REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO 21 OF 2017

CHARLES KAKAI MAYUNGU CHANNAN.....APPELLANT

VERSUS

DAVID MUKWANJA.....RESPONDENT

(An appeal from the judgment and decree of Hon.Malesi Senior Principal

Magistrate,Kakamega in civil suit No.257 of 2016 delivered on the 16-5-2017)

JUDGEMENT

By plaint dated 27TH June 2016, the respondent in this appeal David M MUKWANJA sued the Appellant CHARLES KAKAI MAYUNGU for Kshs.25,000/= being rent arrears for five months Kshs.35,882.96/= being water and electricity outstanding arrears and cost of the suit plus and interest and any other relief this court may deem fit to grant.

By Judgment of the Senior Resident Magistrate, was entered in favour of the Respondent against the Appellant for Kshs.25,000/= for rent arrears and Kshs.28,394.09/= water bill and Kshs.7,488.87/= electricity bill outstanding a total of Kshs.60,882.96 /=. The Appellant was aggrieved by the judgement and appealed against the said award on the following grounds:

i. That the learned trial Magistrate erred in law and in fact when he refused to adjourn the case to allow the appellant to engage the services of an advocate

ii. That the trial magistrate erred in law and fact when he found that the appellant had refused to prosecute his case.

iii. That the learned trial Magistrate in law and fact in wrongfully invoking, misinterpreting and /or misapplying the provisions of article 159(2)(d) of the constitution and section 1 A of the Civil Procedure Act.

iv. That the learned trial magistrate erred in law and fact when he conducted the hearing of the case contrary to the provisions of civil procedure rules and thereby occasioned a miscarriage of justice.

v. That the learned trial magistrate erred in law and in fact when he delivered a judgement devoid of a concise statement of the case and reasons for such decision as stipulated and the mandatory provisions of order 21 rule 4 of the civil procedure rules 2010.

vi. That the trial magistrate erred in law and fact when he totally ignored and/or failed to make any finding or decision on appellant's counter claim

vii. The learned trial magistrate erred in law and in fact in commencing and conducting the hearing of the suit when pleading had not closed.

viii. That the learned trial magistrate erred in law and fact when he found that the Respondent had proved his case and was thereof entitled to Kshs.60,882.96/= yet there was insufficient evidence on record.

ix. That the learned trial magistrate erred in law and fact in not that they lacked territorial jurisdiction to hear and determine this claim that cause of action arose in Webuye Town within county where the appellant lived and worked for gain.

x. That learned trial magistrate erred in law and fact when he failed to find that the Respondent had failed to prove his case against the appellant on a balance of probabilities.

By consent of the parties, this appeal was canvassed by way of written submissions. Mr. Were for the appellant submitted the ground of appeal which raised two pertinent issued being that the appellant was not allowed to engage service of a lawyer and that the appellant was not allowed to prosecute her case. He submitted that the granting of adjournment to a case discretion was exercised wrongly by trial court. He submitted that the trial court was biased against the appellant.

He submitted that the trial court wrongly allowed the respondent to file a reply to defence after close of his case and when the court suo moto sought to shield the respondent under article 159(2)(d) of the constitution relying on authority of ***Kenya Limited Versus John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)[2014].*** He further submitted that provisions of order 21 rule 4 were not complied with by trial court that the Appellant has counter-claim but the same was not considered and behooved the court to make a decision on the counterclaim. He submitted that the respondent did not meet threshold of proof of civil cases on a balance of probability since no witness was called and the appellants defense was not interrogated. He submitted on issue of jurisdiction that this appeal emanated from suit filed in Kakamega CM'S court yet cause of action arose at Webuye Town and Defendant reside in Webuye which was contrary to section 12,14 and 16 of the civil procedure Act therefore appellant was prejudiced.

The Respondent Mr. Mukwanja filed his submission and submitting that the defendant filed his defence and counter claim but raised no triable issues and he submitted that the appellant and respondent had a tenancy agreement where the appellant was to pay rent of Kshs.5000/= monthly and cater for water and electricity bill but he breached the agreement along the way the way.

He submitted that acted judiciously in discharging his duties. He submitted that the appellant cannot raise issue for jurisdiction at this stage which issue was neither raised in his defence and counter-claim during the hearing. He also submitted that the pleadings had closed before commencement of the hearing and not otherwise. He submitted that the appellant is only making attempts to delay him from enjoying fruits of his successful litigation.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

> ***" This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect."***

The evidence before trial court was that PW1 David Muhongo Mukwanja testified that and he wished to adopt his statement dated 27/7/2019 and added on defendant wrote him a letter stating that the amount he had paid would be utilized until February, 2017 and from March, 2017 he would be paying Kshs.5000/= monthly and he has the said letter. He testified that the defendant did not pay rent for March, 2016 until June when he vacated the house without my knowledge. The house remained vacant form July to September, 2016 and therefore claims rent for those months plus accumulated water Kshs.28,000/= and electricity bill Kshs.7,488/= and house repair damages od Kshs.15,000/=.On cross examination he stated that they did not enter into a tenancy agreement and he first claim to Rent tribunal and was advised to file claim to trial court.

On defence hearing the defendant stated he was not ready to proceed and sought adjournment on grounds that he is seeking services of an advocate but court held defendant was applying delay tactics and thereof court issued judgement date.

I have carefully considered pleadings, the evidence adduced, submissions taking into account all the decisions relied on. In my view, the grounds of appeal revolve around jurisdiction and the trial process thereof the issue for determination in this appeal are whether the trial court had jurisdiction and whether the appellant was given a fair hearing process during trial and whether the Respondent proved his case against the appellant on balance of probability.

On issue of jurisdiction, the plaintiff in his plaint was praying for judgement against the tenant for;-

a) Kshs.25,000/= being rent for five months

b) Kshs.35,882.96 being water and electricity outstanding arrears

c) Costs of this suit

d) Any other relief this court may deem fit grant.

The same had been filed in Rent Restriction Tribunal in Kakamega RRC No.67 of 2018 where upon hearing the plaintiff the court ruled;

> ***"In absence of a subsisting Landlord & Tenant relationship, the tribunal has ceased to have jurisdiction over the matter. Accordingly, parties are directed to pursue all outstanding claims through normal courts''.***

Where there is no subsisting tenancy relationship, a claim in arrears of rent can only be handled by the other courts.

Secondly on issue of trial process the appellant has raised concern that he was not allowed to have an advocate represent and also he was not allowed to prosecute his case. He has also stated that his counter claim was never considered during hearing and judgment. The respondent on the other has submitted that the trial court judiciously exercised his duty and all the Appellant was using delay tactics to stop him enjoying fruits of his successful litigation.

To determine the issue on trial process before trial court I have perused the court records the chronology of events is that this suit was filed before trial court on the 27/7/2016 and set down for hearing on 10.1.2017 when the plaintiff testified his case was heard and closed and the defendant took stand but was stood down on ground that the plaintiff had not filed reply to a counter-claim and the Plaintiff was allowed to file reply to the counter claim pursuant to article 159 of the constitution and the defence hearing date was set to be 28/2/2017. When the matter came up for hearing the defendant sought adjournment on ground that he was unwell and the same was allowed and fresh hearing date issued to be 25/4/2017.

On the 25/4/2017 when the matter came up for hearing the defendant sought a further adjournment that he was not ready and he had also filed an affidavit and sought an adjournment so as to seek service of an advocate but the court declined stating reasons that it was a delay tactic and issued Judgement.

Upon analyzing the court record it is my finding that the appellant sought adjournment during defence hearing to engage service of an advocate and same time had just filed another lengthy affidavit to my view he was not been sincere in seeking another adjournment on such ground. I believe he had sufficient time to do so considering an earlier adjournment had been issued on his request which to my view this was a delay tactic appeal on ground that he was denied chance to be represented by an advocate and have his suit prosecuted fails.

The appellant has also raised issue that the appellant filed reply to counter claim after close of his case which was misapplying article 159 of the constitution.

Article 159(2) (d) of the Constitution of Kenya, 2010 provides;

(a)……

(b)……

(c)……

(d) justice shall be administered without undue regard to procedural technicalities; and

(e)…..

A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute. It is my finding that the above provisions of law were properly invoked by the trial court and the Respondent had a right to be allowed to file his reply to counter claim despite close of his case. The appellant has also raised appeal on ground that the Respondent did not prove his case on balance of probability as required against the appellant.

With regard to the above I have analyzed the pleading and this is claim by the Respondent for rent arrears of Kshs.25,000 plus electricity and water bills during tenancy.

I have analyzed the supporting documents to the claim and it is my finding there was no tenancy agreement executed between the parties as to the terms of the tenancy. But the Respondent during hearing stated the appellant agreed to be paying Kshs.5000/= monthly from October 2014 and he indicated that defendant wrote him a letter stating that the amount he had paid would be utilized until February, 2017 and from March,2017 he would be paying Kshs.5000/= monthly and he has the said letter thereof it is evident that there was some arrangement on rent payment and it was been paid until default. The Respondent also provided statement for the outstanding water and electricity bills to support his claim on outstanding bills of water and electricity which amounted to Kshs.35,000/= the Defendant/Appellant denied the claim in his defence and filed a statement but did not provide evidence to the trial court to enable it make decision in his favour. Having declined to give defence evidence, he cannot complain that his evidence was not taken into account.

Thereof it is my finding that the trial court was right in his finding on the rent arrears, electricity and water bills amounting to Kshs.60,000/= to be paid by the Appellant. The Respondent proved his case on balance of probability through evidence he provided to the trial court. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed with costs.

Dated and Delivered at Bungoma this 17th day of July, 2019.

S.N. RIECHI

JUDGE