



REPUBLIC OF KENYA



KENYA LAW
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**Mabalu v Parmar & another (Civil Appeal 23 of 2019)
[2023] KEHC 77 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 77 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 23 OF 2019
FA OCHIENG, J
JANUARY 17, 2023**

BETWEEN

OSBORNE MABALU APPELLANT

AND

SANJEEV PARMAR 1ST RESPONDENT

BRIAN AWUONDA 2ND RESPONDENT

(Being an appeal against the judgment and decision of Hon. R. Ndombi, SRM in the original Kisumu CMCC No. 252 of 2015 delivered on 25th January, 2019)

JUDGMENT

1. The learned trial Magistrate delivered her judgment on 24th January 2019. In the said judgment, the court dismissed the defendant's claim for defamation, whilst it awarded the plaintiffs' judgment for the sum of Kshs. 312,500/=. The plaintiffs were also awarded the costs of the suit.
2. In his memorandum of appeal, the appellant raised 7 grounds of appeal, which can be summarised thus:-
 - (i) The defendant's evidence was disregarded.
 - (ii) The evidence on record was wrongly evaluated.
 - (iii) The trial court did not appreciate the totality of the evidence and the submissions.
 - (iv) The trial court failed to consider the act of the plaintiffs, who locked him out, thus denying him a chance to earn his livelihood.
 - (v) The inconsistencies in the plaintiffs' evidence could not sustain the findings of the trial court.
 - (vi) The trial court took into account, extraneous matters, leading to a wrong decision.



- (vii) The decision was not supported by the evidence on record.
3. As the first appellate court, I am obligated to re-evaluate all the evidence on record. The starting point in this exercise is to summarise the pleadings, so that the re-evaluation of the evidence will be within context.
 4. The plaintiffs' claim was based upon an oral contract, through which they agreed to sublet to the defendant, a portion of their office space which was situated at the United Mall, Kisumu.
 5. It was the plaintiffs' contention that the defendant had agreed to pay Kshs. 27,500/= as rent, every month. Notwithstanding the said agreement, the defendant is alleged to have defaulted. As a consequence of sporadic and erratic payments, the defendant is alleged to have accumulated a debt of Kshs. 312,500/=.
 6. In answer, to the claim, the defendant filed a Defence together with a counter-claim. First, the defendant denied all the claims in the plaint. Secondly, the defendant indicated that on 11th December, 2014, he had obtained an Order from the Business Premises Tribunal, allowing him to operate on the "sublet premises" which are situated at the United Mall, Kisumu.
 7. Notwithstanding the said Order, the plaintiffs locked up the premises during the Christmas vacation 2014. In addition, the defendant asserted that the plaintiffs' engineered the termination of defendant's physiotherapy service contract at Avenue Hospital.
 8. The plaintiffs' said action was said to have led the clients and employees of the defendant, as well as other right-thinking members of the public to view the defendant as a stubborn person who was unreliable, untrustworthy, reckless and irresponsible. The defendant further claimed that the plaintiffs did inform the "Other Medical Practitioners" that the defendant was a "quack in the profession". By necessary implication, that meant that the defendant was unqualified to be a physiotherapist.
 9. In addition, the defendant alleged that the plaintiffs convinced his employee to be employed by a client of the plaintiff. When the defendant's employee left him, the defendant suffered a loss of business.
 10. The actions of the plaintiff are said to have greatly injured the reputation of the defendant who was now ridiculed and shunned by the public, as he was considered a felon and an undesirable person who was unworthy to associate or to trade with.
 11. At the trial, both the plaintiffs testified. Thereafter, the defendant testified.
 12. PW1, Sanjeev Pamar testified that the plaintiffs had discussions with the defendant, spanning 3 to 4 months. It was finally agreed between them that the defendant would pay a monthly rent of Kshs. 27,500/= for the space he would occupy within the offices leased by the plaintiffs. PW1 produced receipts for the total sum of Kshs. 430,000/=:, which the defendant had paid on account of the agreed rent.
 13. PW1 testified that the clinical services provided by the defendant were satisfactory. Indeed, in the assessment of PW1, the defendant was good and experienced. Therefore, PW1 denied the allegations that they had ever called the defendant a quack.
 14. PW1 also testified that it was the defendant who instituted proceedings against the plaintiffs herein, before the Business Premises Rent Tribunal. When the Tribunal ordered the plaintiffs to re-open the premises, the parties resolved the dispute by allowing the defendant to cart away his property from the premises. However, PW1 reiterated that the defendant never paid the rental arrears amounting to Kshs. 312,000/=.



