



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**BUSIA HIGH COURT**

**Hcca No. 2 of 2015**

**Eugene Victor Wandera.....1<sup>st</sup> Appellant**

**Chap Chap Services Limited.....2<sup>nd</sup> appellant**

**Versus**

**Benard Peter Odipo.....RESPONDENT**

**JUDGEMENT**

1. On 9<sup>th</sup> December, 2015, the Resident Magistrate at Busia entered Judgement in favour of Bernard Peter Odipo(The Respondent) against Eugene Victor Wandera (the 1<sup>st</sup> Appellant) and Chap Chap Services Limited (the 2<sup>nd</sup> Appellant) for a sum of Kshs.300,000/= with interest and costs. Unhappy with that Judgment, the Appellants have filed this Appeal.
2. In a Plaint presented to Court on 7<sup>th</sup> August 2013, the Respondent averred that during the year 2012 he and the 1<sup>st</sup> Appellant agreed that, subject to a written and signed agreement, the Respondent would lease the Appellants premises on Land known and described as Busia/Bukhayo/Bugengi/4265 (hereafter The Property). That further, subject to the proper inspection of the premises, the Respondents would deposit Kshs.300,000/= as security for rent from the date of taking over the premises and pay a monthly rent of Kshs.100,000/= thereafter.
3. The Respondent further averred that a cheque of Kshs.300,000/= dated 27<sup>th</sup> June 2012 was paid to the 1<sup>st</sup> Appellant.
4. It was the case for the Respondent that after payment of the Deposit he carried out an inspection of the premises but found that it had defects, neededextensive repairs and did not warrant payment of the Rent demanded. The Respondent averred that he declined to sign the draft lease and made a demand for refund of the deposit.
5. The Appellants entered Appearance through the firm of Balongo &company Advocates and in a joint Statement of Defence dated 16<sup>th</sup> October 2013, the Appellants denied the claim. The Appellants accepted receiptof the payment of Kshs.300,000/= but stated that it was tendered after the inspection of premises by the Respondent. Further that the Respondent retained the lease Agreement for over 3 months and released it unsigned in October 2012.

6. The evidence tendered before the Trial Court was short and straightforward. The Respondent is a businessman and describes himself as a hotelier. At the end of June 2012, he scouted around for premises to carry out Hotel Business at Busia. That led him to the 1<sup>st</sup> Appellant whom he met at Busia.

7. In the meeting the 1<sup>st</sup> Appellant agreed to lease some property to him but on condition that the Respondent pays Ksh.300,000/=. The Respondent paid this money to the 1<sup>st</sup> Appellant by way of a Bankers cheque dated 27<sup>th</sup> June 2012. He then requested to be allowed to inspect the premises.

8. It is the evidence of the Respondent that upon carrying out the inspection he found it to be in disrepair. He gave examples of that disrepair. That there was no electricity, walls were worn out, the roof was leaking and there was no working sewer system. The Respondent then informed the 1<sup>st</sup> Appellant that he did not intend to move in. That he expressed his dissatisfaction through his Advocate Omayya Advocate. He declined to sign the Lease and demanded a refund of the Deposit paid.

9. It was the Respondent's further evidence that another tenant moved into the premises at a rent of Ksh.85,000/= per month. The Respondent denies that he was a tenant of the Appellants.

10. Under cross-examination, the witness insisted that the money paid was a deposit and that he inspected the property after payment of the deposit. The witness further maintained that the Inspection was a pre-condition to the lease.

11. The 1<sup>st</sup> Appellant testified on behalf of the Defence. He is a Software Engineer resident in Nairobi. That in the month of June 2012, he received a call from the Respondent who told him of his interest to rent premises. That the 1<sup>st</sup> Appellant then sent him to his Advocate's office. That it was agreed that the monthly rent would be Ksh.100,000/=.

12. That sometime either, at the end of June 2012 or beginning of the following month, the 1<sup>st</sup> Appellant accompanied the Respondent to the premises. The 1<sup>st</sup> Appellant further testified that he handed over the premises to the Respondent on 1<sup>st</sup> July 2012. That the Respondent occupied the premises from July to October when he received information from a third person that the Respondent had vacated. When testifying the witness was shown a letter dated 2<sup>nd</sup> July, 2012. The witness stated that he was seeing the letter for the first time. He however admitted that the address on the letter was his address.

13. Under cross-examination, the 1<sup>st</sup> Appellant stated that there was a structure in the building that was to be demolished but that the building was otherwise 'clean'. He conceded that the word deposit was used in relation to the Cheque. That he did not ask for Kshs.300,000/= for Deposit of rent but later stated that the money was for rent.

14. Having received that evidence and submissions by Counsel for the parties before it, the Trial Court held;-

*“The Plaintiff described the Kshs.300,000/= as security for rent and not as rent deposits. I have looked at the authorities relied upon by the Defendants. However, in this case the speed with which the Plaintiff demanded for a refund of his money, the refusal to sign the agreement and the nonpayment of a further Kshs.100,000/= as monthly rent shows on a balance of probability that he had not inspected the premises and that vacant possession had not been given.”*

The Court then found in favour of the Respondent.

15. The Appellants take issue with the decision of the Trial Court on the following Grounds;-

1. The Learned Trial Magistrate erred in law and fact by failing to draw up issues for determination in contravention of Order 2 section 4 of the Civil Procedure Rules.

2. The Learned Trial Magistrate erred in law and fact by basing the whole Judgment on the undelivered letter.

3. The Learned Trial Magistrate erred in law and fact by failing to evaluate the pleadings, evidence tendered, submissions and authorities relied upon to make a fair determination.

4. The Learned Trial Magistrate erred in law and fact by relying on oral evidence disregarding the pleadings.

16. The Appeal was heard by way of written submissions. It emerged from those submissions as, indeed in the Lower Court, that the singular issue for determination was whether the Respondent was ever a Tenant of the 1<sup>st</sup> and/or 2<sup>nd</sup> Appellant. In making this determination this Court as a first Appeal Court, will re-evaluate the evidence before the Trial Court with a view to reaching its own findings. The Court is however minded that while it is not necessarily bound by the findings of fact of the Lower Court, it will not usually depart unless it appears that the findings of the Lower Court were plainly wrong (See **Selle vs. Associates Motor Boat Co. [1968]EA123.**)

17. The Respondent's claim for refund was predicated on his position that he never was a Tenant of the Appellants and that payment of the Kshs.300,000/= was merely as security. The Respondent's case was that it had been agreed that he would first inspect the premises before entering into a Tenancy Agreement. Put differently, that the tenancy was conditional upon the inspection of the premises. That he carried out the inspection after payment of the deposit and that on being dissatisfied with the state of the premise he immediately demanded for refund.

18. The 1<sup>st</sup> Appellant on his part stated that Ksh.300,000/= was paid as deposit for rent and that payment was tendered after the Respondent had inspected the premises and was satisfied with the condition. The 1<sup>st</sup> Appellant took the position that the Respondent was tenant from 1<sup>st</sup> July 2012 to 31<sup>st</sup> October 2012.

19. As I turn to reevaluate the evidence, I bear in mind that he who asserts must prove. Section 107 of The Evidence Act provides-;

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

In this case, the onus was on the Respondent to prove its case on a balance of probabilities.

20. It is common ground that some Kshs.300,000/= was paid by the Respondent to the 1<sup>st</sup> Appellant by way of a bankers cheque dated 27<sup>th</sup> June 2012. But not surprising the parties are not agreed as to the purpose of this payment and whether or not it was paid after the Respondent inspected the premises. Each of the parties stood their ground when they testified. However the documents produced as exhibits herein may clarify the true intention of parties at the time payment was made.

21. There is a letter dated 27<sup>th</sup> June 2012 from the firm of Omayya & company sending the Bankers Cheque to Balongo & Company. Omayya & Company were the Advocates of Respondent while Balongo & Company were the Advocates of the 1<sup>st</sup> Appellant. This is a star Document and is reproduced herein below in full;

**OMAYA & CO. ADVOCATES**

**P.O. Box 2396-4010**

**KISUMU**

**27/06/12**

**M/S BALONGO & CO,**

**ADVOCATES**

**P.O. BOX 287-50400**

**BUSIA(K)**

**Dear Sir,**

**RE: LEASE OF BUKHAYO/BUGENGI/4265 FROM EUGENE WANDERA TO BERNARD PETER ODIPO**

**The above refers.**

**We enclose a Banker's Cheque for Kshs.300,000/= drawn in the name of Eugene Wandera being three months rent deposit for the above property.**

**We also acknowledge receipt of the lease agreement from you. We are making the necessary changes and amendments thereon and will forward the same back to you to incorporate in the final agreement for parties to sign.**

**Yours faithfully,**

*Signed*

**A.O OMAYO ADVOCATE**

22. In the Plaintiff, the Respondent averred that;-

5. "The parties hereto agreed that subject to the proper inspection of the premises by the Plaintiff, the Plaintiff would deposit Kshs.300,000 as a security for rent from the date of taking over of the premises and pay rent of Kshs.100,000/= per month thereafter.

6. The Plaintiff deposited Kshs.300,000/= by cheque dated 27<sup>th</sup> June 2012 payable to the 1<sup>st</sup> Defendant and drawn on Barclays Bank. The said cheque was banked and duly paid to the 1<sup>st</sup> Defendant.

The pleaded position of the Respondent was that the sum was paid as security for rent from the date of taking over the premises.

23. This does not sit easily with what the Respondent's own Lawyer states was the purpose of the payment in the letter of 27<sup>th</sup> June 2012 sending out the payment. In that letter the Lawyer states that the payment is '**three months rent deposit**'. Yet on the other hand is a '**rent deposit**' the same thing as **rent**? It seems to me that the contents of the letter are imprecise one way or other. The Court would therefore have to examine whether the events at the time the payment was tendered would clarify this unhappy situation.

24. The Learned Trial Magistrate was able to resolve that issue when she held:-

“However, in this case the speed with which the Plaintiff demanded for a refund of his money, the refusal to sign the agreement and the nonpayment of a further Kshs.100,000/= as monthly rent shows on a balance of probability that he had not inspected the premises and that vacant possession had not been given”..

25. So was the refund sought immediately as found by the learned Magistrate? The Respondent sought to rely on a demand letter dated 7<sup>th</sup> July, 2012 allegedly written by his advocates to the Appellants. Receipt of that letter was denied by the Appellant. In the course of giving evidence, the Respondent made reference to that letter. However, for some reason, which is unclear, the said letter was never admitted into evidence. I have gone through both the original and typed record of The Trial Court and I am unable to find the admission of the letter as evidence. The letter is not one of the documents in the list of exhibits.

26. The result is that a key document on which the Respondent placed heavy reliance is not part of her evidence. The Learned Trial Magistrate could not therefore predicate her decision on it. There is merit in the Appellant Grounds of Appeal that *“the learned Trial Magistrate erred in law and fact by basing the whole Judgment on the undelivered letter”*.

27. This Court reaches a decision that the Respondent has not proved, on a balance of probabilities that the payment of Kshs.300,000/= was for security and not for rent. And as the Respondent had access to the premises and therefore occupation (whether constructive or otherwise) that constituted a periodic tenancy within the Provisions of Section 57(2) of The Land Act 2012 (which commenced on 2<sup>nd</sup> May, 2012, a few days before the rent was paid). The Section reads:-

“if the owner of land permits the exclusive occupation of the Land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.

The Respondent was a month to month tenant and was not entitled to a refund.

28. The Appeal has merit and succeeds. The Judgment of the lower Court is hereby set aside. The Appellant shall have costs here and in the lower Court.

**Dated, Signed and Delivered in Court at Busia this 16<sup>th</sup> Day of August, 2016.**

**F.TUIYOTT**

**JUDGE**

**PRESENT:**

Ashioya h/b for Mulele for Respondent

Jumba for Appealant

..... Court Clerk