



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER 181 OF 2018

BETWEEN

ERASTUS KARANI GIKANDI.....1ST APPELLANT

JOYCE NYAGUTHI.....2ND APPELLANT

AND

JAMES MWIRIGI MINUKU.....1ST RESPONDENT

HENRY WAIREGI MWANGI T/A HENJAM ACADEMY.....2ND RESPONDENT

(Being an appeal against the judgment and decree of the Hon. N. M. Kyanya Nyamori, Resident Magistrate dated 03.12.2018 in Thika CMCC No. 889 of 2013)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The respondents in this appeal were the plaintiffs in the lower court, having sued the appellants vide the plaint dated 23rd October 2013 and filed in court on 1st November 2013. The respondents claim against the appellants was for the sum of Kshs.630,500/- together with interest at court rates and costs of the suit. The said amount was in respect of unpaid rent in respect of a lease agreement entered into between the parties with effect from 1st January 2011 to December 2012 plus repair costs, book replacement and utensils.
2. The appellants denied the claim and urged the court to dismiss the respondents claim. The appellants also sued for set off and counterclaim in the sum of Kshs.1,817,624.90/-. The appellants filed an amended statement of defence as well as amended set off and counterclaim on 29th August 2018. The respondents' defence to set off and counterclaim is dated 1st October 2018.
3. At the close of pleadings, the case proceeded to hearing after which the learned trial court delivered its judgment on 3rd December 2018. The judgment was for Kshs.430,500/- plus costs of the suit and interest.

The Appeal

4. Being aggrieved by the whole of the said judgment, the appellants brought this appeal based on 12 grounds which have been summarized thus:-

1. Grounds 1 and 12

The trial magistrate erred in law and fact in finding for the respondents and dismissing the appellants' counterclaim against the weight of evidence and without giving a cogent reason.

2. Ground 2

That the trial magistrate erred in law and in fact by finding for the respondent with regard to repairs, book replacement and utensils devoid of an inventory.

3. That the trial magistrate erred in law and fact by failing to find that the respondents were the absolute signatories of the schools account and were thus the custodians of any and all monies that would be deposited in the schools account.

4. That the trial magistrate erred in law and fact by failing to find that the respondents could not hand over their ATM cards and PINS to the appellants and the respondents having conceded that they did not inform the bank of the purported hand over.

5. 5 & 6. That the trial magistrate erred in law and fact by failing to opine that there was no basis whatsoever for the appellants to accompany the respondents to the banking hall to make withdrawals.

6. Grounds 7 – 10

That the learned trial magistrate erred in law and fact as specified in grounds 7-10 of the Memorandum of Appeal as to the question whether the money withdrawn was for or on behalf of the appellants as to who made the withdrawals.

5. Based on the above 6 broad grounds, the appellants urge this honourable court to allow the appeal with costs to them.

6. As this is a first appeal, this court has to comply with the principles governing the role of the first appellate court as set out in the case of ***Peters versus Sunday Post Limited [1958] EA 424***. These principles are, *inter alia*, that this court must reconsider and evaluate the whole of the evidence on record and come to its own conclusions in the matter, while remembering that it has no opportunity of seeing and hearing the witnesses who gave evidence during the trial to make an allowance for it.

The Lease Agreement

7. The lease agreement entered into between the parties is dated 31st December 2010. The major provisions are as follows: -

- Term of the leave was 10 (ten) years from 1st January, 2011.
- Rent per month – Kshs.100,000/- payable termly in advance being Kshs.400,000/- per term.
- A refundable deposit, without interest of Kenya Shillings two hundred thousand (Kshs.200,000/-) to be paid on or before commencement of the tenancy and on or before the execution of the lease agreement (receipt of the same was acknowledged while the remaining Kshs. two hundred thousand (Kshs.200,000/-) was to be paid on or before 15th February 2011.
- Monthly rent for every succeeding term of the tenancy was payable on or before the 10th day of the due month, i.e. May 10th and September 10th of each year.
- There would be a rent increase by 10% after two years of the tenancy.

