REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.30 OF 2006

PETER KIMANI WAIRAGU ……APPELLANT

VERSUS

JONATHAN A.O. WABALA ……..RESPONDENT

J U D G M E N T

1. Peter Kimani Wairagu (the "**Appellant**" also the "**Tenant**")was a tenant of Jonathan A.O Wabala (the "**Respondent**" also the "**Landlord**") in business premises situated in Busia Town. In the Lower Court the Respondent successfully maintained a claim against the Appellant for the sum of ksh.124,000/= in rent arrears.
2. Relying on an agreement dated 26th November 1996 the Respondent sought to demonstrate that his claim was unassailable. That agreement which the Appellant pleaded was *void ab initio* on account of misrepresentation turned out to be the most critical document at trial. It remains that important even now in appeal. That agreement which was witnessed by a Magistrate is short and needs to be reproduced.

"REPUBLIC OF KENYA

A G R E E M E N T

BETWEEN: JONATHAN A.O. WABALA ID.NO.2054300/65 – LANDLORD

AND: PETER KIMANI WAIRAGU IDNO. – TENANT

An Agreement to settle a defaulted pay of rent has been entered this 26th day of November, 1996 between JONATHAN A.O. WABALA herein referred to as the Landlord and PETER KIMANI WIRAGU herein referred to as the tenant. The tenant rented the premise of the Landlord on 30th day of September, 1993 and vacated November, 1996 without paying any rent, which mounted to kshs.160,500/= (one hundred and sixty thousand five hundred only).

WHEREBY THEY HAVE AGREED AS FOLLOWS:

1. THAT from 1st day of January, 1997 the tenant shall be paying ksh.7,500/= (Seven thousand five hundred only) until the ksh.160,500/= is cleared.

2. THAT the tenant to meet the repair charges.

3. THAT the tenant has also rented a kiosk from the land lord at kshs.1,500/= per month with effect from 1st day of December, 1996.

4. THAT both the landlord and the tenant have today signed this agreement without force to any of the parties.

SIGNED ON THIS 26TH DAY OF NOVEMBER 1996)
……

IN THE PRESENCE OF:) JONATHAN A.O. WABALA-LANDLORD

MAGISTATE/COMMISISONER FOR OATHS) PETER KIMANI WAIRAGU – TENANT"

3. The Respondents case was that after the agreement the Appellant only paid him ksh.58,500/= leaving a balance of ksh.102,000/=. That in addition there was another ksh.22,000/= being unpaid rent for 10 months for rent of the kiosk (see clause 3 of the agreement). On his part, the Appellant told Court that he started paying rent sometime in September 1993 for the premises which he vacated in November 1996. He showed the Court various receipts for rent paid prior to the Agreement. It is for this reason that the Appellant contended that the Agreement did not faithfully capture the fact that some rent had been paid at the time the Agreement was being signed.
4. The Appellant further said this of the Star agreement.

"I know Exhibit I signed it when he called me to Court. When the agreement was read to my children I was told I had been evicted. I signed the agreement not know (sic) exactly what it was when I got the receipts I found that I had over paid by ksh.89,805/=."

5. In the decision appealed from the Learned Magistrate concluded as follows:

"After considering the total evidence by the plaintiff and the defence I do find that the plaintiff on a balance of probability has proved his claim and judgment will be entere(sic) in his favour for ksh.124,000/= plus costs and interest. On the other hand the counter-claim relates to periods before 26/11/06 and the same has not been specifically proved hence the sa e(sic) dismissed with costs."

6. The decision of the Learned Magistrate was attacked by the Appellant on the following grounds.

"1. THAT the Learned trial magistrate erred in law and fact in entering judgment in favor of the Respondent as prayed in the plaint and dismissing the Appellant's Counter claim when the Respondent had failed to prove his case on a balance of probability and the Appellant had on the other hand proved his counter claim on a balance of probability.

2. THAT the Learned trial Magistrate erred in law and fact in making a finding that the agreement made on 26.11.1996 was valid for having been made before a competent court when no evidence was led to show that indeed the said agreement was made before a competent court.

3. THAT the Learned trial Magistrate erred in law and fact in making a finding based on an alleged agreement made on 26.11.1996 when the evidence on record contradicted the alleged terms of the said alleged agreement.

4. THAT the Learned trial Magistrate erred in law and fact in making a finding that the Respondent had proved his case on a balance of probability when the Respondent had admitted under cross-examination that he had received rent for the years 1994 and 1995 which vitiated the terms of the alleged agreement made on 26.11.1996 showing that the Appellant owed the Respondent kshs.160,000/= for the period 30.9.1993 and Nov 1996.

