REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 39A OF 2016

BENJAMIN K. BUSIENEI...........................APPELLANT

-VERSUS-

ROSALINE KEREWA.......................1ST RESPONDENT

JEMAIYO KEREWA........................2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. G. Adhiambo, Resident Magistrate, delivered on 24 February 2016 in Kapsabet PMCC No. 220 of 2010)

JUDGMENT

[1] This appeal arises from the Judgment and Decree of the Resident Magistrate's Court in **Kapsabet PMCC No. 220 of 2010: Benjamin K. Busienei vs. Jane Jemaiyo Kerewa and Roseline J. Tanu**i. The Appellant was the Plaintiff in the lower court matter; and his cause of action was that, on **31 August 2009**, the Defendants jointly and severally locked his shop situated on Plot No. 17 at **Chepwerta Trading Centre**; and that they did not have any colour of right or a valid court order to warrant such an action. The Appellant further contended in the lower court suit that it was not until **9 March 2010** that the shop was opened with the intervention of the relevant government agencies; and that as a result of the Defendants' illegal action, he suffered loss of his perishable shop products to the tune of **Kshs. 82,870/=.** Hence, the Appellant asked the lower court for judgment in his favour in the aforesaid sum of **Kshs. 82,870/=** together with interest from **31 August 2009** and costs of the suit.

[2] The suit was resisted before the lower court by the Defendants. In their Statement of Defence dated **28 October 2010**, they averred that **Plot No. 17** was part of the estate of **Kerewa Tanui** (deceased); and that the Plaintiff took possession of it unlawfully and in contravention of **Section 35** of the **Law of Succession Act** by purporting to have bought the plot from a son of the deceased who, at the time, did not have a Grant of Letters of Administration Intestate to administer the estate. They further averred that, as no authority was given by the High Court for sale, the transaction was illegal and void *ab initio*.

[3] It was further the contention of the Respondents that the Plaintiff was the author of his own misfortune when he abandoned his own goods at the shop. They further denied that the lower court had the jurisdiction to hear and determine the suit. Notwithstanding the foregoing, the Respondents, filed a Counterclaim for rent at **Kshs. 6,000/=** per month for the period that the Appellant used the suit premises, along with an eviction order and costs. The Respondents accordingly prayed for the dismissal of the Appellant's suit with costs and for their Counterclaim to be allowed as prayed.

[4] Upon hearing the evidence from either side, the lower court passed its judgment on **24 February 2016**, dismissing the suit with costs. Being aggrieved by that outcome, he Appellant filed this appeal on the following grounds:

> **[a]** That the learned Magistrate erred in law and in fact in failing to consider and take into consideration and account that his suit raised triable issues that tilted in his favour.
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> **[b]** That the learned Magistrate erred in law and in fact in failing to consider that the weight on facts, law and circumstantial evidence tilted in favour of the Appellant.
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> **[c]** That the learned Magistrate erred in law and in fact in failing to take into account the irreparable damage and great prejudice and injustice the Appellant would suffer in disallowing the suit.
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> **[d]** That the learned Magistrate erred in law and in fact in failing to appreciate and to give effect to the legal principles of the law of

natural justice.

[e] That the learned Magistrate erred in law and in fact in rendering a decision that was contrary to the law and facts and the rules of natural justice.

[f] That the learned Magistrate erred in law and in fact in failing to weigh and find that the eventual balance of convenience tilted in favour of the Appellant.

[g] That the learned Magistrate erred in law and in fact in failing to appreciate that the Appellant's suit was meritorious, full of basis and facts tilting in his favour.

[h] That the learned Magistrate erred in law and in fact in dismissing and/or disallowing the Appellant's suit based on onerous, unlawful, punitive and unfair basis and on principles that were not in the best and fair interest of justice and parties.

[i] That the learned Magistrate erred in law and fact in failing to make a *prima facie* finding on whether the Appellant's loss had indeed been occasioned by the Respondent.

[j] That the learned Magistrate erred in law and fact in failing to take into account the pleadings, the totality of the documents lodged in court, the exhibits produced, the nature of the claim before her thereby rendering a decision that was unjust and that would lead to the respondents herein unjustly enriching themselves.

[k] That he learned Magistrate erred in law and in fact in failing to take into account the totality of the facts and the authorities placed before her in reaching her decision.

[l] That the learned Magistrate erred in law and in fact in failing to consider the Plaintiff's evidence which was never rebutted by the defence case.

[5] The appeal was urged by learned Counsel for the Appellant by way of written submissions, pursuant to the directions given herein on **5 March 2019.** However, whereas Counsel for the Appellant filed his written submissions herein, dated **1 April 2019,** no submissions were filed by or on behalf of the Respondent. In his written submissions, Counsel for the Appellant chose to argue the grounds of appeal under two broad heads, namely Grounds 1 to 6 and Ground 7 to 12. Under the first head, Counsel submitted that the trial magistrate made an error by misapprehending the evidence on record and in applying the wrong principles to the circumstances of the case before here and thereby reached an erroneous conclusion. He further submitted that since ownership of Plot No. 17 was not within her jurisdiction to determine, the trial magistrate ought not to have made any findings in that regard; and that in any case, ownership of the property was not one of the issues in contention. Hence, it was the submission of Counsel that the learned Magistrate misdirected herself in finding and holding that the Appellant was not the owner of the suit property; granted that no evidence had been called or tendered before her on the issue of ownership.

[6] It was further the submission of Counsel for the Appellant that the trial magistrate erred in failing to find that the Appellant was deserving of compensation. He took the position that, even without proof of ownership of the suit property, the Appellant had demonstrated that his property was destroyed on account of the Respondent's wrongful act of locking the suit premises. He added that the Respondents ought to have served a termination notice or court order before taking action. Counsel relied on **Civil Appeal No. 160 of 1995: Gusii Mwalimu Investments Ltd & Others vs. Mwalimu Hotel Kisii Ltd** and **Quick Lubes E.A. Ltd vs. Kenya Railways Corporation** [2012] eKLR for the holding that even a landlord cannot simply walk into demised premises and obtain possession extra-judicially.

[7] As this is a first appeal, this Court has the obligation to re-evaluate the proceedings before the lower court with a view of coming to its conclusions and findings thereon. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, it was held that:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of 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 itself 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..."**

[8] Before the lower court, the Appellant testified as **PW1** and stated that he was operating a shop on **Plot No. 17** at **Chepswerta Trading Centre**; and that, on **31 August 2009**, the two Respondents went to the shop and closed it down without giving him any prior notice. He further testified that, although he reported the matter to the police, no action was taken. He added that it was not until **9 March 2010** that the shop was opened by a court order. By that time, the perishable goods had all been destroyed while others had expired. He filed a complaint with the Public Health Office and a report was prepared giving the value of the damaged properties as **Kshs. 82,870/=**. He produced his trade licence, Public Health Reports and a demand letter issued by his advocate as exhibits before the lower court. **PW1** admitted in cross-examination that he had bought the suit property from the son of the 1st Respondent; and was, at all material times, aware that previously, the property belonged to **Kerewa Kiptanui**.

[9] Daniel Kipkosgei (PW2) was then employed by the Appellant to sell products for him in the Chepswerta Shop. He testified that he was selling in the Appellant's shop on **31 August 2009** when the two Respondents went there and closed the shop. His evidence was that the incident happened at about 2.00 p.m. and that he was simply ordered to get out of the shop by the two Respondents who were persons well known to him; and that they then closed down the shop and went away without giving him any document or explaining why they took that action. He consequently reported the occurrence to the Appellant.

[10] Francis Kibitok (PW3) was a shopkeeper at **Chepswerta Trading Centre**. He testified that he was at his place of business on **31 August 2009** and witnessed the closure of the Appellant's shop by the Respondents. The Appellant's last witness was **John Langat (PW4),**

a Public Health Technician who was previously attached to **Chemase Location**. He told the lower court that he received a complaint from the Appellant on **6 December 2009** with regard to the closure of his shop. The Appellant asked for his assistance in ascertaining the condition of the goods that had been locked up in his shop. He testified that he visited the Appellant's shop and inspected the goods therein and found that 32 perishable items had become stale. He thereafter applied to the court for a destruction order and had the goods destroyed as being unfit for human consumption. He produced the Inventory of the perishable goods that he prepared, his report and the Destruction Order as the **Plaintiff's Exhibit 2(a), (b) and (c)** before the lower court.

[11] On behalf of the Respondents, the 1st Respondent, **Rosaline Cheptarus Tanui (DW1),** testified on **26 July 2013** and stated that the suit property belonged to her husband, **Kerewa Kiptanui,** who died on **17 January 1990;** and that on the plot they had a shop which the deceased was running prior to his demise. She further testified that the deceased was survived by three wives, and that they could not agree on what to do with the shop that the deceased was running and so they leased it for a while to one **Roseline Nyawade** who also died. **DW1** stated that as the dispute was going on, the Appellant moved into the premises at the instance of **Musa Kipkemboi Sang;** notwithstanding that the process of succession was yet to commence. She added that, subsequently the assets of the deceased were distributed in accordance with the law and that **Plot No. 17** was not given to **Musa Kipkemboi Sang,** but to the Respondents. Hence, they obtained a court order for the eviction of the Appellant which order was brought to the attention of the Appellant but he ignored the same and continued occupying the premises.

[12] It was therefore her evidence that the alleged sale of the suit property was illegal and that they are under no obligation to pay for the Appellant's damaged property. She conceded, in cross-examination, that there were goods in the shop when it was closed down by them; and that the shop was re-opened after about three months. **DW1** also conceded that **Musa Kipkemboi Sang** was subsequently appointed as one of the administrators of the estate of the deceased.

[13] DW1 called her daughter, **Lilian Chepkemboi Kerewa (DW2)** as a witness. **DW2** confirmed that the suit property belonged to her deceased father; and that the deceased died in **1990** and was survived by his three widows, including her mother, **DW1**. She further confirmed that the suit property had been sold by her step-brother, **Musa Kipkemboi Sang,** to the Appellant in **1993** without any reference to the family; and that when the estate was finally distributed, the subject property was given to **DW1, Mary Chepchirchir, Esther Chepkorir** and herself as joint owners. They then wrote a letter to the Appellant dated **2 June 2009** giving him 14 days to vacate, but he ignored the notice. They later closed the shop but that it was re-opened on **2 March 2010** to enable the Appellant remove his property. She conceded that some of the property had to be burnt. **DW2** testified that the Plaintiff was supposed to pay them rent of **Kshs. 6,000/=** and that he had no right to re-open the shop as he did. She made reference to a court order made in their behalf dated **21 December 2009** and urged for the dismissal of the claim.

[14] Jane Chemaiyo Kerewa, the 2nd Respondent herein, testified before the lower court as **DW3**. Her testimony was that **Plot No. 17** initially belonged to the deceased, **Kerewa Kiptanui**; and that it was transmitted to **Rosaline Cheptarus Tanui, Mary Chepchirchir** and **Esther Chepkorir** following the order of the High Court in **<u>Eldoret High Court Succession Cause No. 22 of 2001</u>**. She likewise urged for the dismissal of the Appellant's claim.

[15] Having considered the pleadings presented before her and the evidence adduced in support thereof, the learned trial magistrate came to the conclusion that the Appellant occupied the shop premises unlawfully; and that **Musa Kipkemboi Sang** had no right to sell the suit property to the Appellant. She also came to the conclusion that the value of the damaged property was not proved; and that, in any case, the Appellant was under obligation to mitigate his loss, which he did not do. In the same vein, the trial court dismissed the Respondents' counterclaim for rent, having found no evidence to support that aspect of the Respondents' claim. Thus, in the result, Judgment was entered in the Defendant's favour for:

> **[a]** Dismissal of the Appellant's suit with costs;
>
> **[b]** Eviction of the Appellant from the suit premises;
>
> **[c]** Costs of the suit.

[16] Having given careful consideration to the evidence adduced before the lower court, there is no dispute that, at all times material to this suit, the Appellant was a shopkeeper, operating his business on **Plot No. 17** at **Chepswerta Trading Centre** in **Nandi County**. There is no dispute that he started operating the shop business in **1994** after having bought the said plot from **Musa Kipkemboi Saina**, one of the administrators of the estate of the late **Kerewa Kiptanui**, who was the original owner. The Appellant availed a Land Sale Agreement before the lower court as well as the Minutes of the Meeting of the County Council of Nandi dated **28 July 1994**, by which the change of ownership was approved. The Appellant also produced as an exhibit his Single Business Permit for the year 2011 to demonstrate that he was indeed carrying on business on Plot No. 17.

[17] There is further no dispute that the Respondents, either by themselves or their agents, locked up the subject premises on **31 August 2009**; or that the shop was only re-opened upon an order being issued on **21 December 2009** to that effect by the High Court at Eldoret in **<u>Probate and Administration Cause No. 22 of 2001</u>**. A copy of the order was produced before the lower court by the Respondents and was marked **Defence Exhibit 1;** and it states thus:

> **"UPON HEARING both parties on 14th December 2009:-**

IT IS HEREBY ORDERED

> > **a) THAT the 1st and 3rd Respondents do immediately open the closed business premises and allow the Objector/Applicant to remove his goods from the premises.**

b) THAT the hearing of the application be on 25th January 2020.

GIVEN UNDER my hand and the seal of this Honourable Court this 14th day of December 2009…"

[18] Hence, there was credible evidence presented before the lower court to prove that, when the shop was ultimately opened, some of the goods had been damaged while others had expired. **PW1** testified that he had to call in the Public Health Technician who inspected the items and made an inventory of the damaged goods. The documents were produced before the lower court by **PW4** who also produced his report dated **9 March 2010**. That report confirms that the items in question were accordingly destroyed at the instance of the Public Health Officer; and that their value was **Kshs. 82,870/=**. That evidence was uncontroverted by the Respondents. Indeed, both **DW1** and **DW2** conceded in cross-examination that there were goods in the shop when it was closed down by them; and that when the shop was re-opened by order of the Court, some of the goods had rotten or had otherwise become stale and therefore were burnt up. I therefore find as a fact that the Appellant did suffer loss to the tune of **Kshs. 82,870/=** as claimed by him.

[19] In the premises, the pertinent issue that presented itself for determination before the lower court was the question whether the Respondents were to blame for the Appellant's loss. There is no doubt that the Appellant's products were damaged because the Respondents locked up the shop; and, whereas the Appellant's stance was that the Respondents had no colour of right or a valid court order to lock the premises, the Respondents produced evidence to demonstrate that the property in question was part of the estate of the late **Kerewa Kiptanui** and that, it had been bequeathed to four of the dependants of the deceased, namely: **Rosaline Cheptarus Tanui, Mary Chepchirchir, Esther Chepkorir** and **Lilian Jepkemboi**, following the order of the High Court in **Eldoret High Court Succession Cause No. 22 of 2001**.

[20] It was therefore the contention of the Respondents that, having served the Appellant with notice to vacate, which the Appellant ignored, they were perfectly entitled to assert their proprietary rights by locking up the premises. It is noteworthy that the Appellant admitted in cross-examination that he had been served with a notice to vacate dated **2 June 2009**. As such, this was not a case of forcible entry as posited by Counsel for the Appellant; and therefore the authorities of **Gusii Mwalimu Investments Ltd & Others vs. Mwalimu Hotel Kisii Ltd** and **Quick Lubes E.A. Ltd vs. Kenya Railways Corporation** (supra) are distinguishable. Similarly, in **John Ndirangu T/A Muthinga Produce General Store vs. Maitai Wangombe** [2008] eKLR the Court found as a fact that the Defendants had levied distress for rent illegally and in a manner that amounted to trespass to goods.

[21] The Appellant on the other hand hinged his claim on the assertion that by a sale agreement entered into between him and one of the administrators, **Musa Kipkemboi Sang,** he bought the suit property and therefore, that the Respondents acted unlawfully by locking up the shop as they did. It is noteworthy however that the sale in question is said to have occurred in **1994** in respect of the property of a deceased person, namely, **Kerewa Kiptanui**, long before the process of succession could be initiated. The Order marked **Defence Exhibit 1** shows that the Succession Cause was not filed until **2001**. It is manifest therefore that, by dint of **Sections 45** of the **Law of Succession Act**, the said **Musa Kipkemboi Sang** had no title to pass to the Appellant. That provision is explicit that:

> **"Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."**

[22] In similar vein, the proviso to **Section 82** of the **Law of Succession Act** is clear that **"...no immovable property shall be sold before confirmation of grant..."** Accordingly, the purported sale was null and void for all intents and purposes; and the asset remained part of the estate of the deceased until the same was distributed by order of the court. Thus, I fully agree with the position taken by **Hon. Musyoka, J.** in **Re Estate of Michael Gachihi Mbui (Deceased)** [2016] eKLR that:

"The record reveals that the person from whom Ndiritu Gikaria acquired the subject property was not the registered owner thereof; and therefore he could not possibly have had any legal title to convey to him. The said person was neither an administrator of the estate of the deceased, and therefore he could not possibly transact with him over estate property. Even if he were an administrator, he would still have to contend with Section 82(b)(ii) of the Law of Succession Act…"

[23] Similarly, in **Re Estate of John Gakunga Njoroge** [2015] eKLR, **Hon. Muriithi, J.** took the position that:

> **"A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act … For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the estate is restricted by the provisions on the powers and duties of the personal representatives under Section 82(b) proviso (ii)…"**

[24] It is therefore manifest that the arrangement by which the Appellant allegedly purchased the suit property was in effect, null and void; and as aptly put by **Lord Denning** in **Mcfoy vs. United Africa Company Limited** [1961] 3 AllER 1169:

> **"…if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse…"**

[25] Accordingly, the learned trial magistrate cannot be faulted for holding that the Respondents were entitled to assert their right to

ownership of the suit property, granted the concession by the Appellant that he had been served with notice to vacate. And, whereas Counsel for the Appellant argued that the trial magistrate had no jurisdiction to determine the issue of ownership as between the Appellant and the Respondents, the predominant issue here was not ownership of the plot as such, but whether the Respondents had justifiable cause to close the shop, thereby causing damage to the Appellant's goods.

[26] The Appellant raised this very issue in his Plaint; and in its Judgment, the lower court correctly framed the issues for determination at page 95 of the Record of Appeal. Ownership of Plot No. 17 is not one of them. The key issue was closure of the shop and whether the Respondents' action was lawful. Invariably, the trial magistrate had to interrogate the genesis of the Appellant's occupation of the premises to arrive at her decision. In my view therefore, she committed no error of principle in taking into account the fact that the property belonged to a deceased person and that it was transmitted to the Respondents by dint of a lawful court order. In any case, as pointed out in **the Macfoy Case**, it did not require an order of the court to declare the transaction between the Appellant and **Musa Kipkemboi Sang** null and void. It was null and void *ab initio*.

[27] It is also a cardinal principle that a plaintiff is expected to take reasonable steps to mitigate his loss. The Court of Appeal had occasion to discuss this principle in **African Highland Produce Limited vs. John Kisorio [2001] eKLR,** wherein it held that:

> **"The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimise the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant…"**

[28] In this case the shop was closed on **31 August 2009**. The **Succession Cause No. 22 of 2001** was already pending; and the Appellant was already a party thereto. It was therefore questionable why he did not promptly seek the intervention of the Court to have the perishable goods released to him. It was not until **14 December 2009** that he obtained the Order marked **Defence Exhibit 1**. No explanation was proffered by the Appellant for the time lapse between **31 August 2009** and **14 December 2009** when he obtained the order to open the shop; and more particularly between **14 December 2009** and **9 March 2010** when the shop was ultimately opened.

[29] As the Appellant failed to furnish a plausible justification at all for this tardiness, the trial court cannot be faulted for coming to the conclusion that he was not entitled to the orders sought by him. I have likewise come to the conclusion that the Appellant's suit was for dismissal and that the learned trial magistrate arrived at the correct decision on the facts presented before her. The appeal is therefore lacking in merit and is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF MARCH 2020

OLGA SEWE

JUDGE