REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 75 OF 2016

SAVONA ENTERPRISES LIMITED.....1ST APPELLANT

CHARLES LUTTA KASAMANI

t/a Kasamani& Company Advocates.....2ND APPELLANT

VERSUS

PIONEER HOLDINGS LIMITED.....RESPONDENT

(Being an Appeal from the Judgment and decree of* Hon. T.Obutu (SPM) in *Kisumu C*MCC NO.243 of 2013 delivered on 23rd September 2013*)

JUDGMENT

Introduction

1. SAVONA ENTERPRISES LIMITEDand**CHARLES LUTTA KASAMANI t/a Kasamani& Company Advocates*(hereinafter referred to asappellants)*** sued **PIONEER HOLDINGS LIMITED*(hereinafter referred to asrespondent)*** in the lower court claiming the following:

a) A declaration that the distress upon the goods of the 2nd plaintiff was illegal

b) An order of injunction directing the defendant, its servants and/or agents to forthwith return the 2nd plaintiff's goods at their own cost

c) An order restraining the defendant, its servants and/or agents from levying distress against the plaintiffs or any other way interfering with the plaintiff's tenancy

d) Damages for unlawful distress and locking out and/or eviction of the plaintiff

e) Costs of the suit

2. Defendant/respondent filed a statement of Defence and denied the claim and in its counterclaim prayed for orders that:

a) A declaration that the distress upon the goods of the 2nd plaintiff was lawful

b) Outstanding rent

c) Costs of the counterclaim

3. In a judgment delivered on**23rd September, 2013,**the learned trial Magistratedismissed the appellants/plaintiffs' suit and entered for the respondent that the distress was lawful and ordered the 2nd appellant to pay the respondent Kshs. 587,497/- and costs of the counterclaim.

The Appeal

4. The Appellants being dissatisfied with the lower court's decision preferred this appeal and on 2.10.17 filed a Memorandum of Appeal which sets out 7 grounds which I have summarized into 5 grounds as follows:-

1) The Learned trial Magistrate erred inlaw and in fact by failing to appreciate the legal effect of unregistered lease agreement and in so doing applied wrong principles in his judgment

2) The Learned trial Magistrate erred in law and in fact by failing to make a finding that the respondent's acts of placing padlocks on the doors of the demised premises denied eth appellants the right of access amounting to unlawful eviction

3) The Learned trial Magistrate erred in law byfailing to make a finding that the appellants incurred losses and damages of the unlawful eviction

4) The Learned trial Magistrate's reasoning/analysis of eth evidence on record was biased, skewed and failed to take into consideration the appellants' testimonies as well as their submissions and authorities

5) The Learned trial Magistrate erred in law and in fact in failing to make a finding that the respondent did not specifically plead the outstanding rent arrears

SUBMISSIONS BY THE PARTIES

5. On17.10.17, parties were directed to file written submissions and they dutifully complied.

Appellants' submissions

Lease

6. It was submitted for the appellants that the legal effect of unregistered agreement for lease creates a periodic tenancy upon which the provisions of the Landlord and Tenant Act (Shops, Hotels and Catering Establishments Act), (Cap 301) of the Laws of Kenya (**the Act**) and that the locking of the demised premises amounted to unlawful eviction. Appellants placed reliance on the case of **A.W.Rogan-Kamper v Robert Grosvenor [1977] eKLR**. Appellant further submitted that the respondent did not follow the procedure for termination of the tenancy spelt out at Section 4 of ***theAct*** as a result of which the appellants suffered loss and damage and ought to be compensated. In this regard, the appellants relied on **Rev. Simon NdunguMungai& Another v Municipal Council of Kiambu [2010] eKLR**and **Quick Lubes E.A Ltd VKenyaRailways Corporation [2012]eKLR.**

Outstanding Rent

7. It was submitted for the appellant that the outstanding rent was not specifically pleaded and proved and ought not to have been awarded. To this end, the appellant urged the court to be guided by Order 2 rule 10 of the Civil Procedure Rules

Respondent's submissions

8. It was submitted for the respondent that the appellants did not plead the legal effect of unregistered agreement for lease and cannot raise it on appeal since parties are bound by their pleadings. In support thereof, the respondent relied on **Independent Electoral and Boundaries Commission& another v Stephen Mutinda Mule & 3 others [2014] eKLR**, **HellenWangariWangechi v CarumeraMuthoniGathua [2015] eKLR and Douglas OdhiamboApel& another v Telkom Kenya Limited.**

9. It was further submitted that the appellants did not plead the damages they suffered and to this end respondent relied on **Charles Sande v Kenya Cooperative Creameries Ltd Civil Appeal No. 154 of 1992** to the extent that special damages must be pleaded specifically and strictly proved.

10. Respondent urged the court to find that the appellant who were seeking an injunction had not paid rent and had come to court with unclean hands. To this end, the respondent relied on **Kyangavo v Kenya Commercial Bank Ltd &Anor.(2004) 1KLR 126.**

The evidence

11. As the first appellate court, it is mandatory for this court to consider the evidence at the trial and evaluate it afresh before coming to its own conclusions irrespective of the determinations by the trial court subject, of course, to the understanding that it is only the trial court that had the advantage of seeing and hearing the witnesses. Dealing with same point, the Court of Appeal in **Kiruga v Kiruga& Another [1988] KLR 348**, observed that:-

> ***"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand…."***

Analysis and Determination

12. I have perused the entire record of appeal and considered the submissions by both counsels. From the evidence on record, there is no doubt that there existed two unregistered agreements for lease between the 1st appellant and the respondent. And since the tenancy was unregistered, it is in those circumstances thatI find and hold that there were unregistered agreements for leases on a month-to-month basis governed by ***the Act*** in terms of section 2(3). In this regard, I approve of the holding in **A.W.Rogan-Kamper v Robert Grosvenor**(Supra).

13. The learned trial magistrate found that the sub-tenancy had not been proved because there was no written agreement between the 2nd appellant and the respondent. Section 2 of ***the Act*** defines a

> **"tenant"in relation to mean the person for the time being entitled to the tenancy whether or not he is in occupation of the holding,and includes a sub-tenant**

I therefore hold a contrary view that having received rent from the 2nd appellant; the respondent is estopped from denying knowledge of the existence of the sub-tenancy.

14. On termination of agreements for lease, the rights of the parties are governed by the relationship which was created between them by possession of the suit premises and payment and acceptance of rent, which was a monthly tenancy. Section 2 (1) of ***the Act*** defines a **"controlled tenancy"** to mean a tenancy of a shop, hotel or catering establishment—

(a) which has not been reduced into writing; or

(b) .....

15. The same section defines a **"shop"** to mean premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth. The appellants were offering services for money which would fall within the definition of a "shop".The respondent was therefore bound to follow the procedure for termination of the tenancy spelt out at Section 4 of ***theAct.*** The respondent did not comply with the legal provisions relating to termination of the tenancy and the distress upon the goods of the 2nd plaintiff and the locking of the demised premises was unlawful.

16. On the issue of damages, the most important thing to bear in mind in a claim for special damages is that the claim must be specifically pleaded and strictly proved. Anything short of that is bound to create an entirely different dimension into the whole process.In **Provincial Insurance Co East Africa Ltd versus Nandwa 1995-1998 2EA 288 at page 291** the Court of Appeal expressed the need to plead specifically a claim that is ascertainable and quantifiable and stated thus:-

> ***"It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.***

17. The Courtreiterated its holding in the case of **Siree –v- Lake Turkana El Molo Lodges (2002) 2EA 521**and stated thus:

> ***"This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages"***

18. It is this court's view that damages for unlawful distress and locking out and/or unlawful eviction arenot quantifiable, meaning that they cannot be pleaded as special damages. On the other hand, I find and hold that a claim for outstanding rent is quantifiable and failure by the respondent to plead the same is fatal to its claim under this head. In this regard I am guided by the decision in **Maritim*& Another –v- Anjere (1990-1994) EA 312 at 316,***where the court emphasized:

> ***"It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."***

19. Having said that, I agree with the holding in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** , **HellenWangariWangechi v CarumeraMuthoniGathua [2015] eKLR and Douglas OdhiamboApel& another v Telkom Kenya Limited** that parties are bound by their pleadings. The respondent having failed to specifically plead its claim for outstanding rent which as stated hereinabove is quantifiable; the trial court ought to have disallowed the it.

20. What this boils down to is that the learned magistrate fell into error when he wholly disallowed the appellant's claim and allowed the respondent's claim that was not specifically pleaded. By taking this path the learned magistrate erred in law and arrived at the wrong conclusion.

Orders

21. For the reasons I have given, this court makes the following orders:

> **1) Theappeal is allowed and the trial magistrate's judgment and the award for outstanding rent are hereby set aside**
>
> **2) This file shall revert to Kisumu Chief Magistrate's Court for assessment of the 2nd appellantsdamages for unlawful distress and locking out and/or eviction by another magistrate other than the trial magistrate**
>
> **3) Costs of this appeal shall be borne by the respondent**

DATED AND DELIVERED THIS 15th DAY OF February 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk - Felix& Caroline

Appellant - Mr Ondigo

Respondent - Mr Omondi/Ojuro