15. PW2, Bernard Awuonda, testified that when the defendant defaulted in rental payments, he sat him down and they had a talk. Following the said talk, the defendant gave a schedule showing how he would pay off the arrears. But PW2 said that the defendant thereafter failed to make any payments.
16. PW2 testified that the plaintiffs decided to sue the defendant after he vacated the premises without paying the rental arrears.
17. When the defendant testified, he said that PW1 persuaded him to leave the premises he had been renting, so that he could join PW1 at the premises at United Mall. It was the defendant's understanding that he was to meet the cost of the infrastructure i.e the partitioning. Therefore, the cheques which he issued were in respect of the said infrastructure.
18. According to him, it was not until 2015 that the plaintiffs first demanded that he should pay rent. But he expressed the view that if he had to pay rent, the Landlord would need to first calculate the size of the space he was utilising. When there was no agreement, the plaintiffs locked up the defendant's office. That action prompted the defendant to institute proceedings at the Business Premises Rent Tribunal. When the Tribunal ordered the plaintiffs to open up the defendant's office, the parties later agreed that the defendant should vacate the office.
19. During cross-examination, the defendant confirmed that the dispute between him and the plaintiffs was about rent.
20. Indeed, in his witness statement the defendant made it clear that it is because of the dispute about rent that he instituted proceedings before the Rent Tribunal. He went on to state as follows;

“ The matter was taken to the Rent Disputes Tribunal where the Tribunal gave an order dated 11th December, 2014 to the effect that the plaintiff's reopen the tenant's business premises and not interfere with the tenant's quiet and peaceful enjoyment of the suit premises pending the hearing and determination of the tenant's complaint.”
21. The defendant also testified that the plaintiffs told the Management of Avenue Hospital that he was a quack and an untrustworthy person. He said that the plaintiffs convinced Avenue Hospital and other hospitals to stop giving work to him. Having lost contracts due to what the plaintiffs allegedly said about him, the defendant put in a counter-claim for character assassination.
22. During cross-examination, the defendant indicated that when Avenue Hospital terminated the contract he had with them, they told him that it was because the hospital wanted to build their own clientele. He also said that he continued to run a business which was respected.
23. A look at the judgment reveals that the court expressly found that the payments made by the defendant were for rent. The evidence is that whenever the defendant made payments, the plaintiffs issued receipts which were specifically indicated to be in respect of rent.
24. There is absolutely no evidence that any payment was made in respect of partitioning of the office. The fact that the defendant instituted proceedings at the Business Premises Rent Tribunal, because he had a dispute over rent, is further corroboration of his understanding that there existed a relationship in which rent was a factor. There is not a single piece of evidence which the defendant demonstrated to this Court, that had been disregarded by the trial court.
25. Having re-evaluated the evidence, I find that the totality of the evidence, coupled with the submissions, clearly show that there was a tenancy relationship between the defendant and the plaintiffs. It is for that reason that the defendant went to the Business Premises Rent Tribunal, in his capacity as a tenant.



He cannot have been holding himself out to the tribunal as a tenant, if he did not consider himself to be one.

26. The tribunal issued orders in favour of the defendant, in his capacity as a tenant; He cannot therefore now contend that he was not a tenant. He also received receipts over a long duration indicating that the money he was paying to the plaintiffs, was on account of rents. He thus led the plaintiffs to believe that he knew not only about his status as a tenant, but also that his payments were for rent. He cannot now change that position.
27. As regards the counter-claim, the defendant did not lead any evidence to prove his assertions. He did not prove that any of the plaintiffs spoke ill of him to any particular person at Avenue Hospital or at any other hospital.
28. The defendant did not adduce evidence to prove the impact, if any, on his reputation. If anything, he said that he continued to carry on a respected business.
29. In this case, the defendant did not have a claim for compensation for loss of business, for the period when the plaintiffs had locked him out from his office. He also did not lead any evidence of the loss in earning which he may have suffered. Therefore, the trial court cannot be deemed to have erred for not making a finding on a matter that was not in issue before it.
30. I also find that the trial court did not take into consideration any extraneous matters when it was making its decision.
31. In a nutshell, there is no merit in the appeal. It is therefore dismissed, with costs to the respondents.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JANUARY, 2023.

FRED A. OCHIENG

JUDGE

