



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 148 OF 2007

MACHARIA KARANJA.....APPELLANT

VERSUS

SAMUEL ONYANGO.....RESPONDENT

J U D G M E N T

1). The appellant herein was the respondent's landlord in respect to house situate at in plot No. 418 Manyatta 'A' within Kisumu town. According to the plaint the respondent defaulted in the rent payment to a tune of Kshs. 23,500/= which necessitated the appellant to instruct M/S Ikiriwaya auctioneers to recover the same by levying distress.

The respondent did pay the same by installments which amount was paid directly to the said auctioneers. The total amount paid was Kshs. 37,000/= which included the sum of Kshs. 11,000/= being the auctioneers charges.

2). It was therefore the respondent's defence that the whole amount of Kshs. 29,000/= demanded in the plaint was paid and it was the responsibility of the appellant to collect the same from the auctioneers.

This was the position taken by the court in dismissing the appellant's case.

The said dismissal has provoked this appeal which comprises five grounds. The substance of the said appeal is that the trial magistrate misdirected herself in finding that the rent had actually been paid without taking into consideration the evidence tendered by the appellant.

3). The duty of this court is to evaluate the evidence afresh with a view of arriving at a fresh and independent decision taking into consideration that the trial court had the advantage of seeing the parties adduce their evidence.

4). There is no doubt that the respondent was indeed a tenant to the appellant. But was there any default on rent payment? Evidence on record shows that it was only the appellant who testified and produced exhibits P1 and P2. The respondent was not permitted even to cross examine as he did not comply with some previous court orders. This was a discretion exercised by the trial court and since there is no cross appeal, I shall not comment further on this.

5). The two exhibits are therefore crucial in this suit. Exhibit 1 is the letter from auctioneer detailing the amount collected and remitted to the appellant and what was their costs. It appears that the outstanding rent arrears by May 2002 was Kshs. 23,500/= and the same was paid by installments which was

completed on 8-11-2002 and it totaled Kshs. 37,000/=. Out of this the auctioneer charges were Kshs. 11,000/= therefore the appellant was paid Kshs. 26,000/=.

6). According to the respondent this was the amount due and that infact he overpaid the appellant. As stated earlier on the court accepted this position.

But from the analysis of the trial court it is clear that exhibit P2 was not taken into consideration. The said exhibit is a letter dated 15-11-2002 from the appellant to the respondent which it partly states:

“.....you vacated from the premises on 8th November, 2008 the date you handed over keys, one of which does not belong to either of the locks in the premises. You are yet to handover the other keys numbering (9). You also vacated having not cleared the sum of Kshs. 29,000/= being an accumulated house rent arrears from the month of May balance of Kshs. 2000/=, June upto November 2002 at Kshs. 4500/= per month. This is going per the firms statement on your payment dated 12th November 2002. A copy of the same is enclosed herewith for your ease of reference”.

7). An analysis of this letter which the trial court did not refer shows that while it is true that the respondent paid the arrears between May 2002 to November 2002 of Kshs. 23,500/= it was not paying the outstanding monthly rent. If the sum of Kshs. 23,500/= was the rent then why did the appellant instruct the auctioneers to levy distress? If that was the position it meant that the respondent ought to have moved out of the premises by May 2002 and continued to pay the rent arrears while having vacated the premises.

8). My finding therefore is that the respondent took advantage of the rent arrears of Kshs. 23,500/= which he paid in arrears and conveniently treated it as rent between the month of May 2002. Further, the quoted letter above was not responded to by the respondent.

Infact there seems to be another letter though not produced dated 8-4-2012 which instructed the bailiffs to levy distress which as correctly admitted by parties they proceeded to do so.

9). The upshot of this finding is that the respondent ought to have paid the monthly rent of Kshs. 4,500/= even as he pays the other rent arrears of Kshs. 23,500/=. Between May 2002 and November 2002 he did not pay any monthly rent but he only paid the arrears. He cannot be allowed to benefit from this. He stayed in the appellant's premises and he ought therefore to pay.

I shall therefore set aside the lower court's judgment by allowing this appeal. The respondent should pay the sum of Kshs. 29,000/= together with interest from the date of filing the suit in the lower court. The appellant shall have the costs of this appeal as well as costs in the lower court.

Dated, signed and delivered at Kisumu this 27th day of March, 2014.

**H.K.
JUDGE**

CHEMITEI