REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 57 of 20

JOHN NDIRANGU Trading as

MUTHINGA PRODUCE GENERAL STORE ..... APPELLANT

VERSUS

MAITAI WANG'OMBE ..... RESPONDENT

(Appeal from original Judgment of the Chief Magistrate's Court at Nyeri in Civil Case No.

684 of 1995 dated 8th May 2003 by M. N. Omosa – R.M.)

J U D G M E N T

In a plaint dated 25th October 1995 and filed in court on 30th October 1995, Maitai Wang'ombe, the respondent herein, pleaded that he was at all material times relevant to the suit the tenant of the Defendant in respect of the business premises known as Uhuru Butchery situate in Nyeri Municipality/Block 1/53 hereinafter called "*the suit premises*". On or about March 1993, John Ndirangu t/a Muthinga Produce General Store, defendant then and now the appellant herein, his servants and or agents unlawfully and without colour of right broke into the suit premises and removed the respondent's belongings and denied him any access to the suit premises. As a result of the illegal and or unlawful acts of the appellant aforesaid the respondents tools of trade and or other goods set out in the schedule to the plaint were lost and or destroyed and the respondent therefore suffered loss and damage. The respondent thus claimed Kshs.182,645/= as special damages, general damages, costs, interest and any further and or further relief that the court could deem fit to grant.

In his statement of defence, the appellant pleaded that he was a stranger to the suit as he was not the landlord to the respondent, that the suit premises belonged to a partnership known as Muthinga Produce General Store. He denied having unlawfully broken into the respondent's suit premises as alleged nor did he cause loss to the respondent as a result. He went on to plead that the Muthinga Produce General Store obtained a judgment against the respondent vide Nyeri PMCCC No. 214 of 1990 on account of rent arrears and mesne profits and in execution of the decree, obtained a warrant of sale of the respondent's property. The auctioneer in execution of the decree went to the respondent's premises but did not find anything of value to attach as the respondent had removed all the goods from the suit premises to defeat the execution of the aforesaid decree.

In support of his case the respondent called a total of three witnesses. The first witness Michael Magana who testified that he was occasionally hired by auctioneers to assist them in their work. On this occasion

he was hired by Kabaraini Auctioneers and they proceeded to the suit premises. At the suit premises they met the appellant having already broken into the suit premises. They removed 2 weighing machines, sufurias, knives therefrom and carted them away in a lorry. The second witness was Ambrose Maitai. He is a son of the respondent and used to assist the respondent in his butchery business. He recalled that on proceeding to open the suit premises for business one morning some times in March 1993 he found new padlocks on the doors. The ones he had used to lock the suit premises the previous day had been removed and replaced. The appellant who was in the vicinity then told him that the respondent owed him rent arrears. He asked the appellant whom he considered the land lord for any papers from court but the appellant kept mum. The last witness for the respondent's case was the respondent himself. He stated that the appellant was his landlord as he had rented him the suit premises. He recalled his son aforesaid having called him on the material day and informed him that the appellant had blocked him from entering the suit premises and had taken away everything from the butchery. It was his testimony that he was not at all in any rent arrears. He later compiled the list of all items taken by the auctioneer acting on behalf of the appellant. That list was attached to the plaint as a schedule. According to the respondent the acts of the auctioneer and appellant were unlawful as he was never given anything to show that execution of the decree or distress for rent was contemplated or in the offing.

For the defence, the appellant testified that the respondent was a tenant in the suit premises which are owned by Muthinga Produce General Stor**e**. He was never his tenant as he is not the owner of the suit premises. He recalled that there was once a case between Muthinga General Produce Stor**e** and the respondent being Nyeri PMCCC No. 214 of 1990. Pursuant to the decree issued therein execution ensued and the suit premises were closed.

Having carefully evaluated the evidence and considered the written submissions by respective counsel, the learned magistrate found favour with the respondent's case stating thus "..... After careful evaluation of evidence, the plaintiff proved his **c**ase on the balance of probability. I grant her (sic) all the prayers he sought and dismiss the defence of the Defendant. Right of Appeal 30 days. I also grant him the costs of the suit..."

The appellant being dissatisfied therewith preferred the present appeal. Nine grounds of appeal were proffered through a memorandum of appeal filed through Messrs Kaburu & Co. Advocates. These are:-

1. That the learned Resident Magistrate erred in law in that he failed to give reasons for his judgment and that the failure to give reasons amounts to a denial of justice and is itself an error of law.

2. That the learned Trial magistrate erred in law in awarding special damages when the same were not specifically pleaded and specifically proved as is required by law.

3. That the learned Trial Magistrate erred in law and in fact in that he gave judgment according to his personal whims and not after proper evaluation of the evidence which was adduced before him.

4. That the Trial Magistrate's conduct of the case generally amounts to be (sic) biased against the appellant and this amounts to an error of law.

5. That the Trial Resident Magistrate took an inordinate delay to deliver judgment without giving reasons for taking over five months without delivering judgment and such inordinate delay made it too difficult for him to deliver any reasonable judgment.

6. That the learned Trial Resident Magistrate erred in law in granting "all the prayers he sought and dismiss the defence of the defendant "without actually stating in the judgment what those prayers were and actually entering judgment for specific sums of money.

7. That the learned Magistrate erred in law and in fact (sic) he failed to assess the quantum of general damages.

8. That the learned Resident Magistrate's judgment is not a judgment but a figment of his own

imagination.

9. That the learned trial magistrate would have come to different finding both on the law and on the evidence and he would have dismissed the respondent's claim with costs to the appellant if he had properly evaluated the evidence before him and properly considered the appellant's evidence.

At the hearing of the appeal Mr. Mwangi and Mr. Mugambi, both learned counsel appearing for the appellant and respondent respectively agreed to have the appeal argued by way of written submissions. The court was in agreement with the proposal. Accordingly written submissions were subsequently filed by respective counsel. I have carefully read and considered them together with the authorities cited and annexed thereto.

As this is a first appeal, I should bear in mind and act upon the well established principles which a first appellate court should apply. These are; that although the first appellate court has the power to re-evaluate the evidence and reach its own conclusions, where necessary, it should be very slow to interfere with the findings of fact made by the trial court. The appellate court will however interfere with findings of fact if it is established that they were based on no evidence, or on a misapprehension of the evidence, or that the judge demonstrably acted on the wrong principles in reaching those findings. See generally Peters v/s Sunday Post Ltd (1958) E.A. 429, Makube v/s Nyamuro (1983) KLR 403 Kahn v/s Singh (1985) KLR 716 and Mwanasonoki v/s Kenya Bus Services Ltd (1985) KLR 931.

From the outset I must express my disappointment in the manner in which the judgment was crafted. The judgment fell below the expected standards. It was short and terse. It left a lot to be desired. The learned magistrate having reharshed the evidence tendered merely concluded by saying "After careful evaluation of the evidence the plaintiff proved his case on balance of probability. I grant him all the prayers he sought and dismiss the defence of he defendant.....**....."** He made no efforts at all to comply with the requirements of Order XX rule 4 of the civil procedure rules. That provision of the law provides in mandatory terms that "judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision." So what happens in a situation like the one we find ourselves in where there is a judgment but is not in compliance with the aforesaid provisions of the law. In other words is the omission fatal? In my considered judgment, I do not think it is. After all as a first appellate court it is my duty to reconsider and review the evidence tendered so as to reach my own decision on the evidence. Was sufficient evidence tendered in support of the respondent's case. Yes, I think so. It is common ground that the respondent's goods were attached. It is not clear whether it was in execution of a court decree or whether it was for distress for rent. Whichever way one looks at it, it was all illegal. If it was distress for rent, it is apparent that no Notice was issued before the alleged distress was levied. Further there was no proclamation done before the goods were carted away. Worst of all, there was even no inventory taken of the attached goods. That being the case, the distress for rent levied if at all was clearly carried out in breach of the law. It was illegal. How about if the attachment was pursuant to a court decree? The same reasoning applies. There is no evidence that the goods were first proclaimed and left in the custody of the respondent for seven (7) days as required. There is no evidence that an inventory of the said goods was taken. There is also no evidence that the goods attached were ever sold by way of public auction as required. From the foregoing, it is quite evident that the appellant and his agents broke into the respondent's suit premises and carted away some items. The said breaking in and taking away of the respondent's goods was unlawful and illegal. The appellant did not at all tender in evidence, any order by court and or tribunal authorising him to break into the suit premises. As a result of the said acts of the appellant, the respondent suffered loss and damage.

The respondent had in his plaint prayed for special damages in the amount of Kshs.182,645/=, General damages for illegal and forcible entry and costs. The appellant takes the view that special damages were not specifically pleaded and specifically proved as required by law. That cannot possibly be correct. The plaint in paragraph 5 refers to a schedule to the plaint which sets out the goods that were lost during the illegal distress for rent and or execution of the decree. That schedule formed part of the pleadings. Special damages were thus specifically pleaded and were also proved. The respondent gave evidence on the items lost. PW1 who was among the people who conducted the seizure testified that some items were

taken away and went ahead to tabulate some of them. The loss was found proved by the learned magistrate and was directly attributed to the appellant. Yes the respondent was unable to tender in evidence any documentary prove of the items lost. It would appear that the respondent's failure to produce the receipts in proof of the special damages was occasioned by the appellant's illegal break in and seizure. Indeed the respondent testified that the receipts were in the drawer and were all together with other files taken away by the appellant and or his auctioneers. In the case of Maitai Wang'ombe v/s Samuel Kariuki HCCC No. 324 of 1993 (unreported), in a situation similar to the one obtaining herein, the learned judge delivered himself thus:-

"..... The Plaintiff was handicapped, in that the defendant removed all his things from the premises including his documents. Is he to be penalized simply because he did not produce any documentary evidence? The answer is no, since the non-production of the documentary evidence was due to the unlawful act of the defendant ....." I wouldn't agree more.

In any event it was held in the case of Nthenge v/s Wambua (1984) KLR 799 that illegal distress involves trespass to goods and proof of the actual loss sustained is not necessary; the law gives one the right to recover damages not limited to actual damages sustained. Yes special damages must be specifically pleaded and proved. See generally, Shabani v/s Nairobi City Council (1982-1988) 1 KAR 681, Hann v/s Singh (1982-1988) 1 KAR 738, Charles K. Mukua v/s Mirango C.A. No. 182 of 1995 (unreported) and Total Kenya Ltd v/s Juanco Investments Ltd. C.A. No. 146 of 1999 (unreported). However in the circumstances of this case I am satisfied that he respondent did discharge that burden.

The appellant has also contended that the magistrate gave judgment according to his personal whims without proper evaluation of the evidence. That the conduct of the case was biased against the appellant which amounts to an error of law. That the judgment took inordinate delay to be delivered which affected its quality. I do not discern on the record any evidence of bias. I am not aware that if a judgment is delayed inordinately, its quality is thus compromised. The delay in any event does not invalidate the judgment. That was the holding by the court of appeal in the case of Nyagwoka Ogora v/s Francis Osoro Marko, C.A. No. 271 of 2001 (unreported). The court stated "..... However if non compliance with the rules were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be avoided or declared void ipso facto. The rule cannot not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard, In our considered view, while non-compliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officers concerned from those in charge of judicial Administration it should not be a ground for vitiating a duly delivered judgment....."

The appellant claims that he is non-suited. That he is not the owner of the suit premises. He tendered in evidence a title deed of the suit premises to show that he is not indeed among the registered proprietors of the suit premises. However by his name not appearing in the title deed does not in itself absolve the appellant of liability. He could have been the head tenant of the suit premises a portion whereof he had sublet to the respondent. Indeed the respondent clearly stated that the suit premises were let to him by the appellant and that he did not know of any other landlord. All along therefore, the respondent had been dealing with the appellant as the landlord and nobody else. Although the appellant would want us to believe that he had nothing to do with the suit premises, his testimony however fails him. Under cross-examination by the then counsel for the respondent, Mr. Muhoho, he stated ".....The plaintiff has not paid any rent. It was broken by Kambaraine auctioneers. They were sold by the auctioneer. We never recovered all the amount of money ....." In any event by his own affidavit dated 11th November 2003 and filed in court the following day in support of the application for stay of execution of the decree the appellant is categorical that "..... I am one of the partners of Muthinga Produce General Store and competent to swear this affidavit having been authorised by other partners to swear the same on their and my own behalf....." There can therefore be no doubt at all that the appellant was properly sued. He was and is a partner in the firm known as Muthinga produce general store. He was sued as "John Ndirangu T/A Muthinga Produce General Store." Much as it would have been desirable to enjoin all the other partners in the suit, I do not think that, failure to do so should render the respondent's suit fatally

defective. In any case, if indeed the appellant believed strongly that he was non suited, why couldn't he take out Third Party proceedings against the real proprietors of Muthinga produce general store. The appellant too was present during the illegal break in and seizure. Indeed he masterminded it. That renders the allegation that he was a stranger to the proceedings not plausible. He was the right person to shoulder the consequences of his actions thereof.

As I have already stated, if the appellant was distressing for the rent, the procedure adopted thereof fell short of the requirements set out in the distress for rent Act. If on the other hand the appellant was executing a court decree passed in Nyeri PMCCC No. 214 of 1990 Muthinga Produce General Store v/s Maitai Wang'ombe T/A Uhuru Butchery, and that is what he wants this court to believe, the procedure employed too also fell short of rule 12 of the auctioneers rules. Accordingly, the learned magistrate was right in dismissing the appellant's defence.

It would appear that the respondent may only recover the special damages awarded to him by the trial court. Much as he was awarded general damages, the same were never quantified as expected. Both counsels in this appeal have not been of much help in this regard. In any event the respondent did not cross-appeal on the issue. I do not think I need to say more on the same.

On the basis of the foregoing, I find no merit in this appeal. Accordingly it is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 20th day of November 2008

M. S. A. MAKHANDIA

JUDGE