



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 47 OF 2014

JOSEPH MAKAU MUNYAO.....APPELLANT

=VERSUS=

ANDREW KATANA MWAEBWA.....RESPONDENT

(Appeal from the Judgement of Hon. D. Wasike (RM) dated 24th January, 2014, in Mombasa Senior Resident Magistrate's Court Civil Case No. 2353 of 2010)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment of Hon. D. Wasike dated 24th January, 2014, filed a memorandum of appeal on 14th April, 2014, raising the following grounds of appeal:-

(i) The Learned Magistrate erred in law and in fact in finding that the claim for rent arrears was a claim for special damages;

(ii) The Learned Magistrate erred in law and in fact in finding that the appellant produced nothing to prove the rental (sic) arrears when in fact a tenancy agreement was produced and oral testimony given by the appellant which testimony was not challenged by the respondent;

(iii) The Learned Magistrate erred in law and in fact in failing to make a final finding on the claim for rent arrears;

(iv) The Learned Magistrate erred in law and in fact in her evaluation of the evidence presented and consequently arrived at the wrong conclusion.

2. The Appellant filed his record of appeal on 15th July, 2014 and the appeal was admitted for hearing on 30th June 2016. The appeal proceeded by way of written submissions which were highlighted by the Appellant's counsel on record. There was no attendance on the part of the Respondent. This court was satisfied that the law firm of Gunga Mwinga Advocates for the Respondent was served with a hearing notice.

THE APPELLANT'S SUBMISSIONS

3. Mrs Maithiya, Learned Counsel for the Appellant submitted that the appeal was in respect to a tenancy agreement in which the Magistrate allowed the prayers sought save for Kshs.50,000/= for rent arrears that the Magistrate found to be a special damage claim which had to be proved by way of a receipt.

4. It was submitted that the appellant gave *viva voce* evidence that the Respondent was paying Kshs.20,000/= monthly rent and that the default for rent arrears was for 2½ months, thus the claim for Kshs.50,000/= that was being sought. Counsel cited the case of **Zakaria Waweru Thumbi vs Samuel Njoroge Thuku**, Civil Appeal 445 of 2003, where the Court stated that special damages must both be pleaded and proved.

5. It was submitted that a claim for rent is not a reimbursement that can be proved by way of receipts, yet the Learned Magistrate held that the case was not proved on a balance of probability. The Court's attention was drawn to the case of **Job Evanson Okello vs Stephen Z.K. Njoroge**, Civil Appeal 162 of 2002, where it was held that *viva voce* evidence of the Plaintiff without rebuttal by the Defendant is sufficient to prove a case on a balance of probability.

6. Counsel also cited the case of **Oman Mohammed & Another vs Dr. Abeid Kombo, & Another**, Civil appeal No. 40 of 2006, where it was held that it was erroneous for a court to disallow a claim for rent arrears where there was *viva voce* evidence. Mrs Maithya prayed for the appeal to be allowed.

ANALYSIS OF THE EVIDENCE

7. The duty of the first appellate court is to re-evaluate and analyze the evidence adduced before the trial court and come to its own finding. In **Shah vs Mbogo**, [1968] EA 93, the court stated thus:

“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

This court will analyze and consider the evidence tendered before the Lower Court and make its own findings.

THE PLAINTIFF'S CASE

8. PW1, JOSEPH MAKAU MUNYAO, the appellant herein, testified that on 11th August, 2007, he entered into a tenancy agreement with the Respondent. He produced the tenancy agreement as Pexhibit 1. According to the agreement, the Respondent was required to pay monthly rent of Kshs.20,000/= which was payable on a quarterly basis. After some time, the Respondent started paying rent on a monthly basis. It was a term of the agreement that the Respondent would also to pay bills and other utilities for himself.

9. PW1's evidence was to the effect that the Respondent relocated to another house on 5th April, 2010, leaving his wife, child and house help behind. He did not give notice to PW1. It was PW1's evidence that as at the time the Respondent shifted from his house, he was in rent arrears of Kshs.50,000/= and had an unpaid electricity bill of Kshs.2,250/=. PW1 testified that he had to pay water reconnection charges of Kshs. 500/=. He produced Pexhibit 2 being a receipt for water reconnection. PW1 repaired the house at a cost of Kshs.40,000/= when the Respondent failed to do so. He produced a bundle of receipts as Pexhibit 4. It was PW1's evidence that he paid Kshs.19,650/= to settle the electricity bill. PW1 informed the Court that the Respondent paid him Kshs.22,200/= that he admitted in the Defence.

10. The Learned Trial Magistrate entered judgment in favour of the Appellant for the sum of Kshs.37,985/= for special damages. She also awarded costs and other incidentals and interest on the same at court rates. The said Magistrate declined to award rent arrears of Kshs. 50,000/= and found that no evidence had been produced to show that there was rent arrears as claimed. She held that special damages must be specifically pleaded and proven.

DETERMINATION

The issue for determination is if the Appellant proved his case on a balance of probability.

11. The plaint that originated the case in the lower court was filed on 8th September, 2010. The Appellant's prayer was for a sum of Kshs. 112,235/=, costs of and incidental to the suit, interest at court rates and for any other or further relief that the court deemed fit to grant.

12. The Respondent filed a Defence on 4th October, 2010, in which he admitted being indebted to the Appellant in the sum of Kshs.22,200/= and denied the Appellant's claim of Kshs.112,235/= as pleaded in the plaint.

13. It is my finding that the claim of Kshs.50,000/= for rent arrears was specifically pleaded in the plaint. It was therefore in the form of special damages. It is trite law that special damages must not only be specifically claimed but also strictly proved. In the case of **Hahn vs Singh**, [1985] KLR 716, the Court of Appeal stated thus:-

"...special damages must not only be specifically claimed but also strictly proved. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves...."

14. In the similar vein, section 107(1) of the Evidence Act provides that:-

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist."

15. In the instant case, the Appellant's evidence was that he was paid Kshs.22,200/= by the Respondent being the sum that he admitted in his Defence. This amount comprised an electricity bill of Kshs. 19,650/= and Kshs. 2,550/= being for water expenses, out of which he had paid a sum of Kshs.7,500/= for electricity and Kshs.2,500/= for water as at the time of filing the Defence. The outstanding amount on utilities, he averred was Kshs.12,200/= and rent arrears of Kshs.10,000/=.

16. The Respondent did not attend court for the hearing of the case in the Lower Court and therefore the assertion by the Appellant that he was in rent arrears of Kshs.50,000/= remains uncontroverted. It is my finding that the learned trial magistrate erred when she failed to make the award of Kshs.50,000/= for rent arrears to the appellant. I find that the lease agreement produced in court was sufficient proof of the monthly rent that was due to the Appellant from the Respondent. The Respondent should have attended court to prove that he had paid the said rent. I am of the considered view that the learned trial magistrate misdirected herself by failing to find that the Appellant had proved his case on a balance of probability.

17. I note that the learned trial magistrate made an award of Kshs.37,985/= and ordered that the sum of Kshs.22,200/= which the Respondent had paid to the Appellant before he filed his Defence should be deducted from the final award. I uphold the decision of the learned trial magistrate to that extent. The final award is therefore as follows:-

(i) Special damages in the sum of Kshs.87,985/= less Kshs.22,200/= shall be paid to the Appellant by the Respondent; and

(ii) Costs and interest are awarded to the Appellant

It is so ordered

DELIVERED, DATED AND SIGNED in open court at Mombasa on this 29TH day of AUGUST, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mutisya holding brief for MB Maithya for the Appellant

No appearance for the Respondent

Rose Echor.....Court Assistant