



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 69 OF 2017

PAUL MUNYOKI MUSILI.....APPELLANT

VS.

ALLAN & BRADLEY CO. LTD.....RESPONDENT

(Being an appeal arising from the judgment and decree of Hon. Kigen in Eldoret Cmc No. 769/2011 delivered on 26.5.2017)

JUDGMENT

1. The appellant (**PAUL MUNYOKI MUSILI**) was a tenant at **Petreshah Building Shop number G6** while the respondent (**ALLAN & BRADLEY CO. LTD**) is the managing agent of the said premises. The appellant sued the respondent claiming a sum of Ksh 200,000/=, the rent he had paid plus the value of the goods lost. Further that the respondent without any justifiable reason, violently evicted him out of the said premises despite having paid the rent. He also sought for damages, loss and loss of earnings from his business suffered at the hands of the defendant's action and breach of tenancy contract. The respondent denied the allegations by a defence dated 9.12.2011 which was never amended. In the defence, a preliminary objection was raised that the suit was fatally incompetent for want of jurisdiction and that it offended the mandatory rules of procedure of the law and it was an abuse of the court process.

2. The matter proceeded to hearing and the court delivered its judgment on 22.5.2017, that the plaintiff had not discharged his burden of proof and thus the suit was dismissed with costs.

3. Aggrieved by the said judgment the plaintiff appealed vide a memorandum of appeal dated 9.6.2017 and filed on the same date. The appellant raised grounds of appeal which I have condensed as follows:-

1) That the trial magistrate erred in failing to appraise properly all the evidence on record.

2) That the trial magistrate failed to consider the submissions by the appellant.

3) That the trial magistrate failed to consider the elaborate evidence of the appellant which was to the effect that the respondent through its agent and/or employees without any lawful reason locked out the appellant's business premises and interrupted his business occasioning him loss. Loss of earning and damages.

4) That the trial magistrate failed to consider that the respondent failed to totally rebut the appellant's overwhelming evidence on record in terms of damages and loss, loss of business, earnings and cost.

5) That the trial magistrate erred in law and fact by misapprehending the evidence on record and thereby reached erroneous conclusion and findings as in fact there was a failure to evaluate the evidence, take into account relevant factors and as a result arrived at an erroneous conclusion and finding.

Evidence

4. The appellant testified he was a businessman dealing in electronics, cosmetics and money business which started in the year 2008 as **Stamsee Enterprises**, and he would pay rent to the defendant. His monthly rent was 34,800/=. However, his shop was closed without any reason yet he had paid rent, the total value of the goods closed inside was ksh 3,000,000/=, he produced receipts for purchase of stock as Ex 3a-i. On cross-examination he denied having any rent arrears or that at one time auctioneers had come to close his shop. By August he had no rent arrears, yet his shop was closed for 3 days and when it was opened there were no items therein.

5. The respondent availed one witness **LAWI KIMUTAI KIAI** the marketing officer who testified that the appellant had a shop at ground floor G '6', and had rent arrears from **September 2011 for ksh 89,320/=** which he was he was informed of by a demand letter. Further, it was discovered that another tenant **PETER MBITHI** was also on the premises. In the year 2012 the advocates wrote a distress letter to the

auctioneers instructing for recovery of **ksh 124,200/=** rent arrears. The debt for **ksh 99,000/=** was paid by **Peter Mbithi (Ex no. 4)**. On cross examination he testified that they never locked the premises. The report dated 18.1.2012 showed the appellant had a balance of **ksh 99,000/=**, **the letter for ksh 17.2.12 showed rent arrears for ksh 89,320/=, in July the balance was ksh 89,320/=**. The rent arrears had not been recovered. On re-examination he testified that the appellant had moved out of the premises but the rent had never been recovered.

6. Parties agreed to canvass the appeal by way of submissions.

7. The appellant in his submissions contends that the respondent evicted him from the premises yet he had paid rent. He faulted the trial court for having relied on the respondent's evidence that he had sublet to **Peter Mbithi**, yet the latter was occupying G21 saying this was untrue. Further, that the tenancy agreement did not prohibit him from sub-leasing the premises. He pointed out that he was in the business of importing and selling goods, and the respondent's action was unfair as it had occasioned him loss of business, loss of stock and loss of monies for the scheduled loan repayment. The appellant referred to the decision in **Gusii Mwalimu Investment Ltd & Ors v. Mwalimu Hotel Kisii Ltd CA No. 160/1995**.

8. It was also argued that trial court did not consider the damages pleaded, submitted and proved through his statement, testimony and exhibits adduced to court. In this regard the appellant urged this court to be guided by the case of **Rev. Simon Ndungu Mungai & Anor v. Municipal Council of Kiambu Civil suit no. 67 of 2008(2010) eKLR** where it was stated that:

“Considering the nature of loss and/or damage that the plaintiffs were put into as a result of the defendant's unlawful acts, I assess the damages payable for unlawful eviction at Ksh 2 million which I award the plaintiffs”

Also the court was referred to **Azim Sameja t/a Business 2000 v. Lakhamshi Virpal Shah & Ors** Civil suit no. 689 of 2001.

9. The respondent's position is that the appellant failed to pay rent thereby dishonouring the terms of the agreement, he had also sublet the premises without obtaining consent from the defendant as demonstrated by DEx.3 which proved that Peter Mbithi had paid part of the rent arrears.

10. The court was urged to allow the appeal.

11. The issues that arise for determination are:

- I. Whether the appellant had fully paid the rent arrears.
- II. Whether the appellant had breached the tenancy agreement.
- III. If so, how much is adequate compensation

12. This court being a court of first appeal it has a duty to analyze and re-asses the evidence on record and reach its own conclusions in the matter. This was established in **Selle v. Associated Motor Boat Co.** [1968] EA 123 as follows:

“An appeal to this court from a trial by a 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

13. The appellant was a tenant at Petrishah building, occupying G 6. Both parties did not avail to this court the tenancy agreement which was being referred by the parties. The appellant had a burden of proof as provided by section 107 of the Evidence Act which provides as

“(1) whoever desires any court to give judgment as to any legal right or liability must prove that those facts exist.

(2) when the person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

The appellant testified that he was allowed to sub-lease, however in the absence of the tenancy agreement this court finds the appellant has failed to prove that assertion.

14. The appellant only states that his rent was Ksh 34,800/- which is not known whether it's monthly or quarterly. The respondent produced a letter dated 18.1.2012 which indicated the appellant had not paid rent from a period of September 2010 to January 2012, however after payment by Peter of Ksh 75,000 whom he had sub-leased the appellant still owed the respondent Ksh. 99,000/=. This was disputed by the appellant who testified that he did not owe the respondent any money. The appellant did not produce any receipt to prove he had cleared the arrears.

15. The appellant also claimed that he had a total value of stock worth **Ksh 3,000,000/=**. The court has gone through the bundle of receipts produced in court, it is not in dispute the appellant carried out business in electronics. There are many receipts for the year 2009 and some for 2011. The appellant had testified that he imports electronic, going through the invoices or receipts most of them have the Kenyan address. The receipts show some items which is not clear whether it's the appellant who was purchasing from the sellers or it is him who was selling.

There is no receipt showing his business letter head. The appellant averred that the stock in his shop was worth Ksh 3,000,000/= and that the respondent had not given him back the goods. He had not shown any inventory of stock as at Nov. 2011 when he was filing this case.

16. The appellant had a duty to discharge his burden on a balance of probabilities. Section 108 provides: -

“the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

The above implies that the appellant had a burden to prove all the facts pleaded in the amended plaint. This is so because in civil cases the standard of proof is on a balance of probabilities. The evidence has to make the court think it was more probable than not, then the burden is discharged, but if the probabilities are equal, it is a no. In the text **Phibson on Evidence 17th Ed at page 155 illustrated in Re it (Minors) [1996] A.C. 563 as follows:**

“The balance of probability standard means that a court is testified an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”

17. The appellant had urged this court to rely on **M/s Gusii Mwalimu Investment Co. Ltd v. Mwalimu Hotel Kisii Ltd(supra)** where the issue was whether the high court was right in granting a temporary injunction, a lease agreement had been produced, thus making it distinguishable from this instant case where parties alluded to a tenancy agreement but none was produced.

18. As regards the special damages claimed, I can do no better than adopt the approach in **Karanja Muchiri v. Protcor & Allan East Africa Limited HCCC (Busia) no. 48 OF 2004. In the cited case Hon Msagha J. held:**

“The plaintiff’s claim is for special damages which, in addition to the same requiring to be specifically pleaded, must be proved. It is not enough for a party to plead figures then in evidence place them before the court and say this is my claim. Evidence is required to persuade the court why it should believe that party and disbelieve the other. The plaintiff has come out as an inconsistent litigant without any or adequate evidence to persuade this court to find in his favour.”

The appellant has failed to meet the threshold, nor is it demonstrated that the trial magistrate applied the wrong principles in arriving at the decision. In view of the foregoing, I hold and find that the appeal lacks merit and is dismissed with costs to the respondent.

DELIVERED, SIGNED AND DATED THIS 2ND DAY OF MAY 2019 AT ELDORET

H. A. OMONDI

JUDGE