REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 78 OF 2018

BETWEEN

RISPAH KERUBO ONSANSE.....APPELLANT

AND

DR VIJAY KUMAR SAIDHA.....1ST RESPONDENT

HARIA RAJESH NEMCHAD .....2ND RESPONDENT

HANIF ZULFIKAR AHMED HASHAM.....3RD RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. P. Wamucii, RM dated 10th August 2018 at Kisii Magistrates Court in Civil Case No. 417 of 2015*)

JUDGMENT

1. The facts leading to the suit filed by the respondents before the subordinate court are straightforward. The appellant, RISPAH KERUBO ONSASE, is the registered proprietor of a parcel of land; KISII MUNICIPALITY/BLOCK III/128 ("the premises") which has housing units occupied by the respondents. The 1st, 2nd and 3rd respondents occupied that premises based on an oral agreement to pay, as from 1st January 2014, Kshs 13,000/-, Kshs 22,000/-, and Kshs 13,000/- respective as monthly rent.

2. In due course, the appellant felt that the rent that the respondents were paying was unconscionably low and out of sync with the prevailing market rent for the premises which are located within the Kisii Township Central Business District. She decided to issue notices dated 4th November 2014 to the respondents notifying them that she was increasing rent effective 1st January 2015.

3. On 19th September 2015, the appellant's auctioneer descended on the respondents' premises and proceeded to levy distress on the basis they owed rent arrears based on the increased rent. The respondents denied they were served with the notices to increase rent or that they owed any rent as at 19th September 2015. Following the distress, the respondents averred that they were compelled to pay to the appellant Kshs. 1,374,000/- to forestal the embarrasment of distress. In their plaint, the respondents sought the following reliefs:

> ***a) Declaration that the Distress levied and/or mounted by the Defendants against the Plaintiffs over the demised premises situate on LR NO. KISII MUNICIPALITY/BLOCK III/128 on the***

19th September 2015, were patently and utterly illegal and hence null and void.

b) An Order compelling the Defendants to refund the sum of Kshs. 1,374,000/- only, to the Plaintiffs, which amount was obtained by extortion, fraud and/or false Pretence, by and/or at the instance of the Defendants herein on the 19th September 2015 albeir without lawful cause and/or excuse.

c) Permanent injunction, restraining the Defendants, either by themselves, agents, servants and/or employee, from entering upon and/or levying Distress on the Plaintiffs' Residential Premises situate on LR NO. KISII MUNICIPALITY/BLOCK III/128 without due regard to the law or at all.

d) General Damages for Tresspass, mental torture, Harrassment and Humiliation.

e) Interest at Court rates (14%) on (b), (d) & (f) herein.

f) Costs of this suit be borne by the Defendants.

g) Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.

4. In her defence and counterclaim, the appellant stated that whereas the rent for the premises was duly and effectively increased, the respondents had insisted on paying rent based on the old rates hence they were in default and that she was entitled to levy distress for rent. She also maintained that she was entitled to increase rent by issuing the notices which were served on the respondents. In her counterclaim, the contended that the respondents were not protected tenants and that the court had no jurisdiction to set the rent for the premises and that the respondents must pay the revised monthly rent of Kshs 30,000/-. The appellant therefore prayed for:

1. A Declaration that the Plaintiff are not protected tenants and the same must continue to pay the reviewed rent of at Kshs. 30,000/- per unit, as long as they remain in occupation of the suit premises and the Defendant are at liberty to levy distress and/or terminate the tenancy in the event there is default in paying rent.

5. When the matter was down for hearing, Dr Vijay Kumar Sadhia (PW 1) testified on behalf of the respondents while the appellant (DW 1), the Auctioneer, Josphat Nyachoti (DW 2) and the Process Server, James Moracha Ntabo(DW 3) testified on the appellant's behalf. The trial magistrate found in favour the plaintiff and entered judgment for the respondents against the appellant as follows;

a) A declaration that the distress levied by the defendants, their agents or servants by the Defendants on 19/09/2015 on LR No. Kisii Municipality/Block111/128 without due regard to the law.

b) A permanent injunction restraining the defendants their agents or servants of whichever description from levying distress on the Plaintiff's residential units in LR No. Kisii Municipality/Block/111/128 without due regard to the law.

c) A refund of Kshs 1,374,000/- paid pursuant to the illegal distress.

d) Kshs 100,000/- for each of the Plaintiff's as general damages for trespass, mental torture, harassment and humiliation.

e) Costs of the suit.

6. Aggrieved by the decision of the trial court, the appellant lodged this appeal citing several grounds in her memorandum of appeal dated 11th September 2018. In summary the grounds of the appeal were that

the trial court lacked jurisdiction to entertain the suit, the appellant's counterclaim was not considered and that the respondents failed to prove their case on the balance of probabilities.

7. At the hearing of the appeal, Mr Masese, counsel for the appellant, urged the court to allow the counter claim on the basis that the rent was increased and notices served to the tenants. He submitted that the respondents had failed to pay rent despite being served with the requisite notices. He pointed out that the respondents did not deny that the notices were issued and that it is the respondents who have refused to accept the rent increase or sign the lease reflecting the new rent.

8. Ms Ochwal, counsel for the respondents, submitted that the trial court found that the matter arose out of a contractual relationship and assumed jurisdiction. She supported the findings of the trial court that the notices were unilateral and that they were not served on the respondents and that therefore the consequent distress was illegal as evidenced by the fact that DW 2 was also fined by the Auctioneers' Board.

9. The duty of the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that, reach an independent conclusion as to whether to uphold the judgment **(see *Selle v Associated Motor Boat Co.* [1968] EA 123)**. Further, an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles **(see *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982 – 88] 1 KAR 278).**

10. PW 1 testified that he has been a tenant on the suit premises since 1980 in a 4 bedroomed house. He told court that in 2014 rent payable was Kshs 13,000/- per month, while the 2nd and 3rd respondents paid Kshs 22,000/- and Kshs 13,000/- respectively. He testified that as per the rent book that the respondents had paid the rent for 2014 and 2015. He told court that they had not been served with notices increasing rent. He recalled that on 15th September 2015, DW 2 accompanied by the police officers came to levy distress for rent despite there being no rent arrears. He proceeded to levy distress yet he had not issued a proclamation PW 1 to pay Kshs 514,000/- while the 2nd and 3rd respondents paid Kshs 346,000/- and 514,000/- respectively to forestal distress. He told court that they filed a complaint with the Auctioneers' Board and auctioneer was found guilty and fined for failing to follow the correct procedure.

11. DW 1 who testified that the respondents were her tenants but they had been paying minimal rent and had refused her request to increase rent. She therefore issued notices to the respondents proposing a rental increment. She testified that the notices were prepared and served by DW 3 as the respondents were in rent arrears. She testified that negotiations to agree on the rent increased failed and that is why she sought the services of DW 2 to levy distress. She stated the respondents paid Kshs 1,044,000/- to forestall distress but when she asked them to sign leases they refused.

12. DW 2 confirmed that he received written instructions from the appellant to levy distress for rent arrears against the respondents. He testified that he served the requisite proclamation notices but the tenants refused to sign the inventory. After lapse of the notice period and a confirmation from the landlord that the rent had not been paid, DW 2 filed an application to the court for after considering that the respondents had previously treated him with hostility. After getting security, he proceeded to the premises. Two respondents opted to pay the rent in cash while one made a bank deposit. He told court that his costs were also paid.

13. DW 3 testified that the received instructions from DW 1 to serve notices to increase rent on the respondents. DW 3 told court that on that morning of service he was accompanied by DW 1's daughter to the premises but unfortunately they did not find the tenants so they returned later. He prepared an affidavit of service to that effect.

14. The first issue raised in the memorandum of appeal is that the trial court did not have jurisdiction. There was no dispute that the was an existing tenancy relationship between the parties. I find and hold that the subordinate court correctly assumed jurisdiction after observing that the monthly rent was beyond the jurisdiction of the Rent Restriction Tribunal established under the ***Rent Restriction Act (Chapter 296***

of the Laws of Kenya). The appellant's observation that the trial court found that the tenants were protected is unfounded as the trial magistrate ruled that, "*It is not in dispute that the plaintiffs are not protected tenants within the meaning of Section 4 of the Rent Restriction Act"*.

15. This brings me to the key issue in this appeal. Having agreed that the parties were in a landlord and tenant relationship, the question for determination was whether and under what terms could the appellant as landlord increase the rent. A lot of energy before the trial court was spent on the issue whether the respondents were served with a notice increasing rent. Did the agreement between the parties provide for the manner of increasing rent?

16. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they choose. In ***Housing Finance Company of Kenya v Njuguna LLR 776 (CCK)*** the court expressed the following view which I accept as representing the law:

> *Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they choose. This they must do together with the meeting of the minds. If it appears to a court that one party varied the terms of a contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, this court will say no to the enforcement of such a contract. [Emphasis mine]*

17. On the one hand the respondents stated that the they had agreed with on rent which they had continued paying while the appellant contended that she had increased the rent by notifying the respondents. In fact, the appellant in her counterclaim urged the trial court to find that the plaintiffs must pay the reviewed rent of Kshs 30,000/-. Against these contentions is the principle I have outlined that when varying an agreement, oral or otherwise, the principles of offer and acceptance must be observed and the rent increase will only be effected if there is consensus ad idem. The notice to increase rent issued by a landlord constitutes an offer and the tenants have the option of accepting it and paying the proposed amount, or holding negotiations with the landlord or in the event negotiations fail, either party may elect to terminate the lease.

18. The argument by the appellant's counsel that the respondents did not object to rental increments cannot stand as the respondent did not agree to the proposed increment in the notice. In my view, nothing turns on whether the notices to increase rent were served or not. I would mention here that this is not a case of a controlled tenancy where a statutory regime intervenes to regulate the manner in which rent are increased. In this case, there was no evidence adduced to show that the parties agreed that the landlord could unilaterally vary terms of the tenancy agreement or that the parties agreed on terms of new lease. I therefore find and hold that the old rent was not varied and remained in force as at the time the appellant levied distress.

19. I now turn to whether the distress was illegal in the circumstances. The appellant undoubtedly has right to distress for rent in event of default in payment of rent by the respondents. The Court of Appeal in ***C Y O Owayo v George Hannington Zephania Aduda T/A Aduda Auctioneers & Another*** **[2008] 2 EA 287** held that:

> *Under section 3(1) of the Distress for Rent Act, in looking at what constitutes illegality of distress for rents, the court must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrear; or for a claim or debt which is not rent; as a payment for the hire of chattels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise...a distress levied or proceeded with contrary to the law of Distress…*

20. As I have found, the parties did not agree on rent increase hence the appellant could not claim additional rent based on the purported rent increase. PW 1 confirmed that the respondents had paid for the year 2015. That amount was not disputed by the landlord. The process of leading the distress was impugned and the fact that there was a procedural lapse was established that the Auctioneers' Board which found that the DW 2 did not issue a proper proclamation notice as it lacked specifications or the value of the proclaimed goods. It is an inescapable conclusion that the distress was illegal and the respondents were entitled to damages. In ***Peter Nthenge v Daniel Itumo & Another*** **NRB HCCC No. 1242 of 1974 [1976] eKLR**, the court held that:

> *Illegal distress however involves trespass to goods and proof of the actual loss sustained is not necessary. As Hilbery J said in Interoven Stove Co v Hibbard* ***(1936) 1 All ER 263*** *at page 270."And where there is trespass to goods, though no actual damage results, the law gives a right to recover damages not limited to actual damage sustained, but a right to recover substantial damages even though there is no proof of actual loss."*

21. Having re-evaluated the evidence before the trial court, I find and hold that the appellant and respondents had not agreed, either orally or in writing, on a rent increase. Consequently the respondents did not owe the appellant rent arrears and the appellant was not entitled to levy distress. The distress was therefore illegal and amounted to trespass for which the respondents were entitled to damages. Further, the respondents were entitled to the refund of payments made as a result of the default and paid upon the illegal distress. I therefore affirm the findings of the trial magistrate.

22. The appellant complained that her counterclaim was not considered. It is apparent that the appellant seeks for this court to determine the monthly rent due to her from the respondents. As I have held the determination of rent is in the parties hands and this court cannot vary those terms of the contract in the manner suggested by the appellant. Since that is the effect of the counterclaim, it could not survive the success of the respondents' claim

23. I do not find any merit in this appeal. It is dismissed with costs to the respondents which I assess at Kshs. 40,000/-.

DATED and DELIVERED at KISII this 11th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr G. J. M. Masese, Advocate for the appellant.

Ms Ochwal instructed by Oguttu, Ochwangi and Ochwal Advocates for the respondents.