REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appeal 57 of 1996

JULIANNE ULRIKE STAMM.....
…….....APPELLANT

AND

TIWI BEACH HOTEL LTD.....…….....
…….....RESPONDENT

(Appeal from the decree of the High Court of Kenya at Mombasa (Mr. Justice Oguk) dated the 25th October, 1995)

IN

H.C.C.C. NO 495 OF 1989)

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JUDGMENT OF THE COURT

Order 1XB rule 4(1) of the civil Procedure Rules reads:

“4 (1) If on the day fixed for hearing, after the suit has been called for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”

The learned judge in the superior court (Oguk, J.) had set the suit (H.C.C.C. NO. 495 OF 1989) down for hearing before him on 25th and 26th of October, 1995. On the 25th day of October 1995 Mr. Nowrojee appeared for the plaintiff, the appellant in the consolidated appeals before us, and opened his case in some detail. When he called his first witness who was not the plaintiff, Mr. Kirundi, counsel for the defendant, the respondent in the consolidated appeals before us, objected to this witness being called ad argued that as the plaintiff herself was not present at the hearing of the suit, her claim ought to be dismissed and that the suit should proceed to hearing on the defendant’s counter-claim.

Mr. Kirundi argued that the plaintiff not being present to give evidence, the court would have no jurisdiction to hear the plaintiff’s first witness and in that event the court had no discretion in the matter but to dismiss the plaintiff’s claim.

Of the two consolidated appeals now before us, namely Civil Appeal No. 57 of 1996 and Civil Appeal No. 56 of 1996, the former is against the ruling of Oguk, J. delivered on 25th October, 1995 dismissing the plaintiff's claim and the latter is against the judgement and decree of the superior court dated 3rd November, 1995 whereby, Oguk, J. decreed to the defendant possession of plot number MOMBASA/MS/TIWI BEACH BLOCK/46 (hereinafter referred as "the suit property") and ordered that the plaintiff do pay to the defendant a sum of Kshs.5,000,000/= "as damages for loss of user" of the suit property, allegedly suffered by the defendant whilst the plaintiff was in possession of the suit property.

The hearing of suits is governed by the procedure provided in order 17 of the Civil Procedure Rules. Order 17 rule 2(1) reads:

"2(1) On the day fixed for hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove."

There is no reference in this rule to plaintiff himself, giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issues, which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A plaintiff does not have to be personally present when he is represented by duly instructed counsel as was the case here. It is for a plaintiff's counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else he does not have to be present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short, according to Order 17 rule 2(1), a plaintiff can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his counsel and we say with no hesitation whatsoever, that the point taken by Mr. Kirundi could be described as an abuse of the process of court and that the acceptance of this point and the reasons for this in the ruling by the learned judge were not only surprising but also totally erroneous.

We find no merit in Mr. Kirundi's submission to the effect that amendments introduced by Legal Notice Number 119 of 1975 take away the effect of the decisions in Din Mohamed vs. Lalji Visram [1937] 4 E.A.C.A 1and Finaughty vs. Prinsloo [1958] E.A. 657. The material amendment introduced by that Legal Notice substitutes the word 'attend' in place of the word 'appear'. It is a distinction without a difference. The present Order 9B rule 4(1) in reality does not change the meaning of the Order 9 rules 17 and 18 of the 1948 Civil Procedure Rules. The Din Mohamed and Finaughty cases still stand good.

We must and do allow the appeal against the dismissal of H.C.C.C. NO. 495 OF 1996.

That brings us to Civil Appeal No. 56 of 1996. The learned judge, having dismissed the plaintiff's claim quite wrongly as pointed out by us, ordered that he would hear the defendant's counter-claim at 2.30 p.m. on 25th of October, 1995. At the appointment time, Mr. Nowrojee, counsel for the plaintiff, did not appear and after a short adjournment, the court proceeded to hear the defendant's only witness Mr. Joseph Barage Wanjui, the Chairman of the defendant.

Mr. Kirundi argued that Mr. Nowrojee's non-attendance showed disrespect to the learned judge. With respect, Mr. Nowrojee's presence in the afternoon of that day would have indicated that he was taking part in the proceedings thereby making the proceedings inter-partes. But the learned judge having ruled that Mr. Nowrojee's presence in the morning did not amount to attendance by the plaintiff was clearly a pointer to Mr. Nowrojee that his presence was of no consequence even at a the hearing of the counter-claim; in fact that factor made Mr. Nowrojee's presence irrelevant and unnecessary.

