



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.908 OF 2007

VINAY PRABHULAL SHAH.....APPELLANT

VERSUS

CHANDULAL S. SHAH.....1ST RESPONDENT

ASHOK K. SHAH.....2ND RESPONDENT

(Appeal from the original judgment and decree in Milimani Commercial Courts Nairobi, CMCC No. 9329 of 2002 delivered on 31st October, 2007 by Hon. Mr. Cheronno (SRM))

JUDGMENT

1. The respondents' claim in the trial court was that they entered into an oral landlord-tenant agreement with the appellant. The house rent was KShs. 50,000/- payable on the first day of every month. On or about November, 1998, the appellant vacated the house leaving arrears of KShs. 250,000/- for the months of July, 1998 to November, 1998. They claimed that the appellant issued them with two cheques of KShs. 50,000/- and KShs. 100,000/- which cheques were dishonoured by his bank and the respondents charged a commission of KShs. 500/- for each cheque. The respondents then sued the appellant seeking rent arrears of KShs. 250,000/-, KShs. 50,000/- being one month rent in lieu of notice and KShs.1000/- being commission charged on the dishonoured cheques plus interest at court rates from November, 1998 till full payment.
2. The appellant entered appearance and filed a defence as follows:

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1. *The defendant admits the descriptive parts of paragraphs 1 and 2 of the plaint in so far as the same are only descriptive of the parties herein save that the defendant's address for service for the purposes of this suit will be care of Otieno Okeyo & Co. Advocates, Old Mutual Building, 4th Floor, Kimathi Street, P.O. Box 9684-00100, Nairobi.*
2. *The defendant has no information with which to answer to paragraph 3 of the plaint and the plaintiffs are put to strict proof thereof.*
3. *The defendant denies the contents of paragraph 4-5 of the plaint and puts the plaintiffs to strict proof thereof.*
4. *The defendant denies the contents of paragraphs 6 and 7 of the plaint and puts the plaintiffs to strict proof thereof.*
5. *The contents of paragraph 8 are denied and the plaintiffs are put to very strict proof thereof.*
6. *The contents of paragraphs 10 and 11 are admitted by the defendant...*”

3. The matter went for trial and the learned trial magistrate entered judgment for the respondents

against the appellant for KShs. 250,000/- being rent arrears from July, 1998 to November, 1998 and KShs. 1,000/- being bank charges for the dishonoured cheques together with interest at court rates.

4. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on the following grounds:

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- i. ***That the honourable magistrate in reaching the said decision and judgment erred in law and in fact in awarding the respondents KShs. 151,000/- when in fact the respondents failed to prove any claim against the appellant.***
- ii. ***The honourable magistrate erred in law and in fact in awarding the respondents KShs. 151,000/- when there was no pleading to support the same and no evidence was also led to support the same.***
- iii. ***The honourable magistrate erred in law and in fact in failing to take into consideration the appellant's uncontroverted evidence that clearly established that the appellant owed no money to the respondents contrary to the claim in the plaint.***
- iv. ***The honourable magistrate erred in law and in fact by reaching the said judgment against the proceedings on record, available evidence and submissions made before the court and thereby came to a wrong conclusion.***
- v. ***The honourable magistrate erred in law and in fact in not appreciating that the evidence led by the respondents failed completely to support the pleading and as such, the respondents failed to establish their claim against the appellant on a balance of probability.***
- vi. ***The evidence produced in court by both the respondents and the appellant clearly established that the respondents' claim was unfounded and frivolous and yet the learned magistrate found otherwise.***
- vii. ***The respondents' own exhibits exonerated the appellant from liability to the respondents. a finding by the honourable magistrate that put liability against the appellant is flawed and erroneous in fact and in law.***
- viii. ***The respondents failed to prove their claim against the appellant to the required degree of proof.***”

5. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: ***Peter v. Sunday Post (1958) at pg. 429.***)
6. The issues that were in contention were the exact time of vacation of the premises, whether rent in lieu was payable to the respondents and whether or not the appellant owed any rent to the respondents. The 2nd respondent testified that the appellant made payment vide cheques. The appellant issued cheque No. 200055 for KShs. 50,000/- for the month of January, 1998; cheque No. 200057 for KShs. 100,000/- for the month of February and March, 1998; cheque No. 20058 for KShs. 100,000/- for April and May, 1998; cheque No.s 200660 and 200065 for June and July 1998 and cheque No. 2000069 for August, 1998. He stated that no further payments were made until 12th October, 1998 when September rent was paid vide cheque No. 200085 for KShs. 50,000/-. Cheque No. 200057 for February and March rent bounced but was replaced it vide cheque No. 236905. He stated that cheque No. 200085 for the month of September, 1998 too bounced. No replacement was made for the September cheque. He stated that the appellant vacated the premises on 26th January, 1999 without notice. That the appellant was in arrears of five (5) months rent. He further stated that the appellant had promised to pay rent in lieu of notice but failed to make good his promise.
7. On cross examination, the 2nd respondent confirmed that the appellant had no rent arrears until the month of September but maintained that the appellant left the premises on 25th January, 1999.
8. The appellant denied the respondents' claim and testified that he issued a cheque No. 200065 for KShs. 50,000/- in settlement of September rent and Cheque No. 1411730 for KShs. 50,000/- (P. Exhibit 10) was for October rent. He stated that he stopped the cheque for November rent since he

intended to vacate the premises. He maintained that he vacated the premises at the end of October and had informed the respondents three weeks prior to vacating.

9. From the evidence on record, it is clear that the only rent that is in arrears is that of September considering that its cheque was dishonoured. The appellant's allegation that he vacated the premises in the month of October was not rebutted in evidence. In the circumstances I find and hold that the appellant owes the respondents KShs. 50,000/- being rent arrears for the month of September. Rent in lieu notice was not proved. I set aside the judgment/decree of the trial Court and substitute it with an award of Ksh. 50,000/= The appeal is allowed to that extent. Each party to bear its own costs. Orders accordingly.

Dated, Signed and Delivered in open court this 18th day of December, 2014.

J. K. SERGON

JUDGE