REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 91 OF 2018

THE AGRICULTURAL SOCIETY OF KENYA.....APPELLANT

VERSUS

JOHN MBURU t/a THE BULL PUBLIC BAR.....RESPONDENT

J U D G M E N T

1. Before the trial court the Respondent sued the current appellant for the recovery of special damages in the sum of Kshs.2,029,993/= on account of construction and renovation of parameter wall, Kshs.600000/= for damaged to furniture, electrical equipment and kitchen ware and Kshs.35,000/= being the costs of assessment/valuation report.

2. The circumstances leading to the claim was pleaded to have been the fact that there was a tenancy agreement between the parties by which the Appellant let to the Respondent some business premises situate show Ground, Mkomani Mombasa at a monthly rent of Kshs.60,000/= payable quarterly.

3. It was the Respondent case at trial that he paid the rent due by way of the costs of permitted construction and repairs carried out in the premises and cash paid directly to the Appellant but the Appellant had refused to keep a proper record of payment made. It was then pleaded that on 27/5/2015 the Appellant instructed Ms. Kethemu Auctioneers to proclaim the Respondents goods in distress for recovery of rent arrears of Kshs.708,890/= without regard to the fact that construction and repairs had been undertaken and the costs therefore needed to be applied towards rent. The particulars of work done were then pleaded and particularized to include;-

i. Construction **Kshs.1,838,137.00**

ii. Repair to premises **Kshs. 191,860.00**

iii. Destroyed equipment **Kshs. 600,000.00**

4. It was then further pleaded that there was an agreement that the Respondent would be given a refund of Kshs.5,000 per month on account of labour charges and material which agreement the Appellant failed to implement and that even payment made and receipted were never captured in the Appellants claim for rent arrears of Kshs.708,980/=.

5. Together with that amended plaint was filed a witness statement by the plaintiff outlining the claim and a list of some 5 documents to be relied on as exhibited. The documents included valuation report by Musyoki & Associates dated 20/8/2015, letters by the Respondents advocate dated 25/6/2015, 8/7/2015, 24/10/2014, 6/2/2015 and 14/5/2015, Appellants letter of 14/5/2015 and receipt dated 20/8/2015.

6. On being served the Appellant filed an Ammended Defence and counter-claim in which the Appellant admitted the existence of a tenancy but the rent was initially Kshs.15,000/= with an annual escalation of 15%. Payment of the rent reserved was denied as alleged by the Respondent it been averred that there was never an agreement for the Respondent to offset rent against any repair works. It was further denied that the Appellant allowed or requested the Respondent to carry out any repairs and to have the costs thereof offset against rent. It was then additionally pleaded, *without prejudice*, that even if the Respondent had been permitted to carry out any repairs then the Respondent failed to avail any structural designs and bills of quantities for purposes of verification hence the claim of costs of 1,838,137 was baseless and without proof.

7. The claim of costs for tree trimming and closure of the premises were all denied it being asserted that the Respondent had long closed the

business several months before the Appellant sought to distress for rent and that only carting away of the distrained goods by the Respondent to defeat distress was prevented. It was then asserted that the Respondent had a duty to pay rent and in default the Appellant was vested with a statutory right to recover rent by distress.

8. The Appellant then raised a counter claim in the sum of Kshs.1,236,354/= being rent arrears for the period October 2010 to August 2015 together with interests and costs.

9. In support of the defence and counterclaim the Appellant filed five (5) witness statements and list of some 6 documents including offer of lease and correspondence exchanged between the parties.

10. At the hearing the plaintiff gave evidence and called a former worker as the second witness. However it ought to be noted from the word go that PW 2 denounced the filed statement not to be his. He also had nothing to show he was ever employed by the Respondent just as much as he denied any actions by the auctioneer while insisting that it was the manager who closed the premises and that to him there was no gate closed. On account of the record of the evidence of PW 2, I do find that his evidence is difficult to believe and of no assistance to the court. I chose to ignore and disregard it.

11. For the defendant, even though four witnesses statement had been filed, only one witness, the accountant of the Appellant was called and gave evidence. After the evidence was led and submissions filled, the trial court delivered its reserved judgment on the 18/5/2018 in which the plaintiff suit was allowed as prayed with costs and interests while the Applicant counterclaim was dismissed with costs.

12. In his judgment the trial made the following finding which I find to underpine the rest of the decision. He said:-

> **"I have considered the aforesaid evidence by the plaintiff and the defendant's witness. DW 1 on her part told the Court that her responsibility was to receive money, issue receipts and do reconciliation. She did express herself as familiar with the dealings the plaintiff had with the management. At least the defendant ought to have called the branch manager who signed the letter dated 5/5/2009 to ascertain whether the plaintiff complied with the terms and conditions of constructions of the perimeter wall. In the circumstances, I am satisfied on a balance of probability that the plaintiff was entitled to repair the premises and offset the costs of repair from rent".**

13. In this excerpt, the trial court disbelieved the evidence by DW 1 on the basis that the branch manager ought to have been called to confirm if the Respondent complied with the terms of the construction of the wall having found that the duty of that witness was to receive payments issue receipts and do reconciliation. To that extent alone the decision is erroneous.

