**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL 140 OF 2006**

**1. OMAR MOHAMED**

**2. SAID ALI……APPELLANTS**

**V**

**1. DR. ABEID KOMBO**

**2. JOHNSTONE MOKAYA……..RESPONDENTS**

**JUDGMENT**

This appeal is from the judgment and decree of the Learned Resident Magistrate, T. Nzioki dated 16th August 2006 in Mombasa Senior Resident Magistrate's Court Civil Case No. 87 of 2005. The appellant was the plaintiff and Dr. Abeid Kombo and Johnstone Mokaya were the respondents. By the said judgment, the Learned Resident Magistrate dismissed the appellants' suit with costs. The appellants had claimed Kshs. 500,000/= from the respondents, being arrears of rent plus interest and costs. In their appeal, the appellants have raised four grounds. In my view however, only one issue is raised namely that the Learned Resident Magistrate erred in Law in his evaluation of the evidence and consequently arrived at the wrong conclusion. All the four grounds of appeal can be disposed of under that ground.

The appellants' case before the Learned Resident Magistrate was quite simple and straight forward. They were owners of some property which they had let out to the respondents and by 17th December 2001, the respondents were in rent arrears then agreed to be Kshs. 500,000/= which the respondents had failed to pay. The relevant paragraphs of the plaint are 4, 5 and 6. They are as follows:-

**(4) On 17th December 2001, the defendants who were then in arrears of rent agreed to vacate some of the rooms and to pay Kshs. 500,000/= being arrears of rent by monthly instalments of Kshs. 25,000/= per month effective January 2002.**

**(5) The defendants have since vacated the premises but failed to pay the sum of Kshs. 500,000/= being arrears of rent.**

**(6) The plaintiffs' claim against the defendants is for a sum of Kshs. 500,000/= being arrears of rent as per the agreement dated 17th December 2001.**

In the defence delivered by the respondents, the averments in paragraphs 4 and 5 of the plaint were specifically denied in paragraphs 4 and 5 of the defence. Paragraph 6 was pleaded in the alternative as follows:-

**(7) In the alternative and without prejudice to the foregoing if any sum is/was owed which is denied, then the same was set off by an old agreement between the plaintiff and the defendants.**

At the trial, the 2nd appellant testified for the appellants and called no witness. His evidence was brief and the following portion of his evidence is pertinent.

"**The defendants vacated the house on 17th December 2001. When the defendants vacated the house they had rent arrears of 550,000/=. We had made an agreement. The rent arrears of Kshs. 500,000/= was to be settled in monthly instalments of Kshs. 25,000/=. The defendant did not pay the sum of Kshs. 500,000/=. This is the agreement we entered on 17th October 2001. I wish to produce the agreement as Exhibit No. 1. I pray that the court do allow the claim for Kshs. 500,000/=. I also pray for costs of the suit. The defendants signed the agreement….."**

The cross examination of the testimony of the 2nd appellant was limited to the agreement which the 2nd appellant had produced. The main concern of counsel in the cross examination appears to have been to emphasize the fact that the agreement had been the subject of proceedings in HCCC No. 486 of 2001.

At the conclusion of the appellants' case, the respondents did not testify and called no witness. In a one and half page judgment, the Learned Resident Magistrate felt bound by the High Court ruling on the agreement produced by the appellants and disregarded the contents of the said agreement. Having disregarded the agreement, the Learned Resident Magistrate came to the conclusion that the appellants' evidence had not been supported by any documentary evidence such as accounts, demand notices, etc. He therefore dismissed the appellants' case as it had not been proved on a balance of probabilities.

The appellants were aggrieved and have lodged this appeal in the grounds already referred to above. In his submissions, counsel for the appellants has argued that the Learned Resident Magistrate's findings on the agreement produced by the appellants were misconceived as the ruling of the High Court did not render the said agreement worthless. Counsel further contended that the 2nd appellant's testimony was in any event not controverted and therefore the appellants' case before the Learned Resident Magistrate was proved on a balance of probabilities. Counsel for the respondents on his part contended that the Learned Resident Magistrate had correctly interpreted the decision of the High Court on the said agreement and was justified to disregard the same. Counsel further poked holes in the said agreement and seemed to suggest that, notwithstanding the ruling of the High Court on the same the agreement was itself defective. On the evidence, counsel submitted that the Learned Resident Magistrate had properly evaluated the same and correctly determined that the evidence, although not controverted, did not establish the appellants' case against the respondents on a balance of probabilities.

