



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL NO. 36 OF 2018

KIIO KAVILA.....APPELLANT

VERSUS

1. ROSE MUIA)

2. LITHE MUIA).....RESPONDENTS

(Being an Appeal from the Judgement of Honourable A.G. Kibiru (Chief Magistrate)

delivered on 14/03/2018) in the Chief Magistrate’s Court

at Machakos in CMCC No. 313 of 2011)

BETWEEN

KIIO KAVILA.....PLAINTIFF

VERSUS

1. ROSE MUIA)

2. LITHE MUIA).....DEFENDANTS

JUDGEMENT

1. The appeal arises from the judgement of Hon. A. G. Kibiru dated 14/03/2018 in **Machakos CMCC No. 313 of 2011** wherein the Appellant’s suit was dismissed with no order as to costs.

2. Being aggrieved by the said decision, the Appellant filed a Memorandum of appeal dated 12/04/2018 where he raised 21 grounds of appeal as follows:-

(1) The learned Chief Magistrate erred in both law and fact in failing to note and to appreciate the fact that there had NEVER been a landlord/tenant relationship between the appellant and the respondents, and that the attachment of the Appellants machines/tools of trade by the Respondents and/or their agents in purported levy of distress for rent was wrongful and unlawful.

(2) The learned Chief Magistrate erred in both law and fact in failing to note and to appreciate the fact that there existed a valid/lawful lease and/or tenancy agreement between the appellant and one Martha Pius Kinyamasyo regarding the shop in issue in Kisambalau Building (Plot No. Machakos Town Block 11/78) in Machakos Town, and that the Appellant had NEVER fallen into rent arrears.

(3) The learned Chief Magistrate erred in both law and fact in failing to note that the aforesaid Kisambalau Building (Plot No. Machakos Town Block 11/78) was registered in the names of several persons, one of whom is Pius Kinyamasyo Musyoki (the deceased husband of Martha Pius Kinyamasyo) and who had always leased out the shop popularly known as “Mume Ni Kazi” and which the said Martha Pius Kinyamasyo subsequently leased out to the appellant after the death of the said Pius

Kinyamasyo Musyoki.

(4) *The learned Chief Magistrate erred in law and in fact in failing to note and to appreciate the fact that NO person from the family of the said Martha Pius Kinyamasyo had questioned and/or challenged the right of Martha Pius Kinyamasyo to lease out the subject shop to the Appellant.*

(5) *The learned Chief Magistrate erred in law and fact in failing to note and to appreciate the fact that the respondents, being legal representatives of the estate of the late Peter Muia Ndunda (one of the registered proprietors of Plot No. Machakos Town Block 11/78) popularly known as Kisambalau Building), could only act as landlords/administrators of the said Peter Muia Ndunda regarding that portion/part of the said building/plot controlled by the said Peter Muia Ndunda (deceased) and from which he collected rent during his life time.*

(6) *The learned Chief Magistrate erred in law and fact in failing to hold that being an UNDISPUTED beneficiary of the estate of Pius Kinyamasyo Musyoki, Martha Pius Kinyamasyo was entitled to collect rent from those shops in Kisambalau Building which her said late husband had controlled and had leased out before his death, and to lease them out to new tenants if and when such shops fell vacant.*

(7) *The learned Chief Magistrate erred in both law and fact in faulting and accusing the appellant of “failing to exercise due diligence” while renting the subject shop, yet he, the Appellant, had lawfully rented/leased the subject shop (popularly known as “Mume ni Kazi” from the rightful beneficiary.*

(8) *The learned Chief Magistrate erred in law and fact in failing to state what “due diligence” the appellant was supposed to exercise, and which he DID NOT exercise.*

(9) *The learned Chief Magistrate erred in law and in fact in failing to note that the appellant’s landlady, Martha Pius Kinyamasyo, had NOT signed alleged minutes exhibited by the respondents, vide which the said Martha Pius Kinyamasyo is alleged (by the respondents) of having ceded/handed over the “Mume ni Kazi” shop to the family of Peter Muia Ndunda and/or the respondents.*

(10) *The learned Chief Magistrate erred in law and in fact in failing to note the respondents’ own evidence that they had attached the appellant’s tools of trade/machines in a bid to make the appellant their tenant.*

(11) *The learned Chief Magistrate erred in law and in fact in failing to find and to hold that the attachment of the appellant’s property by the respondents and or their appointed auctioneer (agent), was wrongful and unlawful, YET all the evidence adduced by both the appellants and the respondents pointed to that fact.*

(12) *The learned Chief Magistrate erred in law and in fact in failing to find and hold that auctioneers, though officers of the court, act as agents of the persons appointing them in any particular case; and that failure by the appellant to sue the auctioneers jointly with the respondents was NOT fatal to the Appellant’s case.*

(13) *The learned Chief Magistrate erred in both law and fact in failing to find and to hold that the respondents DID NOT in any way deny having instructed Kande Auctioneers to attach the Appellant’s property in purported levy of distress for rent.*

(14) *The learned Chief Magistrate erred in law and fact by attempting to justify the unlawful attachment of the appellant’s property by the respondents and/or their agent.*

(15) *The learned Chief Magistrate erred in law and in fact in failing to appreciate the appellant’s evidence that NO proclamation of the goods in issue was done prior to attachment thereof, and that the purported proclamation purportedly dated 29/04/2011, was NOT shown to have been served on the appellant or his agent.*

(16) *The learned Chief Magistrate erred in law and in fact in failing to find and to hold that the contents of the purported proclamation dated 29/04/2011 and the notification of sale dated 17/06/2011 are manifestly different.*

(17) *The learned Chief Magistrate erred in law and in fact in failing to note that the respondents had deliberately failed to call the attaching auctioneer as a witness, and that this failure could not be held against the appellant.*

(18) *The learned Chief Magistrate erred in law and in fact in failing to appreciate the auditor’s (PW.4’s) evidence, and in failing to award the appellant the amount proved.*

(19) *The learned Chief Magistrate erred in law and in fact in failing to find and to hold that the appellant had proved his case against the respondents on a balance of probability, and in failing to accordingly enter judgement in his favour.*

(20) *The learned Chief Magistrate erred in law and in fact by failing to fully evaluate all the evidence adduced by the appellant and his witnesses, and proceeding to make a one-sided judgement which is against the weight of the evidence adduced.*

(21) *The learned Chief Magistrate erred in law and in fact in dismissing the appellant’s suit.*

3. This being a first appeal, the duty of this court is well spelt out namely to re-evaluate and analyze the evidence tendered before the trial

court and come to an independent conclusion as to whether or not to uphold the decision of the trial court. This court will also note the fact that the trial court had the advantage of seeing or hearing the witnesses (see **Sele –vs- Associated Motor Boat Co. Ltd [1968] EA 123**).

4. **Kiio Kavila (PW.1)** is the Appellant herein and had testified that initially he had not known the Respondents until the attachment of his goods on allegations that he had not paid rent to them yet they were not his landlords. He maintained that his landlady was one Martha Pius Kinyamasyo with whom he had a lease agreement entered on 28/05/2010 but moved into the premises in November, 2010 where he ran a milk bar business. He stated that on 17/05/2011 some auctioneers raided his said premises and attached all his machines ostensibly on alleged non-payment of rent. He was forced to file suit at the lower court after which he had to deposit security in the sum of Kshs.100,000/- in order for his machines to be released and he had to pay the Auctioneers taxed costs of Kshs.45,100/-. He went on to state that he used to make a profit of Kshs.29,000/- per day and that he had lost business for a record 87 days and had thus lost income to the tune of Kshs.2,523,000/- as per the audited accounts presented to court. He also claimed a sum of Kshs. 41,000/- being costs of live culture for making yoghurt and which went bad plus Kshs.10,000/- being cost of transporting the attached property back to the rented building. On being cross- examined, he confirmed receiving a letter dated 30/03/2011 from the purported landlords but denied being their tenant but confirmed that from the search certificate shown to him that the premises were jointly owned by four persons. He also stated that he agreed to pay the deposit as alleged arrears in order to secure his goods which could have gone to waste.

5. **Alphonse Musau (PW.2)** a resident of Sultan Hamud stated that he had been a former tenant as he had operated a clothes shop in the building styled “*Mume ni Kazi*” on Plot No. **Machakos Town Block 11/78** and popularly known as Kisambalau. He added that the shop had been leased to him by one Pius Kinyamasyo Musyoki and upon his demise his wife Martha Pius Kinyamasyo took over as the landlord. He stated that upon his departure, the Appellant then moved in. On cross-examination he confirmed that Martha Pius Kinyamasyo collected rent from one part of the building while Rose Muia (1st Respondent) also collected rent from the other part that had been in control of her deceased husband Peter Ndunda.

6. **Martha Pius Kinyamasyo (PW.3)** testified that she had leased the premises to the Appellant in May, 2010 and the shop was christened “*Mume ni Kazi*”. She stated that the entire building belonged to four people namely Peter Ndunda Muia, Pius Kinyamasyo, Mackenzie and Kilunga. She went on to add that her late husband Pius Kinyamasyo had been leasing the shop and after he passed on she took over and collected rent. She confirmed that upon the death of Peter Ndunda Muia one of the proprietors (the 1st Respondent) who is his daughter started collecting rent from the portion controlled by her late father. She further added that the Respondents started claiming the entire shop that she had rented out to the Appellant. She produced a grant issued in respect of the estate of her husband Pius Kinyamasyo issued on 7/09/2010. She sought for compensation to be given to the Appellant. On cross- examination, she confirmed that her late husband had two wives and that her late husband and Peter Ndunda Muia shared the shops. She also maintained that the family dispute on distribution of the estates of the two men were not resolved. On re-examination she stated that she used to collect rent from the shops even before obtaining the grant as there was no dispute at all and that the Respondents ought to have sued her instead of harassing tenants.

7. **Boniface Kioko (PW.4)** an accountant with Kigonde Mwangi & Associates testified that he had prepared accounts for the Appellant for the months of January - April, 2011. He confirmed receipt of the ledger books and receipts and did interview the Appellant and was able to build up accounts in the absence of records. He came up with the sum of Kshs.2,548,000/- as the total sales for the said period and further that the production was 270 litres of milk per day based at a price of Kshs.50/- per litre. He also confirmed that the machines used up electricity of Kshs.68,000/- and that there were issues of staff salaries, uniforms, transport, printing and depreciation with the net profit being Kshs.696,000/- for the four months. He produced the report. On cross – examination he confirmed that the Appellant did not inform him as to when he started the business. He also confirmed that he did not sign the report as it was done by the managing partner of the business.

8. The Respondents called one witness namely **Rose Peter Muia (1st Respondent)** testified that her family had obtained grant of letters for the estate of Peter Ndunda Muia and that the property was shared between the families of Pius Kinyamasyo and Peter Ndunda Muia. She confirmed that the families shared the property aside A and B. She went on to add that upon the demise of the two men, a meeting was called by both families and deliberations were made on 10/02/2010 where it was decided to divide the house between the two families whereupon her family took up side A while the family of Kinyamasyo took side B. After the meeting a sample letter was done for the tenants and that the changes were to take effect after three months. She further stated that the appellant had been notified of the changes and that he was to pay rent to the Respondents but did not comply forcing the Respondents to resort to levy distress for rent. She finally stated that the Appellant had not paid rent to the Respondents even after filing the case which should thus be dismissed. On cross- examination, she stated that she did not know if the Appellant paid rent to Martha Kinyamasyo. She also confirmed that the said Martha Kinyamasyo attended the family meeting and had instructed her step daughter Faith Ndunge to sign on her behalf. She also confirmed that they were not evicting the Appellant but only pursuing for rent since he was already aware of the change of landlord. She sought for the dismissal of the Appellants suit with costs.

9. The appeal was disposed of by way of written submissions.

Learned counsel for the Appellant submitted that there existed a valid and lawful lease/tenancy agreement between the Appellant and one Martha Pius Kinyamasyo over the shop style “*Mume ni Kazi*” on **Plot No. Machakos Town Block 11/78 (Kisambalau Building)** and that the Respondents were in charge of the other part of the building. It was further submitted that the Respondent’s purported levy of distress for rent against the Appellant was unlawful since they were not the Appellant’s landlord as there was no lease/tenancy agreement in that regard. It was also submitted that the Respondents did not manage to cast doubt upon the Appellant’s evidence and hence the trial court ought to have ruled in his favour and to grant the prayers sought in the plaint.

Learned counsel for the Respondents raised several issues for determination namely: - *whether Martha Pius Kinyamasyo had capacity to enter into a legally valid binding lease with the appellant; whether the shop in dispute was allocated and run by the Respondents; whether the failure by the appellant to enjoin the auctioneer in the primary suit was fatal; whether the Appellant had proved his case on a balance of probability.*

On the issue of capacity of the said Martha Pius Kinyamasyo to enter into a lease with the appellant, it was submitted that she did not have the requisite capacity since by the time the entry of lease (28/05/2010) she had not obtained the grant of letters in respect of the estate of her late husband Pius Musyoki Kinyamasyo and which were granted on 7/09/2010. Again pursuant to the family meeting dated 10/02/2010 the

Respondents were allowed to occupy part 'A' of the building where the Appellants shop was situated and in which the said Martha Pius Kinyamasyo had authorized her step daughter Faith Ndunge to sign on her behalf and that it was the counsel's contention that the said Martha Pius Kinyamasyo's claim of non-participation of the family meeting was untruthful as her said step daughter was not called to corroborate the assertions. It was further the counsel's submissions that the said Martha Pius Kinyamasyo had intermeddled with the estate of her husband contrary to section 45 of the Law of Succession Act and hence the purported lease was tainted with illegality and thus not enforceable.

On the second issue, it was submitted that the shop in question after the family deliberations fell under the side of the Respondents to manage and who by then had the requisite letters of grant of administration. It was submitted that the family meeting gave the portion where the appellants shop was situated and that Appellant and other tenants were alerted of the new changes but that the Appellant ignored the same.

Regarding the third issue, it was submitted that the Appellant did not discharge the burden of proof required under section 107 of the Evidence Act as he did not prove his claim on balance of probabilities. It was submitted that the items attached were not tools of trade but attachable goods. On the amounts claimed, it was submitted that the same were not proved since no documentary evidence were produced by the auditor (PW.4) and that the figures were just estimates.

Finally it was submitted that the loss of user of anticipated profits was not properly articulated by the Appellant since there was no evidence of mitigation of loss awarded and thus the special damage claims which were not proved ought to be dismissed.

10. I have considered the evidence presented before the trial court together with grounds of appeal as well as the submissions of both learned counsels. It is not in dispute that the appellant had been carrying out milk bar business in the one of the shops styled "Mume ni Kazi" within Kisambalau building on **Plot No. Machakos Town block 11/78** having been put thereon by one Pius Musyoki Kinyamasyo and later Martha Pius Kinyamasyo. It is also not in dispute that the Respondents herein levied distress for rent against the Appellant culminating in this suit first lodged before the trial court. It is also not in dispute that the said plot number **Machakos Town Block 11/78** was owned by four persons two of whom have since died and that the Respondents represent the interest of one of the said deceased proprietors Peter Ndunda Muia while one Martha Pius Kinyamasyo represents the interest of Pius Musyoki Kinyamasyo. It is also not in dispute that the said Martha Pius Kinyamasyo had leased one of the shops upon the demise of her husband to the Appellant herein on the 28/05/2010. That being the position, I find the following issues necessary for determination namely:-

(i) Whether the said Martha Pius Kinyamasyo had the requisite capacity to enter into a binding lease agreement with the appellant.

(ii) Who between Martha Pius Kinyamasyo and the Respondents were entitled to manage the shop styled "Mume ni Kazi" within Kisambalau building on Plot No. Machakos Town Block 11/78?

(iii) Whether the failure by the Appellant to enjoin the auctioneer in the primary suit was fatal.

(iv) Whether the Appellant had proved his case on a balance of probabilities against the Respondents.

11. As regards the first issue, it is noted from the evidence of Martha Pius Kinyamasyo (PW.3) that the Appellant herein had been a tenant of her husband Pius Musyoki Kinyamasyo and that upon his demise she proceeded to sort of formally lease the premises to the Appellant at a monthly rent of Kshs.15,000/=. The lease agreement is dated 28/05/2010 and was duly produced by the Appellant in evidence. Her further evidence was that she filed succession cause in respect of her said deceased husband and was issued with a grant of probate which is dated 7/09/2010. The Respondents have taken great issue with the same and their learned counsel has urged me to find that the said Martha Pius Kinyamasyo had engaged in intermeddling with the estate of her husband and that she had no capacity to enter into the purported lease with the Appellant as the same had been done before the confirmation of grant. It appears the said Martha Pius Kinyamasyo was not patient in entering into the lease agreement. Had she done so after the issuance of the grant then she could not have found herself in such a situation. Even if the Appellant had been a tenant of her late husband, she should have left things as they were and to come later and regularize the tenancy upon obtaining the grant. I am satisfied that she had indeed intermeddled in the estate of her late husband since such conduct is forbidden by section 45 of the Law of Succession Act which provides as follows:-

Section 45(1) *Except so far as expressly authorized by this Act, or*

by any other written law, or by a grant of representation under this Act, no person shall for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.

(2) Any person who contravenes the provision of this

section shall:

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the course of administration.

It is thus clear that the said Martha Pius Kinyamasyo had gone against the clear provisions of entering into an agreement with the Appellant over the property of her deceased husband. She lacked the requisite capacity to enter into the said transaction. Again it is noted that the two families of Pius Musyoka Kinyamasyo and Peter Ndunda Muia had met on 10/02/2010 vide the minutes produced by the Respondents and

had agreed on the manner of sharing the properties wherein it transpired that the shop in question (“*Mume ni Kazi*”) ended up with the family of the Respondent. The Respondents produced documents showing that notices and letters were sent out to the tenants over the new changes. The said Martha Pius Kinyamasyo did not dispute the said family meeting save only to aver that she had not signed the minutes. The Respondents on the other hand maintained that the said Martha Pius Kinyamasyo was present and had authorized her step daughter one Nduge to sign on her behalf. If indeed the family meeting took place which I find it did on the 10/02/2010 then as at 28/05/2010 when Martha Pius Kinyamasyo leased the premises to the Appellant, the said premises had ceased being the property of the family of Pius Musyoki Kinyamasyo as the same had been given to the family of Peter Ndunda Muia. That being the position, I find that the purported lease entered into between Martha Pius Kinyamasyo and the Appellant was improper for the reason that the purported lessor had no capacity and further that the property in issue had already left the hands of the purported lessor. I am therefore unable to fault the trial court’s finding that the lease agreement relied upon the Appellant was unenforceable for the above reasons.

12. As regards the second issue, it transpired from the evidence that the family meeting of 10/02/2010 resolved that the shop in question and which was then occupied by the Appellant was to be taken over by the family of the Respondents. Even though Martha Pius Kinyamasyo vehemently denied being aware of the said meeting, I find the evidence of the Respondents was cogent and believable suffice to add that a step daughter to the said Martha Pius Kinyamasyo is reported to have signed the minutes on her behalf under her instructions. It is also instructive that the said Martha Pius Kinyamasyo opted to come to court to testify alone without being accompanied by her step daughter who would have shed more light regarding the existence and authenticity of the family meeting. The failure to call the said step daughter to testify appears to have been a strategy by the Appellant and his said landlady to discredit the family meeting of 10/02/2010 but the same backfired in my view. I am convinced that the said Martha Pius Kinyamasyo had something to hide going by her conduct in proceeding to lease out the premises while knowing very well that the same had been passed over to the Respondents family. As from the 11/02/2010 the said premises became the property of the Respondents following the family meeting and therefore it was quite legitimate for them to engage the tenants including the Appellant herein over the new changes as can be seen from the various notices and letters produced by the Respondents as exhibits. It is thus clear that it is the Respondents who were to be in control of the premises and not Martha Pius Kinyamasyo and it was perfectly in order for them to issue notices to tenants and even to levy distress for rent.

13. On the third issue, the Appellant has taken issue with the trial court’s decision in faulting him for not enjoining the auctioneer as a party to the suit. Looking at the entire evidence, I find that the trial court was clearly in error in faulting the Appellant in that regard. It is instructive that the auctioneer had not taken an independent action to proclaim the Appellant’s goods and to subsequently seize them but was acting as an agent of the Respondents who are the principals. In any case the Respondents in their evidence did not dispute the fact that their advocates had instructed the auctioneer to proceed to levy distress for rent. Consequently, I find that there was nothing unprocedural on the part of the Appellant in not enjoining the auctioneer as a party to the suit. The failure to do so did not have any bearing on the success or otherwise of the Appellant’s case.

14. As regards the last issue, the Appellant being the initiator of the case bore the responsibility to prove his case on balance of probabilities as he is wont to under section 107–109 of the Evidence Act. The Appellant’s case was that the Respondents were not his landlords and as such they had no lawful right to purport to distress for rent yet he had no lease agreement with them. His other grouse with the Respondents was that as a result of the unlawful distress the Respondents should now compensate him for the loss as quantified by his auditor and as specifically pleaded in the plaint. The lease agreement produced by the Appellant is dated 28/05/2010 whereas the Respondents produced family deliberations dated 10/02/2010 as well as notices and letters to tenants including the Appellant. As at 28/05/2010 it is clear that the Appellant had ceased being a tenant of Martha Pius Kinyamasyo in view of the changes made on 10/02/2010 and therefore the said Martha Pius Kinyamasyo had no capacity to enter into a lease with the Appellant. Even though no lease was entered between the Respondents and Appellant a relationship of landlord and tenant could be implied in view of the changes dated 10/02/2010 and the notices and letters served upon the tenants including the Appellant. The Appellant during his cross-examination confirmed that he was aware of the same. Even though the Appellant had not paid rent to the Respondents the same did not oust the implied landlord and tenancy relationship. The Appellant’s witness Francis Musau Kiluva (PW.2) confirmed that he had rented the same premises from the previous owner Pius Kinyamasyo and stayed thereon for a period of twenty years before the Appellant moved in and during which period no lease was prepared. The Appellant took over the premises and paid rent to the said Pius Kinyamasyo until he died whereupon Martha Pius Kinyamasyo took over and collected rent. It is therefore clear that the only time a lease was introduced was on 28/05/2010 when one was entered into between Martha Pius Kinyamasyo (PW.3) and the Appellant. The family deliberations made on 10/02/2010 effectively changed the landlords and thus the Appellant was under obligation to engage with the Respondents and not Martha Pius Kinyamasyo. The Appellant had been duly notified of the changes and hence his claim that he had no relationship with the Respondents lacks merit. It follows therefore that the Respondents demand for rent and the subsequent proclamation and distress for rent upon the Appellant was lawful.

The Appellant claimed that he suffered great loss and damage as a result of the distress. Vide his amended plaint a sum of Kshs.2,523,000/- was pleaded as lost income for 87 days at the rate of Kshs.29,000/- per day. He also claimed a sum of Kshs. 41,000/- being the cost of culture as well as a sum of kshs.45,100/- paid to the Auctioneer and then another Khss.10,000/- for transportation of the attached goods and finally the sum of Kshs.100,000/= paid into court as security for costs. It is evident from the evidence of the Appellant that no documents were produced to support the claims save for the auditor’s report. The auditor (PW.4) testified and stated that he did not obtain the requisite documents for his forensic analysis but relied on his interview with the Appellant and his staff to generate the lost income. It would seem that the auditor’s assessment was a generalized one and it could have had some weight had it been backed with necessary documents so as to ensure that the same is in tandem with the principle that special damages ought to be specifically proved. The auditor’s evidence on the assessment seemed to contradict itself in that whereas the claim for lost income for the 87 days at Kshs.29,000/- per day of kshs.2,523,000/-, he went ahead to state that the net profits for the months of January – April 2011 was 696,000/-. This thus contradicted with the Appellant’s assertion that he had lost profits worth Kshs.2,523,000/-. All in all, the Appellant’s evidence and that of the auditor was contradictory and coupled with the lack of production of receipts and documents the conclusion one arrives at is that the claim was not proved on balance of probabilities. The Appellant’s claim that the documents were lost during the seizure of the goods is not convincing because the auctioneers attention at the time was concentrated on the attachable goods or items which could be sold afterwards and not on used books and receipts. In the least, the Appellant could even have presented his bank statements which could show the inflow and outflow of money from the business. It is believed that the Appellant being a successful businessman was depositing and withdrawing monies into and out of his bank and not keeping the income at home. This could have lent credence that the business was thriving at the time of the distress.

The Appellant being a prudent businessman was expected to try and mitigate his loss. He waited for 87 days to take a decision to save his seized goods. That was a long period. This court in **Mac Master Ltd –vs- Onesmus Mutuku Muia [2018] eKLR** had stated that business people are expected to act prudently by mitigating their losses. Had the Appellant acted fast as he did in May, 2011, then he would have cut

his losses to some extent. He could not be expected to wait for the losses to escalate with a view to making a quick buck. To that extent, I find that the Appellant had failed to mitigate his losses. I am convinced that the Appellant has not proved all the special damages pleaded in the plaint as well as his case against the Respondent on balance of probability. Hence I uphold the learned magistrate's finding.

Finally, the Respondents had made a counterclaim against the Appellant for unpaid rent of 20,000/- per month from January, 2011. The claim was denied by the Appellant. During the reception of the Respondent's evidence, the 1st Respondent did not manage to establish the claim in that no documents were availed to support the same by virtue of it being a special claim and which ought to be specifically proved. The Respondents failed to establish their counterclaim against the Appellant on a balance of probabilities. The trial court's rejection cannot be faulted.

15. In view of the foregoing observations it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 24th day of September, 2020.

D. K. Kemei

Judge