REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 124 OF 2019

MARY NYABOKE SAGINI.....1ST APPELLANT

JOSEPHAT O. NYACHOTI T/A MINIMAX AUCTIONEERS.....2ND APPELLANT

VERSUS

MARY KERUBO MAINYE.....RESPONDENT

(Being an appeal from the Judgment of Hon. S.K. Onjoro delivered on 1st November 2019

in Kisii Chief Magistrates Civil Case No. 621 of 2016)

JUDGEMENT

1. The appellants are aggrieved by the judgement of the subordinate court allowing the respondent's claim and awarding her special damages amounting to Kshs. 1,725,670/=. They have challenged that decision based on the following grounds set out in their memorandum of appeal dated 18th November 2019;

> **a.** That the learned Magistrate erred in law by finding that an eviction, carried out by the appellants on the basis of a court order that has never been appealed or reviewed, is unlawful;
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> **b.** That the learned Magistrate erred in law by making determination on service of an eviction notice and order which is an issue the subject matter of previous proceedings that led to the appellants obtaining an eviction order against the respondent, contrary to the *res judicata* rules;
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> **c.** That the learned Magistrate erred in law and fact by issuing orders condemning the appellants to pay special damages for items whose existence and loss are not proven by the respondent;
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> **d.** That the learned Magistrate misdirected himself on the law and practice of eviction by determining without legal reference/ citation that the law imposes duty on those carrying out eviction to keep record of and store items they remove during eviction in order to find the appellants responsible for loss;
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> **e.** That the learned Magistrate erred in fact and law by failing to consider the appellant's submissions and giving weight to the respondent's submissions without any basis in law; and
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> **f.** That the learned Magistrate wholly erred in law and fact in arriving at the said decision thereby suffering miscarriage of justice and substantial loss on the appellants.

2. This being the first appellant court, it is my duty to re-evaluate the evidence, analyze it and come to my own conclusion, but in so doing, I must give allowance to the fact that I have neither seen nor heard the witnesses. (See the case of ***Selle v. Associated Motor Boat Company [1968] E.A. 123.***)

3. The dispute before the trial court was as follows; the respondent, in her plaint dated 20th September 2016, averred that she had been running a business named Monsore Wines and Spirits on premises leased from the 1st appellant. She claimed that in the month of January or

February 2016, while she was away in Nairobi, the 2nd appellant on the 1st appellant's instructions entered upon those premises and seized assorted tools of trade, personal effects, professional documents and other properties. She claimed that as a result of the illegal acts of the appellants, she was dispossessed of goods worth Kshs. 1,725,670/= for which she sought monetary compensation or an order compelling the appellants to surrender the goods confiscated.

4. When the matter came up for hearing before the trial court, the respondent testified that she had not been served with any order or letter informing her of the impending eviction. She stated that while she was away attending to a land case at Kibera Law Courts, she was called and informed that her shop had been broken into and everything thrown out. She travelled back and found the locks changed and her items were no longer outside. She testified that her education certificates, some title deeds and the items listed in the plaint got lost. In cross examination she stated that some of the receipts for the items in her inventory were in the shop and other items had been bought long ago. She also stated that she had gone to the tribunal to attempt to reverse the eviction and also made a complaint at the police station that her items had been thrown out.

5. The appellants filed a joint amended defence on 15th March 2019 in opposition to the respondent's claim. Their case before the trial court was that although the 1st appellant had entered into a lease agreement to demise a part of her property known as LR. No. Kisii Municipality/Block III/123/B later known as LR. No. Kisii Municipality/Block III/149, the lease expired. The 1st appellant chose not to renew the lease because the respondent did not faithfully meet her rent obligations. The appellants also averred that the eviction of the appellant was based on judicial process and involved ejection as opposed to seizure of goods as claimed by the respondent. They also pointed out that the respondent had not provided documents to prove title to the properties she claimed had been seized and thus urged the court to dismiss her suit.

