



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 185 OF 2011

BETWEEN

ERIC ADOME.....1ST APPELLANT

DAVID ADOME.....2ND APPELLANT

AND

PAULINE KASUMBA OSEBE.....1ST RESPONDENT

JOYCE MARIACHANA.....2ND RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Busia (Onyancha, J.)

dated 13th June, 2011

in

H.C.C.A. NO. 29 OF 2006)

JUDGMENT OF THE COURT

The first appellant in this appeal **Erick Adome** is the owner of plot No. 135 within Busia Municipality, vide lease agreement dated 31st July, 1997, signed by him on the one hand as the Lessor, and the second respondent herein **Joyce Mariachana** on the other hand as the Lessee. He leased the same premises to the same Joyce Mariachana on terms spelt out in that agreement. As there is no dispute upon the same terms, we find it unnecessary to cite the same terms in this judgment. Joyce got the first respondent in this appeal, **Pauline Kasumba Osebe** who was referred to in the proceedings, as her sister to carry out the business in the same premises. Joyce described her as her agent in the same business although the first appellant felt Joyce had illegally assigned business to her. The facts as found by the trial court and which have not been challenged were that she was an agent of Joyce and Joyce remained the tenant of **Erick**. On 20th October, 2003, Erick broke into the subject premises in the absence of both Joyce and Pauline; removed all the stock goods in the premises and kept them away from the premises thereby technically evicting Joyce from the same premises. He at first alleged that he did so because Joyce failed to meet her rent obligations, but later during the hearing of the case and indeed even before the hearing, he accepted that there was no rent arrears and that indeed rent due was not only paid upto end of October, 2003, but paid upto November, 2003, and thus was overpaid.

Apart from taking other remedial actions such as reporting the matter to the police, the second respondent and first respondent moved to the Senior Resident Magistrate's Court at Busia, filed Civil Case No. 303 of 2004 against the first appellant and second appellant **David Adome** who though not originally involved in the matter, was later party to the breaking into the subject premises and did sign two documents one of which was an “*apology for Breaking through Maryachana Joyce (our tenant's) shop*” and another headed Memorandum of Understanding, both dated 23rd November, 2003, the latter in which he described himself as landlord. In that Civil Suit, the respondents prayed for judgment against the appellants jointly and severally for:

- “(a) Ksh.211,440 and other special damages.
- (b) General damages.
- (c) Costs of this suit.
- (d) Interest.
- (e) Any other or further relief this Court deem (sic) fit and just to grant.”

That suit was vehemently resisted vide joint written Defence Statement and Counter-claim. In the statement of Defence, the appellants sought its dismissal and in the counter-claim it sought Ksh.30,000/= being unpaid rent for ten months at the rate of Ksh.3,000/= per month together with Ksh.20,000/= being the amount incurred for repairing the premises after break-in and taking over the premises.

After one preliminary matter was heard and disposed of, the main suit was set down for hearing before E.H. Keago, the learned Resident Magistrate. The two respondents gave evidence and the two appellants also gave evidence with the second appellant preferring to adopt and support the evidence given by the first appellant. He nonetheless was cross-examined by the learned counsel for the respondents. Submissions were also made by both learned counsel for both parties respectively. In a judgment dated and delivered on 31st August 2006, the learned Resident Magistrate found that the first respondent, Pauline Kasumba Osebe lacked the *locus standi* to pursue any claim against the appellants as she was an employee/agent of the second respondent Joyce Mariachana and remained as such. He struck her name from the pleadings for being non-suited much as she remained a competent witness. The learned Resident Magistrate further disallowed the respondents' claim for ksh.169,940/= allegedly taken from the subject premises at the time the premises were broken into. He however found that the second respondent's claim for Ksh.35,000/= being the value of stock removed from the premises and the extra rent over paid were justified and he granted them. He also ordered return of the shelves and counter which were removed by the appellants from the premises when they broke into the same premises. He rejected the counter-claim made by the appellants. In the end, the learned Resident Magistrate rendered the following orders:

“I finally come to the conclusion that the plaintiff has substantially proved her case and I will make the following orders:-

- (i) The Plaintiff is awarded Ksh.41,500/= being the value of stock in trade and weighing machine.***
- (ii) Ksh.4,500/= being rent spent from 20th October 2003 till 31st November 2003 (sic).***
- (iii) Order the physical return of the shelves and counter to the custody of the defendants within 7 days from the date of this judgment.***
- (iv) Costs of the suit.***

The judgment in favour of the remaining plaintiff against the defendants jointly and severally as the 2nd defendant was party to the alleged acts committed and he himself bound himself by signing Ex 2.”

