



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL 110 OF 2009

WANGARI MWANGI.....APPELLANT

VERSUS

GEORGE KINOTHE.....RESPONDENT

JUDGEMENT

1. This is an appeal against the judgment of the Chief Magistrate court at Embu dated 28th July 2009, which dismissed the appellant's claim in respect of general damages for loss of user of her a motor vehicle registration Number KUE 125 and for special damages amounting to Kshs.69,626/= plus interest and costs of the suit.

2. The appellant was a tenant of the respondent. The evidence of the appellant was that the respondent had unlawfully detained her motor vehicle registration Number KUE 125 in his residential premises. He had detained her vehicle until 20th July 2003, when respondent was ordered to release it by the Rent Tribunal in Case No. 25/2001. The appellant was unable to use that motor vehicle to sell her clothes and as a result she suffered financial loss. She further testified that she used to make Shs.2000/= per day from her sales. The appellant also claimed special damages amounting to Shs.2,678/= per month being the amount spent to buy both water and electricity power from other alternative sources, following the disconnection of the same by her landlord.

3. The respondent denied the claim of the appellant. He denied detaining the appellant's said motor vehicle.

4. The appellant raised eight grounds of appeal. In ground one, the appellant has faulted the trial court for failing to give directions under ***Order XVII rule 10 (1) the Civil Procedure*** upon taking over the case from her predecessor magistrate. The provisions of that order provide as follows: ***“Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.”*** In this regard the proceedings of the 23rd June 2009 are relevant. On that date counsel for the appellant sought directions as to whether the court could read the handwriting of the previous magistrate.

5. The court ruled that it was able to read the said handwriting. In response to the court's ability to read the handwriting, counsel for both parties indicated that they were ready to proceed with the trial. The court then ordered the case to proceed from where the previous magistrate had left it. I find that the court and the parties were alive to the fact that the succeeding magistrate was taking over the case from the previous magistrate. The only issue was whether the succeeding magistrate was in a position to read the

handwriting of her predecessor. I find from these proceedings that there was compliance with Order XVII rule 10 (1) in respect of the taking over by the succeeding magistrate. In the circumstances I find that there is no merit in this ground and hereby dismiss it.

6. In ground two the appellant has faulted the trial court for pronouncing a judgment in the absence of the parties and their advocates. In other words, both parties and their counsel were not served with notice of the judgement date. Reference to the proceedings of 23rd June 2009 are relevant in this regard. The proceedings of that date indicate that after the defence closed their case, Mr. Munene for the defence applied for a judgement date. The court then ordered that the judgement was to be delivered on 21st July 2009 and went further to indicate that the submissions were to be filed on 14th July 2009.

7. On 21st July 2009 the court was unable to deliver judgment because of work pressure. As a result the court deferred the judgement to 28th July 2009 in the presence of both counsel. On all those dates counsel for both parties were in court. However, on 28th July 2009 the court delivered its judgment in open court in the absence both parties and their counsel. In the circumstances I find that there was notice to the parties and their counsel that judgement was to be delivered on 28th July 2009. I therefore find that the parties had notice of the date of judgement and failed to attend. This was their fault. In the circumstances, this ground of appeal is without merit and is hereby dismissed.

8. In ground three, the appellant has faulted the trial court for making a judgment against the weight of evidence. In this regard I have considered the judgment of the trial court and I find that it is well reasoned and was based on the evidence tendered in the trial court. This ground of appeal is without merit and I hereby dismiss it.

9. In ground four, the appellant has faulted the trial court in failing to consider the limitation period for the claim of general damages for loss of user in respect of motor vehicle registration Number KUE 125, commenced when the same was released on 28th July 2003 on orders of the Rent Restriction Tribunal. I find that the limitation period began to run from the day the respondent detained the said motor vehicle on 4th January 2002. This ground of appeal fails and I hereby dismiss it.

10. In ground five, the appellant has faulted the trial court for disregarding the fact that the respondent had not raised the issue of the suit being time barred in his written statement of defence and was therefore estopped from raising it in submissions in this court. The relevant provisions in this regard are found in **section 4 (1) and (2) of the Limitation of Actions Act (Cap 22) Laws of Kenya**. They provide as follows:

4. "Actions of contract and tort and certain other actions (1) the following actions may not be brought after the end of 6 years from the date in which the cause of action accrued-

(a) actions founded on contract

(2) an action founded on tort may not be brought after the end of three years from the date on which the cause action accrued.

11. I find that the issue of limitation of time was alive issue in the trial court and was therefore properly raised in this court. I also find that the claim for tort was time barred for it was filed after the end of three years period and the one of contract was not time barred for it was filed within the six years period. The applicant should have sought *ex-parte* leave to file her tortious claims out of time as required by section 27, Limitation of Actions Act. She failed to do so. This ground of appeal partially succeeds and is hereby allowed in respect of the claim that is based on contract namely the tenancy agreement.

12. In ground six, the appellant has faulted the trial court for disregarding the appellant's claim which was based on both tort and contract. It is true that the claim of the appellant was based on both tort and contract, but the appellant failed to prove his claims in respect of both general and special damages. He did not produce evidence to support his allegations in the pleadings. It was necessary for the appellant to produce his filed tax returns or an auditor's report or other means of proof, in respect of his earnings. She

failed to do so. Counsel for the appellant submitted that this court sits as a court of law and a court of equity. He further submitted that equity would not allow a wrong to be suffered without a remedy and urged this court to exercise its equitable jurisdiction and award general and special damages to the appellant. It is trite law that equity follows the law. The award of damages is a common law remedy. It is also trite law that the equitable jurisdiction may be invoked where there is a gap or lacuna in the law. In the instant case there was not any such gap. In the circumstances, this ground of appeal fails and is hereby dismissed.

13. In ground seven, the appellant has faulted the trial court in finding that the ownership of the said motor vehicle was not proved, when the ownership of that motor vehicle was admitted by the respondent in his written defence. I find from the evidence of the appellant that she had taken insurance for her motor vehicle and in her pleadings she pleaded that the subject motor vehicle belonged to her. This ground of appeal succeeds and hereby allowed.

14. In ground eight, the appellant has faulted the trial court for disregarding the judgement of the Embu Rent Restriction Tribunal in Case Number 25 of 2001. The judgement of that tribunal did not constitute evidence in the trial court. Furthermore, it is only in criminal proceedings that a final judgement of a competent court, which declares a person guilty of a criminal offence, that is taken as conclusive evidence that the person so convicted was guilty of that offence as charged. In terms, the provisions of that section are as follows: ***“a final judgement of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgement or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged”***. The judgement of that tribunal arose out of civil proceedings and is therefore not covered by the provisions of section 47A of the Evidence Act (Cap 80) Laws of Kenya. In view of the foregoing I find that this ground of appeal is not merited and is hereby dismissed.

15. Both counsel for the appellant and the respondent filed rival written submissions in support of their clients' cases. I have considered their submissions. I have also re-assessed the evidence produced in the trial court as I am required to do according to the Court of Appeal in ***Peters v Sunday Post Limited (1958 EA) 424***. According to that case I am further required to arrive at my own independent conclusions while generally deferring to the findings of the trial court based on credibility. I have done so.

16. I find that the appellant did not prove her case against the respondent. The appellant pleaded a claim for general damages for loss of user but did not produce evidence to support that claim. I also find that the appellant did not prove that she suffered special damages although they were pleaded.

17. The appellant's appeal in respect of general and special damages is hereby dismissed in its entirety.

18. The respondent will have a half of the costs of this appeal as the appellant has succeeded in some grounds and failed in others.

Judgment delivered, dated and signed in open court at **EMBU** this **19th** day of **JULY, 2016**.

In the presence of Mr Nduku holding brief for Mr. Munene for the Appellant and in the absence both the respondent and his counsel.

Court clerk Njue

J.M. BWONWONGA

JUDGE

19.07.16