



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 148 OF 2013

DEWDROP ENTERPRISES LIMITED.....APPELLANT

VERSUS

ELKANAH GEKONGE MANGERA.....RESPONDENT

(An appeal from the ruling and order of Hon. W. F. Andayi in Milimani Commercial Courts CMCC No. 1268 of 2011 delivered on 20th September, 2012)

JUDGMENT

1. This appeal emanates from a ruling which dismissed the Appellant's application which sought to have the Respondent's plaint struck out.
2. The origin of the dispute between the parties is a proclamation of the Respondent's household items which was caused by the Appellant. It was the Respondent's case in his plaint that on 3rd May, 2011, the Appellant instructed Jogan Dries Services to proclaim his household items for unspecified rent arrears. He claimed that he was not in rent arrears with the Appellant and that his plea to the Appellant to stop the proclamation was futile. The Appellant filed an amended defence and counter-claim and denied the claim. It contended that as at 3rd May, 2011, the Respondent had accrued rent arrears of KShs.20,000/= for April, 2011 and KShs. 40,000/= for May, 2011 together with late payment fees of KShs. 4,000/=. The Appellant counter claimed that the Respondent on 29th September, 2011 removed his distrained goods from the Appellant's premises without first settling the rent arrears and paying auctioneers fees of KShs. 14,400/=. It was claimed that after taking into account the Respondent's deposit of KShs. 80,000/=, the Respondent was indebted to the Appellant in the sum of KShs. 310,658/= resulting from the breach of duty. In the said counter claim, it was alleged at paragraph 12 that the Respondent in admission to his indebtedness paid the Appellant KShs. 80,000/= as overdue rent for May, 2011 and June, 2011. The Respondent filed a reply to defence and defence to amended counter claim and particularly denied having made any admission or any indebtedness to the Appellant.
3. Before the suit could be set down for hearing, the Appellant filed a motion through which it sought to have the plaint and the reply to defence and amended counter claim struck out. The grounds upon which the application was premised were that the pleadings were frivolous, vexatious, an abuse of court process and that the reply to defence and amended counter claim dated 13th February, 2012 was filed without leave of court. In the supporting affidavit of Edward Thiong'o who is a Director of the Appellant, it was contended that the Respondent was in arrears of water and electricity bill to the tune of KShs.49,426/08 and KShs.10,520/01 as at 3rd June, 2011 as well as rent arrears of KShs.60,000/= together with auctioneers fees of KShs.14,400/=. The Appellant's main contention was that the Respondent admitted to his indebtedness to the Appellant and paid a sum of KShs. 80,000/= as overdue rent for May, 2011 and June, 2011. It was claimed that the Respondent was a habitual defaulter of the tenancy agreement. The Appellant

averred that in the year 2012, the partners in Morara Ngisa & Company Advocates, to wit Ronald Morara, Ngala Stephen Cosmas and Oeri Alice Nyomenda were not certified to practice as advocates. In this regard, the Appellant annexed a printout from the Law Society of Kenya database and urged that the Plaint be struck out.

