



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO. 616 OF 2016

MOHAMMED ATANI.....APPELLANT

VERSUS

HENRY MAINA.....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Nairobi, Milimani Hon. Orange K.I delivered on 10th December, 2018 in CMCC No. 7106 of 2015)

JUDGEMENT

The appellant in this appeal was the tenant of the respondent by virtue of a lease agreement signed on 16th December, 2014 for a period of 5 years to take effect from 1st March 2014. The agreed monthly rent was Kshs. 250,000/= . In the said lease agreement it was provided that in the event the appellant wished to vacate the premises, he was required to, inter alia, give two months' notice to the respondent of his intention to vacate, to pay outstanding rent and utility bills, to paint and repair the house and leave it in the state that it was at the commencement of the lease.

By plaint dated 25th November, 2015 the respondent sued the appellant claiming a sum of Kshs. 829,744/= being arrears of rent outstanding utility bills together with the cost of repair and payment in light of notice to vacate, among other claims.

The appellant denied the respondent's claim in his statement of defence dated 24th October, 2017 and also raised a counter claim of Kshs. 250,000/= said to have been the rent deposit made as security under the lease agreement.

The period between the filing of the plaint and the defence is about two years and this court is unable to find any explanation for that gap. However that is not an issue in this matter.

After hearing the parties the lower court gave judgment in favour of the respondent herein for reasons stated in that judgment dated 10th December, 2018. The appellant was aggrieved by that judgment and lodged this appeal by way of a memorandum of appeal dated 20th December, 2018 which was subsequently amended as reflected in the memorandum of appeal dated 29th July, 2020.

As the first appellate court it is my duty to evaluate the evidence adduced before the trial court and arrive at independent conclusion. Both parties have filed submissions and cited several authorities which I have considered. In the event I do not cite any of those authorities that should not be construed as wanting in substance.

The summary of the facts were sufficiently set out in the judgment of the lower court and I do not consider it necessary to recapitulate the same in this judgment. It is important however to observe that the lease between the parties was never registered. That notwithstanding, there is no dispute that the appellant occupied the premises and continued to pay the prescribed rent to the respondent.

There is also evidence that, before appellant occupied the premises an inspection was done. This appears in both the evidence of the appellant and the respondent. At page 284 of the record of appeal the respondent stated that the appellant **"saw the house before the agreement was signed"**. At page 286 of the same record, the appellant stated **"I viewed the house before I signed he lease for five years."**

From the record, only the appellant and the respondent gave evidence in this matter and upon which the judgment of the lower court was delivered. Under such circumstances, the trial courts are faced with a challenge because it is the word of one party against the other. However, in a dispute of this nature, there was documentary evidence, the facts were relatively clear and I believe the law applicable provided a good guide.

The foregoing being the case, it is my belief that the lower court was possessed of sufficient material to make a decision whichever way. The respondent in his evidence referred to the lease agreement to anchor his case. He also produced evidence and exhibits to justify the repairs made after the appellant left the premises. Before filing the suit he also stated that he served the appellant with a demand notice which however, the appellant did not honour. As to the appellant's claim that the premises were infested by termites, no complaint or notice was ever given to the respondent. He also denied that he paid any money to the appellant. Subsequently, the premises were demolished so that he could develop some apartments.

At no time was he informed by the appellant that the house needed repairs. In fact, the appellant never did any repairs and the respondent did so after the appellant had vacated. He denied having had any care taker and came to realise the appellant had vacated after two weeks. No notice was ever given to terminate the tenancy and in his own evidence, he never met the appellant and were only communicating via email.

On the other hand the appellant gave evidence and referred to the same lease agreement that the respondent relied on. He told the court that the house had hidden issues and there were a lot of termites. He asked the respondent to repair the house but was ignored. He said he sent a notice to vacate the house and left. He said further he handed the keys to the respondent which had been denied by the respondent in his evidence.

In the memorandum of appeal the outstanding issues were that the lower court was wrong to find that the appellant was in breach of contract, in this case the lease agreement; that it departed from the pleadings, evidence and submissions thereby arriving at a decision not supported by evidence and that the appellant did not prove his counterclaim based on the rent deposit.

It is trite law that the courts cannot rewrite an agreement or contract between parties see **Esilon Plastics Of (K) Limited vs. National Water Conservation & Pipeline Corporation (2014) e KLR** and **National Bank of Kenya Limited vs. Pipe plastic Samkolit (K) Ltd & Another (2002) EA 503**. In that case therefore parties are bound by what they have committed themselves to. In the present case, even though the lease was not registered the terms contained therein remained live and governed the relationship between the appellant and the respondent. The court has no business whatsoever entering the arena of conflict to determine the differences between the two parties as far as the terms are concerned.

I have noted that despite the appellant alleging hidden issues existed in the premises and the presence of termites, there is no evidence that he identified these issues or that he notified the respondent of their existence. The law of evidence is clear under Section 107 and 109 of the Evidence Act as to the burden of proof. In the absence of any proof these allegations may have been raised to justify the eventual step of vacating the premises without due compliance with the terms of the lease.

The appellant was bound to give notice upon the decision to terminate the tenancy. He did not. I say so because there was no care taker as he alleged who could have received the notice. The respondent evidence that there was no care taker was never seriously disputed. In any event he never used the mode provided in the lease at Clause 10 which required all notices under the lease to be in writing and that service thereof would be complete if transmitted by way of registered mail to the addresses reserved in the lease. He admitted under cross-examination that he did not send the notice to the respondent. The terms of agreement therefore were binding on him that he had to pay two months rents in lieu of notice.

The production of receipts to show incurred expenses to repair the house after the appellant vacated may not be disputed. In any case, proof of any issue in civil proceedings is on a balance of probability. The fact that the premises were eventually demolished is of no consequence in the present case. There is no proof that that step was influenced by the state of disrepair or alleged termites pleaded in the appellant's case.

On the counter claim it is clear the rent deposit was accounted for both in the plaint and the evidence. In the respondents evidence before the court he adopted his statement filed at the inception of the suit. In the plaint which appears at page 8 of the record of appeal the respondent accounted for Kshs. 250,000/= at paragraph 7(g) after the sub total by deducting the same leaving the balance of Kshs. 829,744/= which he claimed from the appellant.

I am persuaded that the learned trial magistrate cannot be faulted in the determination he made of the issues before him. The end result is that this appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY, 2021

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Githui for the Appellant

Mr. Ombati for the Respondent