



REPUBLIC OF KENYA



KENYA LAW
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**Saina v Makokha (Civil Appeal 19 of 2020)
[2023] KEHC 243 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 19 OF 2020
JWW MONG'ARE, J
JANUARY 24, 2023**

BETWEEN

ESTHER CHEROP SAINA APPELLANT

AND

DAVID LUTTA MUSUMBA MAKOKHA RESPONDENT

(An Appeal against the Judgment of the Honourable R Odenyo, Senior Principal Magistrate delivered on January 30, 2020 in Eldoret CMCC no 411 of 2014)

JUDGMENT

1. The appeal before this court is against the judgment of Honourable R Odenyo (senior principal magistrate) delivered on January 30, 2020 in Eldoret CMCC no 411 of 2014. The respondent instituted a suit against the appellant by way of an amended plaint dated February 19, 2015 where he sought the following orders from the court
 - a) An eviction order/vacant possession.
 - b) Rent arrears of kshs 835,000/= as per the tenancy agreement as at May 31, 2014 and thereafter accrued rent from June 1, 2014 till the date of vacation.
 - c) Increased rent as per market rates for such premises from September 1, 2003 to 2014
 - d) An order of set-off of kshs 400,000/= and owing to the defendant
 - e) Interest in (b) above
 - f) Costs of the suitAny other reliefs this honourable court deems fit to grant the basis of these submissions.
2. The appellant filed a counterclaim against the respondent seeking the following reliefs;



- a) The plaintiffs' suit be dismissed with costs
- b) General and aggravated damages
- c) Costs of the counterclaim
- d) Any other relief the court may deem fit to grant in the circumstances

The matter proceeded to full hearing and upon consideration of the evidence presented before the court, the learned trial magistrate entered judgment against the Respondent as follows;

- a) Payment of kshs 1,445,000.00 being rent arrears as at end of January 2020.
- b) An order do issue compelling the defendant to give vacant possession of the suit property to the plaintiff.
- c) Interest on (a) from the date of this judgment at court rates.
- d) Costs of the suit.

The counterclaim was dismissed with costs.

3. Being dissatisfied with the decision of the trial court the appellant instituted the appeal vide a memorandum of appeal on the following grounds;

- a) That the learned trial magistrate erred in law and in fact in entering a judgment in favour of the plaintiff (now the respondent) as against the defendant (now the appellant) against the weight of the evidence adduced by the appellant hence arriving at a decision that was wholly erroneous.
- b) That the learned trial magistrate erred in law and in fact in failing to make a finding that the issues in dispute between the parties were *res judicata* the judgment of the High Court which was delivered on December 14, 2011 in Eldoret HCCC no 115 of 2006 — [Esther Cherop Saina vs David Lutta Musumba Makokha & Another](#).
- c) That the learned trial magistrate erred in law and in fact in reaching a decision that the defendant (now appellant) was obligated to pay rent arrears of kshs 1,445,000/= to the plaintiff by ordering the appellant to give vacant possession of the suit property land parcel Eldoret Municipality Block 14/320 to the respondent which decision was inhuman, draconian, disproportionate and unreasonable in the circumstances of the case.
- d) That the learned trial magistrate erred in law and in fact in issuing orders in a civil suit affecting the use and occupation of suit land which decision was made without jurisdiction as it offends the provisions of the [Environment and Land Court Act](#) no 19 of 2011.
- e) That the learned trial magistrate erred in law and in fact in failing to find that by the hierarchal system of the courts, the trial court lacked jurisdiction to entertain the matter which had been heard and determined by a superior court which amounts to usurpation of the jurisdiction of the High Court.
- f) That the learned trial magistrate erred in law and in fact in failing to make a finding that the plaintiff (now respondent) having failed, defaulted and failed to comply with the terms of the judgment of a superior court delivered on December 14, 2011 in Eldoret HCCC no 115 of 2006 was legally estopped from filing or agitating a suit before the subordinate court.



- g) That the learned trial magistrate erred in law and in fact in failing to make a finding that the plaintiff (now respondent) was undeserving of the reliefs sought in the plaint as he was the sole author of the delay in the full implementation of the judgment of the superior court by failing to pay the general damages and costs as awarded and consequently the trial magistrate should have made a finding that the suit was merely intended to circumvent the execution of the decree and certificate of costs as awarded by the High Court.
- h) That the learned trial magistrate erred in law and in fact in taking into account extraneous and irrelevant factors and failing to take into account the relevant factors including the existence of the judgment of the superior court and the provisions of the *Distress for Rent Act* in respect of the disputed rent arrears claim hence arriving at a decision that was wholly erroneous and untenable in the circumstances.
- i) That the learned trial magistrate erred in law and in fact in disregarding the matters pleaded in the statement of defence, the defendant's evidence and final submissions thereby arriving at a decision that was against the weight of the evidence and as such grossly prejudicial to the Appellant.