5. THAT the Learned trial magistrate erred in law and fact in making a finding that the Respondent was owed kshs.124,000/= in rent arrears when the Respondent had failed to prove on a

balance of probability that the agreed monthly rent was ksh.7500/= in respect of the shop space and kshs.1500/= in respect of the kiosk.

6. THAT the Learned trial Magistrate erred in law and fact in rejecting the evidence of the Appellant challenging the Respondent's claim of kshs.124,000/= and supporting his counter claim for kshs.99,500/= against the weight of the evidence on record.

7. THAT the Learned trial Magistrate erred in law and fact in not giving or taking directions regarding the issue of whether or not the trial ought to have started afresh upon taking over from the previous Magistrate.

8. THAT the 1st trial Magistrate erred in law and fact in continuing to her the case and take the evidence of PW1 without disqualifying herself given that her purported signature was not on the alleged Agreement made on 26.11.1996."

7. I start with the last two grounds.The Agreement was witnessed by a Magistrate who is now said to have presided over the hearing of the Plaintiffs case. The Court record shows that Judicial officer to be B. Maloba SRM (as she then was). It is however quickly noticed that the Defence case and the judgment was presided over and written by Keago R.M. So does the participation of Maloba SRM vitiate the proceedings?
8. Looking at the record, none of the parties asked the Learned Magistrate to disqualify herself. And the controversy surrounding the agreement is not about whether or not it was properly executed and attested but as to whether it was obtained by misrepresentation. At any rate, it is not said that the Learned Magistrate was partial or biased in the manner in which she presided over the Plaintiffs case. The issue that she should have disqualified herself seems to be an afterthought. That deals with that grievance.
9. True, the Magistrate who commenced the hearing is not the one who finalized it. The Pre-2010 Civil Procedure Rules were applicable to the proceedings that are the subject of this appeal. Order XVII Rule 10 provides:

"10.(1) Where a judge is prevented by death, transfer or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.

(2) The provisions of subrule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 18 of the Act."

Although the provisions refer to a Judge they would be applicable to a Magistrate as well because section 2 of The Civil procedure Act defines a Judge to mean "the Presiding Officer of a Court." There is no requirement that a partheard matter must start afresh. The Court record of 23/6/05 shows as follows:-

"23/6/05

Coram: E.H. Keago RM

Court clerk – Joshua

Plaintiff present

Defendant present

Wanga & co. adv./Omondi for the plaintiff present

Onsongo & co. adv. for the defendant present

AT 3.05

Mr. Omondi for the plaintiff

Mr. Onsongo for the defendant

Present

Mr. Omondi – we pray that the defence case be closed

LATER

Mr Onsongo

Im sorry I am late but I am ready to proceed with the defence case.

COURT

Matter to proceed for defence hearing."

The Appellant who was represented chose to proceed with his Defence case before the new officer and the Learned Magistrate gave those directions.

10. The other grounds can be dealt with together. The issue raised is whether, on the pleadings and evidence, certain payments said to have been made by the Appellant and which seem to contradict the terms of the agreement can be a basis for finding the Agreement void. As a corollary whether on the evidence the Trial Court ought to have found that the Appellant had overpaid by ksh.99,500/= and was therefore entitled to refund of the overpayment.
11. In the Agreement there is this statement made on the recital thereto.

"The tenant rented the premise of the Landlord on 30th day September 1993 and vacated November 1996 <u>without paying any rent</u>, which mounted (sic) to ksh.160,500/= (one hundred and sixty thousand five hundred only)."

The evidence on record does suggest that this statement is not an accurate statement of fact. This is because the tenant produced receipts showing that he had paid some rent in the period preceding the agreement. The Landlord himself said this in cross- examination,

"In 1994, I received all rent. In 1995 I also received the money."

Indeed the Trial Court held

"Although the Defendant had produced receipts which tends to show that he had overpaid by ksh.99,500/= the same are negotiated by P Exh 7 as some of the receipts date back (sic) to a period before the agreement was drawn."

12. The tenant sought to avoid the terms of the agreement by pleading misrepresentation and fraud. Paragraph 4 of his Defence reads;

"4. In the alternative but entirely without prejudice to the foregoing if the Defendant was a tenant and an agreement was made, but which is denied the Defendant avers that all the monies due were paid in toto and the agreement is void *ab initio* by misrepresentation."

Is misrepresentation adequately pleaded?

13. The suit which is the subject of this Appeal was filed in the year 2002 and the Defence and

counterclaim filed on 18th September 2002. At that time the older version of The Civil Procedure Rules applied. Order VI Rule 8 of those Rules (now Order 2 Rule 10) required that particulars of misrepresentation be pleaded. And as correctly pointed by Mr Omondi appearing for the Landlord, and relying on Bullen & Leake & Jacob on Precedents of Pleadings the particulars of claim must show the nature and extent of each alleged misrepresentation and contain other relevant particulars ,for instance, where and when the misrepresentation was made. I am afraid the Appellant did not adequately plead misrepresentation in respect to the agreement. Had he done so then the Respondent may have had an answer to it. There is no knowing. As it stands it would be unjust to allow the Appellant to take advantage of the plea of misrepresentation. That would have ended the matter.

14. But even if I were to find that misrepresentation was well pleaded, this Court would still have difficulty holding that it had been proved. In his testimony the Appellant said this of the agreement,

"I know Exhibit 1 signed it when he called me to Court. When the agreement was read to my children I was told I had been evicted. I signed the agreement not knowing exactly what it was when I got the receipts I found that I had over paid him by ksh.98,500/=." (my emphasis)

What the witness was telling Court is that he signed the agreement in ignorance of the fact that he had made some payments. If that were so then the Agreement was entered into on account of a mistake. But what was pleaded was misrepresentation and not mistake. On misrepresentation, there is no evidence that the Landlord indeed misrepresented certain facts to the Tenant.

15. In addition it is unclear, from the evidence, when the Tenant discovered that he had been misled. I find it curious that he made six payments after the signing of the agreement over a period of close to 1 year without raising a redflag about the agreement.There are receipts for payments made on 18/3/1997, 10/04/1997, 31/7/1997, 4/10/1997 and 23/12/1997.Curious also, because the Appellant took no immediate step to formally avoid the agreement and only raised it when sued by the Respondent. I too like the Learned Magistrate, find that misrepresentation was not proved.
16. The Appellant had also mounted a Counterclaim whose substantial basis was fraud. In paragraph 9 of the counterclaim, the particulars of fraud are given as follows:-

"i. Collecting money from the Defendant's children without informing the Defendant.

ii. Demanding and ensuring that the same amount is re-paid by the Defendant.

iii. Misrepresenting the facts in the agreement.

iv. Making himself over-paid."

17. For some unknown reason the Appellants did not call evidence of his children to support the contention of fraud. From the particulars, the alleged collection of money from the Appellants children was central to his case of fraud. It was therefore difficult, if not impossible, to proof fraud without the evidence of the children. The evidence on record is too thin to enable a Court make a finding that, if there was overpayment then, it was done upon fraudulent misrepresentation by the Respondent. I must repeat that on the evidence on record it would seem that any over-payment was on account of mistake as opposed to fraud. But mistake was not pleaded and it will not now be available to the tenant.
18. The Respondent put forward a simple story. By the agreement of 26th November 1991 it was agreed that the amount owed to him by the Appellant as of that date was ksh.160,500/=. There was evidence that, of this amount, the Appellant only paid ksh.59,000/= leaving a balance of ksh.101,500/=. The Appellant was unable to prove the invalidity of the agreement and so that this simple story was good enough to prove the Respondents claim of ksh.101,500/= on account of the agreement.
19. The evidence of the outstanding rent in respect to the kiosk is less clear. From the agreement the kiosk was to be rented at a monthly sum of ksh.1,500/= per month with effect from 1st day of

December 1996. Although, the Respondent says that the rent was revised upwards to ksh.2000/= per month, there is no written evidence to support that. And the Appellant denies it. The Court will therefore accept evidence that the rental was ksh.1,500/= as provided in the Agreement.

20. The Appellant testified that he occupied the kiosk for roughly 40 months. He admitted that the rent for this period would be ksh.60,000/=. He produced a receipt dated 12/2/1997 for payment of of ksh.4,500/=. He was unable to furnish proof of any further payment. The rent owing for the kiosk, on this evidence would be ksh.55,500/= but the landlord only claimed ksh.22,000/= on this account. Just like, the Learned Magistrate I would find that the Respondent has, on the balance of probabilities, proved that claim of ksh.22,000/=.
21. On evidence I find that a claim of ksh.123,500/= and not ksh.124,000/= was proved. The only difference between this and the holding of the Learned Magistrate is ksh.500/=. Only to that very small extent does the appeal succeed. I would set aside the judgment of the Trial Court and instead substitute it with a judgment in favour of the Respondent for ksh.123,500/= plus interest at Court rate and costs. Interest would be from the date of filing of the suit. The Appeal is otherwise dismissed with costs.
22. Reaching this decision has not been without some anxiety because there is evidence that suggests that the Appellant may have overpaid the Respondent. But a Court of Law cannot go outside the pleadings and evidence presented to it by parties. The Appellant will have to live with the consequences of a poorly pleaded and prosecuted case.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 13TH DAY OF NOVEMBER 2013.

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:-

……. ……COURT CLERK

……..FOR APPELLANT

……FOR RESPONDENT