



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 122 OF 2005

PAUL THAIRU KIMANI.....APPELLANT

VERSIS

ELAM MALONGO ESENDI.....RESPONDENT

JUDGMENT

The appellant herein is Paul Thairu Kimani. He appeals against the decision of SRM, O.A. M’Masi which was delivered on 24/11/2004 in favour of the respondent, Elam Malongo Esendi. The respondent’s claim was contained in the plaint dated 24/2/2004. The respondent was the appellant’s tenant in the premises described as **BLUE SKY HOTEL**, situate at **RUMURUTI MARKET**, Laikipia District. The respondent alleged that on 22/1/04, the appellant unlawfully and without any just or probable cause, evicted the respondent and his employees from the premises where he was carrying on Hotel business and installed the then 2nd defendant, Dorcas Wambui. The respondent therefore sought the following prayers:-

- a) ***A declaration that the plaintiff’s eviction from the suit premises was illegal, null and void and therefore the plaintiff do have vacant possession to the suit premises.***
- b) ***Special damages in terms of loss of income in the rate of Kshs.500.00 per day from the date of the illegal and/or unlawful eviction till the date he shall have vacant possession to the suit premises.***

After hearing the parties, the court rendered its judgment and declared that the eviction was illegal. In respect of prayer 2, the court found that the claim for special damages was not adequately proved but went ahead to order that the first appellant (then defendant) pays Kshs.200/- per day to the respondent from the date he was evicted from the hotel to the date of the judgment. That decision aggrieved the appellant and he filed this appeal on 4/5/07 in which he raised 6 grounds which are as herebelow:-

1. ***That the learned trial magistrate erred in law and in fact in holding against the appellant while there were sufficient grounds adduced to support a judgment in favour of the appellant.***
2. ***That the learned trial magistrate erred in law and in fact in failing to consider the appellant’s evidence which was sufficient to sustain a judgment in his favour.***
3. ***That the learned trial magistrate erred in law and in fact in holding that the appellant was required to pay an amount of money as special damages to the respondent notwithstanding that the same had not been specifically proved.***

4. ***That the learned trial magistrate erred in law and in fact in holding that the respondent had unlawfully and illegally been evicted from the said premises whereas in fact there was overwhelming evince to the contrary.***

5. ***That the learned trial magistrate erred in law and in fact in allowing himself to be guided by immaterial facts that did not form part of the issues for determination.***

6. ***That the learned trial magistrate relied on wrong principles of law and fact in arriving at this judgment.***

After the appeal was filed, Mr. Njihia Njoroge came on record on 7/8/09 on behalf the respondent. The appellant's counsel Mr. Karanja Mbugua took the hearing date ex parte and served a hearing notice by way of post on 8/4/2010. The receipt from the Postal corporation the annexed hearing notice do confirm that the respondent's counsel was duly served with a hearing notice at his postal address in good time but he did not appear at the hearing and this court having satisfied itself that the service had been effected properly, the court went ahead to hear the appellant.

It was Mr. Karanja's submission that the respondent had abandoned the prayer for vacant possession and it was therefore an error for the trial court to enter judgment on the said prayer. In the submissions made in the lower court by Mr. Njihia Njoroge, at the last paragraph, the plaintiff's counsel withdrew part of the claim seeking the respondent's reinstatement to the suit premises because the relationship between the parties had been severely damaged.

The respondent having withdrawn the said claim, it was an error for the trial court to make a finding on it and order the appellant to provide vacant possession to the respondent within 30 days of the date of judgment. This court hereby sets aside that order.

The other ground of appeal is that the special damages that were awarded were not proved. In his plaint, the respondent claimed Kshs.500/- per day from the date of eviction till he was given vacant possession. The respondent had adduced evidence to the effect that he used to get profit of between Kshs.200/- to Kshs.500/- daily and produced a book in which he recorded the daily proceeds. Counsel urged that the sum of Kshs.200/- awarded by the court had no basis and was not specifically pleaded and proved as required. In the case of **HABIB ZURICH FINANCE (K) LTD V MUTHOGA & ANOTHER (2002)1 ER 81**, the Court of Appeal held:-

“Cases must be decided on the issue pleaded. The first respondent was only entitled to the Kshs.218,700/- pleaded if the court found for him.”

In the above cited case, the court had awarded more than was pleaded. In **RYCE MOTORS LTD V MURIUKI, (1996-98)2 EA 363**, the Court of Appeal held that pieces of paper produced as evidence of income could not be accepted as a correct accounting process. In its judgment, the trial court observed:-

“Secondly as regards prayer for Kshs.500/- per day, I find that the same was not adequately proved hence the court will order that the first defendant pays Kshs.200/- to the plaintiff from the date he was evicted from the property to the date of this judgment.”

The magistrate did not demonstrate how she arrived at the figure of Kshs.200/- when she had earlier found that the claim for Kshs.500/- per day had not been proved. I find and hold that the prayer for special damages was not proved as required and the order of the trial court for payment of Kshs.200/- per day was made without basis.

In his submissions, Mr. Karanja raised the issue of jurisdiction and argued that the lower court lacked jurisdiction to determine the matter because it was a controlled tenancy and subject to the provisions of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya** and that recovery of rents and mesne profits was governed by **Section 12(1)(e)**. This is not one of the

grounds raised in the memorandum of appeal. I have also looked at the defence filed by the appellant in the lower court. The respondent pleaded that the trial court had jurisdiction to entertain the matter. At paragraph 6 of the defence, it was admitted that the lower court had jurisdiction to hear and determine the matter. The appellant cannot turn round and allege the contrary. Although that may be the true position, the issue of jurisdiction does not arise and is not for consideration at this stage.

In the upshot, the appeal succeeds. The judgment of the lower court is set aside with costs of the lower court and this appeal to the appellant.

DATED and DELIVERED this 1st day of April 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Ateya holding brief for Mr. Karanja for the appellant.

N/A for the respondent.

Kennedy – Court Clerk.