



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.)

CIVIL APPEAL NO. 265 OF 2011

BETWEEN

PATRICK OGOLA MISIKO APPELLANT

AND

BENEAH CHEMELENI NYAPOLA RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (I. Lenaola, J.) dated 17th February, 2011

in

KAKAMEGA HCCA. NO. 37 OF 2008)

JUDGMENT OF THE COURT

1. The appellant, Patrick Ogola Misiko, is aggrieved by the Judgment of the High Court at Kakamega (I. Lenaola, J) delivered on 17th February, 2011 by which that court allowed the respondent's appeal against the Judgment of the Magistrate's Court at Mumias delivered on 22nd April 2008 dismissing the respondent's claim against the appellant for arrears of rent of Kshs. 247,000.00. The High Court substituted the order by the Magistrate's court dismissing the respondent's claim with an order awarding the respondent Kshs.221,000.00 on the basis of a contentious acknowledgment of debt allegedly executed by the appellant.

Background

2. In March 2005, the respondent commenced suit against the appellant in the Magistrate's court at Mumias claiming Kshs. 247,000.00 as arrears of rent. The respondent asserted that he had let commercial premises situated on E. Wanga/Eluche/1139 to the appellant at a monthly rent of Kshs. 13,000.00; that the appellant vacated the premises in February 2005 with arrears of rent amounting to Kshs. 247,000.00; and that on 13th December 2004, the appellant undertook to defray the arrears but had failed to do so.

3. In his defence, the appellant admitted having been the respondent's tenant at the premises. He however denied that he was indebted to the respondent for the arrears of rent claimed or, that he had undertaken to pay any amount. The appellant contended that he had in fact paid all rent due to the respondent prior to

vacating his premises.

4. In an application by Chamber Summons dated 15th November 2005, presented to the court under the provisions of the then Order VI Rule 13 of Civil Procedure Rules, the respondent applied to have the appellant's statement of defence struck out on the grounds, among others, that it did not disclose any reasonable defence. As an alternative prayer, the respondent sought an order to compel the appellant "to surrender all receipts [with respect to rent paid] he alleges to have been issued by the plaintiff" to the "D.C.I.O Butere Police Station for scrutiny" pending which he sought an order for stay of the suit to await the outcome of investigations. The alternative prayer was based on the ground that when the suit came up for hearing, the appellant came up with some receipts, which he alleged had been issued by the respondent in relation to the period for which the respondent was contending rent was not paid. In effect, the respondent was seeking an order to establish the authenticity of the receipts upon which the appellant was relying as evidence of having paid rent for the months that the respondent was claiming arrears of rent.

5. The appellant opposed that application. In his replying affidavit filed in opposition to the application, he maintained that his defence raised triable issues for determination upon a hearing. He opposed the respondent's prayer for the order to compel him to produce "*forged receipts*" saying that the effect of surrendering the receipts to the police would deprive him of his ability to establish his defence and further that the respondent was "*trying to criminalise this matter, which is purely civil*".

6. After hearing the rival arguments with respect to that application, the learned Magistrate P. K. Sultani delivered a ruling on 22nd December 2005 allowing the alternative prayer having taken the view that "*there is a genuine concern that the documents sought to be produced herein may be forgeries.*" The court ordered the applicant to surrender the documents within 7 days to the CID for scrutiny 'before this case is heard.'

7. Corporal Alex Ndombi of Mumias Police Station who subsequently testified before the court on behalf of the respondent stated that having received the documents in question, he forwarded them to a document examiner who made a report that was produced before the court concluding that the documents were forgeries.

8. That said, the respondent's evidence was that, having let his premises to the appellant in October 2003 at a monthly rent of Kshs.13, 000.00 where the appellant was running a hospital, the appellant stopped paying rent pleading financial difficulties and "*saying he was paying workers and buying drugs*"; that in December 2004, they went to an advocates office where the appellant signed an acknowledgment on 17th December 2004 agreeing to pay Kshs. 221,000.00 that was outstanding at the time and that the appellant had eventually vacated the premises in February 2005. The acknowledgment document was produced as an exhibit.

9. Charles Okumu Wanusu, testified for the respondent and stated that he knew both parties; that he was present at the advocates office on 17th December 2004 where he witnessed both parties sign the acknowledgment bearing the date 13th December 2004.

10. The defence hearing was conducted before E. K. Makori SRM as P. K. Sultani before whom the hearing commenced was no longer at the station. The appellant denied the debt and maintained he did not default in rent payments; that he did not sign the acknowledgment of debt relied upon by the respondent; and that the national identification card number indicated on the acknowledgment was not his.

11. The trial court was not satisfied that the respondent had established his claim on a balance of probabilities. In his judgment dismissing the respondent's claim, E. K. Makori SRM had this to say in relation to the acknowledgment of debt:

"Lastly on the issue of the acknowledged debt. Defendant has also denied the same as alluded to above. It's not clear whether this was also another 'forged' document perhaps the service of M/S

Kenga could have also been required to ascertain whether the defendant signed or not because the signature deposited there is not his when compared to the one he signed in the tenancy agreement and that in his ID card was the document manufactured in furtherance of or in counter of the alleged fake receipts? Why was Akwala not called or why was the same signed for him. Why was Bakhoya not called if he was for the defendant?"

12. Aggrieved by that decision, the respondent appealed to the High Court complaining that the trial magistrate's decision was against the weight of the evidence; that the court did not analyze the evidence; and that the court erred in dismissing the respondent's claim.

13. The High Court, in the impugned judgment delivered on 17th February 2011, set aside the judgment of the trial court taking the view that the respondent's "case was solid" and that there was no basis for the trial court to fault the debt acknowledgment dated 13th December 2004 as "it was signed by the respondent and the appellant and their witnesses included one Charles Okumu Walufu who the respondent admitted was his employee."

The appeal and submissions by counsel

14. Although the appellant set out six grounds of appeal in his memorandum of appeal, during the hearing of the appeal before us, Mr. Luchivya Marisio, learned counsel for the appellant, contended that the learned Judge erred in relying on the acknowledgment of debt as the basis for holding that the appellant was indebted to the respondent. According to counsel, it was not proved, as required under Section 70 of the Evidence Act, that the respondent signed the debt acknowledgment. Counsel maintained that the signature said to be that of the appellant on the debt acknowledgment differed from that on the rental agreement; that under Section 76 of the Evidence Act the learned trial magistrate correctly compared the signature on the debt acknowledgment purporting to be that of the respondent in the rental agreement and correctly concluded that the two signatures were at variance; and that the national identity card number indicated on the debt acknowledgment was different from that of the appellant. Counsel urged that the respondent failed to discharge his burden of proof to establish that the appellant signed the agreement.

15. Opposing the appeal, learned counsel for the respondent Mr. Musa Nandwa submitted that when the debt acknowledgment was produced as an exhibit before the trial court, there was no objection by the appellant to its production; that the learned Judge properly relied upon the debt acknowledgement; that it was executed before an advocate. Regarding the contention that the signature of the appellant on the rental agreement and the signature purporting to be that of the appellant on the debt acknowledgment did not tally, counsel argued that a little disparity between signatures of a person is normal and the court cannot act as a handwriting expert to conclude, as the trial court did, that the signature on the debt acknowledgment was not that of the appellant.

Determination

16. The only question for determination in this appeal is whether the learned Judge erred in relying on the debt acknowledgment as establishing the appellant's indebtedness to the respondent to the extent of Kshs.221,000.00 and by entering judgment for the respondent for that amount.

17. There is no contest that the respondent let his premises to the appellant at a monthly rent of Kshs. 13,000.00. The respondent produced the rental agreement between the parties as an exhibit before the trial court. According to the respondent the appellant paid rent until June 2003 and in July 2003 "he said business was bad" and thereafter he kept promising to pay; that in December 2004, they went "to Bakhoya Advocate for advice before signing" the debt acknowledgment on 17th December 2004. The respondent produced the debt acknowledgment as exhibit 4.

18. As correctly observed by counsel for the respondent, the record shows that the appellant did not object to the production the debt acknowledgment as an exhibit. According to the respondent the parties "had an agent acknowledgment" when they signed the document on 17th December 2004. The cross examination of the respondent was directed at pointing out that there was disparity between the amount

claimed in the plaint and the amount set out in the debt acknowledgment and the disparity in the identity card number.

19. Charles Okumu Wafulu, who testified for the respondent stated, “*I was Patrick’s witness*” and that he was present and witnessed the appellant sign the debt acknowledgment on 17th December, 2004; that they each gave their identity card numbers and that “*Patrick could have messed it up.*”

20. In his evidence, the appellant maintained, “*I never signed this agreement*” and pointed out that the identity card number in the agreement was 5687543 while the number in his identity card is 5687583.

21. We have ourselves examined the “*debt acknowledgement*”. It clear that it was crafted in such a way that each party had their own attesting witnesses. On the part of the landlord it was witnessed by Dickson Shiundu Shikuku and Joseph Lubale Mukonyi and on the part of the tenant it was witnessed by Charles M. Okumu Walufu. The latter who attested the appellant’s signature was called as a witness and testified that he was present when the appellant signed it. Although the acknowledgment also bears the rubber stamp of Akwala & Co Advocates, we think the testimony of Charles Okumu as the attesting witness who was present, and saw the appellant sign was sufficient to establish, on a balance of probabilities, that the appellant did in fact execute it. The evidence of Charles Okumu was not shaken on cross examination and there was no basis for the learned trial magistrate to surmise, as he did that “*it is not clear whether this was also another ‘forged’ document.*” There was no material before the magistrate to support that supposition. We are satisfied that the document was proved and the evidence of the one attesting witness was sufficient to do so.

22. We hold that the learned Judge of the High Court was right in concluding that the trial magistrate erred in faulting the debt acknowledgment when “*it was signed by the respondent and the appellant and their witnesses*”

23. The appeal has no merits and it is dismissed with costs to the respondent.

Dated and delivered at Kisumu

This 17th day of November 2015.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR