



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 157 OF 2005

GASPER JASON URIYO. APPELLANT

VERSUS

S. M. PATEL. RESPONDENT

(Appeal from a Judgment and Decree of Hon. Mr. El-Kindy (PM), delivered at Milimani Commercial Court on 16th May, 2005, CMCC No. 3326 of 2002)

J U D G M E N T

The Appeal herein arises from the Judgment delivered on the 16th February, 2005 by the Hon. El-Kindy the Ag Senior Principal Magistrate at Milimani in CMCC No. 3326/2002 wherein he entered judgment against the Appellant (the defendant in the lower court) plus costs and interests.

A brief history of the matter is that the Appellant was a month to month tenant of the Respondent in premises known as L.R. No. 1870/VI/213 paying a monthly rent of Ksh.45,000/-.

The Appellant's tenancy in the said premises expired on the 31st January, 2002 and the Respondent gave the Appellant one month's notice of intention to terminate the tenancy. The notice was given on the 28th February, 2002 and a demand was made on the Appellant to surrender vacant possession thereof to which he refused neglected and/or ignored and he continued to occupy the premises.

The Respondent further pleaded that the market rent of the premises had gone up to Ksh.65,000/- and as a result of the Appellant's failure to give vacant possession of the premises, he was suffering loss equivalent to the difference in rent and for the said loss he claimed mesne profits.

The Appellant filed his defence on the 13th June, 2002 and raised the issue of Diplomatic immunity among other issues. He averred that at the time of the alleged cause of action he was a member of the Diplomatic Staff of the International and Aviation Organization and by virtue of that, he is entitled to immunity from proceedings herein pursuant to the Privileges and Immunities Act.

This issue of Diplomatic Immunity was canvassed by way of a Preliminary Objection and the court dismissed the Preliminary Objection on 23rd February, 2004.

The Appellant further avers that he is not personally liable as the premises were let to him for use on behalf of the organization and for purposes incidental to the organization's mission.

He admitted occupying the premises known as L.R. 1870/VI/213 at a monthly rent of Ksh.45,000/- but denied that the tenancy expired on the 31st January, 2002 or that he was given reasonable notice to vacate

the premises.

It was his further contention that the Respondent arbitrarily demanded the rent of Ksh.65,000/- per month when there was no agreement between them increasing the rent but that notwithstanding had continued to pay rent of Ksh.45,000/- which the Respondent continued to receive.

The matter proceeded before the lower court and on the 16th February, 2005, the learned magistrate gave judgment in favour of the Respondent. The Appellant was not satisfied with the judgment of the court and hence the Appeal herein.

The Appellant has raised the following grounds of appeal.

1. That the learned magistrate erred in law in finding that the Respondent was entitled to mesne profits.
2. That in the alternative, the learned magistrate erred in law in awarding the Respondent mesne profits in the sum of Ksh.460,000/-.
3. That the learned magistrate erred in law and in fact in not determining that the Appellant was a lawful tenant of the Respondent.
4. That the learned magistrate therefore erred in law and fact in awarding the Respondent mesne profits where the Appellant was a lawful tenant of the Respondent.

The Appeal proceeded by way of written submissions. In his submissions the Appellant argues that there was a landlord/Tenancy relationship between the Appellant and the Respondent which was admitted by both parties at the hearing before the lower court. He further submitted that after the expiry of the lease, the Respondent continued to receive rent of Ksh.45,000/-. He contended that the Respondent neither pleaded nor proved trespass and that figure of Ksh.65,000/- which was the purported increased rent was not supported by evidence.

On the part of the Respondent he submitted that there was no lease agreement between the parties and that the Appellant trespassed on his property and for that reason he was entitled to mesne profits and the learned magistrate was right in awarding the same.

I have considered the depositions and submissions of the parties herein. This being a first Appeal, I am tasked with the duty to analyse and re-evaluate the evidence tendered by the parties in the trial court as decided in the case of **Selle Vs Associated Motor Boat Company (1968) EA 123 page 26** where the Court of Appeal held that: -

“... This court must 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.”

The Respondent in his plaint filed in the lower court sought mesne profits. The meaning of mesne profit was described in the Court of Appeal in the case of **Kenya Hotel Properties Limited Vs Willesden Investments Ltd (2009) KLR 126: -**

“This is in form of an ordinary claim for mesne profits that is to say a claim for damages for trespass to land.....”

It can also be described as another term for damages for trespass arising from a particular relationship of landlord and the tenant.

The issues to be determined in this Appeal are: -

1. Was the Appellant a lawful tenant of the Respondent?
2. Was the Respondent entitled to an award of mesne profits?

According to the evidence on record, the Appellant and the Respondent admits there was landlord/tenancy relationship between them which was created by a letter of intent signed by both parties. The said letter of intent has set out the terms and conditions which governed the relationship between the parties. It sets out the commencement date of the lease, the monthly rent and the period among others. Upon signing of the same, the parties herein bound themselves to the terms and the conditions of the said document and for one year, they were governed by it until it expired on the 31st January, 2002. On the 2nd November, 2001, the Respondent wrote a letter to the Appellant seeking to know if he intended to renew the lease or not, which the Appellant failed to respond to prompting the Respondent to write another on 3rd December, 2001 requesting for a reply.

On the 29th January, 2002 the Respondent gave notice to the Appellant to vacate the premises but the Appellant continued to occupy the premises paying the old rent of Ksh.45,000/-

In my opinion, upon expiry of the notice, the Appellant became a trespasser. This position is fortified in the decision of the court in the case of **Kim Holdings Limited Vs The Attorney General** where the Judge observed and I quote.

“The Defendant was on expiry of the lease a trespasser and could have been sued for vacant possession and mesne profits.”

In the case herein, among the orders that the Respondent had sought in his plaint are eviction but the Appellant vacated the premises before the case was heard. When the matter proceeded before the lower court on the 25th January, 2002 the Respondent admitted that the Appellant was his tenant paying a monthly rent of Kshs.45,000/- and that the Appellant continued to occupy the premises even after the expiry of the tenancy.

The Respondent in his evidence testified that the Appellant continued to pay the old rent though the rent for the same premises had gone up to 65,000/- as per the letting agent’s rate contained in the letter dated 22nd October, 2003. It was not until the 30th October, 2003 when the Appellant vacated the premises by which time the Respondent had lost rent for 23 months based on the market rates of Kshs.65,000/- less the 45,000/- which the Appellant was paying per month.

On his part, the Appellant told the court that he was a tenant from February 2001 – 31st December, 2003. He admitted having signed a letter of intent dated 2nd January, 2001 containing the terms and conditions under which he was letting the premises one of which was the monthly rent at Kshs.45,000/-. He admitted that he was given one month’s notice by the Respondent to move out of the premises and he had been informed about the increment of rent to Kshs.65,000/-.

It has been argued by the counsel for the Respondent that there was no lease agreement between the Appellant and the Respondent. In the concise Oxford English Dictionary, the word lease is defined as: -

“A contract by which one party conveys land, property, services, etc. to another for a specified time.”

A casual glance at the letter of intent signed by the parties herein meets all the requirements of a lease save for the title. The parties were bound by it for the one year period, meaning within that one year, the Respondent was in occupation of the premises legally and with the consent of the Appellant. The circumstances however, changed after the expiry of the one year period.

Having made a finding that the Appellant was a trespasser, it therefore follows that the Respondent was entitled to an award of mesne profits. The Appellant occupied the Respondent’s premises at a lower rent by Kshs.20,000/= per month for a period of 23 months which translates to a total sum of Kshs.460,000/= for that period. Had he moved out of the premises upon expiry of the lease, the Respondent would have rented the premises to another tenant at a monthly rent of Kshs.65,000/=. The increased rent was communicated to him early enough but he chose to stay on but continued paying the

old rent and for that reason the learned magistrate was right in awarding mesne profits of Ksh.460,000/- to the Respondent.

Accordingly and for the reasons above stated, the Appeal herein is dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED at Nairobi this 21st day of January, 2016.

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L. NJUGUNA

JUDGE

In the presence of

..... for the Appellant

..... for the Respondent