



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 510 OF 2017

ENOCK MBAI MAILU.....APPELLANT

-VERSUS-

PRECIOUS GIFT SCHOOLS.....RESPONDENT

(Appeal from the Judgment and Decree of Honourable M.W Murage (RM) on 4th January 2018.)

JUDGMENT

1. Enock Mbai Mailu, the Appellant herein, filed an action against Precious Gift Schools, the Respondent herein before the Chief Magistrates Court vide the plaint dated 10th September 2015 and amended on 21/6/2016 seeking for special damages in the sum of ksh 1,071,000/= being unpaid rent, 3 months rent in lieu of notice and unpaid stamp duty. The aforesaid claim is said to be on the basis of a lease contract/agreement over **L.R no 6845/176**.

2. The Appellant successfully obtained a default Judgment against the Respondent when the Respondent failed to enter appearance.

3. The Suit therefore proceed for hearing exparte before Hon. Murage, learned Resident Magistrate who heard the suit and had it dismissed on 4th January 2017.

4. The Appellant being aggrieved filed this appeal and put forward the following grounds:

i. THAT the learned Magistrate erred in fact and misdirected herself when she held that the Plaintiff had not proved his case on a balance of probability.

ii. THAT the learned Magistrate erred in fact and in law when she failed to consider the rent payment schedule dated the 31st March 2015.

iii. THAT the learned Magistrate erred in fact and in law when she failed to consider the fact that on the 1st April 2015 the Respondent agreed to pay the deposit accrued rent to the Appellant.

iv. THAT the learned Magistrate erred in fact and in law when she failed to consider the fact that the Respondent moved out without giving a 3 months notice to the Appellant as required under the lease agreement between the parties herein.

v. THAT the learned Magistrate erred in fact and in law when she failed to consider the fact that the Respondent did not reimburse the stamp duty paid on their behalf by the Appellant.

vi. THAT the learned Magistrate erred in fact and in law when she disregarded the principle that a party is assumed to be right when his evidence is not rebutted. The affidavit of Wangira Okoba, their advocate in support of the motion. When served, the Defendant filed a notice of preliminary objection to oppose the motion.

5. When this appeal came up for hearing, learned counsel appearing in the matter recorded a consent order to have the same disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the Appellant put forward a total of six grounds of appeal, these grounds boil down to one broad main ground, that is whether or not the Appellant proved his case to the required standards in Civil Case.

6. The recorded proceedings show that the Appellant testified before the trial court. He adopted his written statement as his evidence in

which he stated that on 2/7/2004 he entered into a lease agreement with the Respondent over plots no 52,53 and 54 in L.R no 6845/176. He averred that upon executing the lease agreement the Respondent took possession.

7. The Appellant stated that the Respondent never paid rent stating to him that it had financial difficulties and instead gave him a payment plan. The Appellant further stated that instead of making payments the Respondent moved out of the premises without giving notice. The Appellant stated that he inspected the property and discovered that the same was damaged and needed to be repaired and repainted as per the agreement. He produced the lease agreement, the schedule payment plan and documents showing that he paid stamp duty.

8. The learned Resident Magistrate considered the evidence presented before her. She noted that though the Appellant's evidence was not controverted that alone did not discharge the burden of proof. She stated that it is clear that the parties entered into a lease agreement which was produced as an exhibit in evidence. She concluded that there was no cogent evidence to show that the Respondent took up possession of the premises nor when it left those premises.

9. The learned Magistrate also pointed out that there was no prove that the Respondent took up and was in possession for a year. She further pointed out that the rent schedule payment plan indicates rent deposit for the facility to be ksh. 280,000/= yet the lease agreement stated ksh. 210,000 and for the above reasons the learned Resident Magistrate dismissed the suit.

10. On appeal, the Appellant is of the submission that he tendered a lease agreement dated 24/7/2014 before the trial court which indicates that the rent was payable as from 1st August 2004 meaning that the Respondent would take possession as from 1/8/2014.

11. The Appellant pointed out that he stated in his written statement that the Respondent took up possession, did not pay rent and moved out without giving notice. The Appellant also pointed out that the Respondent admitted when it made a schedule of payment by which time the arrears of rent covered a period of between 1st August 2014 and December 2014, January 2015 and March 2015.

12. The Appellant argued that as of 31st March 2015, the Respondent was still in possession. According to the Plaintiff there was sufficient evidence to prove the Appellant's case on a balance of probabilities hence the Appellant was entitled to the orders sought.

13. The Respondent submitted that there was no valid lease agreement between it and the Appellant. It pointed out that the alleged lease was made on 2/7/2014 and executed on 1st July 2014. It is argued that it is not possible to execute an agreement before the same is prepared. The Respondent also averred that the lease agreement may have been executed by a person who had no authority to do so on behalf of the Respondent Company therefore the agreement is not binding on the Respondent.

14. The Respondent is of the submission that Appellant failed to establish his claim on a balance of probabilities. It is argued that there was no evidence proving that the Respondent had taken up possession.

15. Having re-evaluated the evidence tendered before the trial court, it is clear to this court that the Appellant produced in evidence a lease agreement dated 2/7/2014 executed by both the Appellant and the Respondent before one Miriam Mbithe David advocate. The document appears to have been registered by the Registrar of documents after stamp duty had been paid.

16. The learned Resident Magistrate correctly concluded that the parties executed the aforementioned lease agreement. The learned Resident Magistrate stated that it was not clear as to whether the Respondent took up possession of the demised premises.

17. It is apparent from paragraph 3 of the Appellants' written witness's statement that the Respondent immediately took up possession of the demised premises upon executing the lease agreement on 2/7/2014. The learned Resident Magistrate therefore erred to come to the conclusion that it was not clear as to when the Respondent took up possession. It is also apparent from the lease agreement that payment of rent ksh. 70,000/= per month was with effect from 1st August 2014.

18. The Appellant also tendered in evidence of a payment plan made by the Respondent through the Application dated 31st March 2015. After a careful re-evaluation of the evidence tendered before the trial court, I have come to the conclusion that the Appellant presented evidence which proved his claim on a balance of probabilities. The Appellant was therefore entitled to Judgment as prayed.

19. In the end this appeal is allowed. Consequently, the order dismissing the suit made on 4th January 2017 is set aside and is substituted with an order entering Judgment in favour of the Appellant and against the Respondent as prayed in the amended Plaint dated 26th June 2016. The Appellant to have costs of the Appeal.

Dated, signed and delivered at Nairobi this 13th of December, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent