



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 79 of 2010

PHILIP ISAAC KINGOINA MONG'ARE APPELLANT

VERSUS

KENYORO FARMERS CO-OPERATIVE SOCIETY CO. LTD.RESPONDENT

(Being an appeal from the judgment and Decree of C.G. Mbogo, CM dated 1st April 2010

in the original Kisii Senior Principal Magistrate's Civil Suit No.200 of 2007)

JUDGMENT

THE PLEADINGS

1. The appellant herein, Philip Isaac Kingoina Mongare was the plaintiff in Kisii PMCC Number 200 of 2007 in which he sued the respondent herein seeking judgment in the following terms:-

- A. *An order addressed to the Management of the defendant company requiring them to put the plaintiff in vacant possession of one shop on plot No. Kisii Township BIII/76 forthwith.*
- B. *An eviction order do issue against current occupants and all their servants, agents and employees.*
- C. *Damages for breach of lease contract and loss of user.*
- D. *Costs of this suit and interest.*

Alternatively

E. *A refund of Kshs.120,000/=, interest thereon from 01/01/2007 to date at court rates plus prayer (c) and (d) above.*

2. The appellant's claim was premised on an alleged lease agreement entered into on 1st day of January 2000, by which agreement, the respondents officials are said to have agreed to grant a 5-year lease of the suit premises to the appellant at a monthly rent of kshs.10,000/=. The appellant also averred that after due execution of the said lease agreement, he deposited a sum of Kshs.120,000/= being rent for 12 months, but for reasons unknown to the appellant, he was not put into possession of the suit premises as agreed or at all, hence the filing of the suit that has given rise to this appeal. The appellant alleged breach of the lease agreement by the appellant's officials who he said also refused to heed his calls to put him into possession of the suit premises.

3. The respondent entered appearance and also filed defence on 17th May 2007. In the defence, the Respondent denied the appellant's allegations and averred that it never entered into any lease agreement with the appellant as alleged or at all. The respondent also averred that the appellant's suit was bad in law as same had been filed out of time. The appellant also denied that the appellant ever paid the sum of Kshs.120,000/= as rent or at all and put the appellant to strict proof of the same.

4. The appellant did not file a reply to defence but there is evidence showing that leave to file suit out of time was granted to the appellant on 7th August 2006 – see paragraph 7 of the plaint dated 26th April 2007 and filed in court on 27th April 2007.

THE APPELLANT'S CASE

5. At the hearing of the case before the trial court the appellant testified and also called one witness. He stated that by an agreement entered into on 1st January 2000, he and the respondent entered into a 5-year lease for which he paid Kshs.120,000/= being a year's rent. He produced **P. Exhibit 2** being a receipt dated 9th July 1999 issued by the Respondent to the appellant for Kshs.120,000/= as rent for the house for the year 2000. The appellant stated that the lease agreement **P. Exhibit 3** was signed by Samwel Nyakora, Ratemo Onsongo and Yohana Mireri on behalf of the Respondent in the presence of Innocent Maisiba, Advocate. That the appellant also signed the lease in the presence of the same advocate.

6. The appellant testified further that the lease was to commence on 1st January 2000 but the same did not happen. That on 6th December 2002, the appellant met the respondent's officials at Kisii Farmers Co-operative Union Boardroom where vide the minutes of the same meeting produced as **P. Exhibit 5**, the Respondent promised to give vacant possession of the premises to the appellant. That promise never materialized and the appellant was forced to file suit. The appellant also testified that before filing suit he obtained leave of the court on 7th August 2006 vide HC Misc. Application Number 85 of 2006 (O.S).

7. It was also the appellant's testimony that the lease agreement was duly stamped and sealed on each page and that the lease was in respect of plot Number BIII/76 situated within Kisii Town. The appellant stated that he was seeking judgment for specific performance as well as damages for breach of contract or in the alternative a refund of Kshs.120,000/= paid on 9th July 1999 as rent for the year 2000.

8. In cross examination, the appellant testified that though he paid the sum of Kshs.120,000/= on 9th July 1999, the lease agreement was not dated. He also testified that he could not remember the names of the people who issued the receipt to him, but he was certain of the names of those who signed the lease agreement, among them Samwel Nyakora, the Chairman of the Respondent herein. The appellant was however unable to produce any documentary evidence showing his formal request to be considered as a tenant of the respondent. He was also unable to produce the minutes of the respondent's board authorizing the lease arrangement between himself and the respondent, although in re-examination he insisted that he had written to the respondent seeking to be considered as a tenant.

9. PW1 was Andrew Palfor Nyamasege, who was Secretary/Manager of the Respondent herein as at 6th December 2002. He testified that he was the one who recorded the minutes of the respondent's meeting held on 6th December 2002. The minutes were produced as **P. Exhibit 5**. He confirmed to the court that a notice was issued to the Respondent by the firm of Mose and Mose Advocates regarding the matter in hand.

10. During cross-examination, PW1 stated that he had no documentary proof that he ever worked with the Respondent. He also testified that according to **P. Exhibit 5**, there was an agreement dated 9th July 1999 entered into between the appellant and the respondent, although the agreement produced by the appellant being **P. Exhibit 3**, did not reflect the date of 9th July 1999 but only refers to 1st January 2000. PW1 also testified that the sum of Kshs.120,000/= paid by the appellant was received by the Respondent, and the lease agreement was in respect of Plot No. Block III/76, Kisii Town, which plot was owned by the Respondent in this case.

THE RESPONDENT'S CASE

11. The Respondent's case was supported by the testimony of DW1, John Gesora Asiago, the then Chairman of the appellant and who had occupied that position since 2005. DW1 stated that the suit premises belonged to Kisii Total Kenya Limited as per Certificate of Official Search produced as **D. Exhibit 1**, and that the Respondent's plot was Kisii Block III/78 on which stands a building. The witness produced the Respondent's title deed for plot Block III/78 as **D. Exhibit 2**. DW1 also stated that Samwel Nyakora, Ratemo Onsongo and Yohana Mireri were once officials of the Respondent, and that if they purported to lease Block III/76, then they did so fraudulently. DW asked the court to dismiss the appellant's case with costs.

SUBMISSIONS

12. The parties filed written submissions after the close of their respective cases. Counsel for the appellant submitted that the appellant had proved his case on a balance of probabilities and that he had demonstrated that he had a cause of action against the Respondent. On the issue of the actual plot, the subject matter of the suit, counsel for the appellant submitted that the Respondent was guilty of misrepresentation, and that in the circumstances, the appellant was entitled to compensation for breach of the lease agreement. Counsel urged the court to award Kshs.3,000,000/= for breach of contract and special damages in the sum of kshs.120,000/=.

THE JUDGMENT

13. After carefully considering all the evidence and the submissions made, the learned trial magistrate found that the appellant had not proved his case on a balance of probabilities. He noted that the persons the appellant should follow are Samwel Nyakora, Ratemo Onsongo and Yohana Mireri whose names appear in **P. Exhibit 3**. He also found that the said **P. Exhibit 3** was never registered at the Lands Office. The trial court also found that no evidence was led to show that the appellant was entitled to damages. The court believed the testimony given by DW1, Asiago as opposed to the testimony given by the appellant. The appellant's suit was accordingly dismissed with costs to the Respondent.

THE APPEAL

14. The appellant, being aggrieved by the entire judgment filed the instant appeal citing the following 9 grounds:-

- 1. The Learned Trial Magistrate totally erred in law and fact and misdirected himself on the principal of vicarious liability when we held that – we quot “the persons the plaintiff should follow are Samwel Nyakoria, Ratemo Onsongo and Yohana Mireri whose names appear in Ex No.3”.*
- 2. The Learned Trial Magistrate erred in law and fact by laying undue emphasis and appreciating evidence of the first defence witness who became a chairman of the respondent in 2005 and was not privy to the Lease Agreement (appellant's exhibit No.3) or any relevant transaction between the parties herein.*
- 3. The Learned Trial Magistrate erred in law and fact by failing to take cognizance and appreciate the fact that the appellant is still the respondent's tenant operating a bar business on Plot No.KISII TOWNSHIP/B III/76 – but behind the disputed one shop on the same plot.*
- 4. The Learned Trial Magistrate erred in law and fact by refusing to appreciate and accept the appellant's exhibits which proved that he deposited a sum of Kshs.120,000/= as rent for one full year with the then officials of the respondent and, hence, deserved grant of prayers sought in his plaint filed on 27th April 2007.*
- 5. The Learned Trial Magistrate erred in law and fact by laying undue emphasis on non-registration of the lease agreement in relevant lands office and, hence, decided the case on wrong principles of law.*

6. *The Learned Trial Magistrate erred in law and fact by failing to take cognizance of the fact that KISII TOWNSHIP/B III/76 (now registered as KISII MUNICIPALITY/BLOCK III/76 as per defence exhibit 1 (a0 changed ownership on 8th December 2004 – far much later a date after the lease agreement in issue herein had been executed.*

7. *The Learned Trial Magistrate erred in law and fact by failing to take cognizance of the fact that the appellant had proved his case on a balance of probability.*

8. *Had he considered the provisions of law relating to breach of contract, the Learned Trial Magistrate would have made a finding that the respondent's officials were in breach of the lease agreement and, hence, the appellant deserved grant of prayers he sought in his plaint.*

9. *The Learned Trial Magistrate's findings in the judgment are, clearly, against the weight of evidence advanced by the appellant and this constitutes a miscarriage of justice.*

SUBMISSIONS BY PARTIES HERETO

15. When this appeal came up for hearing on 17th May 2012, the parties agreed to proceed with the appeal by way of written submissions. The appeal was then slated for mention on 9th July 2012 for purposes of taking a hearing date, but on that day, the lawyers in Kisii were on strike and as a result, the appeal did not come up again until 27th November, 2012 after the strike had been called off on 23rd October 2012.

16. The submissions were however filed on 9th July 2012 and 31st July 2012 respectively. Counsel appearing wholly relied on the said submissions.

THE APPELLANT'S SUBMISSIONS

17. It is the appellant's contention, through the firm of Bigogo Onderi & Co. Advocates that this appeal has merit and prays that the same be allowed. Regarding ground one of appeal, it is contended that the fact that DW1 confirmed that Samwel Nyakora, Ratemo Onsongo and Yohna Mireri who executed the Lease Agreement were indeed at one time officials of the Respondent, should have convinced the trial court that the three executed the lease on behalf of the respondent. See the evidence of PW2. Counsel faulted the trial court for failing to find that the respondent was vicariously liable for the acts of Samwel Nyakora, Ratemo Onsongo and Yohana Mireri, which acts included executing **P. Exhibit 3** (lease agreement) in favour of the appellant; whether or not the three persons may have conned the appellant of his sum of Kshs.120,000/= paid on 9th July 1999 as rent for the suit premises for the year 2000.

18. On ground two, counsel argued that the evidence of DW1 clearly showed that the lease agreement was duly sealed on each page with the Respondent's seal. This is what DW1 said in response to some questions put to him during cross-examination:-

“I agree with you that the document bears the rubber stamp of the society. The monies indicated on the document is Kshs.120,000/= ---. Yes, the plaintiff is our tenant. He does not pay rent. Yes, his bar business is behind the shop that is the subject of this dispute.

19. Grounds three and eight were argued together to the effect that had the trial court addressed his mind to the testimony of DW1 in cross examination, he would have found as a fact that there was indeed a tenancy relationship between the appellant and the respondent. Counsel also argued, with respect to ground four that there was sufficient evidence before the court to show that the sum of Kshs.120,000/= was paid by the appellant to the Respondent.

20. Regarding grounds 5,6,7 and 9, it was contended that the trial court erred in both law and fact by failing to properly evaluate all the evidence on record and thereby reaching a wrong decision in the matter.

THE RESPONDENT'S SUBMISSIONS

21. These were filed by the firm of Kaburi Henry & Co. Advocates. Counsel submits that since the suit premises belong to a third party namely Total Kenya Ltd, the appellant had no cause of action against the Respondent, and that if the appellant had any claim in respect of the suit premises, the same should have been directed at Samwel Nyokora, Ratemo Onsongo and Yohana Mireri, the signatories of the alleged lease agreement.

22. Taking grounds 4-9 together, Respondent's counsel submits that the appellant should have sued Total Kenya Ltd. who are the registered proprietors of the suit premises. Further, that in the absence of registration of the lease agreement with the Lands Office, **P. Exhibit 3** was a worthless piece of paper as it also never bore the common seal of the respondent.

23. As regards the appellant's submission for payment of damages of Kshs.3,000,000/=, it is submitted that such damages being of a special nature were neither specifically pleaded nor specially proved. Same should be rejected.

24. Finally counsel submits that the three (3) individuals who purported to execute the lease agreement on behalf of the respondent should have been called to give evidence as to the capacity in which they were acting. Counsel urges court to dismiss the appeal.

THE DUTY OF THIS COURT

25. This is a first appeal. On this appeal, this court is under a duty to rehear the appellant's case by reconsidering and evaluating the evidence afresh. This court is also required to carefully consider and weigh the judgment of the trial court, with the ultimate purpose of determining whether the conclusions reached by the trial court were well founded. In doing this, this court is fully aware of the fact that it has no opportunity of either seeing or hearing the witnesses who testified before the trial court. It is only the trial court which enjoyed that singular privilege. In this regard therefore, this court must move with much circumspection in rehearing this case, while appreciating the fact that it is always a big thing for an appellate court to overturn the findings of a trial court which has had the opportunity to see and hear witnesses. See generally **Selle & another –vs- Associated Motor Boat Co. Ltd. & others [1968] EA 123** and **Peters –vs- Sunday Post Limited & another [1958] EA 424**. This court can therefore only interfere with the findings of the trial court if it is abundantly clear that the evidence on record does not support the conclusions reached or that the trial court applied the wrong principle in reaching the conclusions made.

FINDINGS AND CONCLUSIONS

26. I have now carefully reconsidered and evaluated the evidence afresh. I have also read all the pleadings, the proceedings and the judgment of the trial court. I have also carefully considered the submissions by counsel, while noting that for this appeal, counsel did not cite any authorities. I have however noted the authorities cited by counsel in support of their respective positions before the lower court.

27. Upon perusal of all the above, the issue that arises for determination is whether indeed the appellant proved his case against the respondent on a balance of probabilities. In my considered view, I am satisfied that there was sufficient evidence before the trial court confirming that the issue of the lease agreement between the appellant and the respondent was not in doubt. There was also ample evidence to show that the respondent did not meet its part of the bargain. Extract of minute No.395/28/01/02 of the Respondent's meeting held on 6th December 2002 at Kisii Union Boardroom confirms this position - Reference is made to **P. Exhibit 5**. There is also evidence from the testimony of DW1 that the three gentlemen, Samwel Nyakora, Ratemo Onsongo and Yohana Mireri were officials of the respondent round about the time the lease agreement was executed.

28. I am persuaded that such evidence indeed supported the appellant's case and clearly demonstrates

that the appellant had a cause of action against the respondent. As concerns the prayer for Kshs.3,000,000/= in general damages, it is my view that this amount was not pleaded, and even if it had been pleaded the appellant would have had to prove by evidence how the amount was arrived at. In any event, general damages are not ordinarily payable for breach of contract.

29. Regarding the alternative prayer by the appellant, it is clear that the appellant paid the said sum of money which was received by the respondent's former officials before DW1 took charge of the respondent in 2005. Even at the meeting of 6th December 2002, payment of monies by the appellant to the respondent is acknowledged. I am therefore of the considered view that this amount was refundable as the space promised to the appellant by the respondent, even as late as December 2002 had not been made available to him as at 27th April 2007 when the suit was commenced.

30. In the premises, I allow this appeal, set aside the judgment by the trial court and substitute therefor an order entering judgment for the appellant as against the respondent in the sum of Kshs.120,000/= plus costs and interest thereon at court rates from the date of filing suit until payment in full. The appellant shall also have the costs of this appeal.

31. It is so ordered.

Dated and delivered at Kisii this 31st day of January, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Bigogo (absent) for Appellant

Mr. Kaburi (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.