Having heard Mr. Wanjui, the learned judge ordered that the plaintiff do give vacant possession of the suit property to the defendant and assessed general damages in the sum of Shs. 5,000,000/=. We must keep in mind that the counter-claim arose directly out of the claim. In that sense the counter-claim is not severable from the defence. Despite that, the learned judge proceeded to hear the counter-claim on the erroneous basis that it stood by itself without reference to the claim or the defence.

With respect, that was wrong. In Doge vs. Kenya Canners [1982-88] 1 KAR 759 this court held that the counter-claim was not severable from the defence. The facts in Doge's case were that Kenya Canners Limited had sued Doge in possession of a house and land on which the house stood and land around it. The possession was sought on the ground that as Doge's services with Kenya Canners were terminated, the service tenancy or occupancy right of Doge had come to an end. Doge counter-claim for title to the property on the basis that the property was a gift to him and he claimed title, inter-alia, by virtue of proprietary and promissory estoppel.

Kenya Canners as claimants applied for summary judgment and the learned judge in the superior court entered summary judgment for possession on presumably, the claimant's contention that as the factual basis of the appellant's claim was disputed, the appellant's possession of the house would be independent of and not co-terminous with, his contract of service, and therefore, his claim to ownership of the house could not possibly stand up to analysis.

In the appeal before us, the plaintiff had sought in the superior court orders to stop the defendant from increasing rent or obtaining possession of the suit property on the ground, inter-alia, that she was a tenant protected under and by virtue of Landlord and Tenant (Shops, Hotels and Catering Establishments)Act. Cap 301, Laws of Kenya (the Act). The defendant denied such a tenancy and sought orders, inter-alia, for possession and damages for trespass.

It can be seen clearly that the claim and the counter-claim area clearly inter-woven and are not severable. The learned judge in our view, was clearly wrong in determining the defendant's counter-claim under the provisions of Order 1XB rule 4 (3) of the Civil Procedure Rules.

Mr. Kirundi's argument that the plaintiff's claim stood no scrutiny after the defendant obtained title to the suit property, does not take his case any further. The plaintiff had pleaded, in the alternative, protection of the Act. It is trite law that a tenancy under the Act can only be terminated as provided for in the Act. That would have been an issue for the plaintiff to prove, namely, that her tenancy was protected under the Act. Her claim having been dismissed she was in no position to do so.

We find no merit in Mr. Kirundi's argument that the defendant was only offering a new tenancy to the plaintiff. We see no reason to depart from what this court said in the case of Tiwi Beach Hotel Limited vs. Stamm [1990] 2 K.A.R. 189:

"A copy of that letter (letter dated 1st August, 1989) was sent to the appellant's advocate. Although Mr. Lakha stressed that both these letters constituted an offer for a lease, in my judgment it is plain beyond argument that they were a demand by a landlord for rent from a tenant in possession."

As the dismissal of the plaintiff's claim was wrong, the learned judge erred in proceeding to hold that the plaintiff was never a tenant either protected or unprotected or that she lost protection, if any, by virtue of the defendant being registered as proprietor of the suit property. He similarly, erred in holding that the status of the plaintiff had been reduced to that of a trespasser.

The learned judge also assessed damages "for loss of user". This was clearly wrong. The defendant had not lost any chattel which would entitle him to damages for loss of user. If the defendant had any claim it was for damages for trespass which would of course be in the nature of mesne profits, for allegedly being kept out of his property, if he was lawfully entitled to possession. The defendant knew that the plaintiff was seeking the protection of the Act. If the defendant would have succeeded in its claim for possession, it could only be entitled to claim economic rental value of the suit property which damages could not have been assessed on a lump sum basis as the learned judge did. The award of damages "for loss of user" cannot therefore stand.

We must and do allow the appeal against the judgment of the learned judge whereby he gave judgement for the defendant on its counter-claim.

In the end result, both the appeals are allowed with costs here and costs below and it is ordered that the

proceedings in the superior court do proceed to hearing de novo before any other judge.

Dated and delivered at Mombasa this 19th day of July 1998.

A.M. AKIWUMI

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR