REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 162 of 2002

JOB EVANSON OKELLO……...……..……..APPELLANT

VERSUS

STEPHEN Z. K. NJOROGE……..……...RESPONDENT

JUDGMENT

The respondent's claim before the trial court was for Kshs.37,000/- but it was not disclosed in the plaint how it arose, it was simply stated that the particulars thereof were well within the appellant's knowledge. The appellant, in his defence, denied the said claim but stated that if at all he owed the respondent the said sum, the same was statute barred and/or unenforceable in law.

When the matter came up for hearing, the respondent testified that he had sublet his office to the appellant at a monthly rent of Kshs.1000/- from July 1996 to July 1998, a period of 24 months. There was no written agreement between them. The respondent said that the appellant was supposed to be paying half of the office telephone bills, the total of which was Kshs.7,200/-. He was also claiming Kshs.1000/- on account of a camera which the appellant had allegedly destroyed.

During cross examination by the appellant's counsel the respondent said that the appellant was supposed to be paying rent of Kshs.1200/- per month and further told the court that the subletting was not illegal as the landlord of the offices premises did not prohibit his tenants from subletting their office. The respondent produced before the trial court a note that had been given to him by the appellant regarding some arrears of rent.

The same was as hereunder;-

"Office Arrears as at Now

Arrears owed to the office as at now is Kshs.5,600/- only. That's upto March 31st 1998

= KSHS. 5600/-

Regards (singed)

JOB EVANSON OKELLO"

The appellant chose not to give any evidence during the trial but both parties filed written submissions.

The trial court found that the respondent had sufficiently proved that the appellant was his sub-tenant and

in particular it held that the aforesaid note (P. Exhibit 1) established the sub-tenancy arrangement and indebtedness of part of the claim on arrears of rent whose total was Kshs.28,800/- for a period of 2 years at Kshs.1200/- per month. The court dismissed the other claims and entered judgment for Kshs.28,800/- in favour of the respondent. The appellant was aggrieved by the said finding and he preferred this appeal.

He raised four grounds of appeal as follows:-

> 1. That the learned trial magistrate erred in deciding that the appellant was liable to the respondent for payment of rent in the absence of evidence in support of existence of sub-tenancy agreement between the parties.
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> 2. That the learned trial magistrate erred in law and fact by relying on Exhibit 1 as prove of acknowledgment of sub-tenancy agreement. 3. That the learned trial magistrate erred in law and fact by disregarding submissions filed on behalf of the defendant/appellant and by not directing his mind to the applicable law of tenancy.
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> 4. That the learned trial magistrate erred in law and fact by finding that the plaintiff/respondent had proved his case on balance of probability when evidence on record did not support that.

Mr. Gai for the appellant argued all the above grounds of appeal together. He submitted that no sub-tenancy was proved to have existed between the parties and he faulted the learned trial magistrate for accepting the note that was allegedly given by the appellant (Exhibit 1) as having established the sub-tenancy. He said that the note was a photocopy and did not contain the appellant's signature, did not show who it was addressed to and neither did it indicate which office was shared.

Mr. Ngure for the respondent submitted that the respondent had proved on a balance of probabilities that he had sub-let his office to the appellant and that Exhibit 1 produced before the trial court was an original document which bore the appellant's name and signature and the amount so far owed. He said that the appellant had not objected to the production of the exhibit.

I have considered the record of appeal and the submissions that were made by counsel for both parties in this matter. The only issues that arise for determination are whether there was any sub-tenancy agreement between the appellant and the respondent and if so, whether there were any arrears of rent payable by the appellant to the respondent.

The respondent testified that he had an office at Gate House, Nakuru and produced telephone bills which bore his business name, Stewa Commission Agencies. He said that he had sub-let the said office to the appellant at an agreed monthly rent of Kshs.1200/-.He said that the note that was given to him by the appellant (Exhibit 1) and which he produced before the trial court, confirmed that the appellant was his subtenant. Although in that note the appellant admitted owing the respondent Kshs.5,600/- the respondent said that they disagreed on the exact sum that was due and owing, the respondent saying it was Kshs.28,800/- and the appellant admitting Kshs.5,600/- only. The appellant elected not to testify and so the respondent's evidence was unchallenged. A party who opts not to testify in a trial denies himself the opportunity to disapprove the evidence tendered against him by the other side. The standard of proof in civil cases being on a balance of probabilities, in the absence of any contrary evidence, the trial court was right in holding that the respondent had proved his case as against the appellant.

I find that the appeal has no merits and dismiss the same with costs to the respondent.

DATED, SIGNED AND DELIVERED at Nakuru this 29th day of September, 2005.

D. MUSINGA

JUDGE

29/9/2005

Judgment delivered in open court in the presence of Mr. Gai for the appellant and Mr. Gitonga holding brief for Mr. Ngure for the respondent.

D. MUSINGA

JUDGE

29/9/2005