



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL APPEAL CASE NO 14 OF 2017

MOHAMED SUDI BINDO & ANOTHER APPELLANTS

VERSUS

HAMISI MWINYI NGWISA RESPONDENT

(Being and appeal against the entire Judgment and Decree of Hon. E. Mutunga, Senior Resident Magistrate delivered on 19th May 2017 in Mombasa SRMCC No.2142 of 2013)

JUDGEMENT

1. The Appellant was the Defendant in the **ORIGINAL SUIT NO MSA SRMCC 2142 OF 2013** which decision forms the basis of the present appeal. The Respondent's case (the Plaintiff in the Court below) succeeded and the trial court entered judgment as prayed in the plaint in the following terms:

a. Pay rent arrears of Kshs.54,000

b. Pay November and December, 2012 rent of Kshs.36,000.

c. Engage a fundi to carry our renovations on the premises to the satisfaction of the plaintiff.

d. Pay monthly installments of KShs.15,000 as from 5/2/13 and on every other 5th dayd of the succeeding month until payment in full.

2. The Appellant in his memo of appeal dated 16/6/2017 pleaded that the Honourable Magistrate erred in finding for the Respondent on account of the following:

i. The Magistrate lacked jurisdiction as this was a matter involving a controlled tenancy

ii. The Magistrate erred in granting an order for payment or rent for the period the Appellant was not in occupation of the suit premises.

iii. That the special damages of Kshs.150,000/= for renovation costs were not proved.

3. The appeal proceeded by way of written submissions highlighting the issues raised above. The appellant submitted that the property is in Kwale where he also resides. Thus the trial Magistrate lacked territorial jurisdiction. Secondly that the tenancy agreement produced as Pex 1 and dated 1st January 2011 shows it was for a period less than 5 years thus making it a controlled tenancy thus ousting the jurisdiction of the trial Magistrate.

4. The Appellant submitted further that the claim for Kshs.75,000/= was not proved as no rent books or receipts were produced. He urged the court to set the same aside. On the award of Kshs.486,000/= being rent from January 2013- February 2015, the Appellant submitted that they were out of the suit premises which fact is admitted by the Respondent. That the failure to hand over the keys cannot be used to demand for rent as the Respondent had other options of accessing the suit premises. Lastly the appellants also submitted that the renovation costs of Kshs.150,000/= was unmerited as the same was not proved. That the exhibits produced (Pex 1-4) did not concern the said sum. They also urged the court to dismiss the prayer. In conclusion, the Appellants submitted that they are entitled to cost of this appeal as well as costs in the lower court. They cited necessary case law to support each heading of their ground of appeal.

5. The Respondent opposed the appeal via their written submissions filed on 18th June 2018. It is his contention that his cause of action arises from the terms of the agreement dated 17th January 2013 signed at the offices of Gunga Mwinga & Co. Advocates based in Mombasa. In

submitting that the trial Court had jurisdiction, it relied on the provisions of Section 15 of the Civil Procedure Act. He also submitted that the premises did not fall within the provisions of Cap 301.

6. The Respondent continued that he was entitled to the sums of Kshs.75,000/= as per their agreement of 17/1/2013 which sum constituted the outstanding rent. Similar position was made for the claim of Kshs.486,000/=. That the Appellants conceded that they did not renovate the premises hence an award to Kshs.150,000/= being estimate costs for the same was in order. The Respondent urged this court to dismiss the appeal with costs to enable him enjoy the fruits of his litigation.

7. Therefore going by the submissions of both parties, the issues for determination are whether (1) the Trial Court had jurisdiction to entertain the claim. (2) The Respondent was entitled to the orders granted.

8. I note from the defence filed by the Appellants dated 27/11/ 2013 that they denied the jurisdiction of the trial court. In par 5 (b), the Appellant pleaded that the agreement of 5th November 2013 and 17th January 2013 was entered through deceit, lies and dishonesty on the part of the Respondent. The Appellants also pleaded in para 8 of their defence that it is the Respondent who locked them out of the suit premises in order to steal a match. The Appellant repeated the same sentiments via the evidence of Mohamed Sudi that they entered the premises on 1/1/2011 and stayed on until 7/9/2012 when they found the premises had been locked. That they went to the Respondent's house and they agreed to continue doing business. They were forced to sign an agreement so that they would carry out the repairs. They stayed on till 5/11/2012 when they found the business premises locked with iron bars. That their jiko which they had built at a cost of Kshs.50,000/= was also destroyed. They had to move out of the premises. The Appellants stated that on 10th January 2014, they got a demand letter demanding Kshs.240,000/=. They admitted signing another agreement for minor repairs and rent was to accrue if they did not do the repairs. In cross examination the witness said they were chased without notice. That he was forced to sign the agreement of 17th January 2013.

9. From the evidence of DW1, the Appellants stated they were chased away on 5/11/12 without notice and on 17th January 2013, he was forced to sign an agreement. This suit was filed on 30th October 2013. So at the time of filing of the suit, was there a landlord/tenant relationship subsisting between the parties? The Appellants did not lodge any claim with the Business Premises Rent Tribunal for reinstatement to the premises neither did the Appellants move the court for an order to be returned to the suit premises although their position was that they had been illegally locked out. Consequently, the Appellants having not challenged the manner they vacated the suit premises and having signed the agreement of 17/1/13 the tenancy relationship had been terminated at the time the suit was filed. In my view, they cannot therefore invoke the protection of Cap 301. As regards lack of territorial jurisdiction it is true the suit property is stated in the pleadings to be located in Ukunda. However the Appellants not having taken up this issue during the trial, the court can only deem that they did not suffer any inconvenience in having the matter tried in Mombasa. Lack of territorial jurisdiction cannot make proceeding to be a nullity as it is purely an administration issue to facilitate the right of access to justice. In conclusion I find the ground of appeal on want of jurisdiction of the subordinate court on both limbs as lacking in merit.

10. The 2nd issue is whether the Respondent was entitled to all the prayers awarded as per his claim. The Respondent based his claim on the terms of the agreement dated 17/1/2013. The Appellants claim they were coerced into signing this agreement. In their advocate's letter dated 30/1/13 addressed to Gunga Mwinga & Co. Advocates the Appellants complained of frustrations they were encountering in carrying out their repairs. Part of the letter states thus *"our clients have tried to the best of their ability to renovate the damaged place but your client on several occasions including 26/1/13 denied our masons entry with intention to have the rent accrued clause or invoke the monthly rent clause which clause cannot be enforced in the circumstances."*

11. The Appellants agreed to carry on with the renovations within the same month the said agreement was signed. In this letter no mention is made of being coerced or deceived to sign the said agreement. Their complaint was due to unco-operation from the Respondent so as to benefit from the agreement in terms of the rent clause. The averment that they were coerced or deceived to signing the agreement is thus made without any supporting evidence, is as afterthought thus cannot stand.

12. In terms of the agreement of 17.1.13 the Appellants admitted rent arrears of Kshs. 54,000/=. They also agreed to pay the November – December 2012 rent of Kshs. 36,000/=. Thus a total of Kshs. 90,000/= less Kshs. 15,000 paid on the date of executing the agreement. It is clear Kshs. 75,000/= therefore remained owing to the Respondent. The only issue for me is whether the Respondent was entitled to the award of rent from January 2013 to February 2015 under the last clause of the agreement which provided thus;

"In the event we fail to carry out the repairs by 31st January 2013, this rent shall accrue on a monthly basis up to and until the repairs are done."

13. The Respondent in his evidence stated that the estimated cost of repairs was Kshs.150,000/=. He also stated in his evidence in chief that *"I don't need anything for the repairs"*. In cross-examination, the Respondent denied that he blocked the person sent to do the repairs. He also denied forcing the 1st Appellant into signing the impugned agreement. From the evidence of the Respondent, it is not clear when the repairs were carried out and for how long. In my opinion and I so hold, the Respondent was under obligation to demonstrate to the court that when the Appellants did not comply at as 31.1.13 he began to carry out the repairs and how long the works lasted. The Respondent was also under obligation to prove the specific costs incurred in carrying out the renovations if any and not go by estimated costs. He failed to discharge both limbs of his obligations.

14. In light of the evidence he presented to court, the trial Magistrate erred in awarding him costs of repairs of Kshs.150,000/= which were not proved as well as rent accrued for the period 18th January 2013 to 5th february 2015 when nor foundation was laid for the same. I am persuaded this was a misapprehension of the facts and therefore the trial Court reached a wrong decision. I do hereby set aside the two awards and substitute it there with an award equivalent to two months' rent (Kshs.36,000/=) being a period reasonable sufficient to carry out the renovations of the suit premises. Since actual costs of repairs were not proved, none is hereby awarded.

15. In conclusion, I find the appeal succeeds in part. The Appellants shall pay the Respondent the outstanding rent of Kshs.75,000/= as directed in the court below together with a sum of Kshs.36,000/= being two months' rent to cover the renovation period as well as cost of the

case in the subordinate court. The claim of Kshs.486,000/= as accrued rent accrued and Kshs.150,000/= being costs of repairs is hereby set aside and dismissed for having not been proved. Each party to meet their costs of this appeal.

Judgment dated, signed and delivered at Mombasa this 28th day of September 2018

A. OMOLLO

JUDGE