



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 7'A' OF 2016

JOHN NTHUMBI KAMWITHI.....APPELLANT

V E R S U S

ASHA AKUMU JUMA.....RESPONDENT

J U D G M E N T

1. This is an appeal arising from the judgment and decree of the Embu Principal Magistrate Mr. R.O. Oigara in CMCC No.264 of 2012 delivered on 23/03/2016. Being dissatisfied with the judgment, the appellant lodged this appeal citing ten (10) grounds which can be condensed as follows:-

- (a) *The learned magistrate erred law and in fact in arriving at findings which were against the weight of the evidence.*
- (b) *That the magistrate erred in his finding that the leave of the Business Premises Tribunal was required which is not supported by the law.*
- (c) *The magistrate erred in disregarding the provisions of the Distress For Rent Act which gives the appellant the right to levy distress for arrears of rent.*
- (d) *That the magistrate erred in awarding the respondent Kshs.80,000/= for loss of income and Kshs.150,000/= as goodwill which were in nature of special damages requiring strict prove and were not proven.*
- (e) *That the magistrate erred in not finding that the respondent did not prove her earnings from the business she was operating in the appellant's premises and as such did not deserve any award in loss of income.*
- (f) *The magistrate erred in not finding that the properties that were attached from the premises occupied by the respondent were not the ones listed in the plaint but those listed by the auctioneer at the time of attachment and that the respondent was not entitled to Kshs.2,328,150/=.*
- (g) *That the learned magistrate erred in dismissing the counter-claim of the appellant.*

2. The parties argued the appeal by way of written submissions filed by their counsels on record. Messrs Duncan Muyodi & Co. represented the appellant while the respondent was represented by Ochieng Ogutu & Co.

3. The appellant submitted that the respondent was his tenant on plot No. Embu/Municipality/1112 at a monthly rent of Kshs.6,000/= and was often in arrears during the period of her tenancy. The respondent defaulted in payment of rent and as at January 2009 the arrears amounted to Kshs.24,000/=. A notice seeking payment was sent to the respondent but it was not honoured prompting the appellant to instruct the auctioneer to levy distress for recovery.

4. The auctioneer testified that he found the respondent at the shop on the day he went to levy distress. He saw the respondent take away some items from therein and locked the premises. The appellant had to obtain orders to break into the premises 15 months later. The appellant stated that he lost rent at the rate of Kshs.6,000/= for 15 months amounting to Kshs.90,000/= in respect of the shop rented to the respondent.

5. It was further argued that a landlord does not require an order from the Business Tribunal for levying distress and that Section 12 of the Landlord and Tenants (shops, hotels and catering Establishment) Act provides for various orders that the tribunal may grant. It was not mandatory for the appellant to seek for permission to levy distress in this case since the order is required for cases being heard by the tribunal.

6. The appellant further contended nature of the agreement between the parties did not fall under controlled tenancy as described under the Act. Contrary to the respondent's evidence, the agreement was reduced in writing, contained the terms of payment of rent as well as the obligations of the parties. It was argued that the duration of the tenancy was not stipulated and was not restricted to 5 years.

7. It was the appellant's submission that the respondent was in arrears of rent amounting to Kshs.24,000/= and was served with a notice to levy distress. There was no evidence that the arrears were ever cleared before the goods were proclaimed. The appellant was in compliance with Section 3 of the Distress for Rent Act.

8. The respondent has failed to pay the arrears after the proclamation, the appellant was therefore entitled to distrain and sell for recovery the goods. The proceeds of sale Kshs.51,400/= catered for Kshs.35,000/= to the appellant and Kshs.28,400/= auctioneer's charges. The respondent had paid Kshs.12,000/= after the demand which was taken into account.

9. The appellant further contended that the so called income statement produced by the respondent did not amount to a statement of accounts or a record of income of the business. The claim of loss of business of Kshs.80,000/= per month was not supported by records for daily and periodic sales to prove earnings. There were no receipts issued to customers, receipts for clothing materials bought or any other stock. Records of income and expenditure including bank statement were not provided. The award of Kshs.80,000/= made by the magistrate was not based on any evidence.

10. Similarly, the claim of goodwill of Kshs.1,500,000/= is a special damage and ought to be strictly proved through documentary evidence. The award of goodwill at the rate of Kshs.150,000/= was not supported by any evidence.

11. It was further argued that the respondent did not demonstrate the existence of the goods in her premise and that she owned them. The receipts she represented were not stamped as required under Section 5 & 6 of the Stamp Duty Act and did not cover all the items on the list. The lack of an official stamp under the act renders the documents inadmissible in evidence.

12. The appellant dismissed the respondent's witness PW1 and 3 as unreliable. In cross-examination both witnesses said that they had never seen the list of the items presented by the appellant. None of them was familiar with the names and descriptions of the machines that the respondent claimed were in the shop. As such their evidence ought to be disregarded being a fabrication.

13. The appellant applied to amend his defence and included the counter-claim. The magistrate never gave any reason why he dismissed the claim. He ought to have looked at it on merit as opposed to stating that it was filed late.

14. The respondent submitted that the tenancy agreement was reduced in writing and it contained the terms of payment of rent as well as obligations of both parties but did not stipulate the duration of the tenancy rendering it subject to controlled tenancy. It was further contended that the distress was unlawful and illegal since the appellant did not seek and obtain permission under Section 12 of the Landlord and Tenant (shops, hotels, and catering Establishments) Act. The provisions of the Act overrides those of the Distress for Rent Act. The provisions of the latter are subject to *any other written law* as provided by Section 3.

15. The respondent further stated that it was contrary to the law for the auctioneer to attach tools of trade, perishable goods, goods belonging to third parties, items like cloths beddings and pets. Section 29 of the Landlord and Tenant (shops, hotels and catering Establishments) Act provides that any contravention of the law makes it an offence liable to a fine not exceeding Kshs.6,000/= or to imprisonment to a term not exceeding 6 months, or to both.

16. It was further argued that the appellant did not adduce sufficient evidence to prove his counter-claim. It was not true that the respondent locked the premises from March 2009 to May 2010. It was not explained why the appellant had to wait for such a long period to break into the premises while the distress had been carried out in March 2009. The appellant told the court that he lived on the 2nd floor of the same building and would have noticed within days that the premises had been locked. It was within his knowledge that the respondent was not in possession of the shop from 12th March 2009 when the distress was levied. The counter-claim was an afterthought on part of the appellant.

17. The duty of the first appellate court was explained in the case of *MWANGI VS WAMBUGU, [1984] KLR 453* as follows:-

"A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

18. The issues for determination have been identified as follows:-

(a) *Whether the tenancy between the parties was "controlled tenancy" as described under the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act.*

(b) *Whether the respondent was entitled to damages and to what extent.*

(c) *Whether the appellant's counter-claim was proved.*

(d) *Who between the parties will meet the costs of the suit.*

19. Under Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act controlled tenancy is defined.

20. Section 2(1) provides:-

For the purposes of this Act, unless the context otherwise requires—

“catering establishment” means any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises;

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—

(a) which has not been reduced into writing; or

(b) which has been reduced into writing and which—

(i) Is for a period not exceeding five years; or

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(iii) relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

21. The agreement produced by the respondent in evidence was handwritten and in an abstract form. All the same it provided for the amount of rent, for payment of deposit, for notice to vacate as well as for payment of utility bills. The appellant argued that although the agreement contained the rights and obligations of the parties, it did not stipulate the period of the tenancy and as such, it did not fall under the description of Section 2(1) of the Act.

22. The only contention is whether the agreement falls under Section 2(1)(ii) for the reason that it was not restricted to five (5) years.

23. The provision requires that the agreement either falls under any one of the clauses under Section 2(1)(b). The agreement in question was not “for a period not exceeding five years” as provided by Section 2(1)(b)(i). It does not contain a provision for termination otherwise than for breach of covenant, within five (5) years from commencement thereof as per Section 2(1) (b)(ii).

24. The respondent argued that the premises was a shop and that it fell under the provisions of Section 2(1)(b)(iii) which provides:-

relates to premises of a class specified under sub-section (2) of this Section.

25. Any tenancy which is not a lease and has no specified term of existence and whose rent is payable monthly is a month to month tenancy. The rent for the premises was Kshs.6,000/= a month payable monthly as admitted by both parties.

26. The appellant annexed a notice to terminate or alter the terms of tenancy dated 22/01/2009 in Form A r 4(1) (Amended) headed “The Business Premises Tribunal”. This confirms that the appellant had recognized the tenancy as one which was controlled.

27. This is therefore a controlled tenancy under Section 2(1)(b)(iii) of the Act and I hereby so find.

28. It was argued that the levying of distress was illegal because the appellant failed to seek permission from the tribunal to levy the said distress. The respondent relied on Section 12(1)(h) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which prescribes for powers of the Business Tribunal. It provides:-

A tribunal shall in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act and shall have power to permit the levy of distress for rent.

29. Based on this provision, the respondent argued that the appellant was duty bound to seek the permission of the tribunal in levying distress.

30. The appellant relied on Section 3 of the Distress for Rent Act which provides:-

Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrears and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the Common Law of England in a similar case.

31. The appellant relied on the case of **PETER NTHENGE VS DANIEL ITUMO & ANOTHER HCCC No. 1242 of 1974 Nairobi** where it was held:-

The right of a landlord to distrain for arrears of rent arises at common law and need not be expressly reserved. It enables the landlord to secure the payment of rent by seizing goods and chattels found upon the premises in respect of which the rent or obligations are due. Formerly, the right to distress was a right of some importance to the landlord and was often exercised, but it has now largely fallen into disuse.

32. This right serves the purpose of a remedy for the landlord to recover rent that may be in arrears. For this right to be enforced, there must be rent in arrears. In this case the appellant's evidence was that at the time he issued the notice dated 22/01/2009, the respondent owed Kshs.24,000/= which was not disputed. By the time the distress was levied the rent owing was over Kshs.40,000/=.

33. It follows that the appellant had a right to levy distress for recovery of the rent owed. The issue arising is whether he was required to seek permission from the Business Tribunal. The provision relied on by the respondent provides for the various powers of the tribunal.

34. I have perused the Act but I find no provision to the effect that such permission be sought.

35. I find that the appellant had no obligation to seek permission from the tribunal to levy distress. The fact that the tenancy is controlled does not mean that the landlord applies to the tribunal to levy distress. Distress is a right the landlord is entitled to for recovery of rent. If the tenant chooses he/she could file a reference to the tribunal for orders in objection of the distress.

36. In cases where the premises have been locked, the landlord shall obtain orders to break in so as to levy distress. There is evidence that the premises had been locked and that the necessary orders were obtained.

37. The magistrate in finding that the appellant required orders from the tribunal to levy distress said that the tenancy was controlled under Section 2(1) of the Act. As I have said earlier, the Act has no provision applying for orders authorizing permission levying of distress of rent from the tribunal.

38. I reach a conclusion that the distress carried out by the appellant through Giant Auctioneers was within the law. It was therefore a misdirection on part of the magistrate to find otherwise.

39. The claim of the respondent was based on the allegations that the distress was illegal and unlawful. Her claim was for return of the goods or compensation for the value placed at Kshs.2,328,150/= per month until final payment for loss of goodwill of Kshs. 1,500,000/=. Having found that the attachment was within the law, it is my considered opinion that the claim for damages for loss of income, claim for goods and that return of goods or compensation must fail.

40. In the event that this judgment is overturned on appeal it is intemperate that I give due consideration for the award made by the magistrate.

41. The appellant argued that for the loss of income, the respondent did not strictly prove that she lost such income. The schedule for the sale and expenses per quarter was not supported by any vouchers or receipts. There were no stock records to support the generalized schedule. Daily or weekly records were not available to show the performance of the business.

42. It is trite law that a claim for loss of income must be strictly proved in the same manner as special damages. The magistrate did not show the criteria used to award the figure of Kshs.80,000/=.

43. On the value of the goods the auctioneer gave a list of the items he carried from the respondent's premises while the plaintiff had her own long list of items. Receipts for some of the machines were produced which dated back to the year 2004. The two witnesses called by the respondent to confirm the items taken from the premises did not have information of what was taken away. During cross-examination, they pleaded ignorance of the list the plaintiff relied on.

44. The magistrate took the list of the respondent as gospel truth despite the gaps in the evidence of the actual items carried away. The ages of the various machines were not considered in assessing the value. Some machines were more than 5 years old at the time the distress was ferried.

45. Taking into consideration all the above factors, I would assess the value of the respondent goods as per the list of the auctioneer as Kshs.800,000/=.

46. The counter-claim was for loss of rent of Kshs.90,000/= being rent for fifteen (15) months being the period the premises were allegedly locked from March 2009 to May 2000 at the rate of Kshs.6,000/= monthly. It is not in dispute that distress had already been levied. The appellant did not adduce evidence to prove that the premises remained locked for a period of 15 months.

47. The appellant had an option of going to court for an order to break into the premises and keep any goods found therein in safe custody. He did not have to wait until he was sued in court by the respondent.

48. The counter-claim was filed about two years after the original defence was filed which raises questions as to the genuineness of the claim.

49. I find that the magistrate correctly found that the counter-claim was not proved.

50. It is my finding that the appeal is merited and I allow it accordingly. The judgment of the lower court is hereby set aside in its entirety.

51. Considering the unique circumstances of this case, I hereby order that each party meets the own costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the absence of the parties