REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCA NO 108 OF 2014

MUSA KIMENGICH KIMUGE……..APPELLANT

VERSUS

BETH WANGARI NJOROGE…….……RESPONDENT

JUDGMENT ON APPEAL

(Appeal against order of Magistrate releasing undisputed rent to the landlord; argument that there was a consent for the rent to be deposited in court; argument that formal application needed to be made for variation of the consent; argument that the circumstances for setting aside contract did not exist; no evidence of the consent; if consent existed given the circumstances, Magistrate could not be faulted for not insisting on a formal application; need to do justice instead of having undue regard to procedural technicalities; Article 159 (2) (d) of the Constitution; in any event, agreement, if any, was liable to be set aside as contrary to public policy; matters having arisen when application to cross-examine deponent was made; use of Order 19 Rule 2; calling of deponent of affidavit to be used sparingly; appeal dismissed with costs)

1. The appellant, as plaintiff, filed suit in the Chief Magistrates' Court against the respondent owing to a dispute relating to his tenancy over the land parcel Nakuru Municipality/Block 4/28. The appellant is a tenant in the said premises which is owned by the respondent. He operates a business of a butchery, hotel and lodging on the suit premises. The two had a lease agreement executed on 1st January 2011. It was pleaded by the appellant that the lease was for a term of 8 years commencing 1st January 2011 at a monthly rent of Kshs. 100,000/= which rent was to be revised upwards by Kshs. 3,000/= after every one year. It was pleaded that the monthly rent for the year beginning 2012 was therefore Kshs. 103,000/=. However, the appellant averred that the respondent started demanding rent of Kshs. 150,000/= per month and threatened to terminate the tenancy if this rent was not paid. It was pleaded that the respondent had failed to receive rent from the appellant unless it was Kshs. 150,000/= per month. It was pleaded that the appellant was ready and willing to pay the rent of Kshs. 103,000/= to the respondent, but if she continued to persist in refusing the same, the appellant was ready to deposit it in court if the court so directed.

2. The respondent filed defence in which she inter alia stated that the appellant was misinterpreting the agreement so as to suit his circumstances.

3. Together with the plaint, the appellant filed an application to restrain the respondent from evicting her pending hearing of the suit. In the supporting affidavit to the said application, the appellant stated his willingness to pay rent at the rate of Kshs. 103,000/= and that he was ready and willing to deposit it in court. The application was listed for inter-partes hearing, in the course of which, counsel for the appellant asked to cross-examine the respondent and her witnesses on her affidavit. This was allowed, and the

respondent and her witness, Mr. Motanya, an advocate of the High Court of Kenya, were cross-examined. But an issue arose as to the authenticity of a document which necessitated an adjournment on 13 April 2012.

4. After the adjournment, Mr. Kahiga for the respondent, stated that the appellant had not been paying rent and that they are taking advantage of interim orders. I think I better put down in full what transpired thereafter for that is the genesis of this appeal.

> *Kahiga : The applicant has not been paying uncollected rents. They are taking advantage of the interim orders. We pray for an order that they pay.*
>
> *Ms. Magana: We do not object to depositing uncollected rents in court as counsel submits, pending the hearing of the application.*
>
> *ORDER : By consent the rent arrears until now and as will accrue from month to month, to the extent admitted by the applicant, to be deposited in court, as and when it falls due. The rent admitted by the applicant is Kshs. 103,000/= per month, for the evidence (probably meant avoidance) of doubt liberty to apply granted. Summons to Mr. Motanya extended to 25/5/2012.*

5. On 25 May 2012, when the matter came up, it could not be agreed by the counsels what exactly the matter was coming up for and the matter had to be adjourned. Mr. Karanja, who was in court for the respondent, then made the following submission.

Mr. Karanja : The rent has been deposited. It rightly belongs to the landlady who is in court. The applicants are in occupation of the premises. We urge the court to order that the rent deposited in court be released to the respondent it's their money.

Ms Magana : The money was deposited by consent of the parties on 13/4/2012. If parties seek a variation of the order, they ought to apply formally as required in the setting aside of a consent order. The money was deposited because the respondent refused to receive the money. I would wish to have adequate opportunity to address the issues. Nothing is said about what has changed. I refer the court to order similar which the plaintiff should comply with. The application must be made by mouth. The order in record is a consent order and cannot be reviewed without a formal application. There are issues we wish to raise in the application as to whether the defendant is entitled to moneys deposited. The question is whether if the tenancy we (probably "were") *terminated, would the respondents be entitled to rent. I refer court to the plaint.*

Mr. Karanja : I refer the court to notice (probably meant "Article") *159 (b) of the Constitution what are being raised are technicalities. The money deposited in court is admitted rent. Parties are at liberty to apply in the consent. The Rules do not preclude an oral application. The lease cannot be terminated if they are still in the premises. The issue before court is a question of how much rent should be paid. There is no other issue. They are thus bound to pay rent. I refer the court to the overriding objective in Section 1 A and 1B of the Act.*

The learned trial magistrate then made the following ruling.

"I have considered the case before me. I deem that the only issue before court is whether the respondent is justified to increase rent as she has in the case under consideration. There is no question about whether or not the lease in issue is terminated. The applicants are in court, because the respondent threatened to terminate the lease in question. They seek specific performance of the lease in the plaint. They are in the premises and have by me that fact (sic) and by the suit before court, affirmed the lease. The natural consequence of that affirmation is that the relationship of landlord and tenant continues and the respective obligation persists. It is not just to argue that the respondent should be kept off his entitlement because a suit is pending in court. I find that she is entitled to benefit from her investment. I have considered the consent order entered herein on 13/4/2012. Court granted the parties liberty to

apply, there is no limit to the mode of the application. If this was the intention of the parties, they would have easily provided for a formal mode of application in the consent. To import the provisions of Order 51 Rule 1 of (probably meant "to") *the consent would be to alter the terms of the consent. This is not feasible in the circumstances. Parties are bound by the agreements they make. It is clear in the consent that the amounts deposited by applicant constitute undisputed rent already due and owing. Whichever way the case goes, this is the respondent's money. She can have it now or after ten years but it is still her money. I find no prejudice at all to the applicant if the money is ordered released to the respondent forthwith. It does not alter the rights of the parties herein. In fact it is the respondent who is prejudiced by being kept sidelined from her entitlement while the case persists, and while the applicant continues to enjoy the use of her property. The court cannot take her place as landlord. I order that the amount deposited in court as undisputed and up to this point, be forthwith released to the respondent. The terms of the consent shall remain until the parties apply to vary it none* (probably meant "now") *that the respondent is at least in the meanwhile, willing to observe the status quo. Right of appeal applies."*

6. The appellant was aggrieved by the said ruling and filed this appeal. There are 16 grounds listed in the Memorandum of Appeal. But in a nutshell, the opinion of the appellant is that the trial Magistrate varied the consent without giving the appellant an opportunity to respond and be heard and that this constituted an error. It is the view of the appellant that a formal application needed to be filed and that it was wrong to have the money released before the dispute was determined. It is also stated that the Magistrate was wrong in not finding that the respondent would suffer prejudice if the money remained deposited in court. In the appeal, the appellant has asked that the above order be vacated and be set aside and for costs.

7. When the file first came before me on 2 February 2015, there was in it an application. I thought that the matter had been in court for too long, since the year 2012, given that it was an appeal on an interlocutory order, and I directed that the appeal be heard forthwith. In my discretion, I dispensed with all applications.

8. At the hearing of the appeal, Ms. Magana for the appellant submitted that the parties had entered into a consent to have the rents deposited in court. She submitted that when Mr. Karanja made the oral application for the money to be released, she asked that the application be made formally, so as to allow her seek instructions, but this was denied. She submitted that Order 51 Rule 1 requires that all applications be made formally and that there was no reason to allow the oral application which she thought was made casually. She submitted that although there was liberty to apply, that did not allow an oral application. She submitted that the circumstances under which a consent may be varied are similar to those applicable to a contract. She relied on the case of ***Samuel Wambugu v Othaya Boys Court of Appeal at Nyeri, Civil Appeal No. 7 of 2014***.

9. Mr. Kahiga for the respondent was of the opinion that the only purpose of the appeal is to punish the respondent. He submitted that the rent that was deposited in court was the undisputed rent. He submitted that the parties were at liberty to apply, and in exercise of that liberty, the respondent sought to have released the money deposited. He submitted that the appellant was heard on that application, and there was no reason not to release the money, since it was not being held as security. He submitted that the court found that no prejudice will be caused to the appellant.

10. I have considered the appeal and the submissions of counsel.

11. First, I have my doubts as to whether there was ever consent with regard to depositing of the money in court. What I can see from the record is that Mr. Kahiga, for the respondent, made an application that the appellant be ordered to pay rent. In reply to that application, Ms. Magana submitted that the appellant is ready to deposit the money in court. There is no record that Mr. Kahiga agreed to this proposal. Without there being an agreement by Mr. Kahiga, I do not see how the Magistrate was correct in recording that it had been agreed by consent that the money be deposited in court. From the record before me, I cannot see the basis upon which the Magistrate got the notion that it had been agreed by consent that the money be deposited by court. This is a court of record, and I am bound by what is recorded. None of the counsels has argued that there is any omission in the record. In my opinion, I think the Magistrate was wrong in recording that the deposit of the money was by consent, yet there does not seem to have been a consensus.

12. The appeal herein is premised on the basis that there was a consent. My finding is that there is no record of any consent. It follows that there is no substratum upon which the appeal is founded and on that basis alone, this appeal is liable to be dismissed.

13. But even assuming that the parties had agreed by consent that the money be deposited in court, I am still of the view that this appeal is unmerited. The money was being deposited in court, because Mr. Kahiga had complained that the appellant was not paying the rent. The rent that was deposited was the rent that was not in dispute, that is the sum of Kshs. 100,000/= with the annual increment of Kshs. 3,000/= per annum, which the appellant contended was the correct interpretation of the lease agreement. It is not the disputed rent of Kshs. 150,000/=. There is no basis for holding that the said rent was being deposited as security. It was not. It was money that the respondent was properly entitled to for her investment. It was not money under dispute, and as the Magistrate correctly pointed out, it would still have been made available to the respondent, whether immediately or ten years later, and there was absolutely no basis for withholding it from the respondent.

14. Ms. Magana has attempted to fault the process that the Magistrate followed. It is her argument that a formal written application had to be made pursuant to the provisions of Order 50 Rule 1. That provision is drawn as follows.

Procedure [Order 51, rule 1.]

All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.

15. Technically, applications need to be made formally, unless the rules allow for an oral application to be made. But Article 159 (2) (d) of the Constitution of Kenya, 2010, provides that *"justice shall be administered without undue regard to procedural technicalities…"* . In other words, the court should not be too stringent on procedural technicalities at the expense of doing justice to the litigants. There may be instances where the Court may feel that pursuing a technical rule of procedure would lead to an injustice. That is exactly what the Magistrate thought given the circumstances of this case. I am unable to fault him. He was of the opinion that there was absolutely no need to withhold the undisputed rent from the respondent and that it was not necessary to await a formal application. I am also of the same opinion. I indeed cannot see any other motive that the appellant has other than to try and punish the respondent and keep her away from her money as much as he can. That is abusing the court process for courts are not to be used to deliberately cause hardship and distress to a person. Courts indeed cannot allow themselves to be used for the wrong motive and must go the extra mile to do justice to the parties. That is what the Constitution requires of the Courts.

16. The appellant would still pay the rent, whether in court or directly to the respondent, and I wonder what prejudice he stood, or stands to suffer, if the rent that he was obligated to pay, and which is not in dispute, was released to the rightful owner. Ms. Magana attempted to argue that there are other underlying issues that requires rent to be deposited but I am afraid that I cannot see any.

17. It was also submitted that there were no grounds to vary the consent in absence of an element similar to that which would allow a person to set aside a contract. I do not contest that general hypothesis. But even in the law of contract, relief may be given under equity for contracts that are against public policy. Courts indeed can void a contract that is against public policy and have leeway to decline a consent which is against the policy of the courts. It is my opinion that the consent herein, if ever there was one, fell squarely into such category and was liable to be set aside.

Before I finish, I feel compelled to address the procedure taken by the trial Magistrate. What prompted the alleged consent arose when the Magistrate was determining an application for injunction. Before the application could be heard, counsel for the appellant made an application to cross-examine the deponent of the replying affidavit, under Order 19 Rule 1. However, what transpired thereafter was almost similar to doing a trial. True, Order 19 Rule 1, does allow one to apply to cross-examine the deponent of an affidavit, but the right to allow one to cross-examine is discretionary, not mandatory. In my view, courts

should only allow one the opportunity to cross-examine a deponent of an affidavit if there are exceptional circumstances. It should not be a matter of course. In fact, it is a discretion that in my view should be rarely utilized, and when applying to cross-examine, it should be made clear what exactly the deponent is being cross-examined on. These in my view, should only be for purposes of clarifying an issue that may not have come out clearly in the affidavit, or to sort out an apparent discrepancy in the affidavit. Where possible, a limit as to the number of questions to be asked may be made, for Courts need to be careful that an application to cross-examine does not convert an application into a full blown hearing of the matter, or does not end up consuming a disproportionate amount of precious judicial time.

18. It seems to me that the Magistrate lost control of the application and allowed counsel to go overboard. Technicalities such as the admissibility of a document crept in and the matter indeed had to be adjourned to determine the admissibility of a document put to one of the deponents. That is why the interlocutory application for injunction has not been finalized to date. The application morphed and developed a life of its own, away from the matter that was squarely before the court, that is, what to do in the interim as the suit itself was being heard.

19. Order 42 Rule 32 gives the appellate court power to pass any decree or make any order which ought to have been passed or made. That provision is drawn as follows :-

Power of appellate court on appeal [Order 42, rule 32.]

The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.

20. In exercise of the above powers, I am of the view that the interlocutory matters in the suit before the Magistrate need to be dispensed with. In lieu of hearing the application for injunction, I make the order that the appellant do remain in the premises but do pay the undisputed rent, that is Kshs. 100,000/= as at 2012 with annual increments of Kshs. 3,000/= per annum, until the final determination of the suit.

21. I further direct the trial Magistrate to straight away proceed to the hearing of the suit on priority basis.

22. I have not forgotten the fate of this appeal. I am of the opinion that it is a frivolous appeal and it is hereby dismissed with costs.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 11th day of March 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of :-

Mr Kipsang holding brief for Mrs Gatu Magana for appellant

Mr Lawrence Karanja for respondent

Emmanuel Maelo : Court Assistant

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

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