



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 57 OF 2001

MICHAEL PAUL ATUNDI.....APPELLANT

VERSUS

NGETHE WARUI.....RESPONDENT

J U D G M E N T

The Appellant was a tenant of the Respondent for about 10 years. Their tenancy relationship run into trouble when the Respondent started claiming that the Appellant was in three month's rent arrears and the Respondent engaged an advocate who instructed a firm of auctioneers known as Linda Auctioneers to levy distress for rent against the Appellant.

The appellant in turn engaged another advocate who filed a suit in court to fight the distress, apparently, against the Auctioneers only. The parties are not clear. The Appellant obtained an ex parte interim injunction from the court to stop sale of the distressed goods and had that injunction served upon Linda Auctioneers. But by the time the interlocutory applications in which the interim injunction had been obtained, was heard on 8th April 1993, Linda Auctioneers had already sold the Appellant's attached goods. The interlocutory application was subsequently dismissed.

However the parties have not revealed to this court the fate of the main suit in which the interlocutory application had been filed. What they have said suggests that the Appellant subsequently went on to file two separate cases. One against Linda Auctioneers and the other against the Respondent.

According to the Appellant, the case he filed against Linda Auctioneers sought orders against those Auctioneers for contempt of court only. The Auctioneers were found guilty and fined.

According to the Respondent, the case the Appellant filed against Linda Auctioneers was not for contempt of court. It was alleging illegal sale of the Appellant's attached goods and it prayed for special and general damages against Linda Auctioneers. The Appellant was successful.

The second case is this case filed by the Appellant against the Respondent in the Chief Magistrate's Court Milimani Commercial Courts being No.2549 of 1993 also praying for special damages and general damages. During the hearing of this case in the Chief Magistrate's court the case against Linda Auctioneers was an issue and was canvassed, the learned trial Magistrate coming out with an opinion that the Appellant had been awarded special and general damages in that case against Linda Auctioneers. That opinion by the Trial Magistrate has not however led to an agreement between the parties as they have continued to differ in this court as to what the Appellant claimed against Linda Auctioneers in the other court following sale of the Appellant's attached goods. Curiously the parties deemed it fit to continue that

difference in this court having decided to keep the plaint or the charge as well as the judgment in that case away from courts handling the instant case. In the circumstances, what good reason is there to make this court differ from what the trial court said on that issue that the Appellant had been awarded special and general damages against Linda Auctioneers? The trial court heard and saw witnesses give evidence. It had that advantage which this court does not have.

Right from the beginning the Appellant's complaint was that rent was not in arrears and further that whether rent was in arrears or not, sale of his goods held under distress was unlawful. He was able to prove that the sale was unlawful that is why he won the case against Linda Auctioneers.

As against the Respondent, the Appellant was able to prove again that the sale was unlawful but he waited for the Respondent to prove that he (Appellant) was in rent arrears and as a result he failed to prove that he had paid the rent in question.

Yet the Appellant is the one who had taken the Respondent to court claiming that he (Appellant) had paid rent. As such the Appellant had the burden of proving that he had paid the rent in question and that burden never shifted from the Appellant to the Respondent. Failure by the Appellant to discharge that burden meant that his case against the Respondent would fail whether or not the Respondent proved that rent was in arrears. The Appellant, as the plaintiff, had to prove his case at least on the balance of probabilities.

The learned trial Magistrate after considering all the evidence adduced before her came to the conclusion that the Appellant had not succeeded in proving his case against the Respondent. This is a situation where no records were kept. Rent was being paid cash. No receipt issued. No rent record kept. Evidence in court was the word of the Appellant against the word of the Respondent. The trial Magistrate believed the word of the Respondent. I have said she had the opportunity to see and hear the parties give evidence. I have read that evidence. I hold that from that evidence she was entitled to hold the opinion she held as to who, between the Appellant and the Respondent, was to be believed on the issue of payment of the rent in question.

There is no dispute that the Appellant was not a protected tenant since he was paying a monthly rent more than Ksh.2500/=. The trial Magistrate held that since the Appellant was in rent arrears, he was not entitled to a notice before the levying of distress. Nevertheless the resulting sale having been undisputedly unlawful, nothing more remains in the issue of lack of notice.

But it is important that the Appellant got a judgment for payment to him of special and general damages against Linda Auctioneers in respect of the Appellant's goods attached and sold by the Auctioneers. A question was and still is whether the Appellant should be paid special and general damages twice in respect of the same goods. The learned trial magistrate answered that question in the negative and I find no good reason to answer the question in a different way.

Properly, the Respondent and Linda Auctioneers should have been sued jointly and the award in such a situation should have been one against each one of them jointly or severally and the Appellant would not therefore have qualified to be paid the same quantum of the award twice.

If therefore the Appellant opted to sue the two defendants separately when he should have joined them in one suit, that option does not entitle the Appellant to be awarded special and general damages twice.

Finally, I should comment on the Appellant's ground that the trial magistrate was wrong to hold that the Respondent had not been served with the interim injunction. The argument in this appeal to support that ground has been that the Auctioneer was an agent of the Respondent, and that since service of the injunction was effected upon the agent, that service was good against the principal and that therefore the Respondent as the principal cannot say he was not served. Good as that argument may be, the same was not advanced before the learned trial magistrate. The service the Appellant alleged in the trial court was direct service upon the Respondent and there was no mention of agent – principal relationship concerning that claim for service. It cannot therefore be said that in the trial court the Appellant was relying on

service of a principal through the principal's agent. That having been the position, it was not proper for the Appellant to have come to this court with the ground of service of a principal through an agent. This court will not therefore accept that ground as this court has no way of knowing how the trial court could have decided that issue had that ground been brought up at the trial.

Before the trial magistrate, the Appellant completely failed to prove that the injunction had been served upon the Respondent.

It follows that from the totality of what I have been saying, the Appellant's appeal has no merits. The same be and is hereby dismissed with costs to the Respondent.

Dated this 15th day of May 2003.

J.M. KHAMONI

JUDGE