On the issue of general damages sought by the respondent, the learned Resident Magistrate's response was:

“The plaintiff further sought general damages but there was no clear evidence to the effect of costs but there was evidence that at the time when the shop was being broken into rents had been paid upto 31.11.03. However the plaintiff did not have the proposal or the amount. I will however order amount of the rents unused form (sic) 20th October 2013.”

The second respondent felt aggrieved by the learned Magistrate's decision on general damages. She appealed to the High Court against it. We make haste to add that the first respondent Pauline did not appeal to the High Court against the decision to strike her name from the pleadings, neither did she appeal against the refusal of the learned Magistrate to award Ksh.169,940/= which according to her, was brought to her in the shop for business by her elder daughter, but which money, according to Joyce was from cash sales. The appeal by the second appellant to the High Court - Civil Appeal No. 29 of 2006, was premised on a single ground of appeal in the Memorandum of Appeal dated 28th September 2006 and that ground was:

“That the learned trial Magistrate erred in law and in fact in failing to award the appellant general damages on ground that the appellant did not propose the award payable.”

When that appeal came up for hearing, the record shows that both the learned counsel for the appellant and for the respondent confined their arguments to that issue alone and in our view they each argued their respective points on that issue admirably. However, in the judgment dated and delivered by the learned Judge (*D.A. Onyancha, J.*) on 13th June, 2011, the learned Judge clearly dealt with matters most of which were not raised in the Memorandum of Appeal and in our view, were not canvassed before him. He ended his judgment thus:

“The summary of this Court's findings is therefore as follows:-

(a) The lower Court had jurisdiction.

(b) The evidence on the record by 1st Appellant was sufficient to prove and indeed proved that the appellants jointly and severally, vicariously or directly and respectively, were liable to refund to the 1st plaintiff/Applicant the sum of Ksh.169,940/= lost by the 1st Appellant during the break-in.

(c) The respondents are liable to pay the 1st Appellant a sum of Ksh.46,000/= ordered by the lower court being the value of stock in trade, weighing machine and refund of un-utilised rent, if not paid.

(d) The Respondents are to return plaintiffs' shelves, if not done.

(e) Parties to submit evidence and legal authorities on general damages awardable.

It is so ordered.”

It is thus not surprising that the appellants herein who were the respondents in that appeal moved to this Court as they did vide this appeal in a Memorandum of Appeal dated 11th August 2011 in which they cited three grounds namely:-

“1. That the learned Judge erred in law and in fact in enjoining the 1st Respondent to the Appeal before himself when clearly there was no appeal or evidence adduced at the Superior Court to warrant such enjoinder.

2. That the learned Judge erred in law and in fact in awarding the Respondent a special award when there was no strict proof as required by law.

3. *That the learned Judge of the Superior Court erred in law and in fact by delivering a judgment which was contrary to the weight of the evidence before him and the law.*”

At the hearing of this appeal, Mr. Onsongo, the learned counsel for the respondents conceded the appeal on the first ground and that being so, only the second and third grounds remained available for submissions by both counsel. Mr. Ipapu in his address to the Court submitted that the learned Judge erred in law in awarding both Ksh.169,940/=, and Ksh.46,000/= both of which were special damages whereas the two were not specifically pleaded and strictly proved as is required in law. He added that part of that award, was awarded to a party who had not preferred an appeal and was therefore not an appellant in that court. He urged us to allow the appeal.

Mr. Onsongo, the learned counsel for the respondents, while conceding first ground of appeal, as there was indeed only one appellant, submitted nonetheless that as to the second and third grounds, the learned Judge could not be faulted as the appellants broke into the subject premises, took away Ksh.169,140/= and as to the award of Ksh.46,000/=, Mr. Onsongo's view was that the learned Judge was only confirming the award made by the trial court but was not in any way making any new award. Thus according to Mr. Onsongo, paragraphs (c) and (d) of the final part of the judgment were mainly confirmation of the amounts awarded by the trial court and thus should not attract any complaints. He conceded that as the first respondent did not appeal in the High Court, the learned judge made a mistake in respect of the award of Ksh.46,000/= which was awarded to the first respondent and accepted that no application was made to the learned Judge under “slip” rule to correct that mistake. He urged us to reject the appeal.

