Habour House Limited v Nyakongo t/a Jofah Enterprises (Environment and Land Appeal 28 of 2021) [2023] KEELC 19122 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19122 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 28 OF 2021

NA MATHEKA, J

JULY 27, 2023

BETWEEN

HABOUR HOUSE LIMITED ..... APPELLANT

AND

JOHN OMOLLO NYAKONGO T/A JOFAH ENTERPRISES ..... RESPONDENT

JUDGMENT

1. The Appellant herein being dissatisfied with the Judgment and Decree of the Honourable C. N Ndegwa SPM delivered on the 14th April, 2021 appeals to this Court against the whole decision on the following grounds;

    1. That the Learned Trial Magistrate erred in law and fact in dismissing the Appellant's suit against the overwhelming evidence on record which was sufficient to demonstrate that the Respondent had breached the lease dated 2nd September, 2010 and the Appellant was entitled to the remedies set out in the lease.

    2. That the Learned Trial Magistrate erred in law and fact in failing to determine the issues before Court and relied on extraneous and unpleaded matters in dismissing the Plaintiffs suit.

    3. That the Learned Trial Magistrate erred in law and fact in failing to apply his mind to the fundamental principle of contract and interpretation of Agreements signed between Parties thereby arriving at a wrong decision.

    4. That the Learned Trial Magistrate erred in law and fact in holding that the Respondent was evicted unlawfully when the evidence on record was clear that the Appellant instructed a Licensed Auctioneer who levied a lawful distress upon the Respondent's goods.

5. That the Learned Trial Magistrate erred in law and fact in holding that the Respondent the Auctioneer broke into the suit premises and that the Respondent suffered damage when there was no or no sufficient evidence to prove the same.

6. That the Learned Trial Magistrate erred in law and fact in relying on equity when the suit before Court was based on a signed and clear lease.

7. That the Learned Trial Magistrate erred in law and fact in holding that the security deposit was to be applied to cater for rent arrears contrary to the terms and conditions of the lease Agreement.

8. That the Learned Trial Magistrate erred in law and fact in failing to properly evaluate the Appellant's evidence on record thereby arriving at a wrong decision.

2. The Appellant prays that:-

a. That the Appeal herein be allowed.

b. That the Judgment by Honourable C.N Ndegwa (SPM) delivered on 14th April, 2021 in Mombasa CMCC No. 34 of 2016, Harbour House Limited vs John Omollo Nyakongo T/a Jofah Enterprises be set aside and be substituted with an Order allowing the Appellant's Claim.

c. Costs of and/or incidental to this Appeal.

d. Any other and/or further Order that this Honourable Court may deem fit and just to grant.

3 This court has carefully considered the appeal and the submissions therein. This being a first appeal, this court has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. In the case of *Gitobu Imanyara & 2 others vs Attorney General* (2016) eKLR, the Court of Appeal held that;

4. This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

5. The lease agreement between the appellant as the lessor and the respondent as the lessee was for a term of five years and three months starting from 1st September 2010. Rent was payable every quarter and in the 1st quarter of 2015, the respondent was unable to pay the rent when it fell due. Clause 5 allowed the appellant to re-enter the suit premises and repossess the premises in instances of rent arrears. The repossession of the suit premises led to the determination of the lease and the appellant seized the respondent's fixtures and fittings. On 16th February 2015 the appellant instructed the Sherman Nyongesa & Mutubia Advocates firm to levy distress for rent arrears between January 2015 to March 2015 of Kshs 373,888.75. The firm instructed Beyond Auctioneers to distress for rent, which led to the auctioneers proclaiming and attaching the respondent's goods on 16th January 2015. The respondent rushed to court vide Mombasa CMCC MISC APP 45 of 2015 he was granted stay orders on 27th February 2015 temporarily restraining the proclamation notice dated 16th February 2015. The exparte orders lapsed and on 10th March 2015 the respondent was issued with fresh interim orders restraining the proclamation however, the auctioneer had already proclaimed the respondent's goods.

6. Even where the lease agreement provides for the right for re-entry and repossession of the suit premises due to rent arrears, Section 75 of the *Land Act* provides that the lessor is only entitled to forfeiture after service of a notice of at least 30 days. It provides that,

> Notwithstanding anything to the contrary contained in the lease, no lessor shall be entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease, whether expressed or implied, until the lessor has served on the lessee a notice of not less than thirty days—
>
> (a) specifying the particular breach complained of; and
>
> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach within such reasonable period as is specified in the notice; and
>
> (c) in any case other than non-payment of rent, requiring the lessee to make compensation in money for the breach, and the lessee has failed to remedy the breach within thirty days thereafter, if it is capable of remedy, and to make reasonable compensation in money."

7. The appellant did not demonstrate that he issued the respondent with any notice as required by law before carrying out the proclamation and subsequent possession of the respondent's goods. The demand letter from the appellant's advocate dated 26th October 2015, cannot be said to be a notice envisioned in Section 75 of the *Land Act*, since it was issued after the appellant had been distressed for rent. The respondent was not given notice that his default of payment of rent between 1st January 2015 to 31st March 2015 would lead to the determination of the lease, re-entry of the appellant and proclamation of his property. It was wholly wrong for the appellant to enter and proclaim the respondent's property without issuing him a notice as required by law. Further, the auctioneers were aware of the court orders that were issued on 27th February 2022 and even forwarded the same to the advocates vide a letter dated 2nd March 2015. In the said letter, the auctioneers promised to hold the matter in abeyance waiting for further directions from the said advocates only for them to proclaim the respondent's goods a few days later. It is therefore deceitful for the appellant to claim he was not aware of the orders of the court or the existence of the case instituted by the respondent seeking to restrain the auction of his property in the suit premises.

8. The appellant did not afford the respondent time to remedy the breach of nonpayment of rent. The demand letter dated 26th October 2015 which demanded Kshs 1,389,620.20 as accrued rent arrears from January 2015 to November 2015 cannot be backdated to serve as notice to the respondent. The notice was invalid since it did not give the respondent an opportunity to remedy the breach, if anything the notice came months after the appellant had distressed for rent. More so the time for compliance was indicated as 14 days, while Section 75 of the *Land Act* stipulated that a notice ought to be of not less than 30 days. The notice served no purpose as the respondent could not remedy the breach of non-payment of rent as he had been evicted from the suit premises on 5th August 2015 by the appellant's advocate. The eventual eviction of the respondent followed another proclamation that was carried out by the auctioneers for the second quarter from April 2015 to June 2015 vide a Proclamation notice dated 27th May 2015. It was therefore impossible for the respondent to make good the breach of non-payment of rent when he was not even in occupation of the suit premises.

9. As correctly held by the learned magistrate, the appellant could not demand rent from the respondent after 10th March 2015, after taking possession of the suit premises. The learned magistrate did not err in law or in facts when he found that the appellant took possession of the suit premises illegally,

and as I have discussed herein the reentry was without notice which was contrary to Section 75 of the *Land Act*. Therefore, the appellant was not entitled to any rent arrears after 10th March 2015, more so as correctly held by the trial court the appellant held the respondent's rent security equivalent which ought to cover the rent arrears. In my view, the trial court did not err in law or in facts when it found that the appellant's case was unmerited and dismissed it with costs to the defendant. Consequently, I find the Memorandum of Appeal dated 4th May 2021 without merit and is dismissed with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE