REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO.44 OF 2019

MALFRA REALTORS …..……..…..……1ST APPELLANT

MATHEW MUTINGA ……..…….. 2ND APPELLANT

FRANCIS MUTUA …….…...…….. 3RD APPELLANT

-VERSUS-

FAITH MWENDE …….…….....…..…….. RESPONDENT

(Being an appeal from the Judgment of Honourable Otieno J. SRM delivered on 9th May 2019 in Makueni CMCC No. 166 of 2017).

JUDGMENT

1. In a judgment delivered on 9th May 2019, the magistrates court entered judgment for the respondent (who was the plaintiff) in which the court also awarded special damages of Kshs.14,400/= in a counter claim of the appellants (who were the defendants), in the following terms –

> **"Final judgment is therefore entered in favour of the plaintiff against the defendants as follows –**
>
> **General damages – Kshs.200,000/=**
>
> **Special damages – Kshs.78,000/=**
>
> **Less special damages to the defendants – Kshs.14,400/=**
>
> **Total – Kshs.263,600"**

2. In addition to the above, the trial court also awarded costs and interests to the respondent.

3. Dissatisfied with the above decision of the trial court, the appellants have come to this court on appeal through counsel M/s Wokabi Mathenge & Company relying on several grounds of appeal as follows –

> ***1) The learned magistrate erred in law and fact in finding that the respondent had or was evicted from the premises she occupied as a tenant.***
>
> ***2) The learned magistrate erred in law and f act in finding that special damages had been proved on the balance of probabilities.***
>
> ***3) The learned magistrate erred in law and fact in finding that general damages were available to the respondent.***
>
> ***4) The learned magistrate erred in law and fact in finding that the respondent's items had been destroyed solely attributing it to the appellant.***
>
> ***5) The learned magistrate erred in law and fact in finding that the respondent was not in breach of her tenancy agreement.***

6) The learned magistrate erred in finding that the respondent was not in arrears for both rent and utilities.

7) The learned magistrate erred in failing to find that the tenancy agreement wholly addressed the respondent's occupation of the premises consequently any violation or breach was actionable.

8) The learned magistrate erred in finding that the respondent was entitled to refund of deposit paid at the time of occupation of the premises.

9) The learned magistrate erred in finding that the respondents had suffered any loss out of the alleged eviction.

10) The learned magistrate erred in finding that the respondents had proved the case of balance of probability consequently entitled to judgment in her favour.

11) The learned magistrate erred in law by shifting the evidential burden of proof on the appellant whereas the same was obligated to the respondent.

12) The learned magistrate erred in law in finding that the respondent had not been issued with a notice to vacate.

13) The learned magistrate erred in law by awarding general damages that were excessive and unjustified taking into account all prevailing circumstances.

14) The learned magistrate erred in law in failing to find that the lease agreement mandated the respondent to perform certain obligations at the time of vacating from the premises.

15) The learned magistrate erred in law in failing to make a determination or the appellant's counterclaim.

16) The learned magistrate erred in fact in finding that the respondent was entitled to a refund of money allegedly paid to the appellants.

17) The learned magistrate erred in law in allowing the respondent's case and thereafter, awarding costs of the suit whereas the respondent had not discharged he burden of proof of the evidential elements for suit as pleaded.

4. The appeal proceeded through filing of written submissions. Counsel for the appellants Wokabi Mathenge & Company and counsel for the respondent Mwangangi & Associates filed written submissions, which I have perused and considered.

5. This being a firs appellate court, I have to start by stating that the court has a duty to consider the evidence on record afresh and come to its own independent conclusions and inferences. In this regard, in **Selle –vs- Associated Motor Boat Company Ltd (1968) E.A 123** – the Court of Appeal stated as follows –

"An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

6. Having evaluated and re-considered the evidence on record, the judgment and submissions of counsel on both sides, I observe that at the trial the respondent called 3 witnesses, and the appellants called 2 witnesses. The lease agreement between MAFRA REALTORS and FAITH MWENDE and several other documents were relied upon by both sides.

7. Pw1 was Faith Mwende, the respondent herein who was a tenant and who stated that on the fateful day while in her bedroom she heard someone knock the door and in a short while noted that the premises were broken into and her items destroyed by agents of the landlord. She then reported the incident to the police, which report was entered in the OB. She relied on several documents and asked for award of both special damages and general damages.

8. Pw2 was Paul Ngei Kasimba, a neighbour of the respondent. It was his evidence that he on that day witnessed the respondent's items being removed by some men. Pw3 was Catherine Ndanu a domestic servant of the respondent, whose evidence was that on the day in question, the landlord (*appellan*t) and other men went to the premises, broke the door with a metal grinder, and removed the items of the respondent including a television set, which they broke. This was the evidence of the respondent.

9. The appellants also called evidence to support their defence and counter claim. Dw1 was Mathew Mutinda the 2nd appellant. It was his evidence that he had on 19/08/2017 gone for a routine check of the premises, when he found that Faith (the respondent) had removed her items from the house after she had issued a notice to vacate. However, according to him, Faith was in arrears of some payments totaling to Kshs.73,400/=. He filed a counter claim for arrears of payment. He denied throwing out the respondent's items, but did not say anything about his reaction to finding the respondent vacating.

10. Dw2 was Francis Kyalo Mutua the 3rd appellant, whose evidence was that the respondent had complained about the state of the house ceiling and leakage. He denied that the respondent was evicted from the house.

11. Having reassessed and re-evaluated all the evidence on record, I find like the trial court that the respondent was evicted from the premises because she had given notice to vacate, and there was a dispute on whether she should make additional payments to the landlord before vacating. Otherwise how do all the respondents converge in those premises that day and cut the metal doors open, in a situation where the appellants themselves allege that she owed some money on account of the tenancy. I also agree with the magistrate that the force used by the appellants was excessive and the eviction was thus unlawful. I hold that the evidence of the respondent on the incident was more believable and that she proved unlawful eviction on the balance of probabilities. I rely on the case of **Miller –vs- Minister of Pensions (1947) 2 ALL ER 372 wherein Lord Dening** stated –

> ***"If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged".***

12. On the special damages awarded the same have to be pleaded and proved. In my view, the learned magistrate based the same on the documents produced and placed before the trial court which are on record. I note that the documents relied upon were not seriously challenged by either side, and it was left to the magistrate to make findings on same. The magistrate made findings on proof of special damages both for the respondent (who was the plaintiff) and the appellants (who were the defendants) based on documents relied on by the parties. I find no reason to interfere with the award of special damages both to the respondent and the counter claim of the appellants. I will uphold the special damages awarded by the trial court.

13. With respect to award of general damages, it is trite that in cases of breach of contract, general damages are ordinarily not awardable – see **Kenya Tourism Development Corporation –vs- Sun Power Lodge Ltd (2018) eKLR**. However, there are exceptions to this general principle.

14. In the present case, in my view, the respondent did suffer physical humiliation and anguish due to the mode of evicting her adopted by the appellants. The eviction was done without notice and in a very rough manner. I however, consider that the amount of Kshs.200,000/= awarded by the trial court under the head of general damages was excessive, in that the incident occurred in confined premises, and there is no evidence that the respondent could not get alternative accommodation quickly, as she had already complained about the leaking roof and given notice to vacate, and must have been preparing to vacate. I will thus reduce the general damages awarded to Kshs.50,000/=.

15. To conclude, I allow the appeal in part, vary the judgment of the trial court and enter judgment for the respondent as follows –

General damages – Kshs.50,000/=

Special damages – Kshs. 78,000/=

Less special damages to defendants – Kshs.14,400/=

Total – Kshs.113,600/=

16. The respondent is also awarded 70% of the costs of appeal, as well as interest at court rates till payment in full.

Delivered, signed & dated this 4th day of October, 2021, in open court at Makueni.

…….

George Dulu

Judge