



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 18 OF 2018**

**FELIX IBRAHIM NGULA.....APPELLANT**

**-VERSUS-**

**RACHEAL MUMBE.....RESPONDENT**

**(Being an appeal from the judgement of Hon. Kirugumi Senior Resident Magistrate's Court made on the 17<sup>th</sup> May 2018 in Mwingi Senior Resident Magistrate's Court Civil Suit No. 2 of 2016)**

**JUDGEMENT**

1. The respondent claim is dated 20<sup>th</sup> January 2016. The respondent in a nutshell sought mandatory order to compel the appellant to allow her access into her rented premises a shop and retrieve her stock worth Kshs. 267,455/= or in lieu of the retrieval, order the payment of the value of the said stock to be paid to her.
2. She also sought a declaration that the appellant's action of locking up the premises was unlawful and thus sought damages as a consequence and cost of the suit with interest.
3. The appellant in his statement of defence counter-claimed against the respondent Kshs.23,000/= being un-paid rent arrears. The appellant claimed the actual stock in the rental premises was as listed in paragraph 10 of the statement of defence.
4. Further the appellant claimed the respondent after they had jointly agreed to lock up the premises to allow the respondent pay arrears and clear her goods, broke into the premises and carried away her goods and is not entitled to the same.
5. The matter went into full hearing and the trial court made a finding that, the respondent came to court with unclean hands. Thus the court made the following orders:
  - i. *She was to pay rent arrears of Kshs.23,000/= less the Kshs.2,200/- she and her witness claimed she paid.*
  - ii. *The appellant was to pay or refund the respondent the following items or their value:-*
  - iii. *Twelve bags of maize.*
  - iv. *2 and half bags of maize.*
  - v. *1 and half bag of sorghum.*
  - vi. *1 and half bag of millet.*
  - vii. *5 sacks empty.*
6. The appellant being aggrieved by above decision appealed on grounds in the record of appeal namely:
  - i. **The learned trial magistrate erred and misdirected herself on the facts when she failed to establish that the respondent failed to prove her case according to the evidence on record.**
  - ii. **The learned trial magistrate erred and in fact and law when she misdirected herself when she based her decision on extraneous matters that were not in issue, a misdirection which led her to reach the wrong decision.**

iii. **The learned trial magistrate erred in law and fact when she failed to establish that the matter was landlord and tenant relationship which jurisdiction lies on Business Rent Tribunal.**

iv. **The learned trial magistrate erred in law when she proceeded to hear the matter which she has no jurisdiction.**

v. **That the learned trial magistrate erred in law when she demonstrated open business when she has been conducting the matter by letting the respondent adjournment and deny the appellant adjournment when he asked for it.**

vi. **The learned trial magistrate erred in law in failing to find that the respondent has not proved her case on a balance of probabilities.**

vii. **The learned trial magistrate erred in law and fact in arriving at a decision contrary to law and evidence on record.**

viii. **The learned trial magistrate erred in law when he failed to comply with express provisions of Order 21 rule 4 of the Civil Procedure Rules 2010 a failure which prejudiced the appellant's case led the learned trial magistrate to reach the wrong decision.**

7. Parties were to put their submissions but none did so.

#### ISSUES, ANALYSIS AND DETERMINATION

8. After going through proceedings on record, I find the issues for determination therefore are:-

**i. Whether the trial court had jurisdiction?**

**ii. If above in negative does the appeal have merit?**

**iii. What is the order as to costs?**

9. On issue of jurisdiction, I find the same as an afterthought and a by the way. First no party pleaded the same nor was it raised during the trial by either of the parties. None of the parties has filed submissions to address the court on the same.

10. The claim is based on recovery of held goods or their value and a debt of unpaid rent. **Section 7 of magistrate Act no 26 of 2015** donates Senior Resident power to entertain claim of subject matter not exceeding Kshs. 7 million. The trial court in this court was a senior resident magistrate with such powers. The ground thus fails.

11. On merit, I have considered the pleadings entirely as well as the evidence of the witnesses for both respondent and the appellant. Two events are described by the respondent's witnesses and the appellant's witnesses which are not clear the dates they occurred and in the order they occurred.

12. The respondent admitted she was a tenant in the appellant's premises for eight months. Further she admitted she was to be paying Kshs. 3,000/= per month as rent. The respondent claimed the appellant wanted to increase the rent to Kshs.5,000/- and when she refused he gave her notice to vacate and she hired her two witnesses to carry out the items so as to vacate the premises.

13. The respondent claimed the appellant, his wife and son ordered the two young men who were the respondent's witnesses to remove the items from the Probox vehicle they had loaded them and to take them back to the shop. The respondent claimed the appellant locked the premises and never returned her goods.

14. The respondent claimed she paid Kshs.2,200/= to the appellant. The appellant stated they agreed she was to vacate due to rent arrears and they locked up the premises each with their own padlock but the respondent broke into the premises and carried away her goods.

15. The appellant in addition stated when they took inventory of the stock it was in the presence of the respondent, a village elder and the appellant's former employee.

16. The evidence of DW3 and DW4 was truthful that indeed DW3 counted the items in the appellant's premises on the instructions of the Deputy OCS after the respondent complained the appellant had not paid rent. DW3 produced the original note book she wrote to stock items being the ones listed by the appellant in the statement of defence.

17. These were maize, millet, sorghum and a sack that had sacks. DW4 confirmed indeed they took stock on 12/1/16. The witness stated the respondent was present although she did not sign the list of items.

18. The witness stated each of them locked the premises with their door padlock and the next day the respondent's padlock was missing.

19. The respondent stated she utilized the appellant's premises as a shop for eight months. She stated she paid rent and was not in arrears. The respondent and her two witnesses claim she paid Kshs.2,200/= for the 11 days' notice and the only reason the appellant locked up her goods is they claimed a weighing machine and some cups originally in the premises at the point of renting the premises.

20. The respondent did not produce evidence of payment of rent either by receipt or personal record. The appellant insisted the reason he asked the respondent to vacate was due to non-payment of rent.

21. The respondent could not have agreed to lockup the premises with her padlock on top of the landlord had it not been in agreement that she collects the goods upon payment of rent.

22. Thus the finding by the trial court that, the respondent was in arrears of rent of Kshs. 23,000/= as claimed by the appellant was justified and supported by evidence on record.

23. The appellant did not however follow the laid down procedure for distress for rent. However, it is clear he did not need to since both parties amicably agreed they lockup the premises after they took stock for the respondent to clear the arrears then collect her items.

24. The appellant could not prove the respondent carried away her goods although she was the one with an interest in the said items. No record signed by witnesses on collection of the goods thus the appellant is duty bound to account for the same.

25. The trial court was therefore justified in ordering release of the same goods or payment of the same since the appellant failed to account for the same as he had taken possession of the premises. The respondent will have to pay for the rent arrears unpaid as ordered by the trial court. or them.

26. Thus the court makes the following orders;

*i) The appeal is dismissed and the trial court judgement is upheld.*

*ii) However, the parties to bear their costs in trial court and this appeal.*

**DATED, SIGNED AND DELIVERED AT KITUI THIS 17<sup>TH</sup> DAY OF JANUARY, 2020.**

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**C. KARIUKI**

**JUDGE**