



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 96 of 2003

NICHOLAS WAMBUGU KIGONYE.....APPELLANT

VERSUS

HON. ATTORNEY GENERAL.....RESPONDENT

J U D G M E N T

1. Nicholas Wambugu Kigonye, (hereinafter referred to as the appellant), has sued the Hon. The Attorney General seeking judgment for repair costs and actual losses in rent, income plus interest from date of accrument to date of judgment at commercial rates. The appellant's claim was anchored on a tenancy agreement entered into with the Directorate of Security Intelligence. The appellant claimed that when the premises were handed back to him after the termination of the tenancy agreement it was in a pathetic state of disrepair as a result of which the appellant had to repair the premises. The appellant contended that he suffered loss of Kshs.275,800/= being the cost of repairs, security and loss of rent.

2. The respondent filed a defence in which the appellant's claim was denied in total. Without prejudice to the denial, the respondent maintained that if there was any contract, all the obligations of the contract were strictly adhered to by the respondent.

3. During the hearing of the case before the trial magistrate, the respondent did not attend court although the hearing date was fixed by consent. Hearing therefore proceeded *ex-parte*. The appellant produced a tenancy agreement and a notice given by the respondent terminating the tenancy. He maintained that when the house was handed over to him, he had to spend a total of Kshs.90,000/= on buying materials for repair and Kshs.25,800/= for labour charges. He also paid a sum of Kshs.16,000/= as security charges during the two months period that the house was under repair. He claimed to have lost rent of Kshs.144,000/= for the months of October, and November, 1997.

4. In her judgment, the trial magistrate found that the amount claimed of Kshs.90,000/= in respect of repair was not fully proved. She rejected some of the receipts produced by the appellant in support of his claim for repairs as they included materials bought in December, 1997 and April, 2001 while the appellant's evidence was that he completed the repairs in November, 1997. She found that the amount proved in respect of the materials was Kshs.39,457.85. The trial magistrate rejected the claim in respect of labour charges contending that no evidence was produced in respect of the same. She also rejected the claim in respect of the security charges contending that there was no agreement for such payments. With regard to loss of rent, the trial magistrate contended that there was no justification on the claim in respect of two months and awarded only one month rent. She therefore entered judgment in favour of the appellant in the sum of Kshs.69,857.85 plus costs and interest.

5. Being dissatisfied with that judgment, the appellant has lodged this appeal citing 8 grounds as follows:

(i) The learned magistrate erred in law and in fact in ruling that the agreement was not signed before a 3rd party as the same was not denied by the defence, and in any event it had been in force for over 10 years.

(ii) The learned magistrate erred in law and in fact in failing to note that the parties inspected the premises and noted the damaged areas which said repairs the defence never carried out.

(iii) The learned magistrate erred in law and in fact in failing to note that the plaintiff took some of the materials on credit and hence the receipts were issued after payment had been made.

(iv) The learned magistrate erred in law and in fact in awarding Kshs.69,857.85 and yet she had earlier disagreed with the plaintiff's receipts.

(v) The learned magistrate erred in law and in fact in failing to award the plaintiff for labour charges stating that the same was not proved yet she awarded an amount for materials thereby leaving unanswered question as to how the work was accomplished without a labour cost.

(vi) The learned magistrate erred in law and in fact in stating that the repairs ought to have been done within one month and yet the house contained 60 rooms that needed to be repaired.

(vii) The learned magistrate erred in law and in fact in failing to award security for two months, and yet the receipts were supposed to prove that the plaintiff paid Kshs.16,000/= per month to a security firm.

(viii) The learned magistrate erred in law and in fact in failing to acknowledge the fact that the claim was for liquidated damages.

6. Mr. Gitonga who appeared for the appellant maintained that the trial magistrate was inconsistent in her finding given the evidence which was before her. He urged the court to allow the appeal and enhance the judgment of the lower court by granting the prayers as sought in the plaint.

7. Mr. Kipkogei who appeared for the respondent maintained that the trial magistrate was right in her findings as she gave an explanation as to why she was disregarding some of her receipts. He therefore urged the court not to interfere with the findings of the trial magistrate.

