



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 62 OF 2000**

VIJAY MORJARIA

AMRIK SINGH APPELLANTS

VERSUS

DHIRAJLAL JUTHALAL SHAH

RAJESH JUTHALAL SHAH RESPONDENTS

JUDGMENT

The Respondent landlords sued the 2nd Appellant (tenant) in the lower court to recover possession and unpaid rent in respect of their premises L. R. 209/118/101 in Kolobot Road, Nairobi (hereinafter “the suit premises”) rented to the 2nd Appellant on an oral monthly tenancy. The two main terms of the tenancy were that the 2nd Appellant would pay the monthly rent of Kshs.8,000/=, and would not sub-let the premises.

When the suit was filed the 2nd Appellant filed a Defence claiming, among other things, that the suit premises had been assigned to the 1st Appellant, and promptly filed an application to join him as the 2nd defendant in the suit in the lower court. Here, before this Court, he is the 1st Appellant.

The lower court (Hon. Lessit, CM – as she then was) found, in a carefully prepared Judgment, that there was no evidence of tenancy between the Respondents and the 1st Appellant, and that the 1st Appellant was a trespasser. She also found that the 1st Appellant was in illegal occupation of the suit premises between June 1997 and April 1998 and ordered him to pay mesne profits of Kshs.20,000/= per month for that period.

Aggrieved by that decision, the Appellants filed this appeal based on the following six grounds:

“1. That the trial magistrate erred in law and misdirected her self on the evidence in finding that the appellants were not lawful tenants of the respondents.

2. That the learned trial magistrate misdirected herself on pleadings and the evidence in failing to find that the respondent was in contempt of court by unlawfully failing to re-open the premises after he had been ordered by court and hence arrived at the wrong conclusion in holding that the appellants were liable to pay mesne profits for the period they had been unlawfully evicted.

3. That the learned trial magistrate erred in law in disregarding the independent testimony of the police officer and the respondents tenant who confirmed that indeed the respondent had changed locks and placed another tenant in the premises.

4. That the learned trial magistrate ignored the evidence of the cheques, certificates of posting, electricity Bills etc, which proved that indeed the appellants were in possession of the premises and hence arrived at the wrong conclusion in holding that there was no tenancy.

5. That the learned trial magistrate erred in law in awarding mesne profits after finding that no tenancy had been established thereby treating the appellants as trespassers without any supporting evidence. 6. That in all the circumstances of this case there was no justification for the finding made against the appellants.”

Mr Kahiga, Counsel for the Appellants, submitted that the Respondents knew that the suit premises had been sub-let to the 1st Appellant (by way of an implied tenancy) and that is indeed why a notice of termination was served on the 1st Appellant (without actually referring to him as a trespasser); that the Respondents had continued to receive rent cheques from the 1st Appellant; that these were banker's cheques which the Respondents had accepted and banked; that there were electricity bills in the name of the 1st Appellant showing that he was indeed the tenant; and finally that there was the evidence of a Police Officer who saw a woman in the house after the locks had been replaced by the Respondents, which evidence, Counsel claimed, was material to his case but was disregarded by the lower court.

On the other hand, Mr Vishnu Sharma, Counsel for the Respondents, submitted that there was no evidence of a tenancy between the 1st Appellant and the Respondents; that it was not until the termination notice was given to the 2nd Appellant that the Respondents found out about the alleged assignment of tenancy to the 1st Appellant; that initially rent was paid in cash, later by way of banker's cheques, and that there was no way of knowing that the banker's cheques came from the 1st Appellant; that the 2nd Appellant did not give any evidence in the lower court to controvert the testimony of the Respondents; and finally that the Police Officer's testimony was irrelevant to deciding who was the lawful tenant. Having heard these submissions, and having reviewed the record of proceedings, I am satisfied that the lower court evaluated the evidence properly and came to the correct decision.

The lower court had the opportunity to hear all the witnesses and test their demeanour. In doing so it came to the conclusion that the only tenancy that existed was between the 2nd Appellant and the Respondents. It is instructive to note that the 2nd Appellant, who could have shed light on the alleged assignment of tenancy, was not called as a witness. Consequently, the lower court had essentially two diametrically opposed witnesses, and it chose to believe the Respondents. The third witness, a police officer, who the Appellant's Counsel said was an "independent" and "material" witness and whose evidence should not have been disregarded, was certainly not a material witness. I have reviewed the brief record of his evidence and find absolutely nothing "material" in that testimony. He simply says that he went to the suit premises in response to a complaint that the locks had been changed, and saw a woman there who refused to open the door.

How would that testimony help resolve the real issue: whether the 1st Appellant was the lawful tenant?

The lower court correctly found that none of the other evidence produced by the 1st Appellant such as electricity bills, and banker's cheques proved that he was the lawful tenant.

Counsel for the Appellants referred me to one authority – ***Adkin's Landlord and Tenant 7th Edition page 192*** to demonstrate that if the original tenant assigns his term, the privity of estate between him and the original Landlord is broken, and a new privity of estate is set up between the new tenant and the original Landlord.

However, the privity of contract between the original parties remain. In any event, here in the case before this Court there is no evidence that the landlord knew about or consented to the assignment, nor is there any evidence of an implied assignment.

Finally, on the question of mesne profits, the lower court found that a sum of Kshs.20,000/= per month was payable for the period that the 1st Appellant was in unlawful occupation of the suit premises. The Appellant's Counsel argued that this claim had not been pleaded and proved. I agree with the lower

court's findings that the sum had been properly pleaded and proved in Court by evidence. The evidence of market value was not controverted.

Accordingly, and for reasons outlined, I dismiss this appeal with costs to the Respondents.

Dated and delivered at Nairobi this 2nd day of November, 2004.

ALNASHIR VISRAM

JUDGE