



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 193 OF 2011

CORAM: D. S. MAJANJA J.

BETWEEN

GABRIEL BICHAGE 1ST APPELLANT

CHRISTOPHER NDEMO 2ND APPELLANT

PACIFICA MORAA ONGORI 3RD APPELLANT

AND

NYAMAO NAFTAL T/A GREEN TOWN 1ST RESPONDENT

MUNICIPAL COUNCIL OF KISII 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Maina, CM at the Chief Magistrates Court in Kisii in Civil Case No. 163 of 2010 dated 25th August 2011)

JUDGMENT

1. This is an appeal against the judgment of the subordinate court dismissing the appellants' claim for, "General damages, loss of user, loss of business, repair charges, damaged and stolen property, Loss of user and cost of rehabilitations," following eviction by the 2nd respondent from the property that they had allegedly leased from the 1st respondent.

2. I am alive to the fact that this is a first appeal and I am under a duty to reconsider and evaluate the evidence with a view to determining whether or not the conclusions reached by the trial magistrate should be supported. In doing so, I must make allowance for the fact that I neither heard nor saw the witnesses who testified (see *Peters v Sunday Post Limited* [1958] EA 424 and *Selle v Associated Motor Boat Co.* [1968] EA 123).

3. The trial court heard the testimony of Gabriel Bichage (PW 1), Christopher Ndemo (PW 2), Naftal Nyamao Mokuia (DW 1) and William Wanyonyi (DW 2). The facts that emerged at the trial are not so much in dispute and are that the DW 1 was given authority by the 2nd respondent to construct and run toilets within Kisii Township near Barclays Bank and at Daraja Mbili. DW 1 expanded to the toilets to include further rooms which they leased to traders among them the appellants. The appellants took possession of the premises and obtained trading licences. In due course, the 2nd respondent issued a demolition notice dated 1st April 2010 to DW 1 on the grounds that that he was operating stalls on the facilities without authority of the 2nd respondent. Despite attempts to get the District Commissioner to intervene, the 2nd respondent's askaris came to demolish the premises on the morning of 15th April 2010.

4. Based on the evidence, the trial magistrate framed and answered three issues for determination. First, whether the plaintiffs occupied the premises lawfully. On this issue the trial magistrate held that the occupation of the premises was unlawful because the 1st respondent was required to run toilets and not illegally sub-let the premises to persons not authorised by the 2nd respondent. The second issue was whether the demolition was illegal. On this issue, the trial magistrate held that the 2nd respondent issued a notice of demolition to the 1st respondent and such notice having been given, the appellants had the opportunity to move out of the premises. The third issue was whether the plaintiffs were entitled to the reliefs sought. The court concluded that the claim against the 2nd respondent was in the nature of special damages and since it was not specifically pleaded and proved, it was dismissed.

5. The thrust of the appellants' appeal is set out in the memorandum of appeal dated 22nd September 2010. They contend that the trial magistrate erred in finding that the appellants' occupation of the suit premises was unlawful without appreciating that they were actually

licences of the 2nd respondent. That the trial magistrate failed to give reasons for her decision and that the decision was against the weight of evidence. They complained that the trial magistrate erred in law and in fact in not making a finding that the action of the 2nd respondent in carting away their goods was unlawful and failing to make an order for return of the goods and compensation. Counsel for the appellant re-emphasized these grounds in the written submissions.

6. Counsel for the 2nd respondent opposed the appeal and supported the decision of the trial magistrate. He submitted that the structures built on the site were illegal and proper notice was given for demolition. He pointed out that the 1st respondent had only given licence to the 1st respondent to manage public toilets and that he had no right to construct other illegal structures and let them out to third parties. As regards the reliefs, it was the 2nd respondent's case that there was no cause of action against it.

7. I have reviewed the evidence as required by the first appellate court and evidence of DW 2, who was the Municipal Engineer, is that it only allowed the 1st respondent to build toilets, an office and store. He was not supposed to build stalls for rent out or lease to third parties such as the appellants. Contrary to the appellants' contention, the 2nd respondent did not issue it with a licence to occupy the premises but to carry on the business of trading. DW 3 told the court that such a licence is not given in reference to any premises and would not entitle the appellants occupy the premises. I hold that the trading licence was not an occupation licence and would validate such occupation. I therefore agree with the trial court's finding that the occupation by the appellants of the suit premises was unlawful and the demolition notice having been given to the 1st respondent, the 2nd respondent was entitled to demolish the illegal structure.

8. I would further observe since there was no privity of contract or direct relationship between the appellants and the 2nd respondent, the appellants could only look to the 1st respondent for breach of warranty as to ownership. In either case, I also agree with the trial magistrate that their claim was in the nature of special damages. Before the trial court, the appellants prayed for loss of user of Kshs. 6000/- and Kshs. 2,790,000.00 as repair charges and costs of rehabilitation. These were special damages that were neither pleaded nor proved as required by law (see *Hahn v Singh [1985] KLR 716*). Since the appellant elected to claim damages instead for return of its property, the trial court was correct to dismiss the claim.

9. For the reasons I have set out, this appeal fails and is dismissed with costs of Kshs. 20,000/- to the 2nd respondent.

DATED and DELIVERED at KISII this 6th day of November 2018.

D.S. MAJANJA

JUDGE

Mr Nyantika instructed by Nyantika and Company Advocates for the appellant.

Mr Gichana instructed by Bosire Gichana and Company Advocates for the 2nd respondent.