



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 270 OF 2009

KAMERE & COMPANY ADVOCATES.....APPELLANT

VERSUS

S.M. KIGOTHO T/A SAMKAY LIMITED.....RESPONDENT

(Being an appeal from the Judgment delivered on 25th April, 2006 by Hon. W.C. Wamae (Mrs.) (SRM) Milimani Commercial Courts in CMCC No. 5380 of 2004)

JUDGMENT

1. Vide an Amended Plaintiff dated 25th January, 2004 the Appellant, Kamere & Company Advocates sued the Respondent, Samkay Limited for the sum of Ksh.177,500/=. The said sum of money was stated to have been incurred while the Defendant was a licensed occupant of the Appellant's offices situated on the 3rd floor, Ukulima Co-operative House, Haile Selassie Avenue.
2. The claim was denied as per the Statement of Defence dated 14th June, 2004. It was contended that the Respondent was an agent of Ndagathi Enterprises, who were the Appellant's sub tenants. In the alternative, it was pleaded that the Appellant had no authority from the landlord to sublet the premises.
3. The Appellant filed a reply to the defence and joined issues with the Respondent.
4. The Appellant's case proceeded *ex parte*. The trial magistrate held that the Appellants had failed to prove their case and dismissed the same with each party to bear own costs. That is what triggered this Appeal.
5. The grounds of appeal are as follows:

“1.The learned trial magistrate erred in law and fact in failing to analyse and apply the evidence before her.

2. The learned trial magistrate erred in law and fact by ignoring the evidence tendered before her and arriving at the wrong decision that there was no evidence to support the case.

3. The learned trial magistrate erred in law in dismissing the Appellants case when no evidence was adduced to controvert the Appellants evidence.”

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

“An appeal to this Court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

7. I have considered the Appeal and the submissions filed by the Appellant. The Respondent did not participate in the Appeal though served.
8. Simon Kamere (PW1) testified on behalf of the Appellant. His evidence was that they permitted the Respondent to occupy two of the

Appellant's offices at a fee of Ksh.7,500/= a month. That when the Respondent's vacated the offices in April, 2005 they were in arrears of Ksh.117,500/=. That the Respondent's had also acknowledged arrears in their letter dated 10th April, 2002 which letter was produced as an exhibit. The Appellant's claim was for the sum of Ksh.117,500/= interest and costs.

9. I have perused the letter dated 10th April, 2002 which reflects on the face of it that it was from Samkay Limited, the Respondent herein. The said letter admits rental arrears cum office licence fee and seeks indulgence regarding the pending payments. The said letter does not mention the specific sum owing but talks of a set off for the sum of Ksh.57,680/= and a payment of Ksh.20,000/=. However, the said letter refers to the Appellant's letter ref No. sic 114/2000 which letter talks of arrears of Ksh.110,000/=. The Appellant also produced demand letters dated 10th November, 2003 and 28th April, 2004 written to the Respondent which reflect the sum owing as Ksh.117,500/=.

10. The Plaintiff's evidence remained unchallenged and uncontroverted by any other evidence. In the absence of any evidence in support of the Statement of Defence, this court's finding is that the Appellant had proved it's case on a balance of probabilities and was entitled to the orders sought in the plaint.

11. With the foregoing, the judgment of the lower court is hereby set aside and substituted with a judgment for the Appellant as prayed in the plaint.

Dated, signed and delivered at Nairobi this 6th day of May, 2020

B. THURANIRA JADEN

JUDGE