14. Erroneous because if the witness was the accountant then whether or not payment for rent had been made was squarely with her and not the branch manager. Secondly whether or not there had been compliance with the terms of the construction was a matter pleaded and put forth as the basis of the Respondents case hence it was the plaintiff's onus and obligation to prove. In seeking to prove that assertion he relied on the letter requesting permission and the permission which had conditions among then that the total expenses in construction would be recovered at the rate of Kshs.5,000/= from the rent payable. That to this court meant that they would continue to pay the rent reserved but would in such payment retain Kshs.5000/= per month toward recovery of the construction costs.

15. If that was to be followed then between May 2009 and 27th May 2014, when the distress was levied, a period of 60 months had lapsed and therefore the recovery by the Respondent could only amount to Kshs.300,000/= and not the entire costs of reconstruction and repairs allegedly maintained. I do find that by the time the suit was filed, the entire some used in construction or repairs had not become due for offset against accumulated rent reserved and it was thus not true that the respondent had paid rent by such expenses being offset. Only Kshs.300,000/= could have been offset by that date.

16. That having been agreement between the parties, the Respondent as the person with the burden to prove his case ought to have demonstrated how much was the rent due for the 60 months, how much he had paid in cash, added that to the sum recoverable from the costs of repairs and demonstrated that no sum was actually due or owing by way of rent arrears. That was necessary because the Respondents case as pleaded and presented was a special damage claim.

17. I find that the finding by the trial court that the respondent was entitled to offset construction costs in total and at once against the rents due and payable was not based on the evidence adduced based on the agreement between the parties. To that extent that finding cannot stand but is hereby set aside.

18. The next finding by the court was to the effect that the Appellant had not availed a reconciliation to prove that there was outstanding arreas in the sum of Kshs.1,236,354/= hence the distress was over disputed sum and thus not lawful. It cannot be denied that there was no reconciliation produced but it is also true that before reconciliation could become necessary as far as the Respondents case was concerned, that respondent had to show that it had paid the rent reserved.

19. I have found that the respondent didn't discharge the burden upon it so as to shift the evidentiary burden upon the Appellant. While I would uphold that finding as far as the counterclaim was concerned, I would set it aside as concerns the suit. It is these two findings that led to the award of the construction and repair costs to the respondent. This is evident when the court said in the judgment:-

> **"Having stated the foregoing, I find that the plaintiff is entitled to the repair costs and compensation for the allegedly lost items"**

20. The effect of that finding was to award to the Respondent the entire costs of reconstruction and repairs in the aggregate sum of Kshs.1,838,137 being the sum disclosed by the valuer as the cost of material supplied to the site between 2/5/2009 and 24/8/2009. It is the

same sum the Respondent pleaded had been used to pay rent. The question the trial court ought to have passed and answered is whether it was just to say on one hand that the costs had been used to offset the rent payable and on the same vein order that even if so used to pay rent the same be paid to the respondent. I find such finding awarding the entire costs to the respondent to be inconsistent with the finding that the same respondent was entitled to offset same costs towards payment of rent.

21. On the award of Kshs.600,000/= as costs of the lost items, I do equally said that not to be accurate. This was a claim in the nature of special damages. Specific items were said to have been lost, there was need to prove their existence, value thereof and the loss. In this matter no value was availed at all just as the fact of their existence in the premises.

22. It is not enough that a person who identifies himself as a land economist; a value, could give such values. My understanding is that a land valuer gives the value of a parcel of land and development therefore to ascertain the market value. It is not the expertice of a land valuer to quantify the costs of repairs or construction. That to me falls to be due by a quality surveryor. I am equally of the learning that the value of movable items are best proved by receipts and not by a report by a valuer. More importantly, the valuation report at page 4 says the items were unfunctional while the plaintiff in his evidence was adamant that the same goods were lost, a report made to police and a police abstract issued. The findings of loss and value based on the report are contradictory and not capable of being upheld. The same is equally set aside.

How about the counter claim?

23. I have said before that, I do agree with the trial court that it behoved the Appellant to avail evidence on how the arrears of rent was arrived at. Just like it was in the special knowledge of the respondent how much rent had been paid, it was also in the special knowledge of the Appellant on how much rent had been received. This could have been best done by availing a reconciliation statement which was never done. Failure to do only mean that no prove was availed on a balance of possibilities. Without proof on a balance of probabilities no judgement would be entered on the counterclaim. The counterclaim was thus validly disallowed.

24. However in my review and re-evaluation of the record at trial, I have found that the evidence was led in a very scanty and haphazard manner. It is not coherent which documents filed were ever produced or abandoned. It is the type of a record that judges the counsel to have failed in their duty to assist the court and the court also failed to keep a coherent record as expected. On that basis, I do find that the appeal ought to be allowed but since the evidence is not sufficient for this court to determine the dispute between the parties, I direct that the matter be remitted back for retrial.

25. In those circumstances and being minded that the court is bound to ensure that litigation is conducted without exaggerating the costs, I order that each party shall bear own costs.

Dated and delivered at Mombasa this 31st day of October 2019.

P.J.O. OTIENO

JUDGE