



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 617 OF 2011

SAMSON NGUGI ICHUNGW'AAPPELLANT

- V E R S U S -

JOSEPH D. K. KIMANI

t/a PYRAMID AUCTIONEERS.....1ST RESPONDENT

RAJU DHANANI 2ND RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Milimani Commercial Courts Nairobi, delivered on the 24th November, 2011 by the Honourable SPM (Mr) C. Obulutsa in CMCC No. 536 of 2011)

JUDGEMENT

1. Joseph D. K. Kimani T/A Pyramid Auctioneers, the 1st respondent herein, took out the motion dated 12.08.2011 before the Chief Magistrate's Court, Milimani whereof he sought for inter alia the following orders against Samson Ngugi Ichungw'a T/A Grenair the appellant herein:

a) THAT this application be certified as urgent and heard exparte in the first instance.

b) THAT the officer in charge, Kikuyu Police Station, to accompany the applicant, Mr. Joseph D. K. Kimani T/A Pyramid Auctioneers in order to maintain law and order during the removal of proclaimed goods from suit premises known as LR. No. KIKUYU/KIUKUYU BLK 1/48 ADN 1/55 for recovery of kshs.490,000/= plus cost.

c) THAT the honourable court be pleased to issue police assistance order to the applicant Mr. Joseph D. K. Kimani for provision of security during the removal of the proclaimed goods from the suit premises known as LR. No. KIKUYU/KIUKUYU BLK 1/48 ADN 1/55.

d) THAT cost to this application be in the cause.

2) The application being exparte in nature was placed before Hon.R. A. Oganyo (Mrs) learned Principal Magistrate who consequently allowed the same as prayed on 12th August 2011. When the appellant learnt of the existence of the aforesaid exparte orders, he filed the application dated 5th October, 2011 in which he sought to have the exparte orders set aside. The application was heard by Hon. Obulutsa, learned acting Chief Magistrate, who in the end heard the application and dismissed it vide his ruling delivered on 24th November 2011. In the same ruling, the learned Principal Magistrate gave the appellant

10 days to settle the outstanding amount failure to which the 1st respondent was at liberty to enforce the order in terms of the orders issued on 12.8.2011. Being aggrieved by the aforesaid ruling, the appellant preferred this appeal.

3) On appeal, the appellant put forward the following grounds in his memorandum:

1. The learned trial magistrate erred in law and in fact in determining the dispute relating to the possession of the suit premises whereas the same is pending hearing and determination at the High Court in HCC No. 86 of 2011.

2. The learned trial magistrate erred in law and in fact in holding that the appellant was a tenant of the 2nd respondent in the suit premises whereas the tenancy agreement was a forgery.

3. The learned trial magistrate erred in law and in fact in holding the 2nd respondent had a good and clean title having obtained the same unlawfully and consequently was the owner of the suit premises.

4. The learned trial magistrate erred in law and in fact in holding that the appellant ought to pay rent of the 2nd respondent within ten (10) days from the date of the order whereas the auctioneer had already attached the appellants household goods.

5. The learned trial magistrate erred in law and in fact in ordering that the police do execute the breaking order upon the expiry of ten (10) days whereas the auctioneer had already executed the said order previously.

6. The learned trial magistrate erred in law and in fact in holding that the identity and description of the tenant was known and proceeded to accept into evidence a forged tenancy agreement which had not been executed by the parties.

7. The learned trial magistrate erred in law and in fact in disregarding the fact that the 2nd respondent had filed a previous case in the High Court being HCCC Misc. Application No. 443 of 2011 seeking orders of eviction which was dismissed on 5th May 2011.

8. The learned trial magistrate erred in law and in fact in the decision made by dismissing the appellant's application for review dated 5th October 2011 and making the above findings in a miscellaneous cause as there was no suit in existence.

4) When the appeal came up for hearing, this court gave directions to the effect that the appeal be disposed of by written submissions. At the time of writing this judgement, the appellant was the only party who had filed his submissions.

5) I have re-evaluated the arguments presented by both parties before the trial court. I have also taken into account the appellant's written submissions. The recorded proceedings show that the learned acting Chief Magistrate considered the arguments of both sides over the application dated 5.10.2011 and in end found it to be meritorious.

6) It is the submission of the appellant that the trial magistrate erred when he made his decision ordering the appellant to pay rent arrears or face eviction with the assistance of police yet the dispute was still pending before this court. It is said that the trial court had been informed that H.C.C.C No 86 of 2010 between the appellant, NIC Bank and another was pending. I have critically examined the recorded proceedings and it is apparent that the trial Ag. Chief Magistrate appreciated the fact that H.C.C.C no. 86 of 2010 was pending for hearing before this court. He also noted that the aforesaid suit was filed on 17.2.2010 but no orders were sought to restrain the purchaser from obtaining title over L.R No. KIKUYU/KIKUYU/BLOCK 1/55 and KIKUYU/KIKUYU/BLOCK 1/48. The learned Ag. Chief Magistrate also noted that the appellant cannot claim to be the owner after the auction and more so after a

title deed had been issued to the 2nd respondent. He also opined that it is not correct for the applicant to state that the 2nd respondent fraudulently transferred the land to himself. The learned Ag. Chief Magistrate further stated that if the appellant wanted to remain on the land, then he should pay the outstanding rent of ksh.490,000/=. After a careful re-evaluation of the material placed before the trial court, it is clear in my mind that the learned Ag. Chief Magistrate took into account the affidavit evidence and the submissions presented. He noted that the 2nd respondent had already obtained titles to the suit properties having bought the same in an auction. He also noted that the appellant had challenged the sale vide H.C.C.C no. 86 of 2010 but had failed to obtain orders to restrain the 1st respondent from obtaining title deeds over the suit premises. The learned Ag Chief Magistrate also formed the opinion that there was a tenancy agreement between the 2nd respondent and the appellant.

7) It would appear, the learned Ag. Chief Magistrate ignored the appellant's submission that the agreement annexed to the replying affidavit of the 2nd respondent was a forgery. He also ignored the fact that the issue was pending hearing before the High Court. I am convinced by the arguments presented by appellant that the learned chief magistrate erred when he made conclusive findings on an application filed pursuant to miscellaneous proceedings yet the substantive suit was pending before this court. The trial Ag. Chief Magistrate based his decision on contested documents which are yet to be interrogated before this court.

8) The other important ground which was argued is to the effect that the learned Ag. Chief Magistrate erred when he disregarded the argument that the 2nd respondent had filed H.C Misc. App. No. 443 of 2011 in which he unsuccessfully sought for the eviction of the appellant.

With respect, I agree with the appellant that this submission was made and was completely ignored by the learned Ag. Chief Magistrate.

9) After a careful re-evaluation of the arguments before the trial court, I have come to the conclusion that the application dated 5.10.2011 should have been allowed.

10) In the end, this appeal is allowed. Consequently, the order dismissing the motion dated 5.10.2011 and the order granting the appellant 10 days to pay the outstanding rent are set aside and substituted with an order allowing the motion dated 5.10.2011. Costs of the appeal and the application dated 5.10.2011 are given to the appellant.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent