



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 164 OF 2011

MUTUNGA KIMENYEAPPLICANT

VERSUS

FLORENCE NDULU MWANGANGIRESPONDENT

*(Being An Appeal From The Judgement of The Honourable N. N. Njagi (Principal Magistrate)
Delivered on 29th September, 2011 at Makindu in PMCC No. 246 Of 2010 - Florence Ndulu Mwangangi
= Vs= Mutunga Kimenye)*

JUDGEMENT

1. The Appeal herein arises from the Judgement of Hon N. N. Njagi in Makindu PMCC No. 246 of 2010 delivered on the 29/09/2011 wherein judgement was entered for the Respondent against the Appellant for the sum of Kshs.30,000/= plus costs and interest.

2. The Appellant was dissatisfied by the judgement and filed the following grounds of appeal:-

a. The learned trial magistrate erred in law and in fact in failing to appreciate that the suit was mandatorily required to comply with order 54 Civil Procedure Rules 2010 and that was a miscarriage of justice occasioned.

b. The learned trial magistrate erred in failing to appreciate that the Appellant was represented by an Advocate, a Mr. Maweu, and should not have proceeded with the case in the absence of the said Counsel, or at least ought to have been accorded opportunity to get his advocate.

c. The trial magistrate erred in law and in fact in failing to evaluate and analyze and find that the Respondent's suit having been founded on leasing of a chattel would not translate to a claim for money but remained one of rent for the unpaid lease period.

d. The learned trial magistrate erred in law and in fact in failing to appreciate that the claim herein could as well have been time barred if it was founded on conversion and more specifically erred in failing to make a finding on this aspect.

e. The learned trial magistrate erred in failing to note and appreciate the contradictions in the Respondent's case and failing to analyze when the lease changed to a conversion.

3. Learned counsels for the parties filed written submissions. It was submitted for the Appellant that the trial court did not subject the suit to the provisions of Order 11 of the Civil Procedure Rules which entailed pre-trial processes before proceedings to hear the suit. It was further submitted that the trial court proceeded with the trial in the absence of the Appellant's Advocate thereby violating his rights to fair trial

under Article 50 of the Constitution, it was also submitted that the trial court failed to appreciate that the Respondent's claim was one for non-payment of lease money and not one of conversion of a chattel. It was further submitted that the Respondent's claim if any was time barred under Section 4(2) of the Limitation of Actions Act since the same was made outside the stipulated three (3) years period as it was one of a tort. It was finally submitted that the Respondent did not obtain letters of grant of administration from the estate of her late husband so as to entitle her to mount the claim for the water pump which had belonged to her late husband.

4. It was submitted for the Respondent that the suit fell under the category of small claims under Order 3 of the Civil Procedure Rules and therefore there was no need to subject it to the rigors of order 11 of the said rules. It was also submitted that the Appellant's rights under Article 50 of the Constitution were not violated since he opted himself to proceed with the trial in the absence of his advocate and in any case that the Appellant had filed pleadings in person and indicated his readiness to proceed with the case even in the absence of his counsel. It was also submitted that the Respondent brought the suit after the Appellant who had earlier leased the water pump converted it to his own use and refused to surrender it. It was further submitted that the suit being one of tort was instituted within 3 years as per Section 4(2) of the Limitation of Actions Act and it was not time barred as contended by the Appellant. Finally it was submitted that the water pump was a personal property of the Respondent's deceased husband which rightly devolved to her as a spouse. Respondent maintains that all these issues had not been raised in the Appellant's defence and therefore the trial court could not determine issues not placed before it for determination.

5. As this is the first Appellate Court, its duty is to re-evaluate the evidence afresh and come to its independent conclusion but bearing in mind it neither heard nor saw the witnesses testify but to give an allowance for that the Respondent Florence Ndulu Maweu testified and stated that she had leased a water pump to the Appellant who only paid her Ksh.2,000/= but failed to pay any other money and that the Appellant later converted the pump to his own use and refused to surrender it even after repeated requests. The Respondent was thus compelled to claim the value of the machine which she put it at Kshs.30,000/=. On cross – examination she admitted that the water pump belonged to her late husband and further admitted that the Appellant had loaned her Kshs.2,000/= in the year 2002.

The Appellant stated in his evidence that he had purchased the water pump from the late husband of the Respondent at a price of Kshs.20,000/= which he paid in cash in the year 2003. The Appellant denied leasing the item from the Respondent as claimed. He further stated that he had given the Respondent a soft loan of Kshs.2,000/= with which to sort out some financial problems.

6. I have considered the evidence presented by the Respondent and Appellant before the trial court as well as the submissions of the counsels for the parties herein. It is not in dispute that the Appellant has been in possession of a water pump the subject of the dispute herein. It is also not in dispute that none of the parties availed any documentary evidence of the alleged transaction and neither called witnesses to back up their rival testimonies. Hence it is only the evidence of the Respondent against that of the Appellant to be considered. Upon a critical analysis of their respective evidence as well as the submissions of their learned counsels. I find the only issue for determination is whether the Respondent had leased the water pump to the Appellant.

7. As the Appellant denied ever leasing the water pump from the Respondent, it was therefore the Respondent's obligation to prove on a balance of probabilities that she indeed leased the item to the Appellant as claimed in her pleadings and evidence. The key evidence that will help unravel the issue for determination herein is about the payment of Kshs.2,000/= by the Appellant to the Respondent. According to the Respondent in her evidence in chief this money was the initial payment for the lease of the machine. However the Appellant maintains that the said money was some soft loan that he had given the Respondent to help her sort out some financial problems. The Respondent admitted on cross – examination agreed with the Appellant that he had indeed loaned her Kshs.2,000/=. This piece of evidence then indicated that the Respondent's claim that it was the initial lease money might not be correct after all. The same appears to tally with the Appellant's testimony that the money was a soft loan given to the Respondent to settle her financial problems. It also goes a long way to vindicate the

Appellant that he had purchased the pump from Respondent's late husband. This appears convincing in that there was no reason at all for him to lease the machine yet he had already paid for it. It then became quite clear that the Respondent had in fact not proved her case on a balance of probabilities before the trial court and therefore the Appellants contention that the trial magistrate had failed, to appreciate the contradictions in the Respondent's case and thereby arrived at a wrong decision should be given due consideration by this court. The Respondent having failed to prove that she had leased the water pump then her claim that the Appellant had converted the machine to his own use does not arise at all. In any event the Appellant's evidence that he had purchased the water pump from the Respondent's late husband appeared to be more convincing and further backed by evidence that the money alleged by Respondent to be in respect of lease was actually a loan given to the Respondent to settle her financial problems. Again I find the Respondent did not establish how the alleged lease turned out to give use to a claim for conversion so as to found the demand for the sum of Kshs.30,000/=. In all I am satisfied that the Respondent had not proved her case to the required standard.

8. In the result I find the Appeal has merit. The same is allowed. The judgement of the lower court dated 29/09/2011 is hereby set aside and is substituted with an order that the suit is dismissed. The Appellant is awarded the costs of this Appeal and in the lower court.

It is so ordered.

Dated and delivered at Machakos this 19th day of January, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

N/A for Makundi - for the Appellant

N/A for Isika - for the Respondent

Kituva - Court assistant