REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A.)

CIVIL APPEAL NO 12 OF 2018

BETWEEN

WARDA SALIM.....APPELLANT

VERSUS

SHABIR HATIM.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 16th November, 2017 and delivered by Korir, J. on 4th December, 2017

in

H C. A No 5 of 2015.)

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JUDGMENT OF THE COURT

[1] This is a second appeal as the original suit was heard and determined before the Magistrate's Court at Malindi. Upon its dismissal, an appeal was filed in the High Court at Malindi which was partially successful. Unrelenting the appellant wants a third bite of the same cheery which can only be done on points of law. In order to extrapolate the points of law that fall for determination in this appeal as provided under **Section 72** read with **Sections 79D** of the Civil Procedure Act, we will set out a brief background information of the facts that were before the two courts below.

[2] **Warda Salim** (appellant), was a tenant in a residential house situated at **Plot No, 1402 Malindi** (suit premises), belonging to one Nafisa Hatim Ali Taher, sister to **Shabir Hatim** (respondent). Prior to the events that occurred when the appellant's goods were proclaimed for non-payment of rent, the appellant had resided on the suit premises for about 22 years. Sometimes in March 2011, the respondent instructed auctioneers to proclaim the appellant's goods on the grounds that she had fallen into rent arrears. To forestall the attachment the appellant filed suit before the Chief Magistrates' Court seeking at first a permanent injunctive order restraining the respondent and/ agents from interfering with her peaceful occupation of the suit premises. The plaint was later amended on 3rd September, 2013 to include a prayer that the appellant be reinstated and the goods allegedly distrained from the suit premises be restored to her or she be compensated at the current market value for the said goods. She also sought damages for pain, suffering and loss occasioned to her from the illegal and unlawful acts by the respondent.

[3] In response thereto, the respondent filed a defence denying any wrongdoing while asserting that the appellant was in arrears of rent. That the monthly rental sum payable was Ksh.7500 which was outside the jurisdiction of the Rent Restriction Tribunal. The respondent therefore sought to have the suit dismissed with costs.

[4] The matter proceeded to a full hearing; upon weighing the issues, the trial magistrate dismissed the suit and in so doing, found although there was justification for levying distress for unpaid rent, the said process could not be disguised and used to evict a tenant. However on the prayer for reinstatement the magistrate was of the view that since the owner of the plot was not made a party to the suit, it would be inappropriate to order the respondent who was merely acting as an agent of the registered owner of the plot to reinstate the appellant in someone else's plot. As regards the prayer for damages, the magistrate held that the appellant failed to provide the value of the goods damaged; she did not produce receipts to show how much she had used to purchase them. Similarly the claim for Ksh.1500 per day as hotel accommodation for a period of 2 months also became a cropper as the appellant failed to produce receipts in support thereto. All in all the

appellant's suit was dismissed with no order as to costs.

[5] The appellant appealed before the High Court which appeal was heard by **Chitembwe, J.,** and his judgement is the subject of this appeal. Upon weighing the material before him the learned Judge was of the view that the respondent was a duly authorized agent to collect rent over the suit premises on behalf of his sister who was the land lady. The Judge found the appellant was in arrears of rent; that the Rent Restriction Tribunal had no jurisdiction over the matter; the appellant had already been evicted so by the time the pleadings were amended seeking an injunctive relief and reinstatement, those orders were overtaken by events. However on the issue of damages, for unlawful eviction of the appellant, the Judge found the same was settled when the parties entered and recorded a consent on 3rd August, 2007 settling all the issues including payment of damages of Ksh.40,000. This is how the Judge reasoned out the conclusions;-

> ***" The other issue involves payment of damages. The appellant is seeking Ksh.500,000. My understanding of the consent of 3. 8. 2012 is that the respondent was aware that he evicted the appellant through the wrong procedure. Although there was an eviction order, the respondent initiated the process by way of levying distress. Distress should not be followed by eviction. This legal position poses a challenge where the landlord levies distress and leaves the tenant with no valuable property*** *(sic)* ***to distrain. If the tenant decided to continue living in the premises using mats and bedsheets without other basic equipment like Television, fridge, cooker or radio, the landlord would have to seek legal intervention through the courts or Tribunal where applicable***
>
> ***I do agree with the trial court that the eviction was carried out procedurally.***
>
> ***Since the parties had consented to payment of Ksh.40,000, I do find that amount is fair compensation to the appellant. it is more than five months rent at the rate of Ksh.7,500. The claim of Ksh.500,000 is excessive. The appellant's tenancy had been terminated. She had accumulated rent arrears and the respondent was entitled to recover the rent.***
>
> ***The respondent states in his statement that gave out Ksh.30,000 to the appellant to enable her move out her things. I do find that if that amount was paid, it shall not be set off from the amount of Ksh.40,000 I have awarded. That was a different arrangement.***
>
> ***The appellant contends that her properties are still in possession of the respondent. I do order that if the respondent is still in possession of any of the appellant's properties, the same should be returned within thirty (30) days from the date of delivery of this judgment.***
>
> ***In the end, the appeal partly succeed. The appellant is hereby awarded Ksh.40,000 as general damages. Each party will meet his/her own costs of the appeal"***

[6] Unrelenting, the appellant filed the instant appeal citing 3 main grounds of appeal to wit-

That the Judge erred in law and fact in:-

> **1. Basing the assessment of damages on an irregular consent which had been challenged in court and consequently set aside.**
>
> **2. Failing to correctly evaluate the pleadings and proceedings in particular failing to appreciate the appellant had listed the items in possession of the respondent and there was no rebuttal.**
>
> **3. Failing to appreciate the appellant was entitled to costs of the appeal as well as before the trial court.**

[7] This appeal was fixed for hearing on 14th May, 2018 the appellant's counsel did not attend Court for the hearing although they were duly served with the hearing notice of the appeal on the 30th April, 2018. **Mr. Ongegu**, learned counsel holding brief for **Mr. Mwadilo** for the respondent merely adopted the written submissions and urged us to give a judgment date.

[8] We have considered the submissions by counsel for the appellant; regarding the consent order, counsel strongly argued that the same was set aside pursuant to a notice of motion filed on 7th September, 2011 in **CMCC Misc No. 11 of 2011** at Malindi urging that it was a misapprehension on the part of the Judge to rely on the said consent. On the second ground, counsel faulted the trial Judge for failing to evaluate the evidence as well as the pleadings. Had he done so he would have found that the appellant had listed all the items that were wrongly taken from her house which were carried away by the respondent? Thus it was incumbent upon the Judge to order for the return of the items as per the list and not to order "if any". Finally the appellant was entitled to costs in any event as the successful party.

[9] The respondent opposed the appeal; in his written submissions it was contended that the appellant failed to proof a claim for general damages. In the absence of specificities the Judge was guided by whatever evidence that was on record; thus the Judge could not assess damages from his own private knowledge but based on the evidence adduced. The appellant failed to ascertain the value of the goods and could not identify what was distrained and what was not; it is for that reason the Judge ordered the return of the goods "if any". On the issue of costs it was the Judge's discretion and this Court can only interfere with the concurrent findings of the two courts below only if there is a failure of justice.

[10] This is a second appeal which must only turn on points of law. In the case of ***STEPHEN MURINGI & ANOTHER V R (1982-88) 1 KAR 360***, **Chesoni, Ag JA.** (*as he then was*) posited as follows on page 366:

> ***"We would agree with the view expressed in the English case of*** *MARTIN V GLYWED DISTRIBUTERS LTD T/A MBS FASTENING) 1983 ICR 511* ***that where a right of appeal is confined to questions of law only, an appellate court has loyally to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed***

findings of fact and law, and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

[11] Bringing the above principles to bear in this appeal, the contended issue(s) is whether the appellant proved her case to the required standard especially the claim for damages for unlawful eviction; restoration of the goods illegally taken by the respondent and costs of litigation. The two courts below were not entirely concurrent in their findings except on the issue of costs, that the appellant was properly distrained for rent which she had not paid and that the rent payable was Ksh.7500. Where there was no concurrent finding is in regard to the joinder of the landlady and award for damages for illegal eviction. In other words, the trial magistrate found the suit incompetent for non-joinder of the land lady while the Judge found the land lady was vicariously liable for the actions taken by the respondent as his agent. It was on that basis he made the order of payment of Ksh.40,000 as damages which has now been challenged as being too low.

[12] We have to caution ourselves that an award of damages is an exercise in discretion of the trial court to which an appellate court should pay homage.

In ***KENYA BUS SERVICES & ANOTHER V FREDERICK MAYENDE [1991] 2 KAR 232*** this Court held that:-

"The principles on which an appellate court will interfere with the trial judge's assessment of damages are well settled in the Court of Appeal. The Court will only interfere where an error of principle by the trial judge is shown, or where the damages awarded are so high or so low that they must be wholly erroneous estimate and an error of principle must be inferred."

Similarly in ***HENRY HIDAYA ILANGA V MANYEMA MANYOKA [1961] EA 713***, the predecessor of this Court applied the rule laid down by the ***PRIVY COUNCIL*** in ***NANCE V BRITISH COLUMBIA ELECTRIC RAILWAY CO LTD*** **(4), (1951) AC** at page 613 when discussing the perimeters to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge. It observed that:-

"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at the first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the Judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

[13] Did the Judge err in assessing damages of Ksh.40,000 while relying on a consent order that had been set aside? We have considered the amended plaint that was amended on 3rd September, 2011 which is the principle pleading that must have guided the Court. The appellant did not indicate the value of the goods and items that she alleged were carted away from the house. The items listed under paragraph 28 of the said pleading include some form of machinery, cash at hand and some household goods. On this issue both courts were in agreement that the appellant did not adduce evidence in terms of purchase receipts to prove the claim of general damages. In the absence of this evidence we find that the Judge based his assessment of Ksh.40,000 drawing some comparison from the consent order that parties had entered into as the appellant was leaving the premises. We do not think that assessment is perverse as the appellant bore the burden of proof and the Judge relied on the evidence on record to arrive at what he thought was a reasonable award in the circumstances of the matter as the appellant still owed the land lady rent arrears, some goods were lawfully proclaimed due to her own default and he reasoned that a compensation that was equivalent of 5 months' rent was reasonable. We have no reason to impose our own assessment as we find no justifiable reason to do so. The Judge also ordered the goods that the appellant alleged were carted by the respondent "if any" be returned to her. One should not lose sight that these are the goods the appellant claimed were put in a store and not the ones proclaimed by the auctioneers.

[14] The record shows the Judge analysed the evidence in respect of all the issues that were raised and stated his own conclusions in each of them. Likewise, he did not award costs. Although no reasons were given for not awarding costs for the partial success we do not think we should interfere with the Judge's discretion in this regard while bearing the circumstances of the dispute at hand.

[15] For the aforesaid reasons we find no merit in this appeal, we are also inclined not to award costs as we do not wish to set these parties who were an agent of the land lady and the tenant respectively against each other. The appeal is dismissed and each party to bear their own costs.

Dated and delivered at Mombasa this 12th day of July, 2018

ALNASHIR VISRAM

……..…

JUDGE OF APPEAL

WANJIRU KARANJA

…….……

JUDGE OF APPEAL

M. K. KOOME

…….……...

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR