



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL No. 58 OF 2016

YUSUF NOOR BURO APPELLANT

=VERSUS=

OMAR SALIM NASSIR SULEIMAN RESPONDENT

(An Appeal from the judgment of Hon. J.W ONCHURU (P.M) delivered on 10/05/2016 in Lamu PMCC No. 32 of 2015)

JUDGMENT

1. The Respondent filed a claim against the Appellant in Lamu PMCC No. 32 of 2015 seeking rent arrears for the months of January to September 2015 at the rate of Ksh. 35,000 per month totaling Ksh. 315,000 in respect of a house on plot No. Lamu/Block/1/999 belonging to the Respondent.
2. The Appellant in his defence before the trial court said the rent was Ksh. 5,000 per month. He said he paid the Respondent Ksh. 10,000 in January 2015 being rent for January and February 2015.
3. The Respondent further said in March 2015 he decided to change it into a Guest house whose monthly rent was Ksh. 20,000 since the house was not in good condition. He was to renovate it and recover the cost from the monthly rent.
He said on 2/06/2015, he gave the Appellant Ksh. 50,000 outside Equity bank. He called DW2 (Abdi Yahyi) who said he saw the Respondent receiving the money.
4. The Appellant said the Respondent later increased the rent to Ksh. 35,000 per month without consulting him and on 9/09/2015 he moved out of the house.
5. The trial court found that the Respondent had proved his case on a balance of probabilities and entered judgment in favour of the Respondent against the appellant in the sum of Ksh. 315,000 with costs.
6. The Appellant who is aggrieved with the judgment has now appealed against it on the following grounds:-

(i) THAT the learned magistrate erred in law and in fact in concluding that the Defendant was in occupation of the Guest House from January to September 2015 at a monthly rate of Ksh. 35,000/=.

(ii) THAT the learned magistrate erred in law and in fact in ignoring the straightforward fact and law that:-

(a) there was no written agreement between the parties.

(b) there was no corroboration of the fact of existence and/or signing of such agreement.

(c) the Appellant had at first rented one (1) room then later in March moved into a Guest House within the same building necessitating change in rents.

(d) the Agreement as attached by the Respondent was an attempt to doctor evidentiary materials.

(e) there were other occupants of the other rooms in the house in question at the time the Respondent took one of the rooms.

- (iii) THAT the learned magistrate erred in law and in fact in ignoring the contents of the Defence Statement which contextualized the Appellant's case.
- (iv) THAT the learned magistrate erred in law and in fact in making references to matters that never came up during exam-in-chief, cross-exam, re-examination or submissions.
- (v) THAT the learned magistrate erred in law and in fact in concluding that receipts produced by the Defendant for purchases and renovations undertaken were specifically made to suit the case.
- (vi) THAT the learned magistrate erred in law and in fact in ignoring other receipts produced by the Appellant for purchases, bills and other costs incurred by him.
- (vii) THAT the learned magistrate erred in law and in fact in declining to take into account the appellant's submissions at all.
- (viii) THAT the learned magistrate erred in law and in fact in admitting and referring to filed doctored documents produced by the Respondent.
- (ix) THAT the learned magistrate erred in law and in fact in not finding that the evidence and exhibits produced by the respondent were inconsistent, contradictory and did not support the respondent's case.
- (x) THAT the learned magistrate erred in law and in fact in making a finding in a matter that required an input of a handwriting expert ignoring the well known limits, meaning and operations of the law of evidence.
- (xi) THAT the learned magistrate erred in finding that the Respondent did not pay any house rent.
- (xii) THAT the learned magistrate erred in law and in fact in concluding that no renovations were ever done.
- (xiii) THAT the learned magistrate erred in law and in fact in finding that the Defendant did not prove why he had to give the Plaintiff Ksh. 50,000/= on 2/06/2015.
- (xiv) THAT the learned magistrate erred in law and in fact in failing to understand the manner in which purchases were made, bills paid and renovations carried out on the subject House.
- (xv) THAT the learned magistrate erred in law and in fact in striking out the Appellant's Notice to Recall a Witness and Banking Statement document attached to it.
- (xvi) THAT the learned magistrate erred in law and in fact in ignoring the glaring deficiencies, inconsistencies and the obvious contradictions in the Respondent's case.
- (xvii) THAT the learned Magistrate erred in fact and law in failing to appreciate that the burden of proof lay squarely on the Plaintiff who failed to give sufficient evidence to prove his claim as per the Plaint filed.
- (xviii) THAT the learned magistrate erred in law and in fact in making the ruling contrary to the glaring principles of balance of probability.
- (xix) THAT the learned Magistrate erred in law in awarding the respondent the judgment and costs.