Appellant's Case

4. The Appellant submitted that the basis of the argument that the matter was *res judicata* since the judgment delivered by Justice Ibrahim on December 14, 2011 in Eldoret HCCC no 115 of 2006 Esther Cherop Saina v David Lutta Musumba Makokha & Another, was between the said parties and involved the same cause of action. The appellant submitted that the court found that the plaintiff had proved her case in respect of the issue of illegal distress of rent and there were no rent arrears due and owing to the 1st defendant. She argued that the respondent then waited for two years before he filed a suit against the appellant in the lower court and judgement was delivered by Hon R Odenyo and an order was issued compelling the defendant to give vacant possession of the suit property to the plaintiff. She maintained that parties in dispute are the same in the High Court matter and the lower court matter and that the same was heard and finalized on December 14, 2011. Further, that the aspect of eviction/vacant possession was an issue that the court in HCC 115 OF 2006 dealt with substantially. The plaintiff sought orders of eviction against the defendant and the court pronounced itself on the issue of eviction and declined to issue the orders. He concluded by submitting that the court had competent jurisdiction when determining the issues in HCCC 115 of 2006.
5. On the order of set-off of kshs 400,000/- the appellant submitted that through the judgment issued in the High Court civil case no 115 of 2006, the appellant herein was awarded kshs 400,000/= as general damages and costs of the suit and interest thereof. Pursuant to the Notice to Show Cause proceedings before the High Court in the HCC no 115 of 2006 is that he owed the appellant kshs 1,055,260/= and that there were warrants of arrest issued against him. The appellant maintained that the trial magistrate erred in failing to make a finding that the respondent having failed to comply with the judgment of a superior court was legally estopped from instituting the suit before the trial court.
6. The appellant maintained that there was a lease in writing which was renewed but when the respondents entered into a sale agreement the tenancy was terminated thus moving the matter from the purview of the BPRT (Business Premises Rent Tribunal) dealing with tenancies and leases and placed the matter within the jurisdiction of the trial court. It was her submissions that the said court lacked jurisdiction to hear and determine the matter and urged the court to set it aside.

Counsel for the appellant urged the court to allow the appeal and set aside the award. He maintained that a sale had taken place and that the only issue pending was the payment of the balance of



the purchase price by the Appellant to the respondent, which amount stood at kshs 1,900,000 the appellant having paid an initial payment of Kshs 1,100,000.

Respondent's case

7. The respondent opposed the appeal. He submitted that at the lower court the only issue for determination was the tenancy agreement between the parties herein while the judge in HCCC 115 of 2016 dealt with issue of ownership of the property which was determined in the High Court decision. The respondent submitted that in that case he had sought termination of the tenancy agreement between him and the appellant as well as payment of accrued rent arrears, arising out failure by the appellant to pay the rent over a long period of time after the purchase agreement had collapsed. The case from which the appeal emanates was as a result of the said orders of the High Court directing the respondent to bring the issue of the unpaid rent arrears before the proper court and issue the appellant with the requisite notice, a fact that he did hence the award in the lower court in his favour.
8. The respondent further submitted that the issue of *res judicata* was an afterthought as the issues in both cases were distinct and different and emanating from different chain of events, albeit revolving around the same property. He stated that this could be reinforced by the different sets of reliefs prayed by the parties in both cases.
9. He argued that the Appellant having conceded to not paying any rent to the Respondent from the month of October 2009, it followed that the trial court directed itself properly by working out the arrears of Kshs. 1,445,000/-. He urged the court to dismiss the appeal and allow execution of the award from the lower court to enable him benefit from the property.

Analysis and determination

10. It is settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. (See *Stanley Maore v Geoffrey Mwenda*, CA NO. 12 of 2020) “the duty of the appellate court is to re-evaluate the evidence, assess it and make its own conclusions...”
11. Upon consideration of the submissions of parties, record of appeal and grounds of appeal, the following issues arise for determination;
 - i) Whether the matter in Eldoret CMCC no 411 of 2014 was *res judicata*
 - ii) Whether the trial court had requisite jurisdiction to try the matter.
 - iii) Whether the trial court erred in making an award of the sum of kshs 1,445,000 being rent arrears and further ordering vacant possession of the suit premises by the appellant.
 - i. Whether the matter in Eldoret CMCC no 411 of 2014 was *res judicata*
12. *Res judicata* is provided for by section 7 of the [Civil Procedure Act](#). A close reading of section 7 of the Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the following elements:
 - i. The suit or issue raised was directly and substantially in issue in the former suit.
 - ii. That the former suit was between the same party or parties under whom they or any of them claim.
 - iii. That those parties were litigating under the same title.



- iv. That the issue in question was heard and finally determined in the former suit.
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
13. From the analysis of the pleadings herein and the record in both Eldoret HCCC no 115 of 2006 and Eldoret CMCC no 411 of 2014 several variances arise. Firstly, the cause of action in Eldoret CMCC no 411 of 2014 was on the issue of termination of the tenancy agreement between the parties. It also revolved around loss of rent by the respondent emanating from failure by the appellant to meet her obligations. However, in Eldoret HCCC no 115 of 2006, the matter in issue was a determination as to the ownership of the land subject matter in both suits being LR no Eldoret/municipality Block 14/320 wherein the appellant had moved the court for a declaration that she was the legal owner as a result of a sale transaction between the parties. The outcome in both cases were different. The court in Eldoret HCC 511 of 2006 declared the respondent as the rightful owner of the suit premises and directed that the appellant being a tenant was obligated to pay rent. The court faulted the mode in which the respondent then had attempted to collect his entitlement and directed him to make his claim for arrears at the proper forum. This is what then led the respondent to file the matter in Eldoret CMCC no 411 of 2014, subject matter of the current Appeal.
14. It follows that despite the parties being the same and suit land being the same the issues for determination before the two courts were substantially different and therefore cannot be considered to have been *res judicata*. This court finds therefore that the appellant has failed to establish that the matter in Eldoret CMCC no 411 of 2014 was *res judicata*.
- ii) Whether the trial court had requisite jurisdiction to try the matter.
- Justice Nyarangi JA in the celebrated case of M/V Lillian S stated that
- “Jurisdiction is everything. If a court or tribunal holds that it lacks jurisdiction, it must down its tools at once”.
- It is the appellant’s case that the lower court lacked requisite jurisdiction to hear the matter and make the determination in the case against the appellant. The argument revolved the fact this was a lower court and not one seized with jurisdiction to hear land matter pursuant to the provisions of *Environment and Land Court Act*, no 19 Of 2011, which placed jurisdiction on matters relating to land matters to the specialized court. She further argued that the said court could not purport to determine a matter that had already been determined by the High Court, a superior court to the trial court. In determining the issue on *res judicata*, we established that the causes of action before the lower court and the High Court were distinct and separate. The trial court was asked to establish a case revolving issue of tenancy and unpaid rent arrears, which it properly determined and made an award in favour of the respondent. The High Court was seized with a dispute surrounding ownership of land and the same was also conclusively determined. The matter from which this appeal emanates dealt with issues of tenancy agreement and rent arrears. It is my considered opinion that the said court was clothed with sufficient jurisdiction to try the matter before and make the award as it did. The issue on jurisdiction therefore fails.
- iii). Whether the trial court erred in making an award of the sum of kshs 1,445,000 being rent arrears and further ordering vacant possession of the suit premises by the appellant.
15. During the hearing of the matter in Eldoret CMCC no 411 of 2014, the appellant, in her testimony in court, confirmed that she had not paid rent from October 2009 up to the time the matter was heard and admitted being in arrears. This is discernible from the court record. Instead, she relied on the judgment



in from Eldoret HCCC 115 of 2009 which had acknowledged towards the purported repurchase of the land from the respondent but failed to complete, rendering the intended sale a nullity. The High Court had directed that the said deposit be commuted to clear the rent arrears. From the reading of the judgment, the appellant was not absolved of her obligations to pay rent by the decision of the said court. Instead, the court acknowledged that she had made an effort to purchase the land but had failed to complete the same hence defeating her claim for ownership. Flowing from the said decision, the deposit for the purchase of the property were applied to clear the arrears that were prevailing at the time up to October 2009. She also confirmed in her testimony that she did not make any attempt to pay any more rent hence necessitating the new claim for rent arrears and eviction orders. It follows therefore that the trial court was right in arriving at an award of rent arrears of 1,445,000 for the period from October 2009 and did not err in calculating the arrears due as at January 2020. Flowing from her failure to pay rent for a long period of time this court finds that the order for vacant possession was merited.

16. In the premises, the court is satisfied that the appeal as filed lacks merit and is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 24TH DAY OF JANUARY 2023

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J W W MONGARE

JUDGE

Judgment read in open court in the presence of;

- 1) Rotich holding brief for Njuguna for the appellant
- 2) No appearance for the respondent**
- 3) Kimathi – Court assistant

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J.W.W. MONGARE

JUDGE

24.01.2023