8. Under clause 5 of the lease agreement the tenants (who are the respondents in this appeal agreed to do the following: -

- Pay all electricity and water charges
- Pay rent as and when due
- Use the premises as school only
- Insure pupils and assets belonging to the tenants
- Pay for all requisite legal licences
- Pay for the replacement or replace all broken, lost or damaged fixtures and fittings during the tenancy
- Keep premises and fixtures clean and in good condition
- Hand over the property and fixtures at expiry or earlier determination of the tenancy in the same good and tenantable repair as on entry
- Indemnify owners from any claims whatsoever during the term of the tenancy and for any claim arising out of interaction with 3rd parties

- Be responsible for repairs and/or the costs for repair/damage caused by negligence or willful acts on the part of the tenants and or occupant to walls, ceilings, floors, windows and doors and to repair the same at their own cost.
- To redecorate, repair and varnish all the interior of the buildings, fittings and fixtures with two coats of paint at least fourteen days prior to expiry or earlier determination of the tenancy
- To make periodical inspections of the said premises and immediately report to the owners in writing of the presence of any unwelcome guests such as ants, bees or other destructive insects and any other damage however caused to the premises.
- To abide by all applicable regulations, rules and by-laws of the Municipal Council of Thika.
- Not to make any alteration or additions to the premises during the period of the tenancy without consent of the owners; nor to cause anything to be done to the premises that would become a nuisance or annoyance to the neighbours.
- Not to vacate the premises until the same were inspected by the owners.
- Upon termination of the tenancy either by effluxion of time or otherwise to hand over the keys of the premises to the owners or the owners appointed agents.

9. Clause 6 of the lease agreement provided for the obligations of the owners:-

- To cause a valuation of the computers and books and the tenants to purchase the same in 2 to 3 years.
- To insure the buildings (the extent of the insurance was not specified)
- To cause an inventory of the beds, desks, chairs, kitchen utensils and tables and after expiry of the lease the tenants to hand over the same in the same condition as at commencement of lease, only excepting normal wear and tear.
- To pay rates and rents to the relevant authorities
- To install service and maintain fire extinguishers

10. Clause 7 of the lease agreement sets out penalty for breach of any of the terms of the agreement, including the tenants bearing the costs incurred for collecting overdue rent. Such overdue rent would be recovered by owners holding/detaining/attaching the tenants' assets and or stock as security.

- If the rent remained unpaid for 15 days or more the owners would be at liberty to take whatever step they deemed appropriate to recover the same.

11. It was necessary for me to set out the terms of the lease agreement because this appeal hinges on these very terms with each party alleging breach.

The Case for the Respondents (as plaintiffs)

12. PW1 was James Mwirigi Muruiki and he testified about the tenancy relationship with the appellants between 2010 and 2012. He testified that the tenant was to open own account. During cross examination PW1 stated that he did the inventory before and after handing over the school to the appellants though he did not produce any inventory report. He also testified that fees paid by the parents would go through the school account to which his brother was a signatory. He alleged that the management of Henjam Academy of which he was a member handed over the account to the tenants together with the ATM card, PIN and remaining cheque leaves. He conceded that the handing over was not in writing. He also conceded that the school did not have any books of accounts.

13. In his further testimony during cross examination, PW1 stated that the handover of the ATM card, PIN and remaining signed cheque leafs was done pending the opening of the new account by the tenants, and that this handover was on a friendly basis. It was also PW1's testimony that the old account was never closed, though he added that it remained dormant and that the management of the school had never changed in spite of having the school run by tenants. PW1 finally stated that for a while the appellants paid the rent and then defaulted.

14. Following certain developments during the pendency of the suit, PW1 was recalled to produced exhibits 1-9. The critical exhibits are as follows: -

1. Lease agreement
2. .
3. Check list at the end of the tenancy
4. .

5. Registration of school
6. Registration of business name
7. (a) and (b) – statement for accounts
8. Minutes
9. Receipt books

15. Regarding withdrawals of money from the bank during the tenancy, PW1 stated thus **“we would withdraw money with Gikandi. We would withdraw money from account for rent when fees were paid from 2011 January to around April 2012 when money stopped going to the bank. Money from the account was against the rent. We would take what was there. Sometimes it was not full. Rent was 100,000/- per month and 400,000/- per term. He never finished paying.”**

16. During further cross examination, PW1 stated that whatever transactions took place between him and the tenants was on friendly basis and that at no time did he ever inform the bank that he had handed over the accounts to somebody else. He also alleged that any amounts he withdrew in his name were for Gikandi since the latter was running the school and because he (Gikandi) was not a signatory to the account. He also conceded that even the minutes which he produced as Pex 8 did not indicate that he was no longer an account holder to Henjam School. It was also PW1’s testimony that the total amount paid into the account was 2.1M though he said he had received only 1.8M in rent that was personally withdrawn by himself. PW1 also alleged that Gikandi withdrew some of the money directly using cards. He also testified that he never disbanded the school board.

17. PW2 was Henry Waithegi Mwangi, a co-director of the school with PW1. He stated that he was a director of the school from 2002 -2010 and was an account holder alongside PW1. He also confirmed that he and PW1 did not write to the bank to say they had ceased to be account holders. Finally, PW2 stated that apart from small amounts of up to 10,000/- which Gikandi could withdraw using card, the rest of the withdrawals were done by the account holders. Regarding the total Kshs.2.1million withdrawn from the account, PW2 stated that some of it went to the appellants without being specific about actual amounts.

18. Lucy Wanjiru Mburu testified as PW3. She was a former employee of Henjam Academy. She stated that in her position as secretary, she used to issue receipts for payments, whether the payments were in cash or bank slips. According to PW3, the appellants used to take all the cash. In answer to questions in cross examination, PW3 stated that she was not aware of any documents changing the directorships of the school. PW3’s evidence closed the respondents case.

The Appellants’ Case

19. The only witness for the appellants was Erastus Gikandi, the first appellant herein. His testimony was to the effect that throughout the tenancy, the respondents remained the signatories to the school accounts. He also testified that contrary to agreement reached between the parties, the respondents never gave instructions to the bank that they would have exclusive access to the accounts. It was also DW1’s evidence that the respondents collected a total of Kshs.2.7million out of which they (respondents) admitted to have taken Kshs.1.8million. DW1 also testified that instead of handing over whole cheque books, the appellants issued them with (10) signed cheque leaves, and that the respondents also never handed over the ATM cards. Finally, the witness told the court that there were no opening or closing inventories.

Submissions and Issues for Determination

20. This appeal proceeded by way of written submissions. The rival submissions, replete with supporting authorities are on the file. I have read through the same. From the said submissions, the evidence on record and the judgment of the learned trial magistrate, the issue that falls for determination is whether the findings of the learned trial magistrate were well founded. As I proceed to determine this issue, I have to remember that it is not always easy for an appellate court to overturn the findings of a trial court which has had the opportunity of seeing and hearing witnesses during the trial and observing their demeanor. However, where the findings are premised on wrong principles or on a misapprehension of the law or evidence, an appellate court will not hesitate to overturn such findings.

Analysis and Determination

21. The dispute herein arises from the lease agreement entered into between the parties. The salient points of that lease have been set out elsewhere in this judgment. The compliance or non-compliance of the said lease agreement, by either party is what would determine the truthfulness of their evidence.

22. After carefully reconsidering and evaluating the evidence afresh, I find and hold that the respondents did not prove their case against the appellants. The evidence is clear that even after allowing the appellants to take over the running of the school, the respondents did not allow the appellants to run the school accounts, on grounds that their transactions were on a friendly basis. In addition, either deliberately or otherwise, the respondents took no steps whatsoever to advise the bank that they were no longer the signatories to the accounts. The respondents did not give the cheque books and ATM cards to the appellants. Further, the respondents breached the term of the lease requiring them to take an inventory of both at the beginning and at the end of the tenancy, so it was difficult for anybody to tell what inventory the appellants took possession of and what was available at the end of the tenancy.

23. The evidence also shows that the respondents are the ones who withdrew all the money from the bank accounts. What the appellants could withdraw from the banks were small amounts of Kshs.10,000/- or less. The appellants controverted the respondents’ testimonies regarding the withdrawals.

24. It is also clear from the evidence that because no proper inventory was taken and acknowledged by both parties at commencement and termination of the tenancy, amounts claimed as repair charges, book replacement and utensils were not proved.

25. On the overall, I find and hold, and as correctly submitted by the appellants that the bank transactions were made by the respondents who used money belonging to the appellants to service their own pre-existing loan with the bank before the start of the lease, hence the emptiness of the accounts at the end of the tenancy. These loan accounts were number 009059238623, 0090592386233, 009059605013 and 0090596050136. I have looked at the detailed schedule of amounts deducted from the appellant's submissions on page 39 and I agree with the same.

26. Regarding the counterclaim, the appellants contend as follows: -

- *Total amount withdrawn by plaintiff – Account 1 – Kshs.2077767.90*
- *Total amount withdrawn by plaintiff account 2 – Kshs.88,757.00*
- *Less amount accounted for as per plaintiffs' inventory – Kshs. (251,100.00)*
- *Offset plaintiffs' claim – Kshs.348,900.00*
- *Amount due to defendant (full and final settlement) Kshs.1,566,524.90/-)*

27. Having perused the bank statements and the detailed submissions by the appellants in support of their case and also the respondents' submissions, I find and hold that the counterclaim was proved on a balance of probability and I would allow it.

Conclusion

28. In light of all the foregoing I hereby allow the appeal by dismissing the respondents claim in the lower court and allowing the appellants' counterclaim in the sum of Kshs.1,566,524.90 plus costs and interest. The appellants shall have the costs of this appeal and costs in the lower court.

29. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned electronically at Kiambu on this 21st day of **May, 2020**

CHRISTINE W.MEOLI

JUDGE