REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 484 OF 2017

PATRICIA JEAN LOUIS...APPELLANT

-VERSUS-

NEW MAINTENANCE SERVICES (K) LIMITED................1ST RESPONDENT

GEORGE GITONGA MWANGI

T/A FANTASY AUCTIONEERS...2ND RESPONDENT

(Being an appeal from the decision of Hon. A. M. Obura (Senior Principal Magistrate Nairobi) delivered on 24th day of August, 2017)

JUDGEMENT

1. The appellant lodged claim against respondents for return of attached properties and/or payment of their value, order of declaration that distress for rent was illegal, that eviction and termination of tenancy was illegal, damages for loss of business, refund of deposit Ksh.60,000/=, costs and interest.

2. Defence and counterclaim was filed in response to appellant’s claim. The counterclaim was arrears of Kshs.127,600/=.

3. After hearing the matter the court dismissed the appellant’s claim save for refund of Kshs.60,000/= deposit, costs and interest. It also dismissed the counterclaim.

4. Being aggrieved by the aforesaid decision, the appellant lodged instant claim setting out 10 grounds of appeal. The same can be compressed into one ground:

§ ***Whether the appellant’s case was proved on balance of probabilities?***

5. Parties were directed to file submissions to canvass appeal.

APPELLANT’S SUBMISSIONS:

6. The appellant submits that, PW1 and PW2 testified that no proclamation notice was served on them by the auctioneer. The landlord’s caretaker and purported auctioneers came and locked the shop. Distraining for rent does not mean locking a premise. DW1 was not the auctioneer and thus was in no position to give evidence on this issue. It’s obvious that the defence was concealing the truth.

7. It was contended that the court arrived at a conclusion that the appellant was served on the strength of the testimony of a third party who adduced hearsay evidence and the fact that the appellant had issued bouncing cheques before.

8. It is argued that the trial magistrate contradicts herself on the issue of the bouncing cheques. She states that the appellant had issued bouncing cheques as at the time of the proclamation then later says that the appellant had issued bouncing cheques in the past. Unpaid cheques were issued in February, June and July 2013. Dishonored cheques were not in issue. It is instructive to note that the alleged proclamation was done on 20/08/13.

9. The fact that DW1 could not explain why there was a discrepancy in the inventory of goods proclaimed and later attached shows that no proclamation was issued in the first place.

10. The particulars of illegality under this ground included Rules which require an auctioneer to issue a proclamation notice before attaching the distrained grounds.

Ø ***Locking up a premise under the guise of distraining for rent.***

Ø ***Evicting the appellant under the guise of distraining for rent.***

Ø ***Failing to account for attached goods and failing to release the said goods back to the appellant in good order.***

Ø ***Swearing a false affidavit to obtain break-in orders from the court.***

11. The appellant demonstrated that she suffered massive loss including loss of profit making business because of the respondent's illegal actions. It is appellant's submission that she demonstrated that she was entitled to damages.

12. The evidence given by the DW1 on behalf of the auctioneer was of little probative value and most of it was hearsay evidence. The auctioneer was sued as the 2nd respondent yet he was not produced in court to rebut the appellant's evidence.

13. It was crystal clear that the 2nd respondent auctioneers obtained break in orders by giving false information to the court. This was an indication that the 2nd respondent auctioneer (who did not appear in court) was a person who was not forthright.

14. This evidence should have been in favour of the appellant's case on a balance of probabilities. The trial court instead ignored this crucial evidence and proceeded to endorse the illegalities committed by the respondents.

15. The trial court ignored case law from the superior court that clearly states that landlords cannot simply repossess premises at will. They must obtain an order from a relevant tribunal in cases where tenants are not willing to surrender the premises back to the landlord.

16. See the case of ***Mwalimu Investment Co. Ltd & 2 Others vs Mwalimu Hotel Kisii ltd [1996] eKLR*** and **Eldoret HCCC No. 115 OF 2006** ***Esther Cherop Sania vs David Lutta Musumba & Others.***

17. The appellant never submitted that it was a controlled tenancy. The court misunderstood the appellant's case and drew its own wrong conclusions.

RESPONDENTS' SUBMISSIONS:

18. The appellant submitted that he was a tenant at the 1st respondent's premises where she ran a business. In her testimony, the appellant had stated that she wasn't in arrears but later on stated that she had defaulted in paying rent for 17 days in the month of July 2013. She went ahead to deny the fact that she had issued bouncing cheques which she frantically explained that the cheques weren't in relation to the period of 2013.

19. In the testimony of one Teresia Muthoni who was an employee of the appellant and PW1 in the lower court matter stated clearly that there were rent arrears owed by the appellant and the same was distressed for an outstanding period of 5 months and further stated that it was true that the appellant had issued bounced cheques.

20. It was established that there were rent arrears to the tune of Kshs.127,600/= and the 1st respondent had the right to distress to recover the unpaid rent. The appellant's goods were therefore lawfully and legally attached under Distress for Rent Act, Cap. 293 and the learned magistrate holding on the same issue was sound and as per the provisions of the law.

21. The respondent relied on the case of *J**ohn Tommo Cheresem vs Sammy Kipketer Cheruiyot [2017] eKLR*** where **Githua J** held that:

> ***"...given the appellant's admission in his evidence that he was in rent arrears for about four months, I find that the respondent's action through his authorised agent (DW1) of locking in the appellant's goods and equipment in the rented premises amounted to a distress for rent aimed at recovering unpaid rent. DW1was very clear in his evidence that after locking the premises, he advised the appellant to clear his outstanding rent after which the premises would be re-opened for his use."***

22. On the issue of levying distress, the learned judge expressed herself in similar fashion as the learned magistrate did in her judgment and stated as follows:

> ***"It is clear from section 3 as read with section 4 of the Act that a landlord is not required to give notice before distressing for unpaid rent. A notice of 14 days is only required to be served on the tenant after distress is levied requiring him or her to pay the rent arrears or have the distrained goods sold by public auction at the expiry of the said notice. It is evident from the recorded evidence that the appellant was given due notice to clear the outstanding rent but instead of doing so, he chose to file a case in court. From my analysis of the evidence on record, I do not find anything unlawful in the manner in which the distress for rent was undertaken..."***

23. It's respondent submission that the appellant's goods were legally attached and the rent distress process was conducted within the requirements of the law and the lower court correctly found so. the lower court also correctly held that the appellant had failed to prove the purported inventory of damage/distressed goods in her amended plaint and as such the court had no basis of ordering compensation especially considering that the distress had already been declared lawful by the learned magistrate.

24. The appellant contended that the termination of her tenancy was unlawful and that the 1st respondent regained possession of the premises unlawfully. The learned magistrate asserted in the judgment that Clause 4 of the Lease Agreement was very explicit that the tenancy agreement would be terminated in the event of default. The appellant and her witness had confirmed in their testimonies that indeed there was default in payment of rent and as such the 1st respondent correctly invoked Clause 4 of the Lease Agreement which was binding on both parties.

25. It's respondents' submission that the tenancy agreement was legally determined as per the provision of the Lease Agreement. The tenancy was not a controlled tenancy and the learned magistrate duly and correctly held so since the Lease Agreement was for a period of 5 years and 3 months.

26. The appellant's assertion that the learned magistrate failed to understand her case is wrong. Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301 limits controlled tenancy to an agreement not exceeding 5 years.

27. Thus the court was right to hold the tenancy herein wasn't controlled and could be terminated as per the terms of the Lease Agreement. Respondents submit that the tenancy was legally terminated and the appellant's contention of unlawful termination is wrong.

28. The appeal before court is imprecise and not grounded on any serious grounds that would warrant this honourable court to overturn the lower court's decision. A keen evaluation of the appellant's evidence, clearly demonstrates a witness who deliberately perjured herself in a bid to mislead the honourable court to grant her prayers as sought in the amended plaint.

29. The onus to prove the case was squarely on the appellant and she failed to do so. The appellant's claim, against the respondents was not sufficiently proved through her lies-filled testimony and further she didn't in any way corroborate PW1's testimony.

30. The learned magistrate therefore correctly found that the appellant didn't discharge the burden of proof on her part. In the case of ***Rajan Shah t/a Rajan S. Shah & Partners vs Bipin P. Shah [2016] eKLR*** where **Justice Mativo** held that:

> ***"Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajab JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd."***

31. It's the respondents' submission that the appeal before court isn't arguable and doesn't raise any valid grounds to warrant this honourable court's intervention and thus the respondents pray the appeal be dismissed with costs.

32. The respondents having submitted that the appeal herein is a sham, lacks merit and ought to be dismissed, it's their humble submission that the appellant be condemned to pay the costs of this appeal.

EVIDENCE ADDUCED:

33. PW1 testified that she was at the shop on 15th August 2013 when the landlord's caretaker arrived and informed her that he had instructions to close the shop. It was also her testimony that upon consulting her employer (appellant) on phone, the appellant instructed her to close the shop with their padlock and leave since there was rent dispute which she would sought out. The caretaker allegedly locked the premises with his own padlock too.

34. On cross examination, she conceded that they were in rent arrears at the material time and said that the appellant eventually paid the outstanding rent. The appellant produced copies of her Mpesa statements as Pexh 2 and bank statements to show that she remitted the rent through the 1st respondent's agent, one Irene Irungu on diverse dates.

35. It shows payment of Kshs.25,100/= on 31st August, 2013, Kshs.10,000/= on 31st October 2013; and Kshs.10,000/= on 3rd September 2013. In total, this comes to Kshs.45,100/=. There was further evidence that the appellant made payments to the respondent's Chase Bank A/c No. 0122054281001 on diverse dates between 4th September 2013 and 22nd October 2013.

36. These payments to the 1st respondent's account are not in dispute. It amounts to Kshs.139,000/=. Cumulatively, the appellant proved on a balance of probability that she paid rent arrears of Kshs.184,100/= between 31st August 2013 and 31st October 2013.

37. According to the appellant, she overpaid the 1st respondent in that she paid Kshs.184,100/= yet the distress was for Kshs.127,600/=. It was also her evidence that after the shop was closed between the months of September 2013 and November 2013.

38. She was incapable of paying rent as the shop had been closed and she had no means of generating income. She also said that she was in arrears for 17 days only in the month of July 2013.

39. On further cross examination, she told the court that she had issued bad cheques in the past but she regularised it. She explained that the bounced cheques relate to a period before 2013.

40. DW1 on the other hand testified that they levied distress for rent for 5 months; January, February, June, July and August 2013. It was also his evidence that the appellant issued bounced cheques thrice as evidenced by the Return Cheque Advices (Dexht 10).

41. It shows that the appellant issued bounced cheques on 6th March, 2013, 26th June 2013 and 30th July 2013. To that extent, I find that the appellant was not entirely honest when she testified that she did not issue bounced cheques in the year 2013.

42. On cross examination of DW1, it also emerged that as at the time of filing the Misc. Application No. 983 of 2013 on 30 th September 2013, wherein the auctioneer applied for police assistance to remove the attached goods, the appellant had paid a sum of Kshs.83,000/= to the 1st respondent out of the sum demanded. DW1 conceded that the auctioneer (2nd respondent did not provide accurate information to the court on the outstanding sum.

ISSUES, ANALYSIS AND DETERMINATION

43. After going through the pleadings, evidence and submissions by the parties, I find the issues are whether the appellant proved her case on balance of probabilities? What is the order as to costs?

44. This being the first Appellate Court it is duty bound to re-evaluate the evidence, assess it and come to its own conclusion bearing in mind the fact that It did not have the opportunity of seeing or hearing witnesses who testified at trial (***See Selle vs. Associated Motor Boat Company Ltd (1968) EA 123).***

45. In the case of ***Mbogo vs. Shah & Another (1968) EA 9*****3** the Court clearly stated thus:

> **"….. It is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."**

46. In civil cases, an appellant is required to prove his claim against the respondent on the balance of probabilities. This position was clearly stated in the case of ***Kirugi & Ano. vs Kabiya & 3 Others [1987] KLR 347*** wherein the Court of Appeal stated that the burden was always on the appellant to prove his case on the balance of probabilities.

47. The trial court found that on a balance of probability, the appellant was in arrears of rent and did issue dishonored cheques to the 1st respondent as at the time of alleged proclamation. This would explain why she paid Kshs.184,100/= between August 2013 and October 2013 yet the monthly rent under the Lease Agreement was kshs.25,560/=.

48. She also testified that she did not pay rent for the period the shop was closed. Thus a finding that as at the time of bringing the suit, the arrears had been cleared on balance of probabilities. This court finds no fault in that conclusion as same is support by the evidence on record.

49. In the premise the 1st respondent had been fully paid the amount due. The 1st respondent could not claim rent for September 2013 to November 2013 as it did not form part of his counterclaim and was never proved to be due and owing.

50. If the court were to accept the 1st respondent's claim that the contract was repudiated in light of the appellant's default, then why claim rent for the said period? The counterclaim was not proved on a balance of probabilities and thus same was validly dismissed.

51. In view of the findings above and having regard to the provisions of section 3 of the Distress for Rent Act, Cap 293 Laws of Kenya, the landlord was within his right to levy Distress for Rent Act, the landlord needed not give notice to the tenant before levying distress. Notice is only required after distress has been levied calling upon the tenant to pay the outstanding amount to recover the distrained goods.

52. In this case, the appellant was duly served with the proclamation notice as per the auctioneer's affidavit of service but she declined to sign. She claimed that she was not at her shop but there is no proof that she was involved in consultancy work or committed outside her shop as claimed.

53. The evidence of PW1 that the appellant told her that there was a rent issue when the shop was being closed, coupled with the fact that she issued bounced cheques in the past, all lead to the conclusion that she knew what was coming. Thus the distress for rent was lawful.

54. The number Clause 4 of the parties Lease Agreement provided that the tenancy agreement would determine in the event of default. There was a dispute between the parties as to whether it was the appellant or the respondents who locked the premises.

55. PW1 testified that the appellant instructed her to lock the shop with their padlock and thereafter the caretaker reinforced it with his. There was evidence that the 2nd respondent later obtained a break open order from the court in Misc. Application No. 983 of 2013.

56. Perhaps the fact that there were two padlocks one belonging to the appellant that the auctioneer had to seek the court's assistance. Thus it was justified for the trial court to find that the tenancy determined upon default by the appellant. This was also not a controlled tenancy hence it was not mandatory to wait for expiry for the lease in light of the express terms in Clause 4.

57. The trial court made a finding that the appellant and respondents had not been entirely honest before the court. The appellant lied about her rent payments. The respondents provided a proclamation notice, schedule of movable property and goods acceptance form (Dexht 3, 5 and 6) which were inconsistent as to the goods proclaimed and goods stored with Pangani Auction Centre.

58. Process carried out by the auctioneer in handling the goods raised doubts on his professionalism. He was best placed to shed light in this.

59. In the absence of his evidence, the appellant cannot be condemned to pay unexplained costs and charges. It was also not clear which goods were accepted back by the appellant pursuant to the court order.

60. There is also no credible inventory of what goods were in the appellant's shop and what was actually recovered, sold, missing, lost, or damaged. The court cannot speculate in the circumstances.

61. I agree with trial court finding that the appellant failed to discharge her burden of proof on a balance of probabilities. The fact that she was also not candid made it difficult for the trial court to exercise its discretion in her favour. This court agrees with the conclusion arrived at by the trial court.

i. Thus the court finds no merit in the appeal and dismisses the same with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

C. KARIUKI

JUDGE