



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 377 OF 2015

WHITESTONE AUCTIONEERS (K) LTD.....APPELLANT/PLAINTIFF

- V E R S U S -

DAVID MAINA MACHARIA.....1ST RESPONDENT

KMK UKURIA INVESTMENT CO. LTD.....2ND RESPONDENT

(Being an appeal from the judgement of Hon. Mrs. T. Ngugi (SPM) delivered on 10/10/2014 in CMCC No. 7790 of 2006)

JUDGEMENT

1. David Maina Macharia, the 1st respondent herein, filed an action before the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi in which he sought for payment of ksh.369,061 with costs and interest against Whitestone Auctioneers (K) Ltd and K.M.K. Ukuria Investments Co. Ltd, the appellant and the 2nd respondent herein. It is the 1st respondent's case that on 22.2.1999, the appellant and the 2nd respondent jointly and severally with their agents broke into the 1st respondent's house in Juja Road Estate, without notice and with the permission of the Tribunal and carted away household goods worth ksh.369,061. The 1st respondent demanded to be paid the aforesaid amount from the appellant and the 2nd respondent as a special damage. The appellant filed a defence denying the 1st respondents claim stating that the distress for rent was lawful and in any case the suit was statute barred. The 2nd respondent too, filed a defence denying the 1st respondent's claim stating that it was as a result of a justified distress for rent. It was stated that the 1st respondent was in arrears of rent. The suit was heard and determined in favour of the 1st respondent by Hon. T. Ngugi, learned Senior Principal Magistrate on 10.10.2014. The appellant being dissatisfied preferred this appeal.

2. On appeal, the appellant put forward the following grounds.

- 1. The learned magistrate misdirected herself in law and fact by failing to apply legal principles for proof of a claim for special damages hence arriving at a wrong decision.***
- 2. The learned magistrate misdirected herself in law and fact by shifting the burden of proof to the appellant on the issue of proof of special damages when such an obligation law with the 1st respondent.***
- 3. The learned magistrate misdirected herself in law and fact by holding that the claim for special damages had been proved whereas no single piece of evidence existed and/or produced by the appellant.***

4. The trial magistrate in her judgment was not impartial but acted with emotions hence arriving at a wrong decision.

3. When the appeal came up for hearing learned counsels recorded a consent order to have the appeal disposed of by written submissions.

4. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions. It is the submission of the appellant that during the hearing before the trial court, the 1st respondent stated that some of the goods carted away by the appellant belonged to him while others belonged to his customers who had left them for him to repair. It is the appellant's submission that this claim being a special damage needed to have been strictly proved. The appellant pointed out that the 1st respondent failed to discharge that duty by failing to summon his customers to tender evidence to prove ownership of those items which were left with the 1st respondent and carted away by the appellant. The appellant also accused the 1st respondent of failing to lay evidence to prove the items which belonged to him. The appellant further pointed out that it was difficult for him to produce receipts showing the prices or value of the goods because they were old and some belonged to his customers. The appellant urged this court to set aside the judgment since there was no evidence of actual value of the items placed before the court. The recorded evidence shows that the 1st respondent told the trial court that he was an electrical and electronic technician. He stated that on the fateful day he left his house of a neighbour's house to repair a radio and on returning back he found his household goods including the clothes and tools of trade and those of his customers had been taken away. He produced a list of the items which were carted away. He said he reported to the police. He stated that despite settling the rent arrears, the appellant refused to return the goods taken. The 1st respondent even produced in evidence disciplinary proceedings from the Auctioneers Licensing Board, where the appellant was ordered to release the attached goods to the 1st respondent unconditionally and was too reprimanded. The 1st respondent's witness, Kenneth Mutua (DW1) stated that the appellant also carried some of the goods together with the receipts. He further stated that being a technician he knew the prices of the goods by comparing with those in the shops. The 2nd appellant told the trial court that he received instructions from the 2nd respondent to levy distress for rent at the plaintiff's house which was pointed out by the 2nd respondent's caretaker. The appellant stated that before levying distress, he first obtained a court order to break in. DW1 told the court that the premises was a small house full of radios for repair. The appellant stated that he broke into the house in the presence of a police officer and that he only took away 15 items valued at ksh.15,000/=. DW1 stated that the items listed by the 1st respondent could not fit into the small room. DW1 further stated that the 1st respondent refused to collect the items and also failed to pay storage charges. The Auctioneers Licensing Board found that the appellant had failed to give proper notice before levying distress. Faced with the competing evidence, the learned Senior Principal Magistrate believed the 1st respondent told the truth. It was also concluded that as a technician, the 1st respondent was able to assess the value of the items which were old and used items. The appellant's complaint is that the 1st respondent failed to summon his customers to prove ownership of the items. The appellant also accused the 1st respondent of failing to tender evidence to prove what belonged to him. I have carefully re-examined the evidence tendered. The 1st respondent gave a list of the items which were in his possession. He assigned each of those items the estimate values compared to those sold in the shop.

5. I think the learned Senior Principal Magistrate applied the correct approach in assessing the evidence of the 1st respondent. It is not expected for the 1st respondent to give the exact prices of the items carted away considering the fact that most of those items were old items which were brought to him for repairs. It was not necessary for the 1st respondent to summon his customers to testify if he had the records of those items which were in his possession. In any case the 1st respondent had told the trial court that some of the receipts were either taken away or destroyed by the appellant who had carried out an illegal distress having failed to give a proper notice. In my humble view, I think it was not necessary for the 1st respondent to summon his customers to corroborate his evidence. A critical examination of the estimated values will reveal that the 1st respondent did not exaggerate those values.

6. The other ground of appeal which was ably argued by the appellant is to the effect that the trial magistrate based her judgment on imaginary figures. It is argued that the trial court gave judgment in favour of the 1st respondent on the basis of estimates and purported knowledge of prices by a technician. I have examined the list and the estimated prices attached to each item. The 1st respondent has specifically stated that by virtue of his market knowledge, he attached reasonable prices to those items. I think there is no reason to doubt the veracity of such evidence. The appellant did not attempt to shake the strength of such evidence by either providing the market values to prove that the prices were an exaggeration. I have no reason to doubt the 1st respondent's evidence.

7. In the end, I find no merit in the appeal. The same is ordered dismissed with costs to the 1st respondent.

Dated, Signed and Delivered in open court this 10th day of February, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent