



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 200 OF 2011

Rajan Shah T/A Rajan S. Shah & Partners.....Appellant

versus

Bipin P. Shah.....Respondent

(An appeal against the Judgment made on 30th November 2011 by the Hon. J. Kiarie, P.M. delivered in Nyeri CMCC No. 588 of 2007)

JUDGMENT

The background information relevant in determining this appeal is that the appellant herein instructed auctioneers to levy distress against the Respondent herein so as to recover alleged rent arrear. Upon the proclamation being served, the Respondent sued the appellant in the lower court seeking orders of injunction restraining the appellant or his agents from proclaiming, removing, advertising for sale, disposing or in any manner interfering with the Respondents properties in the appellants premises, namely plot number **Nyeri/ Municipality Block 111/66**. The Respondent also sought a declaration challenging a proclamation levied against him and order that the Appellant furnishes him with accounts for the alleged outstanding rent, delivery of the registered lease and costs of the case.

The Respondents maintained that he paid the total rent for years 2001, 2002 and 2003 amounting to Ksh. 210,000/= as enumerated in paragraph three of the plaint while rent for 2004 to 2007 is alleged to have been paid as stated in paragraph 5 of the plaint. Notwithstanding the alleged payment, the Respondent averred that the Appellant herein whom he described as a stranger to the tenancy in question served him with a demand notice claiming Ksh. 420,000/= and subsequently the appellant instructed auctioneers to proclaim and levy distress an act the Respondent described as illegal.

The Appellant filed a defence dated 18th October 2007, and an amended defence on 9th August 2010 in which the appellant not only denied the Respondents claim, but also raised a counter claim claiming an order for vacant possession, Ksh. 510,000/= being alleged outstanding rent arrears, *mesne profits* at the rate of Ksh. 15,000/= per month from 4th April 2010 to March 2010 and from 1st April 2010 at the rate of Ksh. 24,500/= till delivery of vacant possession plus interests thereon and costs. A reply to the defence and defence to the counter claim was filed on 11th August 2010.

The Respondents evidence was that he lived at the suit premises from March 2000 at an agreed monthly rent of **Ksh. 6,000/=**, payment was by cheque to Nyeri Wholesalers and that in the year 2001 he paid **Ksh. 55,000/=** vide cheque number **00168**, KCB Nyeri, in 2002 he paid of **Ksh. 78,000/=** vide cheque number **000254**, KCB Nyeri, in 2003 he paid cheque number **543** for Ksh. **50,000/=**, in 2004 he paid **Ksh. 500,000/=** vide cheque to one of the directors of Nyeri Wholesalers.

He claimed that on 3.9.2007 he received a demand notice from the appellant herein for **Ksh. 420,000/=**, that he never had any transactions with him, that he sought for particulars of the debt through his advocate but never received a response, instead auctioneers were sent to him and a proclaimed for **Ksh. 436,500/=**. He applied for an injunction. In 2007 auctioneers came again and proclaimed for **Ksh. 200,000/=** which he could not explain. He also referred to statements from his bank confirming the payments. He denied the amounts in the counter-claim

The defendants evidence was that the property in question was owned jointly by three brothers Pravin, Shah, Dhanji Shah and Rajin Shah, that Respondent was their tenant at an agreed rent of **Ksh. 11,000/=** per month which was paid by cash, that he continued paying rent until he was served with a notice to revise rent to **Ksh. 15,000/=** in May 2005, which amount was adopted as rent payable, that he fell into arrears from June 2005, that it is not true he paid rent from 2004 to 2006. The witness produced duplicate receipts dating from February 2000 to May 2005 and insisted that rent then was **Ksh. 11,000/=** per month. He also stated that when the plaintiff came to court he had arrears of **Kh. 420,000/=**, hence the proclamation complained of. He counter-claimed for rent arrears of **Kh. 1,335,500/=** from June 2005 and an order for vacant possession.

The appellant maintained that the Respondent was now a trespasser and claimed **Ksh. 15,000/=** from April 2008 to March 2010 and thereafter **Ksh. 24,500/=** per month. He relied on valuation reports. He also testified that the sum of **Ksh.500,000/=** paid to Karmal & Co was for a different transaction. He also stated that cheques allegedly paid to Katsuri Ltd were for a personal debt to Rajan and were all dishonored. Upon cross-examination the witness stated that no documents were signed, hence everything was by way of oral agreement.

The learned Magistrate after analyzing the evidence was persuaded that there was a possibility that the problem arose out of disputed rent increment but was quick to point out that neither the appellant nor the Respondent proved this fact. The magistrate was however persuaded that the Respondent did not pay rent since he came to court at the admitted rate of **Ksh. 6,000/=**, per month. He also held that the distress was lawful and that no accounts were tendered from the Respondents evidence. The trial court found that the Respondent was entitled to rent arrears not *mesne profits*, that the rent increment was not agreed upon, hence the magistrate found that the Appellant was entitled to rent arrears at the rate of **Ksh. 6,000/=** per month from June 2005 to 30th November 2011 with interests and order for vacant possession and *mesne profits* at the rate of **Ksh. 24,500/=** if the appellant did not vacate as ordered.

The appellant in this appeals seeks to have the judgment of the lower court substituted with an order for payment of rent arrears and *mesne profits* as claimed in the counter-claim. Counsel for the appellants faulted the magistrate for "assuming" that rent could not be increased for 7 years, that there was no proof that the Respondent paid rent as alleged. Counsel submitted that the Appellant was entitled to **Ksh. 1,242,00/=** as particularized at page two of the submissions.

Counsel for the Respondent submitted that this appeal lacks merits, that no evidence was tendered to contradict that rent was **Ksh. 6,000/=** and that the claim for *mesne profits* was unfounded.

I find that the issues for determination are whether the appellant did establish a claim for *mesne profits* and recovery of rent arrears at the rate claimed in the counter claim.

In *Bramwell vs. Bramwell*, Justice Goddard stated that "... **mesne profits** is only another term for [damages](#) for [trespass](#), [damages](#) which arise from the particular relationship of [landlord](#) and [tenant](#)." Similarly, in an Australian case, *Williams & Bradley v Tobiasen* it was stated that these words: "**Mesne profits** are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to [rents](#) and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a [trespasser](#), and the remedy rests on that fact. The action is based on the claimant's possession, or right to possession, which has been interfered with.

A more useful description of **mesne profits** can be found in [Halsburys Laws of England](#), which defines

mesne profits as an action by a land owner against another who is [trespassing](#) on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for **mesne profits** the damages which he has suffered through being out of possession of the land. *Mesne profits* being damages for [trespass](#) can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a [trespasser](#). The action for **mesne profits** does not lie unless either the landlord has recovered possession, or the [tenant's](#) interest in the land has come to an end.

Halsburys, op. cit, 4th, above, suggests that where **mesne profits** are awarded they usually follow the previous rent rate and in the absence of that, a [fair market value](#) rent.

The **Black's Law Dictionary** defines *mesne profits* as: - "*the profits of an estate received by a tenant in wrongful possession between (2) two dates.*" The **Concise Oxford English Dictionary** defines *mesne profits* as: - "*the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.*"

The term '*mesne profits*' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The *Mesne profits* are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property It is settled principle of law that wrongful possession is the very essence of a claim for *mesne profits* and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay *mesne profits* goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for *mesne profits*.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for *mesne profits* is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay *mesne profits* for the use and occupation of the premises till he delivers up possession.

In the present case, there was no written lease. The case leading to this appeal was filed by the tenant (the Respondent) against the land lord (appellant) in 2007 challenging a proclamation issued by auctioneers against him under the instructions of the appellant and also seeking an injunction against the Respondent. The initial defense filed by the appellant dated 18th October 2007 was a denial of the averments in the plaint. The respondents claim as enumerated in the plaint discloses a rent dispute. An amended defense was filed on 9th August 2010 whereby the Appellant cited a notice dated 3rd March 2008 in which he communicated to the Respondent that he had terminated the lease and sought vacant possession. The Respondent through his advocates replied to the said letter and wrote *inter alia* as follows:-

"..... the alleged tenancy/lease herein between our client and yours is the subject matter in Nyeri CMCC No. 585 of 2007.....The issues your clients are raisingare the same issues already in court. Your clients notice of termination of leaseis therefore inconsequential."

Thus, the above notice was challenged on the above grounds. There is no further communication on record on the issue. The appellant never wrote back to dispute the Respondents response. It is important to point out that *Mesne profits* are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for *mesne profits* and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay *mesne profits* goes with actual illegal possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for *mesne profits* provided the occupation is illegal.

For starters, it should be noted that the concept of *mesne profits* is a remedy available to the Landowner/Landlord in the event that a contractual tenancy ceases to exist and the tenant/occupier thereafter continues to occupy the premises as a *trespasser*.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law. This position was reiterated by the apex court of Nigeria which stated:-

“Because a claim for ‘Mesne profits’ is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the lawful use and occupation of the land and premises implies an agreement to pay damages for use and occupation of the land and premises. It is a quasi-tenancy which the law recognises...”

This presupposes that when a tenant holds over having the status of a statutory tenant or the tenancy has not been terminated or there is a dispute on the termination notice as in the present case or a dispute pending in court touching on the termination, the tenant cannot be said to be a trespasser, hence the tenant is not liable to pay *mesne profits* since he is not a trespasser but would be liable to pay compensation for use and occupation by way of rent for the period he has been in occupation

The phrase "**by operation of law**" is a legal term that indicates that a right or liability has been created for a party, irrespective of the intent of that party, because it is dictated by existing legal principles. The Respondent sued the Appellant in September 2007. The disputed notice to terminate the tenancy is dated 3rd March 2008 and the response challenging the notice is dated 19th March 2008. One of the grounds challenging the notice was that the grounds upon which the notice was premised was subject to a pending court case. This position was not rebutted and to me it cannot be said that the tenancy was properly terminated, hence in my view the said notice never took effect. I am fortified in this view by the fact that in the counter claim, the appellant sought an order "for vacant possession of the premises demised to the plaintiff....and in default the plaintiff be forcefully evicted..." If the tenancy had been terminated as alleged, the appellant could have sought for "a declaration that the tenant is a trespasser" or for clear orders that the tenancy was determined with effect from the date of the alleged notice and adduce evidence in support thereof and the court could have made a determination on the question of the status of the tenancy. For a claim for *mesne profits* to be upheld, it must be shown that the existing tenancy was properly terminated and the tenant became a trespasser.

From the pleadings and the evidence, it cannot be said with a reasonable degree of certainty that the tenancy in question was determined and if so when. Useful guidance can be obtained from *Bullen and Leake* on nature of pleadings where the learned authors state as follows:-

"the system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing the court what are the issues between the parties which will govern the interlocutory proceedings before he trial and which the court will have to determine at the trial."(Emphasis added).

Rent is different from damages for use and occupation of land. Rent is liquidated and ceases once the tenancy is determined while damages for use and occupation commence immediately after determination of the tenancy and runs until the court orders the tenant to vacate the property. Upon the issuance of a valid court order, *mesne profit* begins to run against the occupant who is now adjudged a trespasser in the eye of the law.

The earliest reported decision on the point appears to be *Yekinni vs Etti*, where De Lantang CJ observed:-

"A tenant who holds over under the Rent Restriction Act is not a trespasser and does not become one until he disobeys an order of the court ordering him to give up possession. Strictly speaking therefore rent should be claimed up to the date of the order of possession and mesne profits thereafter....."

A trespasser according to the Merriam-Webster online dictionary is defined as:-

"one who enters or remains on the real property of another wrongfully or without the owner's or possessor's authority or consent".

Whether a tenant holds over at common law or as a statutory tenant under the relevant statute, the contractual obligation of payment of rent hitherto binding on the tenant becomes extinguished upon the expiration of the contractual term. However, the law, general or statutory, compensates the landlord for the loss of use and/or occupation and in appropriate cases where the tort of trespass is established, for 'mesne profits'.

Mesne profits" are the rents and profits which a trespasser has or might have received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort which he has committed. A claim for rent is therefore liquidated, while a claim for mesne profit is always unliquidated.

It follows therefore that a claim for mesne profit is inappropriate when the occupier is still a tenant. It can only be maintained when his tenancy has been duly determined according to law and he becomes a trespasser. In this respect, a tenant such as the Respondent, cannot properly be adjudged to be liable for mesne profit unless and until his tenancy has been duly determined according to law because the element of wrongful and tortious occupation is absent.

It is also instructive to point out that in the counter claim, the appellant sought for an order of vacant possession which was granted. Thus, the tenant would become a trespasser once the court orders him to vacate and he fails or once a proper notice takes effect whichever comes first. Thus, the learned magistrate was right in awarding *mesne profits* in the event the Respondent failed to vacate as ordered in the judgement.

On the question of rent, I find that the rate payable was disputed. The lower court correctly found that the rent due was in dispute and no accounts were taken and awarded rent as the rate of Ksh. 6,000/= pleaded in the plaint.

Thus, the issue that emerges for determination is, whether or not the appellant discharged his burden of proof on the rent payable to the required standard in civil cases. To my mind the burden of establishing all the allegations in the counter claim rested on the appellant who was under an obligation to discharge the burden of proof.

All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds* remarked:-

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by *Rajah JA in Bristone Pte Ltd vs Smith & Associates Far East Ltd:-*

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

With the above observation in mind, the starting point is that *whoever desires* any court to give *judgement* as to any legal right or liability, dependant on the existence of fact which he asserts, *must prove* that those facts exist. The *burden of proof* in a suit or proceeding *lies* on that person *who would fail if no evidence at all were given on either side*. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The appellant stated that in February 2000, the agreed rent was Ksh. 11,000/= per month which later increased to Ksh. 15,000/=. From the evidence tendered, I am afraid these figures were not proved to the required standard and I find no reason to fault the learned magistrate for holding that he said sums were not proved.

The standard of proof determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions Lord Denning* said the following about the standard of proof in civil cases:-

‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

The trial magistrate had the benefit of seeing the parties testify, and the opportunity to assess the witnesses ability to recall the events accurately, assess whether the testimony was plausible and likely to be true, assess whether the testimony was consistent or inconsistent, assess whether the manner the witnesses testified reflected upon the truthfulness of the witnesses testimony, assess whether the witnesses had bias, hostility or some other attitude that affected the truthfulness of their testimony, assess whether the witnesses had a motive to lie and if so to what extent such a motive could have affected the truthfulness of the testimony only to mention but some. Bearing the above in mind, I am totally reluctant to fault the magistrates finding on this issue and in particular the finding that rent was **Ksh. 6,000/=** per month.

I find that the learned Magistrate properly directed his mind to the law and the evidence and properly in arriving at the decision in question. The upshot is that I uphold the judgement of the lower court, hence, the appellants appeal is dismissed. The Appellant shall bear the costs for this appeal.

Orders accordingly

Signed, Delivered and Dated, Signed and Delivered at **Nyeri** this **3rd** day of **November** 2016

John M. Mativo

Judge
