REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCA NO. 185 OF 2011

INTER DIOCESAN PROPERTIES LTD.....APPELLANT

VERSUS

PAUL OKENO T/A NYAWARA INVESTMENT AGENCIES.....RESPONDENT

(Being an appeal from the Judgment of Ezra Awino Principal Magistrate delivered on the 16th November 2011 in the original Kisumu CMCC No. 1176 of 2002)

JUDGMENT

The Respondent by his Amended Plaint dated 25th September 2009 sought two prayers against the Appellant.

a) A declaration that the distress is unlawful wherefore an injunction do issue restraining the defendant by itself, its servants or agents from distraining the Plaintiff's goods without recourse to due process of the law under Cap 301 and more particularly pending the hearing and determination of the Plaintiff's reference to the Business Premises Tribunal.

b) General damages for trespass, breach of contract and loss of profits as above.

c) Costs of this suit plus interest thereon.

Prayer (b) was anchored upon paragraph 7 of the Plaint which averred as follows:-

"In breach of contract the defendants closed the suit premises for 21 days from 13th October 1999 to 3rd November 1999 which closure amounted to trespass, and by reason of that closure the Plaintiff suffered great losses and damages; in particular the Plaintiff lost a contract worth Kshs.1,500,000/= during that period from which he would have earned a profit of Kshs.450,000/= for which the Plaintiff now holds the defendant liable."

After hearing and considering the evidence of the Plaintiff as well as the defendant the trial Magistrate found it a fact that the Appellant had indeed closed the Respondent's business premises situate at Alpha House in Kisumu on 13th October 1999 and only opened the same on 3rd November 1999 after the appellant had obtained an order in Kakamega HCCC 2 of 1993 **Diocese of Maseno South and West V. Nyawara Investment Agencies.** He found that the said closure was unlawful and illegal and amounted to trespass and breach of contract and awarded the Respondent general damages in the sum of Kshs.200,000/= and the costs of the suit.

Being aggrieved the appellant appealed on the following grounds:-

1. THAT the learned trial magistrate erred in law and fact in finding for the Respondent when the Respondent's case as pleaded had not to the requisite standard been proved and indeed was against the welter of evidence on record.

2. THAT the learned trial magistrate erred in law and fact by finding that the appellant committed acts of trespass and breach of contract and that such acts were illegal when what he was called upon to declare was that distress was unlawful.

3. THAT the learned trial magistrate erred in law by selectively analyzing the evidence on record in a manner clearly directed at justifying the ultimate decision.

4. THAT the learned trial magistrate erred in law by misapprehending the evidence on record thereby erroneously finding that the dispute between the parties then before the Court was lodged with the Business Rent Tribunal or the complaint so lodged was dismissed when the contrary was the case.

5. THAT the learned trial magistrate erred in law and fact by finding and holding that the appellant closed the Respondent's rented premises in the absence of clear and cogent evidence.

6. THAT the learned trial magistrate erred in law and fact by placing undue reliance on the Court order from Kakamega H.C. Civil Suit No. 20 of 1993 Diocese of Maseno South & West -vs- Nyawara Investment Agency when the appellant was not a party thereto neither was the order directed at the appellant.

7. THAT the learned trial magistrate erred in law and fact by finding in the absence of any credible evidence and on the basis of the hearsay evidence that appellant had distrained the Respondent's properties.

8. THAT the learned trial magistrate erred in law and fact by placing under reliance upon Exhibit P10 which is a judgment in BPRT CASE NO. 6 OF 2003 Paul Otieno Okeno -vs- Inter-Diocesan Properties Ltd as a basis for a finding of distress or closure when that judgment related to the Respondent's reference in dispute to a notice of termination dated 31st January 2003 issued by the appellant long after the occurrence of the cause of action herein.

9. THAT the learned trial magistrate erred in fact and law by unduly disregarding the Appellant's evidence in defence in preference for that of the Respondent who was not even an eye witness to the alleged closure or distress.

10. THAT the learned trial magistrate erred in fact and law by finding that the appellant and the Diocese of Maseno South and West were one and the same entity or that the appellant was the agent of the Diocese of Maseno South and West in the absence of any such evidence.

11. THAT the learned trial magistrate erred in law and fact by finding that the Appellant upon the order produced as Exh. P10 opened the Respondent's door on the face of express denial by the Appellant witnesses and in the absence of any eye witness account.

12. THAT the learned trial magistrate erred in law by finding that as a result of the alleged closure of the Respondent's premises the latter was denied an opportunity to participate in a tender notwithstanding that several options availed the Respondent.

13. THAT the learned trial magistrate erred in law by failing to find and hold that despite the closure, happening of which is denied, the Respondent was under a duty to mitigate his losses by taking preemptive action.

14. THAT the learned trial magistrate erred in law by failing to find and hold that the Respondent was in any event indolent in seeking redress post the alleged closure of his premises, a fact that largely contributed or wholly caused his predicament.

15. THAT the learned trial magistrate erred in law and fact by finding that the appellant was the owner of Alpha House in the absence of any such evidence.

16. THAT the learned trial magistrate erred in law and fact by finding that the closure of the premises was an attempt by the Appellant to force the Respondent out of the premises and especially when eviction was not an issue falling for determination.

17. THAT the learned trial magistrate erred in law by placing undue regard upon the alleged lost opportunity to tender and allowed the same to undue influence his assessment of the quantum of damages.

18. THAT the learned trial magistrate erred in law in awarding the Respondent a quantum of damages that was inordinately high as to constitute an erroneous estimate and injustice.

19. THAT the learned trial magistrate erred in law and fact by failing to properly analyze the evidence on record and draw the reasonable conclusion any tribunal ought to make.

The appeal was canvassed by way of written submissions and as submitted by counsel for the Respondent my duty as the first appellate Court is to reconsider the evidence, evaluate it and draw my own conclusions while bearing in mind that I neither saw nor heard the witnesses – **Selle V. Associated Motor Boat Company [1968] E.A. 123.** Also as stated by the Court of Appeal in **Tayab V. Kinanu [1983] KLR 114:-**

"An appellate Court would not interfere with a judge's findings of fact based on his assessment of the credibility and demeanour of witnesses who gave evidence before him, unless it was wrong in principle."

Throughout the trial it was not disputed that the respondent was the appellant's tenant at Alpha House, Kisumu and that the said tenancy was a controlled tenancy under section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap. 301.

At the hearing the Respondent concentrated on prayer (b) of the Plaint and contended that the appellant unlawfully closed his premises between the material dates. He produced several documents the most relevant to this prayer being "Sudd Consultants Standard Form for Tender Results (EXB.P.12). He contended that as a result of the wrongful closure of his premises by the appellant he could not put in his bid for that tender and as a result he lost 450,000/= which he could have made as a profit. He stated that the premises were only re-opened on 3rd November 1999 when he served an order he obtained from Kakamega High Court in HCCC 2 of 1993 upon the Appellant's agents.

This was vehemently disputed by the appellant's witnesses who testified that it was the Respondent who abandoned the premises. They stated that he left them to another person who may have closed them and whereas they conceded seeing the High Court Order they denied that they re-opened the premises.

Trial Magistrate relied on Tanui J's order in Kakamega HCCC 2 of 1993 wherein on 25th October 1999 he ordered the Plaintiff to re-open the premises of the applicant pending hearing of the application interpartes on 8th November 1999. The record however shows that the application upon which that order was premised and which application was dated 21st October 1999 was on 19th February 2000 withdrawn with costs to the Plaintiff (The Diocese of Maseno South & West) which had taken the applicant (now Respondent in the instant suit) for a totally different matter. The withdrawal of that application and the award of costs to the Plaintiff before the matter was heard interpartes in my view rendered the order issued by the Judge inoperative.

The same cannot therefore be cited in this case as evidence confirming the closure of the Plaintiff's premises by the defendant in the instant case and clearly the trial magistrate acted on a wrong finding of fact.

Weighing the evidence of the Respondent against that of the witnesses called by the Appellant it is improbable that it was the Appellant or her agents that caused the closure of the Plaintiff's premises. To the contrary it was a person (subtenant) who locked the premises and left. Moreover the letter dated 8th November 1999 from Sudd Consultants and which the Plaintiff produced as exhibit P.12 indicates that whereas the Plaintiff's request for late consideration was put to the clients the reason it was not considered was that the lowest bidder, Gumba Building Constructor had reduced his contract further by allowing some percentage and was therefore going to execute the project slightly less than the Plaintiff's figure of 1,500,000/=. Therefore the reason the Plaintiff lost the tender was that the lowest bidder had reduced his contract further meaning he went slightly less than the figure of Kshs.1,500,000/= quoted by the Plaintiff. It was not because the Plaintiff's premises had been closed by the defendant as alleged. That letter reads:-

''Dear Sir,

RE: PROPOSED CONSTRUCTION OF FOUR BED-ROOMED HOUSE FOR MR. AND MRS OSIR AT OTONGLO IN KISUMU.

We acknowledge a receipt of your letter of reference NIA/OF/11/1999.

In respect to the above subject, we are sorry to inform you that we indeed floated your request for late consideration to our client but the lowest bidder, Guumba Building Constructor who happened to be with the lowest bid accepted to reduce his contract further by allowing some percentage, thus he is going to execute the project slightly less than your quoted figure of Kshs.1,500,000.00.

We are sorry for the hitch which made you not to submit your Bills of Quantities with others. We will consider you for any other project that would come by.''

There is also the issue of remoteness of damage. Apart from not being told when this tender was floated vis avis the alleged closure of the Plaintiff's premises which as I have stated was never determined as a fact as the application relating thereto was withdrawn before it was heard interpartes it was not demonstrated that the Defendant had any possibility of foreseeing the same. In awarding of damages the Trial Magistrate stated as follows:-

''There is evidence that some bids were sent out by Sudd Consultants and that he lost the opportunity to tender for the same because of the closure of his business. I agree that there was no guarantee that the Plaintiff would win the tender, he however, had equal chance as the others, he was denied opportunity to compete. He stated that he had in the past done some work for the same people and that would have worked in his favour. I would in the circumstances assess general damages at Kshs.200,000/=, with cost and interest from the date of this judgment.''

This as I have stated was based on a wrong finding of fact as albeit late the Plaintiff was given an equal chance to compete but his bid fell short of that of the lowest bidder who went even further.

The Plaintiff's claim was for general damages for trespass, breach of contract and loss of profits of 450,000/= as stated in paragraph 7 based on closure of his premises from 13th October 1999 to 3rd November 1999 which as I have stated he did not prove on a balance of probabilities. The appeal has merit and is allowed with costs to the Appellant.

Signed, dated and delivered at Kisumu this 23rd day of July 2015

E. N. MAINA

JUDGE

In the presence of:-

N/A for the Appellant

Mr. Orengo for the Respondent

CC: Moses Okumu