



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 1 OF 2015

JACINTA NJERU.....APPELLANT

VERSUS

DAVID KANYIRI.....RESPONDENT

JUDGMENT

1. The appellant herein together with Catherine Rwamba Gichovi (herein referred to as co-plaintiff) moved the Chief Magistrate's court at Embu in Civil Suit No. 146 of 2013 against the respondent in this appeal seeking for judgment against the respondent for the following orders: -

- a) That this Honourable Court do declare that the act(s) of the defendant that is to say the eviction and attachment and seizure of the applicant's goods, salon, equipment, cereals chattels, properties, tools of trade and all the applicant's belonging were illegal wrongful and unlawful in the circumstances.*
- b) Loss of user, actual loss for damaged/stolen goods, mesne profits to be computed at the hearing together with rent overpaid for the month of June 2013 and July 2013 and interest thereon.*
- c) Any other or further relief as this court may deem fit.*

2. On the 8th July 2013, the appellant and the said co-plaintiff filed an amended plaint wherein they prayed for judgment against the respondent as follows: -

- a) That the Honourable Court do declare that the acts(s) of the defendant that is to say the eviction and attachment and seizure of the applicant's goods, salon equipment, cereals, chattels, properties, tools of trade and all the applicant belongings were illegal, wrongful and unlawful in the circumstances.*
- b) Loss of user, lost income at an average of Kshs. 30,000/= per day from 14th June 2013 for the 1st plaintiff and Kshs. 18,000/= per day from 14th June 2013 for the 2nd plaintiff until the period as they shall be restored into their original earning capacity mesne profits to be computed at the hearing together with rent overpaid for the month of June 2013 and July 2013 and interest thereon.*
- c) Special damages in the sum of Kshs. 991,025/= for missing/lost stock at the time the unlawful eviction was carried out.*
- d) Special damages of Kshs. 901,750/= for missing/lost stock at the time of the unlawful eviction was carried out.*
- e) General damages aggravated and exemplary damages for the loss suffered.*

3. The appellant's and the co-plaintiff's cause of action was that they were tenants of Plot No. BPS 39 situated along Kirititi – Buspark Road in Embu town.

4. That they entered into a verbal agreement with the respondent herein whereby the appellant and co-plaintiff agreed to let and the respondent agreed to lease the aforesaid premises.

5. They averred that the tenancy with the respondent was controlled as the same had not been reduced into writing.

6. That, on or between the month of April and May 2013, the respondent had attempted to evict them by issuing illegal notices to vacate

whereof they successfully challenged the said notices at the Business Premises Tribunal and had obtained orders prohibiting the respondent from evicting them from the premises. Further that by a Notice to Terminate the Tenancy dated 30th May, 2013 the respondent gave them a notice to terminate the tenancy with effect from 1st August, 2013. That on the 14/06/2013, the respondent while in company of a group of heavily armed gang raided their premises and carried away crucial salon equipment and vandalized the stock leaving the premises empty.

7. They therefore claimed general damages, aggravated and exemplary damages for unlawful eviction from the business premises and special damages totalling to Kshs. 1,892,775/=.

8. They further contended that the notice to quit purportedly relied on by the respondent in carrying out the eviction did not comply with Form A as prescribed in the Act and that the same was not given pursuant to provision in Section 7(1) of the Act. It was also their case that their tenancy could only be terminated as provided for in the Act.

9. The respondent filed his defence on 1st July 2013 in which he denied their claim. He averred that the eviction was lawful as the appellant and the co-plaintiff had breached the terms and conditions of the tenancy agreement and had become a threat to the respondent, his properties and other tenants, due to their frequent fights which matters were reported to the police and they had both been taken to court. That he was left with no option but to evict them from the premises for his own safety and that of other tenants.

10. He averred that all properties were removed from the premises in the presence of the appellant's workers who were left guarding them until they took them away from the veranda where they had been placed. Further that the properties that are alleged to have been lost could not have fitted in his shop as it was too small to accommodate them.

11. In their reply to defence, the appellant and the co-plaintiff reiterated the contents of their amended plaint and averred that the reasons for eviction are not justified both under the landlord and tenant law and the common law.

12. They contended that there was no arrangement to have their workers supervise the atrocities committed on their suit premises. They urged the court to strike out the defence.

13. When the hearing commenced, the record shows that, on the 11th August, 2014 the co-plaintiff withdrew her case against the respondent. Upon hearing the appellant's case, the learned magistrate, in a judgment delivered on 5th December, 2014, found that she had failed to prove her case on a balance of probability and dismissed the same and ordered each party to bear its own costs of the suit.

14. In his judgment, the learned magistrate found that the appellant had been given a notice to quit the premises and for that reason, he did not find a reason to declare the eviction unlawful or illegal. He also found that if there was any loss that resulted to the applicant, she occasioned the same by advising her employee who testified as PW2 to leave the goods at the veranda unguarded.

15. That judgment is the subject of the appeal herein. The appellant has listed nine (9) grounds of appeal in the memorandum of appeal dated 3rd January, 2015.

16. In my view, the said grounds can be condensed into the following grounds;

i. The learned magistrate erred in law and in fact in holding the eviction was lawful.

ii. The learned magistrate erred in law and in fact in failing to award the appellant any compensation.

17. The appeal was disposed off by way of written submissions.

18. The court has considered the said submissions and the pleadings as filed in the trial court. I have also re-evaluated the evidence tendered before the trial court as it is expected of this court as the first appellate court.

19. In considering the first ground of appeal, this court will be answering the following questions;

i. Whether the tenancy between the appellant and the respondent was a controlled tenancy;

ii. Whether the termination of the tenancy was in accordance with the law governing such a tenancy.

20. From the onset, both the appellant and respondent are in agreement that there existed between them, a tenancy relationship relating to stall No. 39 Kiritiri Stage. The appellant in her evidence stated that they had an oral agreement with the respondent. On his part, the respondent maintained that the tenancy agreement was in writing and he produced a copy of the same, which is dated the 13th December, 2012.

21. The evidence on record shows that, on the 15th day of December, 2013, the respondent had given the appellant a Notice to Terminate the Tenancy on among other grounds that she had caused annoyance to the other tenants but he gave her another one dated 30th May 2013 as prescribed under Cap. 301.

22. It was the evidence of the appellant that she challenged the first Termination Notice at the Business Premises Tribunal and was issued with orders restraining the Landlord (respondent) from evicting her, pending the hearing and determination of the complaint.

23. An issue however arose as to whether the said orders were served upon the respondent and in the contempt proceeding filed against the respondent, the High Court ruled that it was doubtful if the order was served and declined to hold the respondent in contempt of the court orders.

24. On the 14th day of June, 2013, the respondent in the company of other five (5) men evicted the appellant from the suit premises (this fact has not been denied by the respondent).

25. Section 2(1)(a) of the Shop, Hotels and Catering Establishments Act define a controlled tenancy as a tenancy;

a) Which has not been reduced into writing;

b) Is for a period of less than 5 years.

26. A perusal of the lease agreement reveals that it was for a term of one (1) year from 1st January, 2013 (a copy of the same was produced as exhibit 2). Though the same is signed by both parties, it is the appellant's contention that she did not enter into any written tenancy agreement with the respondent. But even assuming that the written lease agreement was signed by both the appellant and the respondent herein, the same is for a period of less than 5 years which brings it squarely within the provisions of Section 2(1)(a) of Cap. 301. It is therefore my considered view that the relationship between them was governed by Cap. 301 laws of Kenya.

27. Having answered that question as hereinabove, the next question is whether the termination of the tenancy could be altered other than in accordance with the Act.

28. Section 4(2) provides that; a landlord who wishes to terminate a controlled tenancy or to alter to the detriment of the Tenant

...shall give a notice to the Tenant in the prescribed form.

29. The record shows that the respondent gave a notice in the form provided for in the Act, and the same is dated 30th May, 2013 and the same was to take effect on the 12th day of August 2013. The reason given therein was that the tenant had become a nuisance to other tenants, among other reasons.

30. From the above narrative and looking at the termination notice dated 30th May, 2013, it is clear that the respondent evicted the appellant before the expiry of the period stated in the said notice. It was to take effect on 1st August, 2013 but the eviction was carried out on the 14th day of June 2013.

31. In view of the foregoing, the court finds and holds that the eviction was unlawful and illegal as it was contrary to the law. The court is not persuaded by the respondent's contention that he evicted the appellant for breaching the terms of the lease agreement and in particular, for being involved in an altercation with the co-plaintiff in the case before the trial court.

32. On whether the appellant is entitled to compensation, it was her evidence that she was dealing with business of selling cereals which included beans, maize, rice, soya beans, green peas and ndengu. She has claimed special damages in the sum of Kshs. 991,025/=, general, aggravated and exemplary damages and loss of user as set out in paragraph 18(b) of the amended plaint.

33. At the hearing she produced cheques, receipts delivery notes, invoices.

34. The court has noted that some of them are in her personal name while others are in the name of a limited liability company namely, ELIMUT ENTERPRISES LIMITED. The issue as to the correct party was raised by counsel for the defendant in his submissions before the trial court following which, the appellant amended the plaint. In the amended plaint filed in court on the 8th July 2013, the appellant is described as follows;

The 1st plaintiff is a female adult of sound mind working for gain in th Republic of Kenya as a dealer in cereals and trading under the name of ELIMUT ENTERPRISES LIMITED. The 1st plaintiff is the appellant herein.

35. In law, an individual is separate and distinct from a limited liability company even if you are a Director of such a company. He cannot trade in the name of a limited liability company. Such a company is a legal person capable of suing and being sued in its own capacity. (see the case of **Salmon Vs Salmon**) and that of **Lucy Wairimu Mule Vs Sleek Trading Limited and Another, Civil Case No. 25 of 2018**).

36. Among the exhibits that were produced by the appellant, is a certificate of Corporation for ELIMUT ENTERPRISES LIMITED which shows that it was incorporated on the 22nd day of November, 2010. Bearing the above legal position in mind, it is not clear from the pleadings filed in the trial court who between the appellant and Elimut Enterprises Limited was the correct plaintiff. As such, I find that in the amended plaint, there is a serious question of misjoinder and the court is at a loss as to the correct plaintiff in the trial court and as to the appellant in this appeal.

37. In the premises the appeal is hereby dismissed with no orders as to costs.

38. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF JULY, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent