



IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 135 OF 2018

BETWEEN

AGNES KWAMBOKA.....APPELLANT

AND

PHILEMON MATOKE MOSIOMA.....1ST RESPONDENT

DANIEL MACHUKI2ND RESPONDENT

KENNEDY MOKUA trading as

MOCO AUCTIONEERS3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. Wamucii, RM dated 15th November 2018 at Kisii Magistrates Court in Civil Case No. 504 of 2012)

JUDGMENT

1. The appellant was the plaintiff before the subordinate court and in her plaint she claimed that sometime in 1999, she rented business premises in Nyansiongo township from one Samson Mosioma Machuka at a monthly rent of Kshs. 3,000/-. She paid him rent upto April 2013 but in the month of January 2011, the landlord, the 1st and 2nd respondents evicted her from the premises.

2. Aggrieved by the interference, the appellant lodged a complaint against the 1st and 2nd respondents at the Business Premises Rent Tribunal, Kisii being Case No. 9 of 2011 whereupon the Tribunal investigated the matter and made orders, inter alia, restraining the 1st and 2nd respondents from interfering with the her quiet possession of the premises and in particular from defacing her advertisement. The landlord was also ordered to repair and repaint her advertisement board and directed them not to set foot on the premises without giving one month's notice. The appellant stated that despite the orders, the respondents accompanied by police officers from Manga Police Station came to her premises and carted away some of her goods and threw away others. The 1st and 2nd respondents removed iron sheets from the premises, defaced her advertisement and removed her doors rendering her business unfit and the residential part uninhabitable. Following what she considered unlawful acts, the appellant prayed for the following reliefs in her plaint:

- a) *Return of the goods or their value.*
- b) *Damages including special, general aggravated and exemplary.*
- c) *A declaration that the attachment, seizure and/or throwing out of the plaintiff's goods by the defendants was null and void.*
- d) *An order directing the defendants to repaint the advertisement board, return and properly fix the doors, iron sheets, shelves and glass counter.*
- e) *An injunction restraining the defendant by themselves, their agents and/or servants or employees from interfering with the quiet enjoyment of the demised premises situated on the isolated plot Nyansiongo township.*
- f) *Costs and interest.*
- g) *Any other and further relief that this court may deem fit to grant.*

3. The respondents in their joint statement of defence denied all the allegations in the plaint including the jurisdiction of the court.

4. Prayers (a) and (e) of the plaint were granted at the interlocutory stage. The matter proceeded for hearing. The appellant (PW 1) and the 1st respondent (DW 1) testified. In the judgment, the trial magistrate held that the court had jurisdiction to determine the matter and that 1st and 3rd respondents illegally destrained against the appellant. The court awarded the appellant Kshs. 200,000/- as general damages and Kshs. 50,000/- as exemplary damages.

5. The appellant has now challenged the judgment on the following grounds set out in the memorandum of appeal dated 13th December 2018;

(1) The learned trial magistrate erred in law and in fact in rejecting the Appellants claim for return of all goods wrongfully attached or their value.

(2) The learned trial magistrate erred in law and in fact in not awarding statutory damages being double the value of goods irregularly and illegally destrained.

6. Although the respondents did not cross-appeal against the findings of the trial court, they contended that the trial court had no jurisdiction to hear and determine the suit. Counsel for the respondents argued that the issue of jurisdiction is fundamental and can be raised at any time. Counsel for the appellant countered that the issue of jurisdiction was a substantive issue that was dealt with in the judgment and hence the respondents were required to appeal or cross-appeal in the event they were dissatisfied with the decision and since they did not appeal or cross-appeal they were debarred from challenging the judgment on that score.

7. Since the issue of jurisdiction is fundamental to any determination, I propose to deal with it notwithstanding it was not appealed against. The respondents submitted that the subordinate court lacked territorial jurisdiction as the subject matter took place at Kijauri market within Nyamira County and not within Kisii County where the court is situate. On this issue, I agree with the trial magistrate that on the basis of **section 3(2) of the Magistrates Court Act (Repealed)** which was applicable at the time provided that the Magistrates Court shall have jurisdiction throughout Kenya. Further, the **section 15 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which provides for territorial jurisdiction, was not intended to limit the territorial jurisdiction of the court but only provide for guidance to the convenient forum for lodging claims. Finally, the **Magistrates Court Act, 2015** does not impose any territorial limits on the jurisdiction of the Magistrates Court.

8. The second ground of attack was that the dispute between the parties arose from a landlord-tenant relationship which could only be determined by the Business Premises Rent Tribunal. The trial magistrate held that there was no landlord tenant relationship between the appellant and the 1st and 2nd respondents as the tenancy was between the 1st respondent and Samsom Mosioma Machuki to which the respondents were not privy hence the court had jurisdiction to entertain the claim.

9. That second limb of the objection to jurisdiction could only be determined once the facts of the relationship between the parties was established. The appellant's case was she did not have any landlord and tenant relationship with the 1st respondent and that is why she sued for illegal distress. The trial court found as a fact there was a tenancy agreement between 1st respondent and Samson Machuka and not with the appellant and that is why it held that the distress was illegal. In view of this finding, the Business Premises Rent Tribunal or Rent Restriction Tribunal could not exercise jurisdiction absent the landlord and tenant relationship. Since the respondents did not cross appeal against this finding, this court can only take the facts as settled by the trial magistrate and affirm the finding of the trial court on jurisdiction.

10. I now turn to the issue raised by the appellant. Counsel for the appellant complained that the trial magistrate ought to have ordered return of the goods or awarded the appellant the value of the goods that were wrongfully attached or directed that appellant to return the goods. He pointed out that the auctioneer proclaimed specific goods and returned others and in light of the fact that the goods were not returned, the court ought to have compensated the appellant.

11. Counsel for the respondents submitted that the appellant's claim was in the nature of special damages and it ought to have been pleaded and proved to the required standard. Counsel pointed out that the appellant attached a schedule of goods and their value to the plaint but the total value was not indicated in the plaint and that the appellant did not pay court fees for that claim. As this was not done, counsel urged that the court could not award compensation.

12. As earlier stated, the trial court had already issued interlocutory orders for the release of the appellant's goods. Counsel for the appellant submitted that there was evidence that not all goods attached were returned. In the circumstances the court could not order return of goods and since the distress had been found illegal, the only relief available to the appellant was compensation of goods attached but not returned.

13. The trial magistrate held that as the appellant had not laid any basis for the award of special damages, none would be awarded. Since the trial magistrate found that the distress was illegal, the appellant was entitled to damages flowing directly from the loss. Apart from general damages which were available for trespass, the appellant was entitled to any other loss that was specific and ascertainable and that loss was required to be pleaded and proved. In **Siree v Lake Turkana El Molo Lodges [2002] 2 EA 521**, the Court of Appeal held that, *"This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages."*

14. At paragraph 13 of the plaint, the appellant stated that, *"The goods which were illegally attached, stolen, and/or wasted gone to waste and/or their value is shown out are shown (sic) on the attached schedule"* The schedule attached to the plaint listed several goods and their value but did not set out the total value. The question raised by the respondent is whether the attachment of a schedule to the plaint can be deemed to the part of the plaint. Neither the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** nor the **Civil Procedure Rules** provide the manner in which the plaint should be prepared. What is important is the plaint should set out the facts constituting the cause of action in the plaint. I do not consider that the incorporation of a schedule to the plaint a violation of the general principle that the plaint ought to set out the whole cause of action. The position I have taken accords with the **Article 159 (2) (d)** of the Constitution which provides that that the court has to do justice between the parties without undue regard to technicalities of procedure.

15. I have also considered whether any prejudice was occasioned by attaching the schedule of the goods to the plaint. The issue before the court was about wrongful distress and in fact, the appellant's witness statement set out the same list of goods that were set out in the schedule attached to the plaint. The interlocutory decision directing the 3rd respondent to release the goods attached left no doubt that the issue at the heart of the case was in relation to the appellant's distrained goods. I therefore find and hold that the schedule of goods attached to the plaint constituted part of the plaint and the respondents had sufficient notice of the same.

16. I now turn to consider whether the claim was invalid for failure to pay court fees for the claim. Any person who files a plaint is required to pay court filing fees prescribed by the Chief Justice under **section 10** of the the *Judicature Act (Chapter 8 of the Laws of Kenya)* unless the person is exempted from paying such fees as a pauper under **Order 33** of the *Civil Procedure Rules*. The *Civil Procedure Act* does not state the consequence of failure to pay court fees but **section 96 of thereof** implies that payment of the assessment filing fee is an imperative for validity of a claim. However, failure to pay such fee does not *ipso facto* invalidate the suit. It provides as follows:-

96. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.

17. This view was taken by Mativo J., in *Mombasa Cement Ltd v Speaker, National Assembly & Another* NRB Pet. No. 177 of 2015 [2018] eKLR where he observed that:

The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees in time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case. Consequently, I find and hold that failure to pay the requisite Court filing fees, which is a prerequisite for instituting suits renders this Petition incompetent.

18. The issue of non payment of court fees was not raised before the trial court and was raised by the respondents for the first time in this appeal hence the appellant did not have the opportunity of taking advantage of **section 96** of the *Civil Procedure Act* to request the court to allow her to pay the filing fee.

19. Since the trial magistrate did not consider the issue of special damages, I allow the appeal to that extent. However, I did not have advantage of the trial magistrate's consideration of the evidence including a determination of what goods were lost and the value thereof in order to determine the level and extent of special damages hence there is no basis upon which I can re-evaluate the evidence and determine the appellant's goods taken and the value thereof.

20. The powers of this court when exercising the appellate jurisdiction are provided for under **section 78** of the *Civil Procedure Act* which is in the following terms:

78.(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

21. Since the trial magistrate heard the parties testify and all the material and submissions bearing on the issue of special damages is on record, I am inclined to exercise my powers under **section 78(1)(a)** aforesaid and remand the issue of special damages for consideration by the trial court for final determination in light of the observations I have made in this judgment. Since the error was occasioned by the trial magistrate, I will not impose costs.

22. For reasons I have set out, I now make the following orders:

(a) The appeal is allowed only to the extent that the order dismissing the claim for special damages is hereby set aside.

(b) The appellant is directed to pay court fees assessed on the total value of goods set out in the schedule attached to the plaint within **fifteen (15) days** from the date hereof.

(c) The issue of special damages is remanded back to the trial magistrate who shall make a determination on basis of the evidence

and submissions. Such determination shall be within **thirty (30) days** from the date hereof.

(d) There shall be no order as to costs.

DATED and **DELIVERED** at **KISII** this **14th** day of **JUNE** 2019.

D.S. MAJANJA

JUDGE

Mr Gichana instructed by Bosire Gichana and Company Advocates for the appellant.

Mr Nyambati instructed by Nyambati and Company Advocates for the respondents.