



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 650 OF 2012

(CORAM: F. GIKONYO J.)

ERNEST KAMAU MUNGAIAPPELLANT

VERSUS

MANTRAC KENYA LIMITED RESPONDENT

(Being an appeal from the judgment of the Chief Magistrates' Court, Milimani Commercial Court at Nairobi delivered on 16/11/2012 in Civil Case No. 2971 of 2007)

JUDGMENT

1. The appellant was the defendant in the trial court and was sued by the respondent for vacant possession, mesne profits at a rate of Kshs. 40,000/- per month from 1st September 2006 until delivery of vacant possession, costs of the suit as well as interest. On 16/11/2012 the trial court awarded the plaintiff the mesne profits of Kshs. 40,000/- from 1st September 2006 until November 2009 less Kshs. 360,000/- already paid as well as costs of the suit and interest.

2. The appellant was aggrieved by the said decision and filed this appeal citing six grounds in the Memorandum of Appeal dated 28/11/2012 which may be summarized into two issues:

a. Whether the Appellant is a trespasser?

b. Whether the Appellant is liable to pay the Respondent mesne profits?

Submissions

3. The appeal was canvassed by way of written submissions. The appellant submitted that the appellant's and respondent's relationship arises out of a lease agreement. The lease was for a period of two (2) years commencing 1st September 2004 and was to expire on 31st August 2006. Having paid the rent for the month of September 2006 and the same having been acknowledged by the respondent the trial court was wrong in holding that the appellant was a trespasser on the property. Acknowledgment of the rent was an indication to the appellant that the respondent had by implication automatically renewed the lease agreement and it was to run from month to month until a formal lease between parties was to be executed.

4. Furthermore, the respondent did not issue a notice to vacate as at 31st August 2006. This means that the respondent was aware of the appellant's stay in the premises. Thus, he was not a trespasser as alleged. It is his argument that it was the duty of the respondent to issue a 3 months surrender notice of which they did not.

5. The respondent submitted that the trial magistrate did not err by finding that the appellant was a trespasser as it is not disputed that he remained on the suit property after expiry of the lease. It was abundantly clear that the respondent did not accept any rent after the expiry of the lease but merely accepted any payment on account as mesne profits. Hence, there was no month to month tenancy as alleged. As a result, the appellant was to pay mesne profits as put by the magistrate. They relied on the cases of **Halal Meat Products Ltd vs Attorney General [2005] eKLR** and **Rajan Shah t/a Rajan S. Shah & Partners vs Bipin P. Shah [2016] eKLR**.

ANALYSIS AND DETERMINATION

6. This court being the first appellate court it should evaluate the evidence and come to its own conclusions expect being reminded that it

neither saw nor heard any witnesses. See **Selle & Another vs Associated Motor Board Company Ltd [1968] EA 123**.

Tenant or trespasser?

7. Was the appellant a tenant or a trespasser? According to the **Black's Law Dictionary Tenth Edition** at page 1735 a trespasser is defined as :

“Someone who commits a trespass; one who intentionally and without consent or privilege enters another’s property.”

8. Through a letter of offer dated 30th July 2004 the respondent offered to lease to the appellant L.R. No. 330/245 Ithuri Gardens (“*the premises*”) for a period of two (2) years. It was accepted by the appellant and commenced from 1st September 2004 where he would pay Kshs. 40,000/- as rent.

9. According to **PW1 Samuel Muiga**, commercial manager for the plaintiff, the lease agreement expired on 31st August 2006 and the plaintiff had no intention of renewing it. He stated that at no time did the defendant write to them asking for renewal of the lease or extension thereof. On 27th September 2006 the respondent informed the appellant that they did not wish to enter into a new lease agreement and required him to vacate and hand over vacant possession.

10. The respondent made an offer on new terms to the appellant by a letter dated 25th October 2006. On 26th October 2006 the appellant made a counter –offer which was not accepted or responded to by the respondent. The appellant then drew a cheque dated 13th March 2007 for Kshs. 240,000/- for rent for October, November and December 2006 and January, February and March 2007 and deposited it into the respondent’s account without their prior knowledge. They accepted the payment as mesne profits and not as rent.

11. DW1 Ernest Mungai Kamau testified that there was an option to renew the lease. He paid rent for September 2006 because he expected the lease to continue. He negotiated with the plaintiff’s property manager for renewal of the lease but the offer was too high and he rejected it. He vacated the premises in October 2009 but had no evidence in support of this.

12. From the lease document it is clear that the lease period was for two years expiring on 31st August 2006. By expiration of the lease it means that the terms they had agreed on the lease had come to an end. Consequently, the appellant ought to vacate. This was not a termination that required a three month prior notice as stipulated under clause 3(c) and (d) of the lease agreement. The appellant stayed on the premises after the lease expired but he was aware that he did not have the consent of the Respondent. The respondent demanded vacant possession of the premises through the letter dated 27th September 2006. In such circumstances the Appellant could not claim any form of tenancy; not at will or at sufferance.

13. The appellant argued that he paid through a cheque of Kshs. 240,000/- being rent for the months of October to December 2006 and January to March 2007. Also he paid Kshs. 120,000/- being rent for months of July to September 2006. According to him by virtue of the respondent acknowledging receipt of his money including rent for September 2006 which was after expiry of the lease meant that the lease was renewed on a month to month basis. In such circumstances as in this case and which I have described in the preceding paragraph, no rent is paid but compensation for wrongful occupation, possession and use of the premises. The respondent’s argument that through their letter dated 3rd May 2007 they acknowledged the payments as mesne profits holds sway in law.

14. Looking at the letter the respondent refers to Kshs. 240,000/- and not the Kshs. 120,000/- which included the September 2006 rent. Either way, this cannot be interpreted as an invitation of renewal of lease for the appellant was issued with a letter asking him to hand over vacant possession as the respondent had no intention of renewing the lease. Consequently, the trial magistrate did not err in concluding that the appellant was a trespasser as he was on the premises intentionally and without the consent of the owner.

Mesne profits

15. It is now clear the direction the court is taking. Is the appellant liable to pay mesne profits? Mesne profit was aptly explained in the case of **Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR** by M. Mativo J as follows:

“The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.”

The appellant continued to stay in the premises after termination of the lease and after being asked to vacate. He was in wrongful possession of the premises of which the respondent is entitled to compensation through a claim of mesne profits. Accordingly, the Appellant is liable to pay mesne profits. As such, the trial magistrate did not err by awarding the respondent mesne profits.

16. Hence, I find the appeal not to have merits and is dismissed with costs to the Respondent.

Dated and signed at Meru this 29th day of October 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 31st day of October 2019

L. NJUGUNA

JUDGE