6. The 2nd appellant (DW1) testified in support of his case and also gave evidence on behalf of the 1st appellant. He stated that he had proceeded with eviction after obtaining an eviction order from the Business Premises Tribunal dated 6th January 2016. He testified that the 1st appellant intended to carry out major renovations and had also terminated the lease for non payment of rent. He insisted that the eviction notice was served upon the respondent. He also told the court that he had not confiscated any items from the tenant and his work was only restricted to removing the items from the room. He stated that the only items that had been thrown out were a wheel barrow, a table, spirits and old wine bottles. He stated that there were no permits and the premises were dusty.

7. During cross examination, the 2nd appellant admitted that he had not come across any affidavit of service that notice to terminate tenancy was served upon the respondent. He also admitted that he had not come across any affidavit of service for the eviction order but added that the issue of service had been addressed by the court and there had been no appeal or review of the decision. He also stated that he had filed returns in court although he did not have them before the court.

8. The parties disposed of the appeal by way of written submissions which I have duly considered. The issues arising from their submissions and the record of appeal are as follows;

a. Whether the eviction carried out by the appellants was unlawful;

b. Whether the issue of service of an eviction notice was the subject matter of previous proceedings and thus res judicata; and

c. Whether the appellants were condemned to pay special damages whose existence and loss was not proven;

9. On the first issue, the appellants contend that the lower court erred by failing to realize that the eviction was carried out lawfully on the strength of a court order issued by the Court in Kisii Misc. App. No. 7 of 2016. The appellants submit that the respondent's argument that she had not been served with the eviction notice was untenable since she gave contradictory statements as to her whereabouts during the eviction process. They also questioned why the respondent was able to produce the eviction notice and all eviction orders leading up to her eviction. In their view, this was evidence that the appellant had been duly served. They argued that in a letter dated 6th January 2016, the Business Premises Rent Tribunal (hereinafter the "BPRT") acknowledged that an eviction notice had been served upon the respondent in accordance with the law and proceeded to allow the eviction of the respondent.

10. From the evidence on record it appears that the letter dated 6th January 2016 was adopted as the orders of the court in Kisii Misc. App. No. 7 of 2016 on 15th January 2016 and an order of eviction issued against the Respondent in respect of the premises. The respondent claims that she was not served with an eviction notice and only learnt of her eviction after the fact. The evidence shows that she filed an application attempting to challenge the eviction process before the BPRT on 16th February 2016 to no avail. She also contended that the letter dated 6th January 2016 which had purportedly been adopted by the court in Kisii Misc. App. No. 7 of 2016 had been authored by a Rent Control Inspector who had no capacity to make such a decision. However, no appeal was preferred against the orders of the court issued in Misc. App. No. 7 of 2016 and they remained enforceable.

11. The question then is whether the orders of eviction issued in Kisii Misc. App. No. 7 of 2016 were served upon the respondent since this was the basis upon which the appellants removed the respondent's property from the premises and not the letter dated 6th January 2016.

12. I concur with the persuasive case of ***Kirima Bus Services Ltd v Joseph Kariuki Gichimu t/a Tausi Enterprises & Peacock Enterprises Civil Case No. 667 of 2010 [2013] eKLR*** where Odunga J. held as follows on the burden of proof where service is denied;

> *"The Plaintiff contends that the Notice was duly served on an employee of the Defendant. The Defendant has however denied that the alleged employee was its employee and that no such notice was served.* ***Section 107(1) of the Evidence Act provides that 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. Clearly therefore the burden was on the Plaintiff to prove its allegation that the Defendant was***

duly served. *What is a person who is not served with such notice expected to do? In* ***Jayantilal R. Shah vs. Hussein Nanji Padamshi & 5 Others Civil Appeal No. 5 of 1982 [1984] KLR 531*** *the Court of Appeal held that a party who contends that he did not receive a particular letter by post can do no more than to deny the receipt of it, and bare though the denial appears by itself, it is capable of raising a triable issue. Although that decision arose from an application for summary judgement the same principle applies to a situation where the Defendant contends that he was not served in which case the burden is on the Plaintiff to prove otherwise. As was held by* ***Visram, J*** *(as he then was) in* ***Mbura and Others vs. Castle Brewing Kenya*** *Lim****ited and Another [2006] 1 EA 185,*** *the Evidence Act provides that an act is not proved when it is neither proved nor disproved. [Emphasis added]*

13. In the case of ***Joseph Nyakundi Orina v Joseph Ambuka ELC NO. 235 OF 2017 [2018] eKLR*** the court held;

"4. The application is not opposed. However, I have absolutely no evidence before me that the respondent was served with the judgment and/or decree as I had directed in the judgment, and no evidence that 30 days have lapsed from the time that the judgment/decree was served, to the time that this application was filed. There is no affidavit of service of the judgment and/or decree upon the respondent annexed to the application, and my perusal of the file has revealed none. I regret my inability to issue an order of eviction before I have seen proof of service of the judgment and/or decree as stated in the judgment."

14. The burden of proving the service of the eviction orders rested upon the appellants. When put to task on the issue of service during cross examination, the 2nd appellant admitted that he did not have any affidavit of service of the eviction orders dated 15th January 2016. An affidavit of service is the best way to test the genuineness of alleged service. (See ***Amayi Okumu Kasiaka & 2 others v Moses Okware Opari & another Civil Appeal No. 15 of 2010 [2013] eKLR***). In the present case, none was produced. The 2nd appellant's written statement filed on 16th March 2019 is also not clear on the manner in which the eviction orders dated 15th January 2016 were allegedly served upon the respondent.

15. The appellants argue that the issue of service or non-service of the eviction order was the subject matter in Kisii Misc. App. No. 7 of 2016. They contend that it was obvious that matters relating to service had been dealt with by the lower court before it issued eviction orders and the issue was therefore *res judicata*.

16. The doctrine of *res judicata* is provided under **section 7** of the **Civil Procedure Act** thus;

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

17. The appellants cited the case of ***Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 Others Civil Suit No. 20 of 2015[2017]eKLR*** where the court expounded on the doctrine as follows;

"26. The doctrine of res judicata as stated in the said Section has been explained in a plethora of decided cases. I only need to cite one of those cases. In the recent case of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), the Court of Appeal held that: "Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disinjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

18. The Court of Appeal in ***Kenya Commercial Bank Limited v Benjoh Amalgamated Limited Civil Appeal No. 107 of 2010 [2017] eKLR*** held that *res judicata does not only apply to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time*.

19. The eviction orders issued in Kisii Misc App. No. 7 of 2016 were made pursuant to **Section 14** of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** which provides that once the BPRT makes an order, the same is to be filed in a competent subordinate court after which the determination may be enforced as the decree of the court. The mandate of the lower court was thus limited to adopting the determination of the BPRT and issues of service of the order of the court could not be raised in the Miscellaneous Application. I therefore reject the argument that the issue of service was res judicata since the issue of service could not be raised before the court in Kisii Misc App. No. 7 of 2016 which merely adopted the BPRT's decision.

20. The trial court's finding that there was no proof of service cannot be faulted as no cogent proof was adduced to show that the appellants had served the eviction order before its execution. There is also an indication by the court in Kisii Misc App. 7 of 2016 that the eviction order

was issued *ex parte* hence the need to prove service of the eviction order or an eviction notice before its execution. The evidence shows that the 2nd appellant acted on the 1st appellant's instructions to remove the respondent's goods from her premises and thus both appellants were legally liable to the respondent for carrying out the eviction without notice.

21. Having proved that the eviction was irregular, the respondent was then required to prove the loss she had suffered as a result. The appellant argues that the lower court awarded Kshs. 1,725,670/= for a totally unproven claim. They contend that the amount awarded to the respondent was based on an inventory prepared by the respondent herself without producing documents to show she held title to what she claimed. They argued that the respondent never paid rent and it was highly unlikely that she owned what she claimed she did. They also pointed out that the licences she produced in support of her case were last paid for in 2007 and the last actual purchase of alcohol from her retail business was in 2007.

22. Relying on the cases of ***Virani t/a Kisumu Beach Resort versus Phoenix of East Africa Assurance Company Ltd Civil Appeal No. 88 of 2002*** and ***Savannah Development Company Limited vs Posts & Telecommunication Employees & Another Civil Appeal No. 160 of 1991***, the respondent countered that she had pleaded and particularized the loss she suffered as a result of the illegal eviction.

23. The documents produced by the appellant in support of her claim for special damages were an inventory of goods, a bundle of liquor licences, a bundle of single business permits and receipts on account of purchases of wines and spirits. The inventory dated 31st March 2016 listed the items the respondent claimed were in the premises as at 15th February 2016. The bundle of licenses and permits included liquor wholesale licences, occupation licenses, licenses from the public health office and several business permits for the period between 1998 and 2007. The bundle of receipts included several receipts between 2006 and 2007 issued to Monsori Wines and Spirits by different suppliers.

24. The Court of Appeal in the case of ***Simon Ndungu Mungai & Pastor Vincent Mungai t/a Overcomers Christian Centre & Likelink Communications vs Municipal Council of Kiambu Civil Appeal No. 23 of 2012 [2019] eKLR*** had this to say in a similar case;

> *"As to whether there was any evidence to support the value of the lost and damaged goods,* ***our attention was drawn to the inventory which provided a list of the goods and equipment alleged to have been confiscated. No valuation or receipts or any other documentary evidence was supplied to support these claims.***
>
> ***In view of the aforegoing, we find that the learned judge rightly found that the appellants had not made out a case for an award of special damages, and likewise, we so find****. [Emphasis added]*

25. Msagha J. in ***Karanja Muchiri V Proctor And Allan (E.A) Limited Civil Case 48 Of 2004 [2009] eKLR*** held;

> *"The plaintiff's claim is for special damages which, in addition to the same requiring to be specifically pleaded, must be proved. It is not enough for a party to plead figures then in evidence place them before the court and say this is my claim. Evidence is required to persuade the court why it should believe that party and disbelieve the other."*

26. The court in ***David Njuguna Ngotho v Family Bank Limited & another Civil Case No. 11 of 2015 [2018] eKLR*** also held;

> *"On the plaintiff side if indeed the claim is on wrongful attachment the exhibits on proclamation and goods carried away for sale by the auctioneer should contain sufficient evidence on actual loss suffered. The measure of damages is prima facie either ascertained from the purchase price of the goods at the time they were delivered or on the basis of available market price at the time the goods were unlawfully attached. In the circumstances of this case given the approach taken by the plaintiff while prosecuting this claim failed to articulate clearly whether the actual loss was to be calculated on the purchase or sale price of the goods. He merely asked this court to go by the inventory of three months which I found to be at variance with the attachment inventory of the auctioneer. This special claim included laptops but to our dismay they were not part of the attached properties by the auctioneer."*

27. The respondent produced an inventory dated 31st March 2016 which was most likely compiled after the eviction had taken place. A list of the stock in the premises prior to the eviction would have been useful in proving the respondent's case but none was produced. The respondent also failed to explain the basis of her inventory. The bundles of receipts and licenses produced by the respondent had been issued nearly a decade prior to the eviction and did nothing to aid the respondent's case. The 2nd appellant admitted that he had removed some items from the premises but it was upon the appellant to prove the value of what she lost. It is an elementary principle of law that special damages must not only be specifically pleaded but also proved with a degree of certainty. Having reviewed the evidence before the trial court it is my finding that the respondent did not prove her loss to the required standard.

28. For the reasons given, I find that this appeal has merit and the same is allowed. I hereby set aside the judgment and decree of the trial court dated and delivered on 1st November 2019. The appellants shall have the costs of this appeal.

Dated and Delivered at Kisii this 22nd day of July, 2020.

A. K. NDUNG'U

JUDGE