REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU
(Coram: Kneller, Hancox, JJ.A. & Platt, Ag, J.A.)
CIVIL APPEAL NO. 20 OF 1983

BETWEEN

RICHARD SAIDI ……..…… APPELLANT

AND

1. BROWN AURA KHAYINGA …… 1ST RESPONDENT

2. KARIUKI NJUGUNA …… 2ND RESPONDENT

(Appeal from an order of the High Court of Kenya at Kakamega (Gicheru, Ag, J.) dated February 28 1983

in

Civil Appeal No. 10 of 1983)

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JUDGEMENT OF THE COURT

Richard Saidi, the appellant, had his appeal of February 4, 1983 from a judgment of January 18, 1983 by a Kakamega resident magistrate summarily rejected by the High Court (Gicheru Ag J) on February 28 this year. This must have been done under the provision of section 79(B) of the Civil Procedure Act which means the learned judge perused the appeal (including the memorandum of appeal, proceedings, exhibits and judgment) and considered that there was no sufficient ground for interfering with the decree, part of a decree or order appealed against.

A brief history of the litigation so far is essential to a just decision in this appeal. The appellant is a farmer and businessman who owns a bar in Malava market in South Kabras Location in Kakamega District. He let it out in 1973 to Brown Aura Khayinga and Kariuki Njuguna, the respondents, who are businessmen in the same area. Brown Aura Khayinga is also t he local health officer.

The appellant in his amended plaint asked for judgment against them for Kshs 8,906 special damages, general damages, costs and interest. The special damages were for the malicious action of the respondent over a period of four years.

The respondents in their almost identical written statements of defence of October 13, 1977 admitted the tenancy, denied libility for the special and general damages, pleading res judicata. They also alleged the appellant illegally terminated the tenancy, evicted them, confiscated their property and so they suffered

loss for which they counterclaimed special damages of Kshs 3,093 for loss of their property, general damages for inconvenience and loss of profits when the appellant closed the bar.

The plea of res judicata was based on the appellant's claim against the respondents for Kshs 650 in Kakamega District magistrate Civil Suit No 467 of 1973 for arrears of rent which the respondents paid him and the orders of the Bungoma Business Premises Rent Tribunal Case 1 of 1976 which dealt with the respondents' complainants against the appellant relating to the tenancy of the bar.

The appellant denied the second respondent's counterclaim and in a reply of August 25, 1977 asked for it to be dismissed.

All this was part of Civil Suit 51 of 1977 in the Kakamega High Court which was transferred to the Kakamega resident magistrate and became his Civil Suit 150 of 1979.

The suit was dismissed under order 98 rule 2 on May 25, 1981 by a Kakamega acting resident magistrate on the application of Mr Nakhone for the respondents because the appellant was not present for the hearing of it.

The appellant applied for the dismissal to be set aside on July 21, 1981 but Mr. Nakhone successfully persuaded the same magistrate to dismiss it under Order IX rule 7(1).

The appellant went to Kakamega High Court to appeal from this decision and succeeded in having the order of the magistrate of May 25, 1981 set aside and securing an order for the suit to be fixed for hearing. The suit had not in fact been fixed for hearing on that date (May 25, 1981) and Order XCVIII rule 2 did not apply because it empowers the court to dismiss the suit when neither party attends and on that day the respondents were present.

It came for hearing before a different Kakamega acting resident magistrate on January 4, 1983 and the testimony of the parties was recorded. Judgment was delivered a fortnight later and the appellant's claim was dismissed with costs on their counterclaim which is, it will be recalled, what they pleaded as special damages.

The magistrate made no award for general damages because the evidence was too meagre to make one. The magistrate found, among other things, the appellant locked the bar in May 1973 because the respondents were in arrears with their rent. They took him to the Tribunal for an order to let them in again to trade and recover their property. The Tribunal made an order they should pay the appellant the Kshs 450 arrears and then have vacant possession of the bar. Meanwhile, the appellant re-let the premises to Benson Malobi and others so the respondents did not attempt to re-enter or recover their goods in them. He could find no evidence that the respondents had intimidated the appellant.

He also found the respondents proved that when they returned to the bar after paying the appellant arrears of rent, as ordered by the Tribunal, their goods had disappeared and the appellant was responsible, so they had proved their special damages claim. He refused to make any award for general damages and loss of profits because they had not been proved.

The appellant's grounds of appeal in his first appeal were (in a shortened form) (1) The resident magistrate erred in law in finding the respondents proved their counterclaim on the balance of probabilities;

(2) There was no evidence to support I;

(3) He took into account extraneous matters.

Here in this court, the appellant submits the learned judge (Gicheru Ag J) did not study the material in the appeal before summarily rejecting it. Had he done so, he would have discovered there was no evidence to support the magistrate's award on the counterclaim.

The respondents had not prosecuted him for locking them out of the bar and making away with their stock. The counterclaim particulars revealed the total claim for special damages amounted to Kshs 2,743. The Tribunal had dismissed the same claim.

Perusing the material before the learned judge and taking into account the memorandum of appeal in that first appeal and this second one in this court and, subject to that which we shall shortly say, the appellant's submissions in this appeal we are of the view t hat the judge was right to reject the appeal summarily. So far the judgment concerns the merits of this appeal because the parties are laymen in these matters despite their decade of litigation about this bar and their belongings in it.

We turn to a point of law. This is an appeal from an order passed in appeal by the High Court so a second appeal to this court only lies on any of the following grounds, namely

a) the decision is contrary to law or to some usage having the force of law;

b) the decision failed to determine some material issue of law and or usage having the force of law;

c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possible have produced error in defect in the decision of the case upon the merits.

Section 72(1) CIVIL PROCEDURE ACT Of all the appellant's 18 grounds of appeal only two topics arise for consideration. The first is a matter of law in that the courts below misdirected themselves in finding that special damages of Kshs 3,093 had been claimed proved whilst in fact it is clear that only Kshs 2,743 had been claimed in the counterclaim. The second question is a matter of law and procedure, namely, whether the learned judge entitled to reject the appeal summarily. These questions fall within Section 72(1)(a) and (c). The other matters put forward are matters of fact and cannot be put forward in this appeal which is a second one from a subordinate court. Section 71A.

The appellant is right that the counterclaim was only for Kshs l2,743. The appeal to the learned judge questioned the proof of this counterclaim. That meant that the quantum claimed and the proof of the items of the counterclaim should have been scrutinized. It follows that the counterclaim should not have been summarily rejected because there were grounds for interfering with the damage.

But a further point arises. The appeal record does not include the decree of the High Court appealed from so it is for that reason incompetent. Rule 85(1) Court of Appeal Rules. Commercial Bank of Africa Limited v General Motors of Kenya Limited CA 45 of 1981 and Irungu Gitaka v Mwangi Gitaka CA (Nairobi) Civil Appeal 19 of 1982 (unreported) October 13, 1982. We have been anxious, however, to deal with the points raised in this appeal because the parties are unrepresented.

We suggest the appellant should apply on notice under Section 99 of the Civil Procedure Act to the present/resident magistrate, Kakamega to correct the figure Kshs 3,093 to Kshs 2,743 in his judgment.

Therefore, this appeal must be dismissed with costs and we so order.

Delivered at Kisumu this 8th day of December, 1983

A.A. KNELLER

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JUDGE OF APPEAL

A.R.W. HANCOX

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JUDGE OF APPEAL

H.G. PLATT

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AG. JUDGE OF APPEAL

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

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DEPUTY REGISTRAR