



REPUBLIC OF KENYA

IN THE HIGH COURT

AT

Civil Appeal 53 of 2002

TIMOTHY MICHENI KANAMPIU APPELLANT

VERSUS

MT. KENYA GUIDE PORTERS (*Suing thro' the Director*

GERALD KIRUJUA) RESPONDENT

(Being an appeal against the decision/Judgment of the Learned Resident Magistrate Mr. N.H. Oundu delivered on 7th May 2002 in Meru

CMCC No. 145 of 1995)

JUDGMENT

The lower court case was filed by the respondent. The respondent in the lower court case was seeking for special and general damages for wrongful distress for rent by the appellant who was his landlord. The evidence of the respondent in the lower court was very simple. That evidence was led by Gerald Kiruja, who described himself as a former director of the respondent company, and also by a secretary of the respondent. Their evidence was to the effect that the appellant levied distress for rent when they had no rent arrears. They stated that on 1st February 1995 the 2nd defendant, who by the time the case came up for hearing was deceased, under the instructions of the appellant carried away all items of the property belonging to the respondent. Those items of property were listed in an inventory left behind by the appellant. Although the respondent denied being in rent arrears there was a voucher that was produced in

the lower court as plaintiff exhibit number 1 by the respondent and according to the evidence of Kiruja that voucher reflected the last rent paid to the appellant and the next rent was due for payment 6 months after the date of that voucher. Kiruja in evidence said the appellant distress for rent 5 months after the date of that voucher. In my consideration of the evidence here, I find that the respondent's evidence that there was no rent arrears did not tally with the plaintiff exhibit number 1. Plaintiff exhibit number 1 the voucher was dated 16th May 1994. According to the evidence of the respondent, distress for rent took place in February 1995. That was a period of more than 5 months. Indeed, it was in total 9 months from the date of the voucher. That as it may be the respondent in evidence further alleged that the appellant did not give to the respondent notice before levying distress for rent. The appellant did not adduce evidence before the lower court. The judgment of the lower court was in favour of the respondent but the lower court found that the respondent had not produced evidence to prove its claim for special damages of Kshs. 60,000/=. The learned magistrate by using the value stated in the appellant inventory entered judgment for the respondent for Kshs. 19,000/= as per that inventory. That judgment has provoked this appeal. The appellant has presented 8 grounds of appeal. The appellant appeal according to those grounds falls into two broad areas. The first is that the respondent was not a legal person capable of suing or being sued. The 2nd is that the respondent did not prove its claim for damages. I will deal with the 2nd area first. The respondent's case was that the appellant illegally and without notice distress for rent. The appellant did not adduce evidence in the lower court to counter that evidence. Certainly once the respondent alleged that the appellant distress for rent without notice the burden of proof shifted to the appellant. Notice before distress of rent is a requirement under The Distress for Rent Act Cap 293 and more particularly S. 4(1). The burden shifted to the appellant by virtue of Section 107 of the Evidence Act to prove that notice as required by S. 4(1) was given to the respondent. That section is in the following terms:-

“107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

It is the appellant who was bound to prove the existence of such a notice as required under Cap 293. The appellant failed to satisfy that burden and in my view, the court was right to find that the distress carried out on the respondent premises was unlawful. I am in total agreement with the finding of the learned magistrate that the respondent having failed to prove its claim for special damages the court could then fall back on the value given by the appellant in the inventory of the items carried away. On the merits, I find that I cannot fault the finding of the lower court. The first area which I highlighted earlier in this judgment related to whether the respondent was a legal person. I find that argument of the appellant to have merit. The title of the respondent in the claim at the lower court as even can be seen at the title of this case is:-

“Mount Kenya guided porters suing through Director Gerald Kiruja.”

When one looks at that title, one is left not sure whether the plaintiff (respondent) was Mount Kenya Guided Porters or Gerald Kiruja. It is not clear why a company should sue through its director and I call it a company because that is how it was described in the plaint. Paragraph 1 of the plaint is as follows:-

“The plaintiff is a registered company with power to sue and be sued.....”

The respondent was either a company registered under the Companies Act and if so had a legal personality distinct from its directors or it was a firm. But as quoted above, the plaintiff (respondent) described itself as a company which is registered. Since it described itself thus it then has its own distinct legal personality. This was the finding in the case of **Salomon Vs. Salomon & Co.** [1897] A.C. 22 where Lord Halsbury L. C. stated:-

“Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and nothing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.”

That quotation is very applicable to our case. If Mount Kenya Guided Porters was a registered company it could not sue through its director. It was necessary for the respondent in the lower court to clearly disclose who was the plaintiff. Was the Mount Kenya Guided Porters or Gerald Kiruja? From a casual glance of the Civil Procedure Rules and in more particular Order I it is clear that parties to a suit have to be specifically identifiable. Order I Rule 10 even gives the power to the court to strike out a party wrongly joined in the proceedings. What that means is that no one is to be left guessing who the plaintiff or the defendant is in a case. On that basis I find and I hold that the appeal has merit and on that basis alone this is the judgment of this court:-

1. The judgment in Meru CMCC No. 145 of 1995 delivered on 7th May 2002 is hereby set aside and substituted with an order dismissing that suit with costs to the appellant.

2. The costs of the appeal are awarded to the appellant.

Dated and delivered at Meru this 26th day of November 2009.

MARY KASANGO

JUDGE