4. In his replying affidavit, the Respondent denied having consented to his cheque number 100064 being applied for part payment of rent and water bills; that 1st May, 2011 was a public holiday on which date he could not make any transactions and that the following days fell on a weekend hence the distress was unlawful; that it was unlawful to distress rent for one month's rent especially when a tenant made rent deposit; that the distress was unlawful since the auctioneer in question was not licensed; that it had been agreed that he was meant to sort out issues relating to water bill with the Nairobi Water company, that he stopped using a post paid electricity meter after he had cleared with Kenya Power and Lighting Company and that he uses the prepaid meter; that at the expiry of his tenancy he wrote a letter through his lawyers which elicited no response but that he left his deposit of KShs. 80,000/= which was to cater for the rent for September, 2011 and KShs. 40,000/= for repairs and that he was to be refunded the balance. In response to the Appellant's allegations that the Respondent's advocates were not allowed to practice in the year 2012, the Respondent annexed practising certificates for the said advocates for the year 2012.
5. The Appellant filed a supplementary affidavit and denied having received the letter dated 14th May, 2011 from Nairobi City Water and Sewerage Company. It was contended that paragraph 7 of the replying affidavit offended section 102 of the Evidence Act, that 3rd May, 2011 fell on a Tuesday and that rent for May, 2011 could have been paid in April, 2011; that as per the terms of the tenancy agreement, the deposit was not to be used as rent payment; that the auctioneer was licensed; that the Respondent stopped using post-paid electricity meter on 3rd June, 2011 and that the Respondent was on 2nd June, 2011 ordered to pay the Appellant KShs. 80,000/= being rent arrears for May and June, 2011.
6. The trial magistrate heard the application and dismissed the application. The application was dismissed on the basis that the issue of whether or not the Respondent was in arrears will be determined on merit and that the issues raised by the Appellant did not address the orders sought. Aggrieved by the said decision, the Appellant preferred this appeal on the grounds that:-
 - i. ***The learned magistrate erred in law and in fact in finding that paragraphs 5, 6 and 7 of the plaint dated 6th May, 2011 were not frivolous, vexatious, an abuse of the process of the court and may delay the fair trial of the action;***
 - ii. ***The learned magistrate erred in law and in fact in his finding that the Appellant did not file an affidavit of service of the defence and amended counter-claim dated 30th January, 2012;***
 - iii. ***The learned magistrate erred in law and in fact in his finding that the reply to defence and amended counter claim dated 13th February, 2012 was properly filed under Order 8 rule 1 (3) of the Civil Procedure Rules;***
 - iv. ***The learned magistrate erred in law and in fact in his refusal to admit into evidence exhibit ETW-14 annexed to the supporting affidavit of Edward Thiong'o Wachira sworn on 27th February, 2012;***
 - v. ***The learned magistrate erred in law and in fact in failing to find that the reply to defence and amended counter claim dated 13th February, 2012 was not frivolous, vexatious, an abuse of process of court and may delay the fair trial of the action;***
 - vi. ***The learned magistrate erred in law and in fact in failing to narrow or resolve the outstanding issues;***
 - vii. ***The learned magistrate erred in law and in fact in totally disregarding the Plaintiff's evidence;***
 - viii. ***The learned magistrate erred in law and in fact in failing to interpret the tenancy agreement in accordance with the clear expression of the document in question; and***
 - ix. ***The learned magistrate erred in law and in fact in failing to allow the Appellant's application dated 27th February, 2012.***
7. This being a first appeal, I am called upon to re-evaluate the facts afresh, re-assess this case and make my own independent conclusions as was held in ***Peters v. Sunday Post (1958) E.A. 424.***

8. To have succeeded in its application, the Appellant must have demonstrated that the Plaint is frivolous and vexatious. For a plaint to be termed scandalous, frivolous or vexatious, an applicant must establish matters therein which are indecent, offensive, allegations made in the plaint for the mere purpose of abusing or prejudicing the opposite party; immaterial or unnecessary matters which contain certain prejudicial imputation on the opposite party; allegations which charge the opposite party with bad faith or misconduct, degrading allegations on the opposing party or matters which are necessary but are accompanied by unnecessary detail; unless of course, though scandalizing, the matter is relevant and admissible in evidence to prove the truth of some allegations in the plaint. A pleading can also be frivolous if it has no substance, it is fanciful or that the party is simply trifling with the court or wasting the courts time. A pleading is also vexatious if it has no foundation in law, it is filed for the mere purpose of annoying the other party; it is leading to no possible good and has no chance at all of succeeding. Further, pleadings are otherwise an abuse of the court process when they are filed in court simply to waste its time or when they are otherwise worthless or to delay the due process of law.
9. The Appellant claims that the proclamation was lawful since the Respondent was in arrears which arrears he acknowledged. On the other hand the Respondent denies having acknowledged any arrears and stated that he was in one month's arrears but had paid a deposit and that since he had paid a deposit, the Appellant had no right to proclaim against him. These are issues that can only be resolved on merit by full hearing. It must also be noted that for judgment on admission to be issued, an admission must be unequivocal and it was upon the Appellant in this instance to so prove. An unequivocal admission was defined in **Equitorial Commercial Bank Limited v. Microhouse Net Limited (2005) eKLR** to be one that is plain, clear and obvious. Nowhere in the affidavits on record has the Appellant demonstrated that the Respondent made an admission in terms of the definition in **Equitorial Commercial Bank Limited** case (supra) and I find no basis on the argument on that ground.
10. As for the issue that the Respondent was in arrears, it was contended that the arrears was for one month and that when the Respondent approached the Appellant to sort out water issues, the Appellant informed him to deal with Nairobi Water and Sewerage Company directly. The Respondent further alleged that he changed his meter from post paid to pre-paid meter and had no arrears. To determine whether or not the proclamation was lawful, the above issues must be heard on merit at a full hearing and evidence tested. I find that the Appellant did not establish that the plaint was frivolous or vexatious since it raises issues that are truly triable.
11. On the issue of the defence and counter claim dated 13th February, 2012 being filed without leave for the reasons that the Respondent's advocates were not allowed to practice in the year 2012, it is noteworthy that the Respondent produced copies of his advocates' practicing certificates for the said year and proved that they were allowed to practice. Further as was stated by the trial Magistrate, the printout produced by the Appellant was not authenticated to establish that it emanated from Law Society of Kenya. In the circumstances I find no merit in this appeal and uphold the trial courts finding.

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A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 21st day of September, 2015.

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JUDGE