REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 19 OF 2018

WESLEY MOMANYI NYANDORO.....APPELLANT

-VRS-

1. ALICE ATAMBO.....1ST RESPONDENT

2. HEZRON GETUMA ONSONGO

T/A HEGIONS AUCTIONEERS.....2ND RESPONDENT

{Being an appeal against the Judgement of Hon. B. M. Kimtai – SRM Keroka dated and delivered on the 25th day of September 2018 in the original Keroka Senior Resident Magistrate's Court Civil Case No. 286 of 2016}

JUDGEMENT

By a plaint filed in the court below on 22nd November 2016 the appellant sued the respondents seeking: -

> **"(a) Payment and/or monetary compensation on account of the value of the goods and/or properties which were unlawfully burnt, destroyed and/or damaged amounting to Kshs. 1,913,350/= only.**
>
> **(b) General damages for Trespass.**
>
> **(c) Interest on (a) and (b) at court rates (14%).**
>
> **(d) Costs of this suit be born by the defendants.**
>
> **(e) ....."**

Briefly the appellant's case was that the 1st respondent was the proprietor of premises of a stall otherwise known as Plot No A1 in Keroka Township which she had allegedly leased to the appellant and in which the appellant carried on a business of assorted merchandize in the name and style of **"Mali Mali Stores."** Sometimes in July 2016 the 1st respondent purporting that Everline Momanyi was in rent arrears of Kshs. 96,000/= in respect of the lease, instructed the 2nd respondent to levy distress and the 2nd respondent proceeded to the Kisii Chief Magistrate's Court and obtained an order authorizing him to break into the premises and requiring the police to be present for his security. Upon going to the premises on 29th August 2016, the 2nd respondent was met with an order of the Business Premises Rent Tribunal obtained by the appellant stopping the distress and could not therefore break into the premises. However, the 1st respondent proceeded to the premises on 30th August 2016 and as he was breaking into the premises using a grinder the premises caught fire razing the stall and all that was within it to the ground.

The 1st respondent denied any wrong doing on her part and while conceding that she was the proprietor of stall No. A1 and that she had in fact instructed the 2nd respondent to levy distress, she denied the appellant was her tenant stating that her tenant was one Everlyne Momanyi. She produced a tenant agreement to that effect.

After considering the evidence by both sides the trial Magistrate found that the appellant did not have a tenancy relationship with the 1st respondent and as such there was no privity of contract between them and he had no capacity to bring the suit and struck it out with costs to the respondent.

Being aggrieved the appellant preferred this appeal. The same is premised on grounds that: -

"1. The Learned Trial Magistrate failed to cumulatively and/or exhaustively evaluate the entire Evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before him (Trial Magistrate) and thus arrived at an Erroneous conclusion, contrary to and in contradiction of the evidence adduced.

2. The Learned Trial Magistrate erred in fact and law in finding that the Appellant herein had not entered into a Lease and/or Tenancy Agreement with the 1st Respondent in total disregard of the evidence adduced in Court.

3. The Learned Trial Magistrate erred in fact and law in finding and holding that the 1st Respondent was in a lawful and existing tenancy agreement with one Everline Momanyi at the time of filing the suit in the Subordinate Court while the evidence adduced and on record established that the said Tenancy Agreement lapsed on or about end of the Month of March 2010 when the last rental payment was to be made.

4. The Learned Trial Magistrate erred in fact and law in finding that the 1st Respondent was in lawful and existing tenancy agreement with one Everline Momanyi while there was no Lease and/or Tenancy Agreement tendered in Court as evidence to prove that assertion.

5. The Learned Trial Magistrate erred in Law and Fact in finding and holding that there was a misjoinder of Parties in total disregard of the evidence adduced by the Appellant.

6. The Learned Trial Magistrate hence arrived at a slanted and erroneous Judgement, based on the failure to appreciate and/or discern the claim by and/or at the instance of the Appellant.

7. The Learned Trial Magistrate misdirected himself by striking out the suit after the issues for determination were heard on merit hence the suit could not be struck out at that juncture.

8. The Learned Trial Magistrate erred in law and fact in failing to appreciate the evidence of the Appellant on previous proceedings between the appellant and the 1st Respondent vide KISII BUSINESS PREMISES RENT TRIBUNAL CASE NO. 44 OF 2016 whereby the Parties herein were in a Landlord-Tenant relationship.

9. The Learned Trial Magistrate erred in law and fact in failing to enter judgement against the 2nd Respondent who was the agent of the 1st Respondent in levying Distress on the suit premises while evidence on record confirmed that the 2nd Respondent acted at the instance of the 1st Respondent.

