REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 139 of 2005

JOSEPH MAINA KINGORI WANGECHI…….....…....PLAINTIFF

VERSUS

JOSEPH WAMBUGU NDEGWA……...……..DEFENDANT

JUDGMENT

The appellant, Joseph Maina King'ori Wangechi, filed suit against the respondent, Joseph Wambugu Ndegwa seeking to be paid the sum of Ksh.61,500/= which he claimed were "*rent arrears mesne profit*" for the appellant's premises at Mwenja for a period between June 2000 and October 2003. The appellant further prayed to be awarded costs of the suit. The respondent filed a defence. He denied that he owed the appellant the said sum of Ksh.61,500/=. He denied ever having leased the appellant's premises at Mwenja. He averred that he had entered into an agreement with the appellant for the purchase of a plot, which agreement fell through when the appellant failed to transfer the plot to him. The respondent urged the court to dismiss the appellant's suit with costs. The trial court heard the appellant's suit in the absence of the respondent. The respondent had not attended court despite being present when the hearing date was fixed by the court. After hearing the appellant's suit, the trial magistrate held that the appellant had not established his case. He dismissed the appellant's suit with costs.

The appellant was aggrieved by the said decision of the trial magistrate. He filed an appeal to this court. In his memorandum of appeal, the appellant raised four grounds of appeal. He faulted the trial magistrate for failing to accept the appellant's uncontroverted evidence that the respondent had been in possession of the suit premises prior to the failed agreement for sale and therefore the trial court ought to have found the appellant was entitled to be paid mesne profit. The appellant was aggrieved that the trial magistrate had failed to consider that once the agreement between the appellant and the respondent failed, the parties ought to have been restored to their original position, and in this case, the trial court ought to have found that the respondent was entitled to pay rent for the period that he was in occupation of the suit premises. The appellant was aggrieved that the trial magistrate had failed to consider the evidence that he had adduced and thus reached a decision dismissing the appellant's suit against the weight of evident. He urged the court to allow the appeal with costs.

At the hearing of the appeal, Mr. Chege counsel for the appellant submitted that the cause of action arose out of the use of school premises at Mwenje Township by the respondent. He submitted the appellant and the respondent had entered into an agreement for the sale of the suit property, which agreement subsequently thereafter fell through. He submitted that when the agreement collapsed, the parties were put in the position they were before the agreement was entered into. In the case of the appellant and the respondent, the respondent, who had remained in possession of the suit premises, ought to have paid rent. Mr. Chege maintained that it was not in dispute that the respondent had occupied the suit premises without paying rent. He submitted that the trial magistrate ought to have considered the principle of

restitution in integrum and awarded the appellant his claim for mesne profit.

Mr. Chege explained that the trial magistrate had failed to consider the evidence which was adduced by the appellant which had established to the required standard that the appellant was entitled to be paid rent for the period that the respondent was in occupation of the suit premises pending the finalization of the agreement which however subsequently collapsed. He submitted it was the respondent's breach of the agreement that caused the agreement to fall through. He urged the court re-evaluate the evidence adduced and find that the appellant was entitled to be awarded mesne profit. He urged the court to allow that appeal with costs.

The respondent, who was acting in person, opposed the appeal. He submitted that the appellant had not established the existence of a lease agreement that would have entitled the appellant to claim rent. He explained that he took possession of the suit premises when he entered into the sale agreement for the said suit premises and subsequently move out when the agreement was frustrated. He submitted that at no time did he agree to pay rent of Ksh.1,500/= per month to the appellant. He maintained that it was the appellant who had breached the agreement when he failed to avail the ownership documents of the suit premises.

The respondent submitted that the sum of Ksh.7,000/= which he had paid to the appellant was part payment of the purchase consideration and not the rent for the suit premises. He submitted that when he established that the appellant was unable to fulfill the terms of the agreement, he made arrangements to vacate the suit premises. He maintained that his vacation from the suit premises was hastened when the actual owner of the suit premises, one Kimamo, asked him to give vacant of the suit premises. He maintained that the appellant was not the owner of the suit premises and therefore could not claim any rent or mesne profits in respect of the same. The respondent submitted that he took occupation of the suit premises when he entered into the agreement which was subsequently thereafter rescinded. He vacated the suit premises when he was asked to give vacant possession. He urged the court to dismiss the appeal with costs.

This being a first appeal, this court is aware of its duty as the first appellate court. As was held by the Court of Appeal in **Bidco Refineries Ltd vs Rosslyin Developments Ltd C.A Civil Appeal No.227 of 2007 (Nrb) (unreported)** at page 8;

"***The principles upon which an appellate court would interfere with the decision of a court of first instance are now well settled and have been restated many times by this court. A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. An appellate court also has jurisdiction to review the evidence in order to determine whether the conclusion reached upon the evidence should stand, but this is a jurisdiction which should be exercised with caution – see*** *Makube – vs Nyamira [1983] KLR 403 and Kiruga vs Kiruga & Anor. [1988] KLR 3483****."***

In the present appeal, the issues for determination are two fold;

(1) Whether the appellant established that the respondent was a tenant in the suit premises at the time the agreement which was later rescinded was entered into.

(2) Whether the appellant established that he was entitled to be mesne profit as a result of the respondent's occupation of the suit premises.

I have re-evaluated the evidence adduced before the trial magistrate, as I am required to by the law. The dispute between the appellant and the respondent arose from the occupation by the respondent of some three plots at Mwenje Trading Centre in Laikipia District. The appellant and the respondent entered into agreement on the 11th June 2000 in which it was agreed that the appellant would sell the said plots to the respondent for a purchase consideration of Ksh.60,000/=. It is not disputed that the respondent paid a deposit of Ksh.4000/= on the signing of the agreement. It is apparent from the agreement that the parties

envisaged that they would enter into another agreement after a valuation had been undertaken of the improvements on the said plots. The subsequent agreement was not entered into. According to the appellant, the respondent should pay him a sum of Ksh.61,500/= which he has calculated as the rent of 41 months at the rate of Ksh.1500/= per month.

To establish his claim, the appellant was required to prove that there existed either a lease agreement, or a clause in the sale agreement that would have mandated the respondent to pay him monthly rent of the claimed sum of Ksh.1500/= per month. The appellant failed to establish either that he had entered into a lease agreement with the respondent or that there was a clause in the agreement that would have entitled him to be paid rent on a monthly basis in the event that the agreement was frustrated. The appellant further failed to prove that he was the owner of the plots which were the subject of the agreement. The respondent submitted that he subsequently learnt that the said plots were owned by one Kimamo.

It is therefore clear that the trial magistrate was not at fault when he held that;

"***The sale agreement does not provide any provision that the defendant was in possession of the plot and or in the occupation of the premises that were standing on the plaintiff's plot at the time of writing the agreement. The plaintiff has not tendered any evidence to demonstrate that he had leased out the premises to the defendant before the writing of the sale agreement."***

Having re-evaluated the evidence adduced before the trial magistrate (*who had the opportunity of seeing the appellant testify and therefore properly assessed his demeanour*) and considered the submissions made during the hearing of this appeal, it was evident that the appellant failed to establish, to the required standard of proof on a balance of probabilities, that he was entitled to mesne profit in the circumstances of this case. In any event, the appellant was not allowed in court to adduce parole evidence to explain what was specifically provided in a written agreement.

The upshot of the above reasons is that the appeal filed by the appellant lacks merit. It is hereby dismissed with costs to the respondent.

DATED at NAKURU this 15th day of November 2007

L. KIMARU

JUDGE