REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.92 OF 2010

NAHASHON MWAI GATERE.....APPELLANT

VERSUS

SUSAN WARIGIA GITONGA.....RESPONDENT

(Being an Appeal from the Judgment of Hon. H.N.Ndung'u (Miss), Senior Principal Magistrate, in Nanyuki Senior Principal Magistrate's court civil case no. 92 of 2006)

JUDGMENT

NAHASHON MWAI GATERE, the appellant herein, filed an action before the Senior Resident Magistrate's court Nanyuki by way of the Amended plaint dated 25th June 2008 in which he sought for *interalia:*

i. **The eviction of Susan Warigia Githonga, the Respondent herein from Plot no.2787/1/14.**

ii. **Mesne profits and costs.**

Hon. Ndungu H.N., learned Senior Principal Magistrate, heard the suit and had it dismissed on 5th May, 2010.

The appellant was dissatisfied hence this appeal.

In his Memorandum of Appeal, the appellant put forward the following grounds:

1. **The learned trial Magistrate erred in fact and law in finding that there was collusion between the Plaintiff's witness (PW1) and a third party in absence of any evidence toward proof of that fact.**

2. **The learned trial Magistrate erred in law and fact in failing to find that collusion could only be proved through adducing evidence in court.**

3. **The learned trial Magistrate erred in law and fact in finding that it was mandatory to enjoin a third party to the proceedings.**

4. **The learned trial Magistrate erred in law and fact in finding that there existed a tenancy between the Appellant and Respondent after 13th April 2006.**

5. **The learned trial Magistrate erred in law and fact by departing from the pleadings and evidence on record and basing her judgment on extraneous matters.**

When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the evidence which were presented before the trial court. I have also taken into account the rival submissions. In the trial court, the appellant testified and also summoned one witness to support his case. He produced a one year tenancy agreement he executed through his agency with the Respondent. The agreement was due to expire on 12th April, 2005. At the expiry of the tenancy agreement, the appellant secured an extension of the tenancy by one year from Paul Mwithaga, the Respondent's husband. It is said that at the end of the second tenancy, Paul Mwithaga wrote a letter to the appellant stating that he was not interested in extending the tenancy but instead opted to vacate. The appellant claimed that the Respondent vacated but returned after two days absence without the appellant's consent. For the above reason, the appellant regarded the Respondent as a trespasser. It is said the Respondent remained on the premises but left after one month. It is alleged that the Respondent damaged several items before leaving. An inventory of the items destroyed was produced in evidence as an exhibit. Though the value of the damaged goods were paid, the one month's rent for illegal occupation remained unsettled. It is alleged by the appellant that the repairs of the premises took four (4) months thus making him lose revenue in form of rent. On this ground the appellant prayed for mesne profits. The Respondent did not tender any evidence to counter the appellant's assertion.

It is the submission of the Appellant that the trial Magistrate erred when she concluded that there was a collusion between him and a third party by the name Paul Mwithaga yet there was no supporting evidence. The Respondent on her part was of the view the trial Magistrate cannot be faulted because the evidence of the Appellant's agent (PW1) shows that there was collusion between the Appellant and the Respondent's husband to have her evicted. The evidence tendered shows that the tenancy agreement dated 13th April 2004 executed by the Respondent lapsed on 13th April 2005. The Appellant tendered evidence showing that Paul Macharia Mwithaga signed another tenancy agreement to run for a year with effect from 14/4/2005. On 12/04/2006 just two days before the lapse of the aforesaid agreement Paul Macharia Mwithaga wrote to the Appellant's agent informing him that he had no intention of renewing the tenancy agreement. According to Solomon Kiige Ngecha (PW1), Paul Mwithaga being husband to the Appellant was not required to pay a deposit because the agent held the deposit originally made by the Respondent. Soon thereafter it is said the Respondent went to collect her deposit from PW1. PW1 further said Paul Mwithaga vacated the premises. It is said the Respondent continued to occupy the house but indicated she would also vacate the same. PW1 further stated that the Respondent requested her to get her another house and on 9th April 2006 she signed another lease agreement for another premise. It is said she move out of the suit premises for three days to reside in the new house but came back to the suit premises where she had no tenancy agreement. PW1 produced a demand notice dated 28/04/2006 he served the Respondent through the firm of Gichure & Co.Advocates. The demand letter prompted the Respondent to move out on 31st May 2006. PW1 said, before leaving, the Respondent demolished the perimeter wall, pulled down a chain link and garden lights. The damage done by the Respondent were refixed by her husband Paul Mwithaga. It is said those repairs took four months to be done thus denying the appellant five months rent. PW1 denied colluding with the Respondent's husband. The Respondent's advocate was in court but he did not cross-examine the Appellant's agent to test the veracity of his evidence. She did not also testify nor summon witnesses to controvert the Appellant's evidence. She did not further present evidence to establish the allegation that there was collusion. The trial Magistrate proceeded to analyse the evidence and wondered why Paul Mwithaga was not joined as a defendant. On this basis she inferred that there was collusion to evict the Respondent and thereafter place Paul Mwithaga to take over occupation of the suit premises. The learned magistrate further made inferences to the effect that PW1 had involved himself in the matrimonial dispute between the Respondent and her husband. She stated that the couple should have been jointly sued. She further said that the Respondent was sued because she was of the weaker sex. She also said no one saw the Respondent destroy the chain link, garden lights or perimeter wall. She said such damage should have been specifically pleaded and claimed. The learned magistrate further alluded that the failure to claim for compensation is an indication of bad faith. For the above reason she dismissed the suit. Let me begin by stating that the learned Senior Principal magistrate fell into serious error in arriving at the conclusions. She failed to appreciate the fact there were clear and un-controverted evidence of PW1 that the Respondent's husband Paul Mwithaga had actually vacated the premises after giving notice to the Appellant that he was no longer interested in renewing the tenancy agreement to occupy the suit premises. There was no evidence to show that the said

Paul Mwithaga came back to cohabit with the Respondent in the suit premises. If it is true that he had vacated the premises then there would have been no need to enjoin him to the suit. It would appear the learned Senior Principal Magistrate was emotionally carried away to the extent that she could not objectively look at the evidence presented but instead took into consideration extraneous matters. The other area where the learned Magistrate fell into error is where she made inferences to show that there was collusion. In paragraph 5 of her defence, the Respondent alleged that there was collusion between the Appellant and her husband, Paul Mwithaga to have her evicted from the premises. The Respondent did not deem it fit to tender evidence to prove what she specifically pleaded. Her advocate did not even cross-examine the Appellant nor his witness on the issue. The law enjoins all parties who make specific allegations to prove. The learned trial Magistrate was not allowed in law to make inferences which were not supported by evidence. The learned Senior Principal Magistrate also concluded that since the Appellant did not sue for compensation for damages visited on the property, then there was bad faith manifesting itself. With respect, that was an erroneous finding because, the evidence of PW1 was very categorical that Paul Mwithaga stepped in and paid the amount required to repair the damage the Respondent is alleged to have committed hence there was no need to sue. The trial Magistrate further stated that there was no eye witness who saw the Respondent cause the damage alluded. In this regard, I think the trial Magistrate should not have gone to that extent because there was no specific allegation against the Respondent in the Plaint. The evidence of PW1 detailing the damage alleged to have been committed by the Respondent is in my view of no use because it was not alleged in the Plaint. No claim can flow from a cause of action which was never pleaded. The issue was only introduced by PW1 when testifying. It is the evidence of PW1 that the Respondent destroyed a perimeter wall, a chain link and garden lights. It is also his evidence that it took about five months to repair the building hence the Appellant could not let the premises because it was not in a habitable state. He prayed for the Appellant to be paid mesne profits of Kshs.10,000 for five months i.e Kshs.50,000. With respect, I do not think the claim can be sustained. As earlier stated, there was no pleading in the plaint that the Respondent had damaged the Appellant's premises. I hold that no award on mesne profit can be founded on this ground. There was also an allegation that the Respondent had been given another premise to occupy but decided to come back to occupy the suit premises. PW1 did not tell the trial court as to what happened to the Respondent's house she had leased situated in Block 9/160. If the Appellant lost any money as a result of the Respondent's illegal occupation, then it is only in the month of May 2006.

I think I have said enough to show that the appeal partially succeeds. The order dismissing the Appellant's suit is set aside but is substituted with an order entering Judgment in the following terms:

1. **The defendant (Respondent) became a trespasser in the premises standing in plot no.2787/1/14 Nanyuki Municipality from 15th April, 2006 until 31st May 2006.**

The Appellant had asked for Mesne profits for five months from May-September 2006. I have already stated that there was no allegation in the Plaint that the Respondent caused damage to the premises. It is therefore not clear that the delay to repair the premises was due to the Respondent's fault. However, I am convinced she was entitled to pay the Appellant rent for the month of May,2006.

2. Consequently, the Appellant is entitled to Kshs.10,000 as mesne profits.

3. Costs of the appeal and suit is given to the Appellant.

4. Interest at court rates of (2) and (3) above from date of Judgment until full payment.

Dated, Signed and delivered this 16th day of December 2013.

J.K.SERGON

JUDGE

- In open Court in the presence of Mr. Githinji holding brief for Gathoni for Respondent.

- N/A for the Appellant.