7. The Appellant submitted in writing as follows:-

- (i) That the documents produced by the Respondent as exhibits in the trial court were an afterthought. That the rent agreed on was Ksh. 5,000 before the Respondent changed it into a Guest house for Ksh. 20,000 per month.
- (ii) That there was no written agreement between the parties.
- (iii) That the trial court erred in ignoring the contents of the defence dated 2/10/2015 which contextualized the Appellant's case and further that the trial court ignored the contents of the letter dated 26/08/2015 and only narrowed it's view to a small portion which gave a breakdown of rent and repairs.
- (iv) That the trial Magistrate made reference to matters which did not come up during the examination in chief, cross-examination and re-examination or submissions of the case.
- (v) That the trial court erred in law and in fact in concluding that the receipts produced by the Appellant were tailor made to suit this case and that the court ignored other receipts produced by the Appellant.
- (vi) The Appellant also submitted that the trial court ignored the Appellant's submissions, pleadings and testimonies of the Appellant's witnesses in arriving at it's decision.

(vii) The Appellant also submitted that the trial court relied on the Respondent's doctored documents and by so doing ignored and admitted obvious irregularities and arrived at an erroneous judgment.

(viii) That the trial court made a finding that the documents were made by the same hand without calling a document examiner and by so doing ignored well known limits and operations of the law of evidence.

8. The Respondent also submitted in writing as follows:-

(i) That the Appellant entered into an oral tenancy relationship on 1/01/2015 when the Appellant approached the Respondent and requested to lease the Respondent's premises known as Guest house on plot No. Lamu/Block/1/999 for Ksh. 35,000 per month.

(ii) That on 3/01/2015 when the tenancy agreement was to be executed, the Appellant told the Respondent that he did not have any money and he requested the Respondent to let him occupy the premises as he was waiting to be paid by the County Government of Lamu in respect of contractual work he was doing for the County Government.

(iii) That the Appellant did not pay the Respondent any money and the Respondent instructed ASMV General Agency to take over the management and collect rent.

(iv) That the Appellant maliciously and secretly vacated the premises without paying rent.

(v) That the trial court evaluated the defence evidence and found it not to be genuine and tenable and further that the trial court made a finding that purchases and renovations allegedly undertaken by the Appellant were tailor made to suit the Appellant's case.

(vi) The Respondent further submitted that the amount of money the Appellant allegedly paid to the Respondent or spent on the alleged purchase of materials and renovation was not proved and further, that the Appellant did not file any counter claim or set-off against the Respondent.

9. I have carefully evaluated the grounds of appeal in this case. I have also considered the submission by the parties. My findings are as follows:-

(i) My duty as the first Appellate Court is to reconsider and re-evaluate the evidence before the trial Court and draw my own conclusions while bearing in mind that I did not see the witnesses and also only to make a finding on the evidence on record.

(ii) In my opinion, the duty of the High court when seated in its first Appellate capacity is the same as that of the Court of Appeal when hearing first appeals from the High Court. In the case of **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212**, the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

(iii) I find that the main issues for determination whether the Respondent proved his case to the required standard and whether the trial court relied on evidence that was not placed before it.

(iv) I find that there is no evidence that the trial court acted on wrong principles in reaching the findings it did. The Appellant did not deny that he stayed in the Respondent's house from January to September 2015 when he moved out.

(v) I have perused the record and I find that the appellant did not raise any counter-claim or set-off in respect of the money he allegedly spent in the repairs and materials for renovation of the Respondent's house.

(vi) I find that the Respondent proved his case to the required standard in civil cases and in the absence of a counter-claim or set-off, the court had no basis for finding for the Appellant.

(vii) I find that the trial court rightfully noted that the receipts produced by the Appellant had serial numbers following each other yet the Appellant said they were issued on different dates and I find that this not the kind of evidence that requires a document examiner and neither is it outside the evidence tabled as the trial court is duty bound to consider the documents produced before it.

(viii) I also find that in cross-examination of the Respondent, the Appellant did not ask any questions about the alleged witness (DW2) who was allegedly present when the Appellant allegedly paid the Respondent ksh.50,000.

(ix) The trial Magistrate made a decision which was based on the evidence placed before him and I find that there were reasons for refusing to rely on the defence evidence such as the absence of a counter-claim or set-off.

(x) In civil cases, the standard of prove is on a balance of probabilities.

(xi) The trial court considered both the Respondent's and the Appellant's evidence and it made a finding for the Respondent.

(xii) I find no basis upon which to interfere with the judgment entered by the trial court.

(xiii) The Appeal herein lacks in merit and the same is dismissed with costs to the Respondent.

(xiv) The order for stay of execution with all consequential orders is accordingly set aside.

Dated, Signed and Delivered at Malindi this 23rd day of March 2018.

ASENATH ONGERI

JUDGE.