It is now settled that it is a very hard thing for an appellate court to interfere with the findings of fact by a trial court particularly if such findings are based on the demeanor of witnesses as observed by the court and its general appreciation of the evidence in the case. However, where the trial court has failed to appreciate the weight or bearing of circumstances admitted or proved, then an appellate court is entitled to interfere even with its findings of fact. (See **Peters – v – Sunday (Post Limited [1958] EA 423 among many others).**

The position was reiterated in **Shah – v – Mbogo [1968] EA 93.** The court held at page 94 as follows:-

"**I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

I will consider this appeal with the above principles in mind. The only evidence on record was tendered by the 2nd appellant and I have already quoted the material portion of his evidence above. The evidence clearly disclosed that the respondents were in arrears of rent of Kshs. 500,000/= when they vacated the appellants' premises and offered to settle the same in monthly instalments of Kshs. 25,000/= which proposal was not fulfilled. To buttress his oral testimony, the 2nd appellant produced an agreement executed by the parties in respect of the said rent arrears and the payment proposal made by the respondents. The cross examination of the 2nd appellant was not directed at the oral testimony given by the 2nd appellant. Indeed the 2nd appellant's testimony regarding rent arrears owed by the respondents was not challenged at all. The main concern of counsel for the respondents was the fact that the agreement which the 2nd appellant produced had been used in HCCC No. 486 of 2001. In that case, W. Ouko, then Ag. Judge, (now Judge) had observed as follows:-

"**I have looked at the agreement and in my view it is a document which a court of law cannot accept in proceedings where parties are represented by able counsel."**

Did that finding of the Learned Judge vitiate the oral testimony of the 2nd appellant, given that the same was not challenged? I think not. There was no other evidence, oral or documentary, which rebutted the testimony of the 2nd appellant. Whereas there is no requirement in law that a defendant should testify in his or her defence, yet in the circumstances of this case it was necessary for the respondents to testify in order to rebut the cogent testimony of the 2nd appellant that they were in arrears of rent in the sum of Kshs. 500,000/=. In civil cases, proof is on a balance of probabilities and the appellants clearly proved their case on such balance and the conclusion of the Learned Resident Magistrate that the oral testimony of the 2nd appellant although not controverted did not amount to proof of their case on a balance of probabilities was clearly a misdirection. Save for specified cases, there is no requirement in Law that a fact can only be proved by documentary evidence.

I have also had the advantage of perusing the respondent's plaint in HCCC No. 486 of 2001 which is included in the record of this appeal. It is averred in paragraph 6 of the said plaint as follows:-

"**(6) The rent owing from the plaintiff to the defendants would be Kshs. 521,800.00 while the amount spent on the premises by the plaintiff is Kshs. 608,000/=."**

And in an affidavit sworn by the 1st respondent and filed on 1st October 2001 in support of an application for *inter alia*, an injunction in the said case, the 1st respondent deponed as follows in paragraph 4.

"**4. That whereas it is true that the rent which would be owing from us to the defendants is Kshs. 521,800.00, I made several improvements by installation and renovation on the said premises……..in which sum amounts to Kshs. 443,000/=."**

In view of those averments of the respondents, it is not surprising that counsel for the respondents did not challenge the issue of rent arrears when he cross examined the 2nd appellant during his testimony. In the premises, I have come to the conclusion that the Learned Resident Magistrate's findings of fact were clearly not based on the evidence adduced before him and I am satisfied that his decision is clearly wrong. The appellants clearly proved on a balance of probabilities that the respondents owed them rent arrears of Kshs. 500,000/= and judgment should have been entered for them as prayed.

The upshot is that this appeal is allowed. The order of the Learned Resident Magistrate dismissing the appellants' suit with costs is set aside and is substituted with an order allowing the appellants' suit as prayed in the plaint. The appellants shall have the costs of this appeal.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF JUNE 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Mr. Hamza holding brief for Achani for the Respondents and Mr. Lijoodi holding brief for Mr. Khatib for the Appellants.

**F. AZANGALALA**

**JUDGE**

**4TH JUNE 2009**