



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

Civil Appeal 162 of 2004

**(Being an appeal from the judgment and decree of the Hon. Mr. Soita, SPM, in Kisii
CMCC No. 565 of 2002)**

JARED O. ATANCHA APPELLANT

VERSUS

PHILIP J.K. MONGARE RESPONDENT

JUDGMENT

The respondent was the plaintiff before the trial court. He pleaded that he was the sole registered proprietor of a business enterprise known as “**Sunstar Courtyard**” which he had been operating since 15th October, 1999 in premises known as Plot No. B III/76 within Kisii town. The premises were leased to him by M/s Kenyoro Farmers Co-operative Society. He claimed that the respondent was trespassing on his premises claiming that he was the owner of the said business. He sought a permanent injunction to restrain the defendant, his servant and/or agents from trespassing on his business premises or interfering with the same in any manner.

In his statement of defence, the appellant admitted that the respondent was the registered proprietor of the said business name. He however alleged that sometimes in the month of January, 2001 the respondent had agreed to allow him use the said business name and consequently, he had entered into an oral tenancy agreement with Kenyoro Farmers Co-operative Society to let to him an open space that was at the rear of the said business premises. Thereafter he opened a bar known as “**Sunstar Court yard bar**” which he operated from January 2001 until he was ejected therefrom by the respondent.

The appellant further contended that save for the said business name, the respondent is a total stranger to the business known as sunstar court yard.

By way of a counter claim, the appellant stated that sometimes in August 2000, the respondent and his employees trespassed onto his business premises and wrongfully ejected him therefrom. He prayed for an order that the said business be handed over to him by the respondent and for a permanent injunction to restrain the respondent from trespassing onto the said premises or interfering with the business in any way.

The respondent denied all the appellant’s contentions as stated in the counterclaim.

During the hearing the respondent produced a certificate of registration of a business name –

“**SUNSTAR COURT YARD**” which was issued to him on 15th October, 1999. He is named therein as the sole proprietor thereof. He also produced a lease which he entered into with Kenyoro Farmers Co-operative Society on 1st January, 2000. He further produced several receipts as evidence of payment of rent. He said that since he was living in Nairobi, he requested the appellant, who is his brother in-law, to be his agent in managing for him the said business. He further stated that the appellant had not put in any money into the said business.

Joseph Moseti, PW2, the chairman of Kenyoro Farmers Co-operative Society, testified that the respondent was their lawful tenant in the said premises. He added that the structures thereon were put up by the respondent.

The appellant conceded that the respondent was his brother in-law. He said that the respondent used to be his tenant since 18th September, 2002. He had earlier entered into an oral lease agreement with the landlord of the plot on which he had put up his temporary structure.

In cross examination, the appellant said that he had no document to show that he had ever operated the said business. He also had no evidence to prove that the respondent had allowed him to run the said business. He called no witness to support his case.

The learned trial magistrate found for the respondent. He held that all the documents produced during the trial favoured the respondent’s contention that he was the proprietor of the said business.

The appellant, being dissatisfied with the aforesaid judgment, preferred an appeal to this court. He raised the following grounds:

“1. The learned trial magistrate erred in law in granting the respondent all the reliefs sought in the suit on fatally defective pleadings.

2. The learned trial magistrate erred in law and in fact in believing the respondent’s case which was tainted with a lot of contradictions as compared to the appellant’s case.

3. The learned trial magistrate erred in law in deciding this case against the weight of evidence on record for the appellant.

Mr. Minda for the appellant and Mr. Bigogo for the respondent made brief submissions which I have taken into account.

With regard to the first ground of appeal, Mr. Minda’s contention was that the respondent’s plaint was supported by a defective affidavit which had no heading and had some deletions which had been done by hand. The drawer of the affidavit was also not disclosed.

I have looked at the said affidavit and the observations made by Mr. Minda cannot be disputed. However, under **Order XVIII rule 7** of the **Civil Procedure Rules**, a court may accept an affidavit notwithstanding such irregularities, particularly if they do not go to the core of the matter in dispute. The

said irregularities were not shown to have occasioned any miscarriage of justice or prejudiced the appellant's case in any way.

I find no merit in the first ground of appeal and reject it.

Combining the second and the last grounds of appeal, the evidence that was tendered by the respondent was clear that he was the proprietor of the said business name. He produced the certificate of registration. He also produced the lease which he had with his landlord. He had receipts to show that he had been paying rent for the premises. A liquor licence had been issued in his name. He explained how the appellant gained access to his business.

That evidence was not sufficiently challenged by the appellant who had nothing to back his bare arguments. It cannot be said that the learned trial magistrate decided the case against the weight of evidence on record. There were a few clerical errors in the respondent's pleadings but the same did not in any way affect the weight of the evidence that was tendered.

I find no merit in this appeal and dismiss the same with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 9TH DAY OF SEPTEMBER, 2009.

D. MUSINGA

JUDGE.

9/9/2009

Before D. Musinga, J.

N/A for the applicant

Mr. Bigogo for the respondent

Court: Judgment delivered in open court on 9th September, 2009.

D. MUSINGA

JUDGE.