



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NUMBER 1 OF 2007

BEATRICE NDUNGWA MAKAU. APPELLANT

VERSUS

NAIROBI CITY COUNCIL. 1ST RESPONDENT

NATIONAL HOUSING CORPORATION. 2ND RESPONDENT

(From the Judgment and Orders of Enock Cherono, SRM in Milimani CMCC No. 4226 of 2004)

J U D G M E N T

The appellant, Beatrice Ndungwa Makau, in a plaint filed in the lower court and dated 21st April 2002, claimed against the 1st and 2nd defendants therein,

- a) Ksh.194,500/- special damages.**
- b) A declaration that his eviction from House No. HM 13-C on 30th March 2004 was illegal.**
- c) General Damages for the said illegal eviction.**
- d) Reinstatement to the said house by court order.**
- e) Costs and interests.**

In the said plaint the appellant had pleaded that in October 1999, the 1st Respondent, Nairobi City Council, let the said house to her with effect from the October, 1999, at a monthly rent of Ksh.4000/-. She paid Ksh.12,000/- for the first three months.

The appellant had also pleaded that thereafter she enjoyed quiet occupation until 30th March 2004 when the 1st Respondent forcefully evicted her and her family from the said house, and in the process damaged her domestic properties enumerated in the plaint with each property's value, all totaling to Kshs. 194,500/-. She further pleaded that the eviction was illegal and sought general damages and reinstatement.

In its defence the 1st Respondent denied in general terms each claim in the plaint and sought proofs. It however also specifically stated that the appellant was not entitled to be reinstated to the house aforesaid, although the 1st Respondent as well claimed that it was a stranger to the contents pleaded in the plaint.

The 2nd Respondent also had pleaded that it was a stranger to the Appellant's claims, although it had knowledge that the rightful tenant in House No. HM 3-C was one Charity Wangui Karumba and not the appellant. It also claimed, that it was wrongfully sued, as it was non-suited and that the suit was *res judicata* Milimani CMCC no. 11518 of 2003. Otherwise, it had denied all the claims raised by the appellant in that plaint.

In Court during the hearing, the appellant gave evidence confirming that she took up the tenancy of Huruma House No. HM 13-C from the 1st Respondent in October, 1999 at a monthly rent of Ksh.4000/- and paid for three months. That she was meanwhile wrongly evicted but reinstated. That on 30th March 2004 she was again unlawfully evicted by the agent of the 1st Respondents although she had been paying her monthly rents. She produced rents receipts covering the period of tenancy up to February 2004. She also testified that the 1st Respondent could not be able to reinstate her when she proved that she had paid all the relevant rents since another tenant had already taken occupation. She further testified that the 1st Respondent through the Director of Housing, a Mr. Gachuhi, admitted that the appellant's eviction was not authorized by the relevant Council Committee and was, therefore, illegal. She called two other witnesses, one of whom was a Councilor in the 1st Respondent's Council who confirmed her evidence.

In his judgment the honourable trial magistrate found that the special damages sought of Ksh.194,500/- had not been proved since the receipts related thereto were not admissible for containing no Revenue Stamp as required under the Stamp Duty Stamp.

As to eviction on 30th March 2004 the trial magistrate concluded that it was not unlawful since the appellant admitted that he was in arrears of rent, although the 1st respondent had not served the appellant with notice thereto. He concluded that the Tenancy agreement which presumed service of notice without actual notice being served was unconscionable but valid.

As to the order of reinstatement of the Appellant into the house, the trial court said it was not available since the house had meanwhile been reallocated to another party who was not party in this case and whom the appellant should have joined. He, therefore, dismissed the suit wholly, which triggered this appeal.

I have carefully considered the grounds of appeal against the findings of the trial magistrate as shown above. The grounds of appeal mainly complain that the trial magistrate did not properly or legally consider the evidence adduced by the appellant and in particular, did not consider whether the rents due to the 1st Respondent were in arrears or not.

Clearly, the appellant's pleadings did little to link the 2nd Respondent to this suit as well as her evidence in her testimony in court. The trial magistrate was accordingly right in dismissing the suit against the 2nd Respondent, the National Housing Corporation.

The same cannot, however, be said of the 1st Respondent. The plaintiffs' pleadings clearly show that the 1st Respondent rented the relevant premises to the Appellant. It also shows that at one time the 1st Respondent evicted the Appellant but had to reinstate her after she went to court notwithstanding some the evidence on record that the appellant may have defaulted in rent repayment before the first eviction. However, it is also clear from the said evidence that the appellant paid the defaulted rents before the reinstatement. She later also paid rent up to and inclusive of February 2004.

The 1st Respondent did not adduce any evidence to controvert the clear evidence of wrongful eviction on

30th March 2004, carried out by its agents or servants. Indeed, the evidence on record shows that the eviction of 30th March 2004 was not done because the Appellant had defaulted in the payment of rent, which in any case she had paid inclusive of the month of February, 2004. On the contrary, the eviction was done by the 1st Respondent to purportedly obey a court order in CMCC No. 11518 of 2003, an order which was however not produced into evidence to confirm the same as a genuine order of court.

In this court's view, however, the fact that a court order existed, could not justify the eviction on 30th March 2004. If it was necessary to remove the appellant from the said house, the 1st Respondent had all the reasons to lawfully notify the Appellant to move out on the basis of the court order and if the Appellant failed, other legal methods would be used to evict him. A primitive and forceful method like the one applied was not an option at that time.

It is also noted that the 1st Respondent did not really deny the unlawful eviction. If anything, it justified it on the basis that it was carrying out a court order. In the view of this court, the trial magistrate failed to properly understand the evidence before him, probably due to failure to peruse it carefully.

For example he concluded that the appellants evidence was that there was a tenancy agreement under which the appellant agreed to pay a monthly rent of Ksh.12,000/- of which she paid a rent of one month. I have perused the appellant's evidence before the lower court. It nowhere stated the above. The magistrate's conclusion that the eviction was due to default of rent payment is not supported by evidence.

Furthermore the appellant's evidence was to the effect that the sum of Ksh.194,500/- claimed by her was due to loss or damage of her specifically named items. She had pleaded the sums claimed in respect of each item. She repeated in the evidence that sums claimed arose due to damage or repair or loss of the items. That evidence was not contraverted although cross-examined on. In my view, she proved the special damages on the balance of probabilities and the trial Magistrates erred in not awarding it.

In rejecting the evidence contained in the receipts produced by the appellant, the trial magistrate used the ground that the receipts were not revenue-stamped. However, that reason was one for rejecting the receipts from being produced. However, neither the Respondents nor the court objected to production. Once the evidence was properly produced in my view, it would be difficult for the court to close its eyes and brain to the evidence they contained or represented. In my opinion, the court should not have ignored properly admitted evidence of the appellant, which were in any case, not rejected by the respondents.

As to the illegality of the evictions, the Respondent's argument that it was carrying out an order of court did not justify the eviction as earlier stated. The appellant further said that after eviction his family suffered for a week before getting a place to occupy or to move it.. The appellant accordingly suffered pain, mental torture and shame etc and deserved an award of compensatory damages. Her counsel suggested Ksh.800,000/-. In my view, the trial court should have made some award in case his findings are overturned. He erred in not doing so.

I have considered the issue. It is my view, doing the best I can in these circumstances, that a sum of Ksh.200,000/- as general damages, would be sufficient. I so award.

The final issue was whether or not the appellant was entitled to reinstatement to the house in question. There is evidence that the house had been allocated to a third party and could not therefore be available. Removal of the 3rd party would obviously cause inconvenience to her and yet she herself was not party in this case. In my view, the cause of the problem is once more the 1st Respondent who again should bear the consequences.

The appellant somehow knew from the evidence on record, that a third party was as well entitled to the house. In filing this claim, she should have raised the issue directly, thus seeking an alternative relief if the vacant possession could not be given. She did not do so. This court cannot give her a relief she did not plead or pursue.

In conclusion, therefore, this appeal is allowed to the extent that: -

a) Special damages of Ksh.194,500/- are awarded.

b) General damages of Ksh.200,000/- are also awarded.

c) Interest on special damages from the date of filing of suit and general damages from the date of lower court judgment.

d) Costs are to Appellant here and the court below.

It is so ordered.

Dated and delivered at Nairobi this 14th day of February 2012.

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D A ONYANCHA
JUDGE