evidence Act* Cap 80 laws of Kenya which provides as follows:

> " 107 Burden of Proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

47. In *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the Court stated:

> " It is therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue."

48. It is not in doubt that the parties herein entered into a lease agreement that provided in its Clause 3 (a) inter alia that in cases of breach, it shall be lawful for the lessor re-enter upon the premises in any part thereof in the name of the whole and thereupon this tenancy shall absolutely determine but without prejudice to the right of action of the lessor in respect of any antecedent breach of any of the covenants on the part of the lessee herein contained.

49. It was the undisputed testimony of PW1 that the appellant got into default as at October 2014 and that they managed to get break in orders over the suit premises on the May 21, 2015 as the appellant was still in possession of the premises but could not be seen. She further testified that she got official vacant possession of the suit premises on the July 31, 2015.

50. It is also worth noting that the appellant failed to controvert the respondents claim of Kshs. 986,969 being the rent due and generator services fees as evidenced hereinabove. Accordingly, I find and hold that the respondent was entitled to this award.

51. It is a settled principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -

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

52. In *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that:

> " We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

53. The appellant argued that the trial court was wrong in awarding general damages for breach of contract. The award of damages involves exercise of discretion by the trial court. In that regard, the law is settled that an appellate court will not readily interfere with exercise of that discretion unless it was wrongly; was based on no evidence or the court considered irrelevant facts or failed to consider relevant factors which resulted into an injustice.

54. In *Mbogo & Another v Shah* [1968] EA 93, the Court, (Sir Newbold, P.) stated at page 96:

> A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.

55. In *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR, it was emphasized that an appellate court should pay some deference to decisions made in exercise of discretion but should not follow them slavishly. Where there is a basis for upsetting such decisions, the court should do so if the findings in question are based on no evidence, or a misapprehension of the evidence; consideration of irrelevant matters or failure to consider what ought to have been considered. The court will interfere if it is shown demonstrably that the court acted on wrong principles in reaching a particular finding of fact or conclusion of law or if the decision is generally perverse and unsupportable.

56. On whether an appellate court should interfere with an award of damages by a trial court, it was stated in *Kemfro Africa Ltd t/a "Meru Express Services (1976)" & Another v Lubia and Another (No.2)* [1985] eKLR:

> "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 damages."

57. In *Johnson Evan Gicheru v Andrew Morton & Another* [2005] eKLR, the Court of Appeal stated:

> "It is trite that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

58. The trial court awarded general damages for breach of contract of the lease agreement. I have perused the judgment of the trial court. I do not find the basis upon which the award was made in favour of the respondent herein or how the trial court arrived at the said amount or even comparable awards from case law.

59. The law is that general damages are not awardable for breach of contract or breach of contractual obligations. A contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered as a result of the breach, but not general damages.

60. In Kenya Tourist Development Corporation v Sundowner Lodge Limited (supra), the appellant had agreed to give the respondent a loan of Kshs, 15,000,000 for construction of a hotel. However, the appellant unilaterally withdrew that offer. The respondent filed a suit claiming general damages of Kshs. 421,760,000 in the form of opportunity costs and loss of business following breach of contract. The High court awarded general damages of Kshs. 30,000,000 for breach of contract. On appeal, the Court of Appeal held that as a general rule, general damages are not recoverable in cases of alleged breach of contract. Damages for breach of contract are compensation to the aggrieved party and a restitution of what he has lost by the breach.

61. In *Dharamshi v Karsan* [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication. And in *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract. (See also *Provincial Insurance Co. EA Ltd v Mordechai Mwanga Nandwa*, (KSM Civil Appeal No 179 of 1995,)

62. The above decisions affirm the position that what is suffered or is believed to have been suffered, the damage that is to be compensated by way of damages, can only be known by the party and it is claimed in specific terms which has to be proved.

63. Flowing from the above principles of law, I find and hold that the respondent was not entitled to general damages for breach of contractual obligations, having raised a specific claim for special damages.

I therefore find that the trial court applied wrong principles, and misapprehended the evidence, thus fell into error in awarding general damages to the respondent. This award is hereby set aside in its entirety.

Whether the respondent is entitled to aggravated damages

64. As stated by the Court of Appeal in the case of *Miguna Miguna v The standard Group Ltd & 4 others* [2017] eKLR while quoting the case of *John v GM Limited* [1993] QB 586:

> " Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize."

65. It seems then that aggravated damages are awarded where reputation of an individual has been tarnished such as in defamation cases. Exemplary damages go beyond compensation. Both damages are meant to punish the wrongdoer and act as a deterrent from similar conduct in future.

66. The Court of Appeal in the case of *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR stated that:

> " Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:
>
> i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
>
> ii) cases in which the defendant?s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
>
> iii) where exemplary damages are expressly authorized by statute".

67. In the circumstances of this appeal, I am not satisfied that the respondent's actions were so arbitrary and oppressive so as to justify an award of exemplary damages. This award is equally set aside in its entirety.

Whether the trial court failed to consider the appellant's set-off

68. The appellant pleaded and submitted that the trial court failed to consider his set-off defence. Order 7 rule 8 of the *Civil Procedure Rules* gives the Defendants permission to raise a counterclaim against the Plaintiff together with any other persons. This provision gives the Defendant a leeway to bring a counterclaim even against a person not already a party to the suit. He too may file a counterclaim against a Co-Defendant in the same suit. The provision (Order 7 Rule 8) is as follows:

> " Where a Defendant by his defence sets up any counterclaim which raises questions between himself and the Plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be Defendants to such cross-action, and shall deliver to the Court his defence for service on such of them as are parties to the action together with his defence for service on the Plaintiff within the period within which he is required to file his defence".

69. Order 7 Rule 3 of the *Civil Procedure Rules* which is pertinent to the foregoing provides as follows:

> " A Defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the Plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the Plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to Defendant to avail himself thereof".

70. In my considered view, the rationale of Order 7 rule 8 is to avoid multiplicity of proceedings and claims based on the same or different causes of action as between the parties to the suit. The section did not contemplate a defendant filing an independent suit to a claim based on the same cause of action but rather envisaged the Defendant to proceed by way of counter-claim. I am also of the considered view that, the circumstances leading to the cross-action by way of Counter-claim and set off are so closely intertwined that the only thing which any reasonable Court would do is to rule that the original suit and the counterclaim should be heard as one suit. Separating the Counter-claim from the main suit will lead to a multiplicity of suits and extra costs hence defeat the objective of Section 1A (1) of the *Civil Procedure Act*.

71. Similarly, Order 7 Rule 3 of the *Civil Procedure Rules* is clear that a Counter-claim is to be treated as a cross suit with all the indicia of pleadings as a Plaint. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceedings and needless protection, the legislature intended that courts would try both the suit and the counter- claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim or set-off in the same suit as a suit and cross suit and have them disposed of in the same trial.

72. Applying the principles established above to the circumstances of the instant case and appeal, it is noteworthy that the appellant prayed that his deposit of Kshs. 107,712 and the value of the partitions of the suit premises, valued at over Kshs. 650,000 be deducted from the monies owed to the respondent.

73. Notably, the trial court considered the appellant's set off. Regarding the deposit paid by the appellant, I am in agreement with the trial court that nowhere in the lease agreement was it provided that the same would be off-set against the rental arrears if any. The appellant did not adduce evidence to prove this claim on a balance of probabilities and thus this remained a mere averment.

74. As regards the partitions, DW1, the carpenter who was alleged to have created/build them stated that he used to have receipts for the same but that he did not have them anymore. It was his testimony further that he similarly did not have the quotations for the said work.

75. Accordingly, this claim, which was in the nature of a specials damage, remained unproven contrary to the maxim that special damages have to be specifically pleaded and strictly proven. It is therefore my finding that the trial court considered the appellant's set-off and rightly found that the same remained unproven. I am thus in agreement with the trial court in its failure to award the same.

76. The upshot of the above is that the instant appeal is partially successful, in the following terms:

    a. Judgement entered for the plaintiff for Kshs. 986,969 is hereby upheld

    b. Damages for aggravated and general damages are hereby set aside.

c. As the appeal is partially successful, each party shall bear their own costs of the appeal.

77. This file is closed.

I so Order.

DATED, SIGNED AND DELIVERED BY E MAIL TO THE PARTIES' COUNSEL AT KISUMU THIS 29TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE