



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 112 of 2002

FESTUS MWEBIA M'IKIRERA APPELLANT

VERSUS

MICHAEL KUNGU KIGIA RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate's Court N. B. K. N. Nyamategandah, in Meru CMCC No.177 of 1995)

JUDGMENT

This is an appeal from the decision of the subordinate court at Meru, (Mr. N. B. K. N. Nyamategandah, SRM) in which the respondent in this appeal was awarded both special and general damages in the sum of Kshs.269,161/= plus costs and interest at the court rates – for wrongful eviction and the value of lost and/or damaged goods.

The appellant being aggrieved by the findings of the lower court has preferred this appeal citing 16 grounds which were condensed and argued as five as follows;-

1. That the respondent failed to prove his case on a balance of probability and failed to call witnesses to support his testimony
2. That there was discrepancy between the original and carbon copy of the list of goods returned by the appellant.
3. That the list forming the basis of the suit was originated by the respondent unilaterally and prices attached without basis.
4. That the trial court awarded what was not prayed for
5. That the court misdirected itself by awarding general damages on the basis of mental and financial difficulties suffered by the respondent.

Learned counsel for the respondent, responding to these submissions, argued that the respondent proved his claim on a balance of probability; that the appellant illegally removed the respondent's goods, failed to return them when demanded and when finally returned, some were missing and others damaged.

It was further argued that the respondent's claim before the court below was in the alternative and the trial court properly directed itself in awarding the value of the damaged/lost goods, based on the receipts

produced.

I have considered these arguments and the case of Dalmas B.Ogoye V K.N.T.C Ltd, Civil Appeal No.125 of 1996 to which reference was made by learned counsel for the appellant.

The background to this dispute can be briefly stated as follows;-

The appellant was the respondent's landlord. The former intended to change the user of to the leased premises and notified the respondent accordingly. When the respondent failed to vacate, the appellant moved in and evicted him, carrying the former's personal household goods to unknown destination.

It took the intervention of the Rent Restriction Tribunal for the appellant to return them. The appellant was also charged with wrongful eviction contrary to Section 29 of the Rent Restriction Act and fined Kshs.3,000/=.

When the goods were eventually returned some were found to be missing or damaged. For this the respondent instituted a suit before the lower court seeking that either the appellant returns the missing and damaged goods or pays their equivalent value.

He also prayed for general damages, costs and interests. The court found for him prompting this appeal. The respondent's claim was based on a typed list admittedly drawn by himself and signed also only by himself, showing 69 items not returned and their respective values as Kshs.296,689/= reflected. That list is dated 30th November, 1994 and was produced as P.Exh.9.

There is yet another handwritten document, marked P.Exh.10.A which makes reference to a list of items returned and received by the respondent. I suppose the list is what is marked D.Exh.1 – listing 28 items. It is upon the respondent to prove that indeed the 69 items listed in P.Exh.9 were either not returned or returned damaged. Looking at the two lists, the typed one of 69 items and the handwritten listing 28 items, one cannot fail to see glaring discrepancies.

It is not clear why the respondent having signed the handwritten list found it necessary to draw another list on the same day. The first list was signed by both the appellant and the respondent, with their respective witnesses attesting their signatures.

The second list is dated and signed on the same day as the handwritten one but not signed by the appellant or witnessed. The trial magistrate explained in his judgment that the respondent acted prudently by

“First receiving the goods and then check which one had been returned and which ones had not been returned”.

With due respect, what the respondent did cannot be described as prudence. Had he caused the typed list to be signed by the respondent, confirming that all the 69 items had not been returned or were returned damaged, this dispute would probably not have arisen. It appears to me that the typed list was originated by the respondent to decorate his case.

I am satisfied from this that the genuine list is the handwritten list in which some items are acknowledged to have been damaged. These items are a table, 2 beds, 3 glasses (broken) and broken cups (no number(s) given).

It is only those items that the appellant can be held responsible for. From the list of items removed by the appellant it is allegedly that 12 cups at the cost of Kshs.600/= were taken away. In the list dated 30th November, 1994, of the damaged/lost items, which I have rejected 12 cups are reflected to cost kshs.600/=. This is also supported by a receipt issued on 7.2.89 by Bajeta Stores. Table is reflected in the two lists as one item at the cost of Kshs.2,500/= and the same is supported by a receipt issued by Meru Furniture Makers(date not clear). 3 glasses at Kshs.150/=(as 12 glasses is reflected in a receipt issued on 7th February, 1987 by Rajata stores to cost Kshs.600./-).

Then two beds at Kshs.5,000/= making a total of Kshs.10,000/=. (See receipt from Meru Furniture makers dated 5.5.1983). What the respondent was entitled to was Kshs.13,250/= based on the proved claim before the lower court. That is what I award.

The respondent was also awarded general damages in the sum of Kshs.80,000/= because, according to the learned trial magistrate;

“He must have suffered mental, financial and even time (sic) in trying to follow up their (sic) properties”

It is trite that damages for mental anguish and stress are not recoverable in an action such as this. See Dalmas B. Oguye(Supra).

While there is no dispute that there was a tenant/landlord relationship between the respondent and appellant, it is also conceded that the appellant was upto-date with payment of rent.

Indeed the reason advanced by the appellant for seizure of the respondent’s goods is that the former wanted to change the user of the leased property from residential to commercial.

From the record the appellant moved in and took away the respondent’s household goods without an order of the court or without giving the requisite notice.

Section 106 of the Transfer of Property Act provides that a lease such as the one in this matter is terminable by fifteen days’ written notice. The appellant’s averment that he required the respondent to vacate is not backed by evidence. I come to the conclusion that the seizure and removal of the respondent’s goods was wrongful act of high-handedness.

No landlord is bound to keep anybody as a tenant. Whether it is a question of arrears of rent or change of user, the tenant can always be asked to vacate in a civil manner.

So, what kind of damages can be awarded for the acts of the appellant? It was held in Perera V Vandiyar(1953) 1 KLR 672, a decision cited with approval in Mundia V Lolchoki (1976) KLR 284, that there is no tort of eviction. In my view the relationship of the appellant and respondent is purely contractual.

Section 108 (c) of the Transfer of Property Act provides that;

“108. (c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contract binding on the lessee, he may hold the property during the time limited by the lease without interruption”

It follows that the respondent was entitled to damages either for breach of contract or trespass. I, with respect, agree with learned counsel for the appellant that remedies for breach of contract should have flowed from the facts of this case.

Where a contract is unlawfully determined, in principle the aggrieved party is entitled to such damages as would as nearly as possible put him in the same position as if the contract had been completed. The respondent was, as it were, thrown out on 2nd February, 1994 and it was not until 30th November, 1994 that the respondent’s goods were returned and the respondent allowed back in the premises. This is a period of nine months. Not a short period. The lease between the parties is the usual layman’s agreement where emphasis are laid, not on the terms such as notice or period for the lease or even the consequences for breach, but on the rent.

The rent in this case was Kshs.1,000/= per month. The respondent can only be compensated in that measure assuming, in order to mitigate his losses he occupied another accommodation during the period the house was locked and household goods in someone else’s hands.

I will grant the respondent Kshs.9,000/= representing rent at Kshs.1000 for 9 months . In the result this appeal is allowed by substituting special damage of Kshs.189,161/= awarded by the subordinate court with Kshs.13,250/-. General damages of Kshs.80,000/= is similarly substituted with Kshs.9,000/=: plus interest on special damages from the date of the suit and the general damages from the date of this judgment. Costs of this appeal to the respondent.

DATED AND DELIVERED AT MERU THIS 18th DAY OF May, 2007

W. OUKO

JUDGE