



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 127 of 2000

J. R. GITHERE APPELLANT

VERSUS

MUNISHRAM INTERNATIONAL BUSINESS MACHINES LTD RESPONDENT

(An Appeal from the Judgment of Hon. C. O. Kanyangi, SPM, in Milimani

Commercial Courts Civil Suit No EJ 517 of 1997 delivered on 24th February, 2000).

JUDGMENT

By an amended Plaintiff dated 8th January, 1999, the Respondent (Plaintiff in the lower court) sued the Appellant/Defendant to recover a sum of Kshs.303,300/= being mainly arrears of rent (and other minor expenses) arising from the Appellant's tenancy in the Respondent's premises in Nairobi known as L. R. No. 209/689.

The trial court found that the Respondent had proved its case on a balance of probability and awarded it the sum claimed. Aggrieved with that decision, the Appellant has preferred this appeal on the following six grounds of Appeal.

- 1. *The learned trial Magistrate erred in law and fact in finding that the Plaintiffs had proved its case on a balance of probabilities.***
- 2. *The learned trial Magistrate erred in law and fact and misdirected himself in giving judgment for the Plaintiff against the Defendant who was non-suited.***
- 3. *The learned trial Magistrate erred in law and fact and misdirected himself in failing to arrive at a finding that the Plaintiff's claim was based on the judgment of the Business Premises Rent Tribunal Case No. 1223 of 1991 where the Appellant was not a party.***
- 4. *The learned trial Magistrate erred in law and fact in failing to arrive at a finding that the Appellant and S M Githere the Plaintiff's father were two different personalities in law and a judgment against S M Githere could not be enforceable against J R Githere the Appellant.***
- 5. *In assessing the evidence adduced by the Plaintiff and the Defendant, the learned Magistrate took erroneous considerations into account and acted on wrong principals (sic) to the prejudice of the Appellant.***
- 6. *In all the circumstances of the case, the learned trial Magistrate failed to consider the relevant laws and principles applicable in the case and hence arrived at an erroneous judgment.***

Essentially, as I understand it both from the above grounds, and from submissions made before this court, the quantum or the amount claimed and awarded by the lower court is not in issue. The only issue is whether the Appellant was a tenant of the Respondent and hence liable for payment of the rent arrears.

The Appellant's argument, both here and before the lower court, was that he was non-suited, that he was not the Respondent's tenant, and should have never been sued in the first place. His Counsel, Mr Kariuki, submitted that it was the late Mr S N Githere, the Appellant's father who was the tenant, and not him; that notice to increase rent was given to "S N Githere", who also was the one to file the Reference in the Business Premises Tribunal; that the Tribunal's ruling was against S N Githere; that he only assisted his father manage the business and paid rent on his behalf.

The Respondent, through its Counsel, Mr Mbabu, submitted that indeed the original tenant was S N Githere. However, in the 1990's when Mr S N Githere started ailing, his son J R Githere, the Appellant, took over the business and continued trading in the name of S N Githere. The Appellant, as the new tenant of his father's business, continued paying rent, by Bankers Orders; that when the notice to increase rent was issued he went to negotiate with the Respondent, and eventually filed a Reference in the Business Premises Tribunal. All this implied a tenancy.

The lower court, in finding for the Respondent, expressed itself, in part, as follows:

"The only dispute here arises because the defendant claims that it is his deceased father who could and should be responsible to pay the amount. The plaintiff says that the defendant should pay as he was the de facto tenant. The defendant has conceded that he used to manage the business in those premises owned by the plaintiff. He used to have another business therein and he appears to have been paying the rent allegedly on the instructions of his deceased father. In the view of this court, the defendant appeared to have been a partner or an agent to the deceased. He must pay the rent arrears."

Having carefully reviewed and re-evaluated the record of evidence in the lower court, as I must do being the first appellate court, I am satisfied that the findings of facts by the lower court are based properly on the evidence before it and that it has not acted on wrong principles in reaching its conclusion.

The issue before the lower court was simple: who pays for the rent arrears? Who was the tenant? There was no dispute that the arrears were payable, and the amount payable, only who pays.

Was the Appellant the tenant? The evidence before the lower court is clear that although the original tenant was S N Githere, upon the latter's illness, and eventual death, his son, J R Githere, the Appellant took over the tenancy by conduct and implication. He managed the business, and indeed paid rent, by bankers orders. Why would he do this? Would it not have been simple to hand over the premises if he had no intention to continue the tenancy, and operate the business? But he did no such thing. Instead, when he received the notice for rent increase, he went to the landlord to negotiate a better rent; he filed the Reference to the Business Premises Tribunal, and attended the proceedings of the Tribunal. All this indicates, much more than on a balance of probability, that the Appellant took over the tenancy, and is liable for the rent. He certainly benefited from the tenancy, and is now using a red herring to evade his responsibility. To allow him to do so, would be to permit unjust enrichment to him. His claim that his father was the tenant, and that the business name was S N Githere, is of no help to him. A person can choose to operate a business in any name – in fact it was prudent for him to continue using the same name, but whether, he was a tenant, and, therefore, liable for rent, is a question of fact. The learned Magistrate answered that question correctly, as does this Court.

I find that there is no basis to this appeal, and dismiss the same with costs to the Respondent.

Dated and delivered at Nairobi this 12th day of May, 2005.

ALNASHIR VISRAM

JUDGE