



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL APPEAL 241 OF 2015

DICKSON MWANGU NDEVA.....APPELLANT

VERSUS

CHRISTOPHER KISALU NDEVA.....RESPONDENT

Being an Appeal that arose from the decision of Hon. M. Murage-CM that was

delivered on 14th October, 2015 in Kitui Chief Magistrate's court

Civil Case No. 325 of 2014

JUDGEMENT

1. This is an appeal that arose from the judgement of Hon. Murage-Chief Magistrate delivered on 14th October, 2015 vide Kitui Chief Magistrate's Court Civil Case No. 325 of 2014.

2. The brief facts from the case at the trial shows that the suit was based on breach of contract. The appellant and the respondent herein are brothers who apparently disagreed over rent which the respondent claimed from the appellant. The appellant failed to pay the rent and the Respondent levied distress for rent by disposing off the property (posho mill) seized in the premises which the respondent claims to have been leased by the appellant for use upon agreed consideration of rent.

3. It was the appellant case that the respondent had agreed to use respondent's parcel for free and that he did not understand when the brother (respondent) after 4 years demanded Kshs. 72,000 in rent arrears.

4. The trial court upon trial found that the dispute between the two brothers revolved around rent and not land. The trial court found that the appellant did not challenge his brother (respondent) when he received demand for rent and that because the respondent followed due process in demanding for rent arrears and levying distress for default, the appellant's claim had no basis and dismissed it.

5. The appellant felt aggrieved and filed this appeal raising the following grounds namely: -

i. That the Learned Trial Magistrate erred in law and facts by failing to consider the subject matter of the proceedings and the rights can issue with exactitude and accuracy.

ii. That the Learned Magistrate erred in law and fact by failing to consider that there was no clear factual evidence and she further erred and misdirected herself by favoring the evidence of the defendant and never considered the evidence of the Plaintiff

iii. That the Learned Trail Magistrate erred in law and fact by failing to consider the evidence of the Plaintiff and its submissions filed in court.

6. In his written submissions dated 19th July, 2021 done through counsel the Appellant disputes that there existed an oral agreement for payment of rent between him and the Respondent and submits that the only evidence that was tabled before the trial court was to the effect that the Appellant only used the Respondent's land. He submits that he did not rent any premise belonging to the Respondent but only utilized land given to him by the Respondent free of charge. He submits that there was no contract from the two parties for three years to demonstrate that there was any agreement for rent.

7. The respondent has opposed this appeal through written submissions dated 22nd July, 2021 done through learned counsel. The Respondent

submits that it was established through the testimony of the Respondent's witness that there was an agreement for payment of rent between the two parties and the Appellant failed to remit the same. He further avers that evidence tabled evidencing the process that was employed by the Respondent for recovery of the rent was well appreciated by the trial court who made sound findings in its decision over the dispute.

8. This court has considered this appeal and the response filed. The duty of this court as an appellate court is to evaluate and re-examine the evidence adduced in the trial in order to reach a finding taking into account the fact that the court had no opportunity of hearing or seeking the parties as they testified and therefore, make an allowance in that respect.

An appellate court will not normally interfere with a finding of fact unless the same is founded on wrong principles or law. This is the position taken in ***Selle & Anor. versus Associated Motor Boat Co. Ltd & Anor. (1968) EA 123.***

9. The only issues for determination in this appeal is if there was a valid agreement and if so, whether the respondent was in order to levy distress for rent.

10. The Respondent submits that it was established through the testimony of the Respondent's witness that there was an agreement for payment of rent between the two parties and the Appellant's failed to remit the same. Further that there was evidence tabled evidencing the process that was employed by the Respondent for recovery of the same as such, the trial court appreciated the subject matter of the dispute and made sound findings in its decision.

11. Flowing from the above it is trite that a contract need not be in writing to be enforceable. The same can be inferred from the conduct of parties.

The appellant conceded during trial that he operated businesses in the Respondent's parcel of land. DW2 also confirmed to the trial court that he was aware that his sons had entered into some agreement in respect to the premises and that the only thing he was unaware of are the details of the arrangements. That in my view, established the fact that there was some agreed arrangements between the appellant and the respondent. The trial court was correct to make the conclusion it did. Upon re-evaluation of the evidence tendered, I find no basis to interfere with that finding of fact by the trial court.

12. On the question of levying distress for rent, the provisions of ***Section 3 of the Distress for Rent Act (Cap 293)*** provides that a landlord has the right to levy distress for rent. The law states;

“Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.

Section 4 (1) of the above Act proceeds to state that a landlord is only required to issue a fourteen days' notice on the tenant after distress is levied requiring him or her to pay the rent arrears or have the distrained goods sold by public auction at the expiry of the said notice. It provides;

Where any goods or chattels are distrained for rent reserved and due upon a grant, demise, lease or contract, and the tenant or owner of the goods or chattels so distrained does not, within fourteen days after distress has been made, and notice thereof (stating the cause of the making of the distress) left on the premises charged with the rent distrained for, pay the rent together with the costs of the distress, or replevy them, with sufficient security to be given to the licensed auctioneer according to law, the person distraining may lawfully sell on the premises or remove and sell the goods and chattels so distrained for the best price which can be obtained for them, towards satisfaction of the rent for which they are distrained, and of the charges of the distress, removal and sale, handing over the surplus (if any) to the owner.”

13. The Appellant informed the court that he started a posho mill business in January 2010. That his brother, the Respondent allowed him to set up his business on his parcel of land. He informed the trial court that he took up a room which had been put up on the Respondent's parcel of land and used the same as a store. He however contended that the Respondent allowed him to use the parcel of land free of charge and it came as a shock when the Respondent demanded for rent of Kshs 72,000/- in June 2013 as the two did not have any agreement for payment of rent.

14. On his part, the Respondent conceded to the fact that he allowed his brother, the Appellant to utilize his parcel of land for purposes of setting up his posho mill business. He stated that there were two rooms on the parcel of land which the Appellant used for storage. He contended that one room was his while the other one belonged to the Appellant. He further informed the court that the two had an oral agreement for payment of rent of Kshs 2000/- for the room that belonged to him. He stated that his parents were aware of the agreement and that for 3 years, he sought settlement of the rent but the Appellant did not remit the same which prompted him to distress for rent.

15. Witnesses called before the trial court did not lead evidence regarding their knowledge of the agreement apart from DW2 who informed the court in examination in chief that he was aware that the two parties had an agreement. He also stated that he knew that the Respondent had given the Appellant his premises to operate his business but he was not aware whether the Appellant was paying rent. He also informed the court that he asked the Appellant to pay rent in vain.

16. The evidence laid before the trial shows that there were no written agreements and if there was no written agreement between the parties is it possible to presume that there was a valid contract between the two? The court of Appeal in ***Ali Abid Mohammed versus Kenya Shell & Company Limited (2017) eKLR***, stated that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. The court said

In Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mohammed Investments [2014] eKLR, this Court stated:

“There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the Law of Contract Act is one such provision”.

Lord Clarke put it thus in RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14:

“The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement”.

“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King versus King 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time.”

17. The trial court found that the Respondent issued a demand notice to the Appellant dated 4th June 2013 and that the Appellant admitted to receiving the same and but did not respond to it. The Appellant further admitted to being served with the auctioneer’s proclamation letter dated 26th June, 2013 and later seeing the auctioneer’s advertisement on the newspaper but he did not respond despite seeing that his items were up for auction. The auction was scheduled to take place on 10th October, 2013.

The appellant did not challenge the process for distress for rent and the trial court correctly noted that the suit was filed more than a year after the goods attached had been sold. The delay in taking action meant that the appellant knew that he had not met his part of the bargain.

In the premises this court finds no merit in this appeal. The same is dismissed but owing to the close relationship between the parties herein, I will not make any orders as to costs.

Dated, Signed and Delivered at Kitui this 14th day of February, 2022.

HON. JUSTICE R. K. LIMO

JUDGE