10. The Judgement of the Learned Trial Magistrate does not capture the Issue(s) for determination, the determination thereof and the reasons for such determination. Consequently, the Judgement of the Learned Trial Magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.

The appeal was canvassed by way of written submissions which I need not reproduce here. Suffice it to state that an appeal being in the nature of a retrial I have myself reconsidered and analysed the evidence in the court below so as to arrive at my own independent conclusion all the while remembering that I did not hear or see the witnesses giving evidence and making provision for it – **see Selle v Associated Motor Boat Company Ltd [1968] EA 123.**

Counsel for the respondents submitted that at the trial the appellant admitted the lease agreement for the stall was between the 1st respondent and his wife therefore there was no privity of contract between him and the 1st respondent. As such he could not be allowed to benefit from the contractual rights of another party. Counsel cited the case of **Savings & Loan (K) Ltd v Kanyenje Karangita Gakombe & another Civil Appeal No. 272 of 2006** where the Court of Appeal held: -

"Its classical rendering the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party."

And in the case of **Agriculture Finance Corporation v Lengetia Ltd [1985] KLR 76** cited in the above case where Hancox J stated: -

"As a general rule, a contract affects only parties to it. It cannot be enforced against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue, or make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

I am guided and in fact I do agree with the above tenets of the law. My finding however is that the appellant's claim was not one for enforcement of the contract but for compensation for goods destroyed by a fire set upon the premises through what he considered to be the unlawful conduct of the respondents who were wrongfully levying distress. It is clear from the evidence that whereas initially the tenancy agreement was between the 1st respondent and Everlyne Momanyi, the 1st respondent did on 1st August 2013 enter into a tenancy agreement with the 1st respondent which continued up to the end of February 2014. Had the trial Magistrate looked at the **"STALL AGREEMENT PAYMENT CHART"** he would have noticed that the 1st respondent indeed appended her signature on page 2 of the document although she did not do it on page 1. The appellant produced documents and called two witnesses who corroborated his evidence that he was the one carrying on business in the stall. It was him who had stocked it. The 1st respondent also admitted that the case at the Business Premises Rent Tribunal was between her and the appellant. She conceded that he had obtained an order restraining her from levying distress and she had not raised any opposition to the same yet she could have done so if indeed he was a stranger to her. Moreover, she herself admitted that at

the tribunal it was her husband who attended the proceedings. She cannot therefore be heard to say that the appellant was wrong to occupy and carry on business in premises rented by her to his wife if at all. Whichever way one looks at it the appellant was not a trespasser because if he was she would have long taken out proceedings to evict him from the premises. The fact that he occupied those premises with her full knowledge and she did not take any steps to evict him also means he was not a trespasser. It is my finding therefore that the appellant had proved his case on a balance of probabilities and that the trial Magistrate misapprehended the law and facts when he came to the conclusion that he was a stranger to the suit.

At the hearing the 1st respondent conceded that the premises and all the merchandize therein were destroyed by a fire when the 2nd respondent tried to gain entry into the premises using a grinder. In cross examination she stated: -

> ***"I know that as the grinder works it sparks some flames. I heard that the auctioneer was using a grinder to gain access. I heard that the stall caught fire and the items therein were burnt. The items therein belonged to the tenant. The following day I went to the premises. There was nothing to salvage, my tenant went at a loss. The auctioneer is to blame. Were it not for the auctioneer my premises stall would still be intact. My husband instructed the auctioneer on my behalf. The auctioneer was our agent."***

It is my finding that as the auctioneer's principal, the 1st respondent was vicariously liable for his actions which in this case were unlawful as there was a lawful order from the Business Premises Rent Tribunal issued on 29th June 2016 and 1st August 2016 which barred and restrained them from levying distress. The last order was issued after the breaking order obtained by the 2nd respondent. Moreover, even were they within their right to levy distress they owed the tenant a duty of care not to destroy his merchandise as all they were entitled to do was attach goods sufficient to cover the arrears of rent.

The appellant specifically pleaded the sum claimed and strictly proved it through production of receipts at the hearing. The authenticity of those receipts was not questioned at the trial or in this appeal. He was therefore entitled to succeed as he had proved his case on a balance of probabilities which was all that was required of him. accordingly, the judgement of the trial court striking out the appellant's suit with costs is set aside and substituted with one for judgement for the appellant against the respondents jointly and severally for: -

1. **A sum of Kshs. 1,913,350/= (one million nine hundred and thirteen thousand three hundred and fifty only).**

2. **General damages for trespass in the sum of Kshs. 50,000/= (fifty thousand only).**

3. **Costs of the suit and of this appeal.**

4. **Interest at court rates from the date of this judgement.**

It is so ordered.

Signed, dated and delivered in Nyamira this 19th day of December 2019.

E. N. MAINA

JUDGE