REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Appeal 69 of 2007

HANNAH WAITHERA KANGETHE …….APPELLANT
VERSUS
1. MBULA NDISYA
2. JAMES NZIOKA
3. MWANGANGI
4. LYDIA KALEVE ……..RESPONDENTS

(Being an appeal from the original judgement and decree in Kitui Resident Magistrate's

Court RMCC No. 314/1998 by Hon. M.O. Kizito on 15/3/2007)

JUDGEMENT

Part of the directions issued by me in this appeal on 3rd February 2012 was that the appeal be canvassed by way of written submissions. However, it was not until 11th May, 2012 that parties complied with the above directions, filed and exchanged the written submissions which I have since carefully read and considered.

The genesis of this dispute is the suit filed by the appellant in the Resident Magistrate's Court at Kitui. By an amended plaint dated 14th December, 1999, filed through **Messrs Mutula & Company Advocates** the appellant sought against the Respondents the following orders;-

· The respondents do open up the gate to the suit premises or store.

· A permanent injunction restraining the respondents from interfering, blocking, closing and or in any other way denying the appellant access to the suit premises.

· Special damages of Kshs. 18,318/=

· General damages

· Punitive/exemplary damages.

· Interest

· Any other relief the court may deem fit to grant

The appellant's complain then was that the respondents operated businesses in Kitui town on plot No.

165, behind which were stores and the only access to those stores was through two main doors manned by the respondents. The appellant owned one of the stores. On or about 9th November, 1998, the respondents denied her access to her store by locking the only door to her store and refused to open when requested by the appellant. As a result of the respondent's unjustified act, the appellant suffered loss of business as she could not sell most of her goods in the store, hence the suit.

The suit was defended. The respondents through **Messrs Kinyua Musyoka & Company Advocates** filed a joint defence in which they denied that, they manned the two doors of access to any of the stores, indeed they averred that they were strangers to the allegations. In the premises they denied the loss attributed to them by the appellant. They also averred that the appellant was not a lawful tenant to the premises consequently; she lacked legal capacity to maintain the suit. Otherwise, there had been a resolution passed by all the tenants on the suit premises that they install a security door and hire watchmen to guard their premises after several incidents of in-house break-ins during odd hours of the day, and each tenant was required to make a duplicate key to gain access, and that no tenant was refused access to the suit premises. On those ground the respondents urged the court to dismiss the suit.

The suit was eventually heard by **Hon M.O. Kizito** R.M. on 2nd June 2005, 26th October, 2006 and 8th February, 2007. The appellant and her one witness as well as 2nd appellant testified in support of their positions. The appellant in her evidence simply reiterated her averments in the plaint. Suffice to add that she suffered loss when her mitumba clothes were kept locked in the store and were damaged. She also produced documents showing her loss and also the fact that she was allegedly a tenant on the suit premises. Otherwise the respondents had stopped her from accessing the store between 9th November and 22nd December, 1998 respectively. The appellants allowed her access to the store after a court order. She was a mitumba trader, and when the store was eventually opened, she found her mitumba clothes damaged and could not be sold.

Cross – examined, she conceded that the store was infact rented by her husband. The gate was usually padlocked. Though every tenant had keys to the padlock, she did not have.

The appellant's 2nd witness was the area chief, **Dunstan Muinde Kilonzo**. He confirmed that on 9th November, 1998, the appellant complained to him that a certain tenant had closed the gate of the plot where she used to carry out her business. He summoned the tenants of the plot to his office, but none turned at the required time. When they finally appeared, he referred them and the appellant to their landlord.

The case for the respondents was that the appellant was not a tenant on the suit premises. Because of a spade of burglaries committed on the plot, the tenants contributed money and fixed a metal door to stop further burglaries. All tenants made their own keys. The appellant never sought the keys so that she could access the plot.

Cross-examined he stated that he never saw the appellant on the plot. The tenants who did not get the original keys were asked to make duplicate keys. It is the owner of the plot who floated the idea that all tenants should have keys to the metal door.

In dismissing the appellant's claim with costs, the learned magistrate held that there was no landlord/tenant relationship between the appellant and the owner of the plot. Indeed it was her husband, **Peter Mburu,** who was the tenant. Therefore, the respondents had no obligation to grant the appellant access to the plot. In the premises, the person who should have been aggrieved by the closure of the gate leading to the stores should have been **Peter Mburu** and not the appellant.

The appellant was not happy with the above outcome. She consequently lodged this appeal on the grounds that the learned magistrate erred in law and fact in holding that the appellant was not a tenant when evidence galore proved the contrary. The magistrate had not considered the evidence of the appellant's 2nd witness. The trial magistrate failed to appreciate the contradictions in the respondent's case. By holding that the appellant was not tenant, the trial magistrate had effectively varied the consents

recorded in the suit prior to the hearing which consents confirmed that the appellant was a tenant.

This is a first appeal, but even so, this court will be slow to interfere with the findings of fact made by the trial court unless the findings are based on no evidence, or at all, misapprehension of the evidence, or the trial magistrate is shown demonstrably to have acted on wrong principles in reaching the findings. The rationale for that caution has been restated many times, and I take it from **Mwanasokoni vs Kenya Bus Services Ltd [1985] KLR** where the Court of Appeal stated at page 934;-

"…***Although this court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary… But the jurisdiction (to review the evidence) should be exercised with caution. It is not enough that the appellate court might have itself have come to a different conclusion…"***

Having reviewed the evidence on record, I am not in any doubt that the learned magistrate reached the right conclusion on the matter. I do not think that it can be disputed that the appellant was not a tenant on the plot. Indeed the tenant was her husband, **Peter Mburu.** Nowhere in her testimony in chief does she refer to herself as a tenant of the appellant. Though she claims that she continued paying rent for the store, she does not say that she did so as a tenant of the owner of the plot. If the husband was indeed the recognized tenant of the store, then her payments aforesaid, if at all, could only have been on account of her husband. Under cross-examination, the appellant is recorded as saying the following:-

"…I did not have the keys to the padlock. Each tenant had his/her own keys… I did not ask for my own keys…I was occupying store 3. Exhibit 4a states that store number 3 is occupied by Peter Mburu… Peter Mburu is my husband…"

What emerges from the foregoing is that, all the tenants had keys to the main door. If indeed the appellant had been a tenant as she claimed, she too would have been entitled to the keys. Even assuming for purposes of argument that indeed she was such a tenant, she deliberately refused to ask for the keys. Now if she did not do so, why then should she blame the respondents? The story may perhaps have been different if she had asked for the keys and was denied. But again I do not see how the respondents could even be held liable for denial. They had no obligation towards her to give her the keys. She could only have addressed her concerns to the landlord. If the appellant and respondents were all tenants, as the appellant claimed, why should it be the duty of the respondents to address her concerns when after all, they were all co- tenants. None had superior rights on the tenement than the other. By the appellant conceding that she did not ask for her own keys, is an admission and or recognition of her status as a non tenant of the plot. If she was, she would automatically have been entitled to the keys. It is not beyond imagination that perhaps **Peter Mburu** who apparently had accommodated her in his store No. 3 had his keys as a tenant.

It is trite law that he who alleges must prove. The appellant had the onus to prove that she was a tenant to the plot but she did not. She therefore had no *locus standi* to sue the respondents as she had not recognized right of access as the other tenants of the plot. As correctly submitted by counsel for the respondent, she did not produce any tenancy agreement, or any evidence, documentary, oral or otherwise from the landlord, to prove that she was a tenant. Above all what was so difficult for her to avail the landlord as her witness. He was readily available going by her testimony. That she never bothered to avail such a critical witness can only mean that she was aware of her status as a non –tenant of the premises.

The appellant has complained that the trial magistrate erred in holding that the appellant conceded and admitted in her evidence that one, **Mr. Peter Mburu** was the tenant. I agree with the appellant that indeed there was no such outright concession. However, even if such finding was ignored, there is sufficient evidence on record to show that **Peter Mburu** and not the appellant was the actual tenant. There was oral and documentary evidence that proved that fact. When cross-examined, though she did not come out categorically to confirm that her husband, **Peter Mburu** was the real tenant, such inference can easily be drawn given her answers.

She also complains that the trial magistrate only appreciated the evidence of the appellant and respondent in determining the dispute yet there was the evidence of her witness, the chief which he completely ignored. According to the appellant, this is born out of the fact that in his judgment, the magistrate states that only the appellant and 2nd respondent testified. This complaint is also true. However, this omission was not fatal to her case. The evidence of this witness was to the effect that the appellant complained to him that he had been denied access to her store by the respondents. He summoned them and since he could not resolve the dispute he referred them to the landlord. How could this evidence have assisted the appellant's case? I do not agree with the submissions of counsel for the appellant that the evidence of **Dunstan Muinde Kilonzo**, the chief of Kitui town location confirmed that the appellant was a tenant in plot No. 165 Kitui town by virtue of the fact that the respondents complained that she never contributed to buy steel door like other tenants hence frustrations she faced from the respondents who were her co-tenants. Counsel's interpretation of such evidence is obviously slanted in favour of his client. Contributing money *perse* towards the purchase of the steel door could not have turned her into a tenant. It is also possible that her failure to contribute was a testimony to the fact that she was not a tenant and also due to the fact that her husband may have paid. Further, the respondent's complaint could be interpreted to mean that they wanted her to contribute since she also used the door.

The appellant too has raised the issue of consents recorded in the proceedings as conferring on the appellant a status of a tenant. Nothing could be further from the truth. The appellant submits that the respondents conceded to the appellant being granted access to the suit premises which they had locked her out of and the concession could not have been made to her if she was not a tenant. Court orders should be seen and interpreted for what they are. Nothing should be inferred in a court order. The court order speaks for itself. The consent order recorded on 22nd December, 1998 did not confer on the appellant the status of a tenant. In any event the consent order was between the appellant and respondents to the exclusion of the landlord. How can a tenancy be created by an order of court without the involvement of the landlord. A court cannot force a tenancy on a landlord in the light of the circumstances of this case.

The upshot of all the foregoing is that the appeal lacks merit. Accordingly, it is dismissed with costs to the respondents.

JUDGMENT DATED, **SIGNED** and **DELIVERED** at **MACHAKOS,** this **6TH** day of **JULY**, 20**12**.

ASIKE-MAKHANDIA
JUDGE