REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL 21 OF 2012

DOMINIC WAMBUA KASONI……..…….APPELLANT

VERSUS

SELE MUTINDA.....……...….....RESPONDENT

(*From the decision in Mwingi SRMCC No. 80 of 2006 – V. A. Otieno RM*)

JUDGMENT

The appellant brought a suit in the subordinate court seeking damages for breach of contract as well as costs. He claimed that he was the land lord of the respondent who had failed to pay rent at the time of suit totaling Kshs. 24,000/= as at January 2006. The respondent filed a defence. He also counterclaimed for goods taken by the appellant that it motor vehicle spare parts worth 82,000/=. The case proceeded to hearing and both sides tendered evidence.

In a judgment delivered by the learned trial magistrate on 6th September 2012, the court allowed the amount of 24,000/= claimed by the appellant together with costs and interest at court rates from the date of filing suit. The court also allowed the counter claim of 82,000/= made by the respondent. The court also decided that in view of the circumstance of the case, it was not appropriate to make any order as to costs.

Aggrieved by the decision of the trial court the appellant, who the plaintiff has brought this appeal through his counsel Musyoka and Muigai advocates. The grounds of appeal are as follows:-

1. That the resident magistrate erred in law and fact in failing to consider that the plaintiff had proved his case on the balance of probability.
2. That the resident magistrate erred in law and in fact by failing to consider that all evidence adduced by the plaintiff and his witnesses was eye witness evidence.
3. The resident magistrate erred in law and in fact by failing to record everything that was said during the hearing of the case hence contradicting himself when writing his judgment.
4. The resident magistrate erred in law and in fact by admitting the evidence of receipts produced by the defence on the issue of the counterclaim yet the said receipts were a forgery by the defence and were challenged during the trial.
5. The resident magistrate erred in law and infact by failing to award the appellant costs yet he had proved his claim on the balance of probability.
6. The resident magistrate erred in law and infact by finding that both parties had suffered loss yet it was the respondent who had breached the contract between the parties.
7. The resident magistrate erred both in law and in fact by trying to apply the issue of quantum of damages payable to appellant yet the appellant was only claiming payment of 24,000/= plus costs and interest.

8. The resident magistrate erred in law and in fact by arriving at his judgment that the appellant had proved his claim and at the same time holding the respondents counterclaim as allowed which leaves the judgment hanging.

The counsel for the appellant Ms. Musyoka and Muigai and the counsel for the respondent Ms.Mulinga Mbaluka and Company, filed written submissions. On the hearing date Mr. Mwangi appeared for the appellant and highlighted the written submissions. There was no appearance for the respondent.

I have considered both the written submissions of the parties counsel and the oral submissions made by counsel for the appellant.

At the hearing of the case the appellant called three witnesses. PW1 was the appellant. He testified that the respondent was his tenant and was to pay him rent of 4,000/= per month. That the respondent fell into arrears totaling 24,000/= and then rocked the building. The appellant thus called the assistant chief and, in the absence of the respondent, broke the building and took some spare parts belonging to the respondent. PW2 was Francis Karuga a mechanic who was present when the premises were reopened and spare parts taken. He stated that an inventory was taken in his presence. PW3 Jospeh Sokoa a mechanic was also present when the shop of the respondent was broken into and spare parts taken by the appelant. That was the appellant's case.

The respondent testified in person and did not call any witness. It was his evidence that he was a businessman selling vehicle spare parts. He admitted that the appellant was his landlord since 2005 and stated that the monthly rent for the shop was 3,000/=. He stated that on the day in question he had gone for a funeral at Makueni and when he came back he found that the premises had been broken into and spares worth 82,000/= taken. He produced receipts to back up the value of the spares. He admitted in cross examination that he owed the appellant rent amounting to 24,000/=.

This is a first appeal, as a first appellate court I am required to reexamine the evidence on record and come to my own conclusions and inferences. See the case of ***Selle Vs. Associated Boat Co. Ltd [1986] EA 123.***

The appellant complains that the learned trial magistrate erred in finding both for the appellant and at the same time for the respondent.

I observe that the counterclaim of the respondent was not seriously disputed by the appellant or his counsel. Though the appellants now claims on appeal that the receipts produced by the respondent were a forgery, no challenge to the said receipt were raised to the trial. No issue of fraud or forgery was raised at the trial.

Since the respondent admitted owing the appellant 24,000/= as rent, the learned magistrate, in my view was right in accepting both the claim of the appellant and the counterclaim of the respondent. This is based on the evidence on record.

Again though it has been raised on appeal that the spare parts were second hand, that issue was not raised during the hearing. The learned magistrate could not thus imagine how much those spares would be worth. It is admitted by the appellant and his witnesses that the spares were indeed taken away by the appellant in the absence of the respondent. No suggestion was made for the return of the said spares to the respondent. Even in this appeal, no such suggestion has been made.

On the issue of the learned magistrate not making any order to costs, costs are awarded at the discretion of the court. In my view in that circumstances of this case, the learned trial magistrate was right in not penalizing any party to costs because both the claim of the appellant and the counterclaim of the respondent were successful.

In the result I find no merits in the appeal. The same is dismissed. I also order that in the

circumstances of the matter each party bears their respective costs of the appeal.

Dated this 30th day of April, 2015.

GEORGE DULU

JUDGE