8. I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. At paragraph 7 of the plaint which was filed in the lower court, the appellant pleaded the actual repair costs and loss incurred. Although in his final prayer, the appellant did not pray for the specific amount but requested for judgment for "*repair costs and actual losses in rent income, plus interest from date of accrual to date of judgment*", the amount claimed was clear. The tenancy agreement which was produced by the appellant was clearly not executed. However, the letter dated 28th August, 1997 from the Director of Security Intelligence which was produced as Pexh.2 clearly confirmed that the appellant's premises were rented out to the Director of Security Intelligence although no formal tenancy agreement was signed. It is further evident from that letter that the Director of Security Intelligence was in possession of the premises which they intended to hand over back to the appellant by 30th September, 1997. Notwithstanding the fact that the tenancy agreement was not signed, there was ample evidence that there was a tenancy relationship between the appellant and the directorate of Security Intelligence.

9. Although the respondent did not call any evidence, the appellant had a responsibility to specifically prove his claim. As regards the amount of Kshs.90,000/= claimed in respect of repair costs the total receipts produced by the appellant for the materials purchased were as follows:

Schedule of receipts

OCTOBER, 1997

	DATE	ITEM	SUBTOTAL	TOTAL
1.	31.10.97	5x4 Super Gloss Ivory	4,800.00	
2.	“	5x4 Super gloss Brilliant white	4,800.00	
3.	“	1x5 Wyco white spirit	340.00	
		Less	994.00	
		Sub total	8,946.00	
		Vat 15%	1,431.35	
		Sub-total		10,377.35
4.	31.10.97	1 length ½ Pipe	700.00	
5.	“	1 Tinboss White	140.00	
6.	“	2 ft Hening	40.00	
7.	“	8 pc Hex Nig	120.00	
		Sub-total		1,000.00
8.	31.10.97	5 Sipron	2,250.00	
9.	“	5 Ball Valve	1,500.00	
10.	“	5 Cistern Handle	1,000.00	
11.	“	2 Gate Valve	400.00	
12.	“	½ Elbow	80.00	
		Sub-total		5,230.00
13.	4.10.97	4 pcs 3m glass	310.00	
		Total		310.00
14.	29.10.97	4 bottle trap 1½	1,000.00	
15.	“	3 bottle trap ¼	600.00	

16.	“	12 taps (bib)	1,200.00	
17.	“	2 bib taps (Pillar)	500.00	
18.	“	Flexible tube	1,200.00	
		Sub-total		4,500.00
19.	31.10.97	Binding wire	25.00	
20.	“	Screw	38.00	
		Sub-total		63.00
TOTAL				21,480.35
NOVEMBER, 1997				
1.	3.11.97	3x4 Wyco varnish mahogany	650.00	
2.	“	1x4 Elmulsion true blue	930.00	
3.	“	3x4 Emulsion bri white	2,340.00	
4.	“	1x1/2 Wycoloac Bedoxide	140.00	
5.	“	Wyco white spirit	340.00	
	“	Sub-total	4,400.00	
		Less	660.00	
		VAT 15%	598.40	
		Sub-total		4,338.40
7.	3.11.97	1 pc Flash bond	120.00	
		Sub-total		120.00
8.	3.11.97	2 taps	240.00	
9.	“	2 brushes	80.00	
10.	“	4 S/papers	40.00	
11.	“	1 hard brush	35.00	
		Sub-total		395.00

12.	4.11.97	1 Basin	750.00	
13.	“	1 Union ½	50.00	
14.	“	8 Washow	40.00	
		Sub-total		840.00
14.	4.11.97	2x4 Emulsion crystal blue	1,860.00	
15.	“	2x½ Wyco undercoat	440.00	
		Less	42.00	
		Subtotal	238.00	
		VAT 15%	38.10	
		Sub-total		276.10
16.	5.11.97	2x4 Nip Bobby blue	2,100.00	
		Sub-total		2,100.00
17.	7.11.97	1x4 Emulsion white	780.00	
		Less	117.00	
		Subtotal	663.00	
		VAT 15%	106.10	
		Total		769.10
18.	26.11.97	10 paper	100.00	
19	“	2 brushes	170.00	
20	“	1 turpentine	50.00	
		Sub-total		320.00
21.	26.11.97	Goods	470.00	
		Sub-total		470.00
22.	27.11.97	2 Bag cement	900.00	
		Sub-total		900.00

23.	27.11.97	½ Redoxide	175.00	
		Sub-total		175.00
24.	28.11.97	35 pcs window handles	2,625.00	
		Sub-total		2,625.00
25.	28.11.97	35 pcs window stag	2,625.00	
		Sub-total		2,625.00
26.	29.11.97	2 socket outlet	400.00	
		Sub-total		400.00
27.	30.11.97	3 pc cooker C-Unit	2,250.00	
	“	2 pc cooker connector	600.00	
		Sub-total		2,850.00
TOTAL				19,203.40

DECEMBER, 1997

1.	3.12.97	2 pc cooker control unit	1,500.00	
		Sub-total		1,500.00
2.	9.12.97	9 3 cm clear glass	600.00	
3.	“	Keys on union 3 lever lock	200.00	
		Sub-total		800.00
4.	8.12.97	6 pieces shower rose	600.00	
		Sub-total		600.00
5.	9.12.97	Cistern handles	1,400.00	
		Sub-total		1,400.00
6.	9.12.97	2 pc lamp holder	70.00	
7.	“	1 pc straight holder	40.00	
8.	“	1 pc socket outlet	250.00	

9.	“	1 pc cooker c- Unit	750.00	
10.	“	1 pc bulb 100	40.00	
		Sub-total		1,150.00
11.	9.12.97	2 ball valve	700.00	
		Sub-total		700.00
12.	11.12.97	1x4 R/oxide V/G	750.00	
13.	“	1x4 Turpentine	60.00	
14.	“	1 flush pipe bend	200.00	
15.	“	1 flush pipe connector	100.00	
		Sub-total		1,110.00
16.	11.12.97	4 kg putty	100	
		Sub-total		100.00
TOTAL				7,360.00
JANUARY, 1997				
1.	2.1.97	1 Union	90.00	
	“	1 Nipple	35.00	
		Sub-total		125.00
TOTAL				125.00
TOTALS FOR JAN, OCT, NOV, & DEC, 1997				48,268.75
Less Expenditure for January and December, 1997				7,485.00
TOTAL				40,783.75

10. The total cost of all the materials added up to Kshs.48,268/= . this included items worth Kshs.7,460 which were purchased in the month of Dec ember, 1997 and Kshs.125/= for items purchased in January, 1998. The trial magistrate was right in excluding these receipts as the appellant did testify that the repairs were done between the month of August, and November, 1997. The evidence before the magistrate therefore showed that the appellant only spent a sum of Kshs.40,783.75 in purchasing the items for the repairs done in October and November, 1997.

11. As regards the sum of Kshs.25,800/= which was claimed in respect of labour charges, although no receipt was produced, it is evident that labour was necessary for the repairs to be done. It is also evident that where work is performed by casual labourers, receipts may not be easily available. The amount of Kshs.25,800/= claimed was reasonable and ought to have been allowed. With regard to the security for the month of October, and November, 1997, appropriate receipts were produced. It is evident that during the period of repairs, the property had to be secured. The claim for security was therefore established and ought to have been allowed. With regard to the rent claimed in respect of two months, the appellant claimed that the repairs took two months. The trial magistrate had no reason to reject this evidence. The claim for two months loss of rent ought to have been allowed.

12. Although the appellant claimed rent at the rate of 72,000/= there was no evidence that the rent had moved up from the sum of Kshs.32,400/= which was indicated in the unsigned rent agreement. The appellant is therefore entitled to rent of two months at the rate of Kshs.32,400/= per month. The upshot of the above is that there was sufficient evidence before the trial magistrate to prove the appellant's claim as follows:

Kshs.40,783.75 for cost of materials

Kshs.25,800/= labour charges

Kshs.16,000/= security

Kshs.64,800/= rent for October and November, 1997

Total – Kshs.147,383.75.

Accordingly, I allow this appeal, set aside the judgment of the trial magistrate and substitute it with the judgment in favour of the appellant for Kshs.147,383.75 together with interest thereon from the date of filing the suit. The judgment is subject to the appellant paying the appropriate court fees.

Dated and delivered this 16th day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Kamau for the appellant

Ongoto for the respondent-