REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. ELCA NO 20 OF 2017

HUSNI SAID MBARAK……..……..……...…….. APPELLANT

VERSUS

DAVID MOSETI NYABETA……...……...…….…… RESPONDENT

JUDGMENT

(Being an appeal from the decision of Hon. G. Kagoni, Senior Resident Magistrate, in Mombasa CMCC No. 1339 of 2012 delivered on 4 August 2017)

1. Through a letter dated 15 June 2012, the appellant demanded from the respondent the amount of Kshs. 35,000/= as rent arrears for the respondent's occupation of a parcel of land described as Plot No. 118/11/MSA Likoni and further sought vacant possession. Auctioneers were later sent to distress the goods of the respondent. This development prompted the respondent to commence legal proceedings through a plaint filed on 29 June 2012. In the plaint, the respondent contended that he was in possession of the parcel of land described as Plot No. Mainland South/1105 in Likoni Mombasa/ Lunga Lunga Road. He claimed to have developed it and was operating a hardware business. He pleaded that he is not a tenant of the appellant and averred that the distress was illegal and aimed at fraudulently arm-twisting him to pay money to strangers. He asserted that the premises he occupies belongs to him and that the appellant has no claim over it. He thus sought orders to have the distress declared null and void; a declaration that he is not a tenant of the appellant; and an injunction to restrain the appellant from interfering with possession of his Plot No. 1105.

2. In his statement of defence, the appellant pleaded that the respondent owes him rent of Kshs. 350,000/=. He contended that the respondent was his tenant in the land described as Plot No. 118/11/MS (which he later amended to read Plot No. Mombasa/MS/1031) and was paying rent up to and until August 2011 when he stopped paying. He pleaded that the respondent has been paying him rent since the year 2008 and he is now estopped from turning around and branding him an imposter. He asserted that he was entitled to proceed with distress. He later amended his defence to include a counterclaim seeking orders that the respondent be declared his tenant; an order for payment of rent due and owing up to June 2012 being Kshs. 350,000/=; and an order for the respondent to pay subsequent rent of Kshs. 35,000/= per month from July 2012.

3. The respondent testified as the sole witness. In his evidence, he stated inter alia that the appellant was son to the landlord in respect of the Plot No. 118/11/MSA which is next to the plot that he occupies. He acknowledged that he was a tenant of Mbarak Said (the deceased father to the appellant) at the rent of Kshs. 20,000/= per month which was later raised to Kshs. 25,000/=. He was not happy with security and there was an adjacent plot owned by one Mali and they agreed that he could take the plot. He then started constructing on it in December 2008. He stated that the plot he currently occupies is 115/11/MSA. He stated that by 15 June 2012 when he got the demand letter, he had already moved out of the appellant's property. He stated that he did a search on the Plot No. 118 and found that it belongs to one Kimani Mutui though he acknowledged that it is occupied by the children of the deceased. He was cross-examined on whether he had any land ownership documents but he had none. He also did not have the agreement through which he claimed to have purchased the plot.

4. The court then adjourned to take further evidence at the disputed site. At the site, the respondent stated that the plot he occupies and the Plot No. 118 are different. He agreed that he was a tenant in the plot No. 118 and he used to pay rent. He stated that some boys came and built in front and so he looked for another plot which is now the Plot No 1105. He testified that he moved into the plot No. 1105 after developing it and he does not owe any rent for the Plot No. 118. He testified that the (initial) owner of the plot (No. 1105) was one Ali Bangare and Salim Boss who sold it to him. He knew the appellant as his neighbour and a wall separates them. He stated that the Plot No. 118 that had been leased to him is a smaller plot. He said that he no longer occupies it and does not pay rent. He did not know the present tenant and had no interest in it. He was questioned by the court and he stated that he has since learnt that the plot he used to occupy is Plot No. 1106 but there is some overlap. He stated that he is not the one who put up the separating wall.

5. The above proceedings were taken before Hon. S.R Rotich and is she who visited the site. She must have been transferred because the matter was then taken over by Hon. Kagoni. Parties appeared before him and agreed to proceed from where the matter had reached. Hon. Kagoni did not see the need to revisit the site and no party pressed for a second visit.

6. The appellant subsequently gave his evidence before Hon. Kagoni. He inter alia testified that his father bought the land from one Waitiki about 28 years ago. The respondent then leased part of the land from his father. He had a lease dated 13 June 2008 when the monthly rent was Kshs. 20,000/=. The rent was later adjusted to Kshs. 35,000/=. He stated that the last time the respondent paid rent was August 2011 and he produced the receipt book as an exhibit. When rent was not forthcoming he instructed an auctioneer to distress. He testified that he has other tenants on the land and the respondent was not his only tenant.

7. DW-2 was one Abdulwalid Abed Salim. He stated that he knows both appellant and respondent. He testified that he is the one who linked the respondent to Mzee Said (the deceased) as he wished to rent a godown. He saw the godown and agreed to lease half of it for Kshs. 20,000/= per month. He witnessed the lease agreement executed in the year 2008. He stated that the respondent later opted to take the entire godown and rent was adjusted to Kshs. 35,000/=. He asserted that the plaintiff was a tenant and not owner of the godown.

8. In his judgment, the learned trial Magistrate properly warned himself that he did not take down the respondent's evidence and neither did he visit the site. He referred to the record and found that it shows that the respondent demonstrated that the plot in which he has his hardware is not the same plot that he was operating before as the appellant's tenant. He held that for the respondent to be compelled to pay rent, it must be established that the person seeking rent was landlord, and thus the appellant needed to prove ownership of the plot. He held that the appellant has not proved ownership of the Plot No. 1031 and not proved that the respondent was a tenant in this plot. He referred back to the record and held that the respondent showed the court the plot he now carries on business and the plot that he previously used to carry business and these were two different plots. He therefore allowed the case of the respondent and dismissed the counterclaim of the appellant.

9. Aggrieved by the judgment, the appellant filed this appeal.

10. In his written submissions, Mr. Odundo, learned counsel for the appellant submitted inter alia that the appellant produced several exhibits to show that the respondent was his father's tenant and that his father had acquired the land. He submitted that the appellant challenged the assertion that the respondent moved from their property. He submitted that both appellant and his witness were categorical that the respondent had never moved from their parcel of land to a neighbouring parcel and he thought that the decision of the Magistrate, to believe the respondent and not the appellant, was not explained. He thought that the evidence of the respondent was inconsistent and contradictory. He submitted that the respondent had no sale agreement and no documents for the land.

11. For the respondent, Ms. Mwainzi submitted inter alia that from the evidence adduced, the respondent was no longer a tenant of the appellant. She submitted that no document of ownership was availed by the appellant for the Plot No. 1031.

12. I have considered all the above. This being a first appellate court, it is the duty of this court to reconsider the evidence, evaluate it itself and draw its own conclusions as stated in the case of *Selle vs Associated Motor Boat Co. (1968) EA 123*. I bear in mind that I neither saw nor heard the witnesses and I make due allowance in this respect. I also acknowledge that I am not bound to necessarily follow the findings of fact of the trial Magistrate.

13. The case of the respondent was that he is not a tenant of the appellant and therefore the appellant cannot seek rent from him. The appellant of course asserted that the respondent was his tenant and he was fully entitled to demand rent. From the evidence, it is not disputed that at some point the respondent was indeed a tenant of the father of the appellant. The case of the respondent was however hinged on the contention that he moved out of this premises, which he described as Plot No. 118, and occupied the premises that he is currently in possession of, which he described as Plot No. 1105. He of course claimed to own this Plot No. 1105.

14. I have gone through the site visit notes and I observe that at the site, the respondent did point out the former premises that he used to occupy and the current premises that he occupies. I have gone through the nature of cross-examination at the site visit and I have not seen anywhere where the appellant's counsel challenged the respondent, that the Plot that he was showing the court as the one that he is in occupation of, is the same plot that he had previously been paying rent to the appellant. I have also not seen anywhere where the appellant or his counsel offered to point out to the court the dimensions of the Plot that was leased to the respondent. The appellant stated that the respondent, after the initial lease, asked for more space and the rent thus went up. However, it was never demonstrated by the appellant that this extra space is the same space that the respondent now claims to own. Without that demonstration on the part of the appellant, I do not see what other conclusion the court could have come up with, other than that there were two distinct plots, one which the respondent had earlier leased from the appellant (or his father) and the other which the appellant purchased or somehow got from other persons and which he was currently in occupation of. Without there being any evidence tendered by the appellant, and his witness, that the premises leased out in the year 2008 was the same premises that the respondent was still in occupation of, I do not see how the Court could have reached any other finding other than the conclusion that these were two separate premises.

15. The appellant certainly did not advance the case that the respondent moved from one premises to another but which were both owned by the appellant. The appellant's case remained that the respondent was his tenant in the Plot No. 118 (or Plot No. 1031 whatever Plot description is given) , which had earlier been rented out in the year 2008, and that it is here that rent was owed. However, as I have pointed out, there was overwhelming evidence that the respondent had moved out of this plot. Indeed, the respondent stated that he does not now know who rents this plot that he was previously in occupation of. The appellant did not call any evidence to say who is in this plot, or how it is used. It is again not the appellant's case that where the respondent built is on a plot that he owns, or that the building encroached into a plot that was owned by the appellant. The Court was certainly not hearing any boundary dispute and the case before the Court was never presented as a boundary dispute. It means therefore that there were two distinct plots. What the appellant showed was that there was a tenancy in the "old" plot No. 118, but he never showed that there was any landlord-tenant relationship in the "new" plot No. 1105 as described by the respondent. The respondent did demonstrate that he had already moved out of the "old" plot No. 118 and it was upon the appellant to prove a fresh landlord/tenant agreement over the "new" location of the respondent. This was certainly not proved. Given the fact that the evidence showed that the respondent had already moved out of the "old" plot owned by the appellant, the appellant could not now distress for rent over this plot. The respondent was not in occupation of it and the appellant's case was not that the respondent moved out without notice and therefore the respondent still needed to pay rent despite not occupying this "old" plot.

16. I am satisfied from the foregoing that the trial Magistrate arrived at the correct finding. The respondent did prove that he was occupying different premises from that which he earlier had a tenancy with the appellant. The appellant did not prove that there was any tenancy in this

"new" plot and further the appellant did not prove that he owned this "new" plot. The appellant also failed to demonstrate that the old plot and the new plot were one and the same. He could not therefore succeed in his counterclaim and the same was correctly dismissed.

17. From the foregoing, it will be seen that I am not moved to disturb the findings of the learned Magistrate. I therefore dismiss this appeal with costs.

18. Judgment accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of March, 2020.

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MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Odundo for the appellant.

Ms. Mwanzia for the respondent.

Court Assistant; David Koitamet.