REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 151 OF 2011

JOHN TOMNO CHESEREM.....APELLANT

VERSUS

SAMMY KIPKETER CHERUIYOT.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate Honourable C. G. Mbogo (CM), in Eldoret CMCC No.855 of 2006 dated 12.8.2011)

JUDGMENT

1. By an Amended plaint dated 11th May 2005, the appellant *John Tomno Cheserem* sued the respondent then the defendant in Eldoret CMCC No. 855 of 2006 seeking special damages in the total sum of Kshs. 783,770 being cost of renovations to business premises he had rented from the respondent; cost of equipment acquired for his hotel business and loss of earnings for three months in lieu of notice.

2. According to the appellant, the loss was occasioned by the respondent's action of unlawfully evicting him from the premises without notice and retaining his stock in trade and other goods. He also prayed for general damages and interest.

3. It was the appellant's case at the lower court that he rented the respondent's business premises situated at Zone/Division 01-CBD (Elgeyo road) Plot NO. 335 on 1st June 2003 for the purpose of operating a hotel business and that he dutifully paid the agreed rent of Ksh.20,000 as and when it fell due; that it was therefore unlawful for the respondent to evict him from the premises without notice.

4. The trial court's record shows that the respondent did not file an Amended defence. He relied on the statement of defence filed in court on 1st November, 2004. In his statement in defence, the respondent denied all the allegations made against him by the plaintiff including the particulars of loss of earnings/profits in the sum of Kshs.537,120 and special damages amounting to Kshs. 246,650. It was the respondent's case that his actions were in compliance with the terms and conditions of their tenancy agreement and/or the provisions of the *Landlord and Tenant (shops, Hotel and catering Establishments Act)* Chapter 301 of the Laws of Kenya.

5. After a full trial, the learned trial magistrate Hon. Mbogo C.G (CM) rendered his decision in a well-reasoned judgment dated 12th August, 2011. He made a finding that the appellant had failed to prove his case to the required legal standard and dismissed it with costs to the respondent.

6. The appellant was aggrieved by the trial court's decision. He filed the instant appeal through a memorandum of appeal dated 29th August, 2011. He relied on seven grounds of appeal which can be condensed into the following main grounds;

That the learned trial magistrate erred in law and in fact in finding that the appellant had failed to prove his case on a balance of probabilities; in disregarding the plaintiff's evidence and submissions in arriving at his decision; in finding that no accounting documents were produced in court yet the same had actually been produced and proved; in failing to take into account relevant factors and instead considering irrelevant factors; and lastly, in applying the wrong legal principles.

7. By consent of the parties, the appeal was prosecuted by way of written submissions which were highlighted before me on 18th July, 2016. Those of the appellant were filed on 2nd March, 2015 while those of the respondent were filed on 11th July, 2016. At the hearing, learned counsel *Mr. Kagunza* argued the appeal on behalf of the appellant while learned counsel *Mr. Mwetich* appeared for the respondent.

8. This being a first appeal to the High Court, it is an appeal on both facts and the law. The duty of a first appellate court is well settled. It is to re-evaluate and consider afresh all the evidence tendered before the trial court in order to reach its own independent conclusions having in mind that unlike the trial court, i did not have the advantage of hearing and seeing the witnesses.

See: ***Selle Vs Associated Motor Boat Company Ltd & Others (1968) EA 123; Mariera Vs Kenya Bus Service (MBS) Ltd (1987) KLR 440.***

9. That said, it is important to note that as a general rule, the mandate of the appellate court must be exercised with caution. The court should be slow to interfere with the findings of the trial court unless certain circumstances are shown to exist. These circumstances were well enunciated by the Court of Appeal in ***Kiruga V Kiruga & another (1988) KLR 348*** where it held as follows;

"...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 but this is a jurisdiction which should be exercised with caution.…"

10. I have carefully considered the pleadings in the lower court, the evidence on record, the judgment of the learned trial magistrate, the grounds of appeal and the submissions both written and oral made by learned counsel for the parties.

11. Having done so, I find that three key issues emerge for my determination. These are;

(i) Whether the tenancy between the appellant and the respondent was a controlled tenancy within the meaning of *Section 2* of the *Landlord and Tenant (Shops, Hotels and Catering Establishments* Act (hereinafter Cap 301).

(ii) Whether the respondent's action was intended to be a termination of the tenancy or a distress for rent.

(iii) Whether the learned trial magistrate erred in finding that the appellant had not proved his case on a balance of probabilities.

12. Starting with the first issue, the starting point is a determination of what constitutes a controlled tenancy. A controlled tenancy is defined in *Section 2* of *Cap 301* as follows;

"A controlled tenancy" means a tenancy of a shop, hotel or catering establishment –

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

(b) Which has been reduced into writing and which-

(i) Is for a period not exceeding five years; or

(ii) Contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(iii) Relates to premises of a class specified under subsection (2) of this section.

13. It is not disputed that the appellant operated a hotel business in the rented premises. However, the terms of the tenancy agreement produced as exhibit 1 took out the tenancy outside the ambit of a controlled tenancy. This is because a close look at the agreement shows that the tenancy created by the said agreement was for an endless term. Put another way, the term was not fixed. Though the agreement was in writing, the terms thereof did not specify that it was for a term not exceeding five years. Clause 10 of the agreement which provided for distress for rent and eviction for failure to pay the agreed rent and clause 3 requiring three months' notice by either side for termination of the tenancy were also open ended. They did not for instance state that they were to be operative within five years from the date of commencement of the lease or for any other period.

14. The appellant did not also adduce any evidence to prove that his tenancy was one of the tenancies gazetted by the relevant minister under *Section 2(2)* of *Cap 301* as a controlled tenancy regardless of the period of the tenancy. I say so because it is trite law that he who alleges must prove. In the absence of such proof, i am satisfied that the tenancy between the parties herein was not a controlled tenancy and was therefore not protected under the provisions of Cap 301. The appellant's submissions that he was a protected tenant and that his tenancy could not be lawfully terminated without giving him notice as required by the provisions of Cap 301 are thus without merit.

15. On the second issue, 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. DW1 was 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.

16. It is thus clear that the respondent's intention was not to terminate the tenancy. The respondent remained willing and ready to re-open the premises for the appellant upon payment of the outstanding rent. Clause 3 of the tenancy agreement which required a party desiring to terminate the tenancy to give the other party three months' notice did not therefore apply. The respondent did not need to give any notice before exercising his right to distress for rent which had already accrued. The parties were bound by the terms of their agreement including clause 10 which in my view was in tandem with *Section 3* of the *Distress for Rent Act* Chapter 293 of the Laws of Kenya (the Act) in so far as distress for the recovery of unpaid rent was concerned.

17. 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.

18. 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 since it is not disputed that the appellant was allowed to take away perishable goods which had been in the hotel. The appellant did not also specify which tools of trade were distrained if any. General allegations to that effect cannot suffice. In the premises, I do not find any merit in the appellant's submissions that the respondents' action amounted to unlawful termination of his tenancy. The respondent only levied distress for unpaid rent which he was entitled to do and there is nothing to suggest that the distress was undertaken in an unlawful manner. It is therefore my finding that the appellant did not prove that he was entitled to an award of general damages as pleaded.

19. Consequently, I am satisfied that though indeed the learned trial magistrate erred in not addressing his

mind to the issue of whether or not the respondent's impugned action was lawful and whether the appellant was entitled to general damages as pleaded, given my aforegoing findings, the learned trial magistrate's failure to consider the issue did not have any impact on the appellant's case and cannot therefore be a basis of vitiating his decision.

20. Turning now to the last issue, I have already held that the appellant was not entitled to general damages. Regarding special damages, it is trite law that special damages must not only be pleaded but must also be strictly proved. See: ***Charles Sande Vs Kenya Co-operative Creameries Ltd Civil Appeal No. 154 of 1992***; ***Coast Bus Service Ltd Vs Murunga Danyi & 2 others Civil Appeal No. 192 of 1992.***

In this case, the appellant pleaded special damages in the sum of Kshs. 246,650 being tools and goods retained by the respondent and Kshs.537,120 being loss of earnings for three months in lieu of notice.

21. Starting with the amount claimed for loss of earnings, as stated earlier, the respondent's action did not amount to a termination of the tenancy without notice. It was simply a distress for rent which did not require the respondent to give the appellant any notice before levying distress. In so far as the respondent's claim is based on the allegation that the respondent terminated the tenancy without notice, it is my view that the claim is at best misconceived.

22. But there is one more thing i would like to say regarding the evidence adduced in support of this claim. The evidence reveals that the appellant relied on a figure he claimed represented his daily sales which was an average of Kshs. 5,968. This is the amount that was used to compute the sum claimed of Kshs. 537,120. However, even if the court were to accept this evidence, this amount cannot be proof of daily profit which would be the true indicator of daily earnings since the hotel's daily expenditure had to be deducted from the daily sales in order to determine the appellant's daily profit. No evidence of expenditure was availed to the trial court nor were any statements of accounts[HJEG1] . The learned trial magistrate was therefore right in his finding that the appellant had not proved this particular claim.

23. Regarding the claim for 246,650, the appellant relied on an inventory of the tools and equipment which he says he had acquired but which were retained by the respondent. He also relied on some receipts and proforma invoices. I have perused the said inventory. In my opinion, the inventory was inadmissible in evidence since it was neither dated not signed by its maker. On the face of it, it does not show that it was prepared in respect of goods or equipment in the appellant's hotel known as Kerio Dishes. Secondly, the receipts produced in evidence to prove purchase of some of the items had dates either preceding the date of commencement of the lease or dates after distress had been levied. There were other items for which no receipts were produced allegedly because they had been locked up in the hotel. This explanation falls flat on its face because had that been the case, the appellant would have moved the trial court to make appropriate orders under the then Civil Procedure Rules to compel the respondent to avail the documents to him. Besides, there is evidence from PW1 that he allowed the appellant to remove some perishable goods and files from the hotel.

24. There is also undisputed evidence that the respondent still has in his possession 23 plastic chairs, 2 arm chairs, 16 tables, one gas cylinder, one gas pipe, assorted utensils, plastic flower vessels; 2 doors, 3 kitchen sinks, 2 mirrors, a chips maker, one meat mincer, five lockers, 4 crates of soda, four empty crates and one food warmer which he is ready and willing to return to the appellant upon payment of outstanding rent arrears and storage charges. It is important to note that the alleged cost of the above items is included in the sum claimed yet these items were not lost to the appellant. According to DW2's evidence, he still had an opportunity of getting the items back after clearing the outstanding rent and paying for their storage charges.

25. I have also noted that the documents produced by the appellant as proof of acquisition of some of the items in question were proforma invoices. The Court of Appeal in ***Total (Kenya) Limited formally Caltex Oil (Kenya) Limted V Janevams Limited (2015) eKLR*** while discussing whether invoices amounts to proof of acquisition of goods or receipts held as follows;

"A proforma invoice is considered a commitment to purchase goods at a specified price. It is not

a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the respondents' loss, or the replacement value of the respondent's equipment".

In view of the foregoing, I am inclined to find that the claim of Kshs. 246,650 was also not proved on a balance of probabilities.

26. In the end, I have come to the same conclusion as did the learned trial magistrate that the appellant failed to establish his case against the respondent to the standard required by the law. I consequently find no merit in this appeal and I hereby dismiss it with costs to the respondent.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 31st day of January 2017

In the presence of:

Mr. Isiboe Holding brief for Mr. Manani for the Appellant

No appearance for the Respondent though duly notified.