We have anxiously considered this appeal which in our view raises serious concerns. First it is clear to us, with respect to the learned Judge that he misdirected his mind as to who filed the appeal he was deliberating upon. It is apparent that he all along treated the appeal before him as having been filed by Pauline Kasumba Osebe, the first respondent and Joyce Mariachana the second respondent, whereas that was not so. In our minds, that misapprehension ran throughout the judgment being challenged and must have seriously clouded the mind of the learned Judge. We do not agree that the mistake was confined to findings (c) and (d) only which could have been corrected under the “slip rule”; it went throughout the entire judgment. For example, at paragraph 2 of the judgment, the learned Judge states:

“The appellants were tenants of the respondents,”

and throughout the judgment the learned Judge referred to “appellants” whereas only one appellant was before him and not two appellants. As concerns the award of Ksh.169,940/= the learned Judge treated it as property of the first respondent whom he referred to as 1st Appellant. Hear him at the last paragraph of page 3 of his judgment:

“The pleadings and the evidence from the 1st plaintiff/appellant, clearly showed that she controlled possession of the shop as an agent. This did not disentitle her from keeping personal items in the shop as a human being. Evidence showed that she had received a sum of Ksh.169,940/= from her elder daughter with a view and purpose of using it to buy stock for business. She had proceeded to keep the money in the shop and found it had disappeared after the defendants broke into the shop and took away the stock in trade.

.....

In my opinion and finding the 1st Appellant was entitled to join the 2nd Appellant in claiming at least her Ksh.169,940/= which she had kept in the shop and which she believed the 1st defendant or his agents took during the break in.”

This part of the learned Judge's judgment demonstrates beyond any doubt that all the time he treated the first respondent as another appellant before him. This was not proper but as we have stated that aspect shows that the judgment could not have been written as should have been with only one appellant in mind. In our view this error was serious enough to necessitate the appeal being allowed.

The other aspect that we find disturbing is that whereas the appeal that was before the learned Judge

raised only one point which was that the trial Magistrate erred in refusing to award any money in respect of general damages on ground that the second respondent did not propose the amount and whereas as we have stated the record shows that both counsel before the learned Judge confined themselves to that one point alone, the learned Judge clearly considered other matters that were never canvassed in the appeal nor raised in the Memorandum of Appeal that was before the Court. The learned Resident Magistrate in his judgment rejected the claim for Ksh.169,940/= and in so doing stated as follows:

“PW1 and PW2 contradicted each other as to the source of Ksh.169,940. There was no evidence from the balance (sic) to show that indeed the plaintiff had such money or they at leased (sic) used to deposit such exhibit. Hence the above exhibits have not been proved hence the claim of Ksh.169,940/= is disallowed.”

The plaint shows that the claim was set out as special damages and thus was not being sought as general damages in respect of which the second respondent had appealed in the High Court. Neither the first respondent nor the second respondent challenged that decision refusing to award that amount of Ksh.169,940. Yet the learned Judge considered that claim at length and eventually awarded it to the first appellant, a person who was never a party in the appeal before the learned Judge. Again, the issue as to whether the trial court had jurisdiction to hear the matter was never raised on appeal before the learned Judge and we are at a loss as to what prompted the learned Judge's verdict on it. It might have been raised in the statement of defence, but clearly when the Resident Magistrate framed the issues after setting out the facts of the case, that issue of jurisdiction was never one of the issues before him and indeed was never one of the complaints before the learned Judge. Again in our view this aspect, that the learned Judge considered matters not in the Memorandum of Appeal and not canvassed before him would be enough reason for allowing the appeal and certainly the award of Ksh.169,940/= which was never an issue before him and which was awarded to a wrong person. It is also clear that the award of Ksh.46,000/= to “*first appellant*” was in the same vain wrongly made.

We now proceed to consider the complaint that was before the learned Judge which was that the learned Resident Magistrate erred in law and in fact in failing to award the appellants general damages on ground that the appellant did not propose the amount payable. The learned Judge agreed with the learned Resident Magistrate that the second respondent was entitled to such general damages but rejected the Resident Magistrate's refusal to have such damages awarded in terms of money. He felt that such damages should have been awarded in the circumstances of this case, but felt that although he could have assessed and awarded a figure as he had jurisdiction to do so, he ended up ordering the parties to submit evidence and legal authorities on general damages available.

We have considered the learned Judge's views on this aspect. In this case, the facts that were before the trial court and which were pleaded were in brief that the first appellant leased the subject premises to the second respondent for purposes of business. The second respondent honoured her part of that lease and faithfully paid rent and even went above what was required.

The first appellant alleged that the second respondent had closed the premises for a period of ten (10) months and thus was not doing business in the premises, but that was rebutted when Pauline who was declared a competent witness by the trial court and who was the agent of the second respondent stated in cross-examination that she only closed the the shops temporarily to see her husband at the hospital and was returning to the shop to open it regularly. In any case that the second respondent kept on paying rent and that some stock, however few were found in the premises and taken away by the appellants was evidence that the premises broken into by the respondents and thereafter closed with their padlock was being used for business the purpose for which it was hired. That business was abruptly stopped and hence general damages was properly claimed. What was difficult in the entire matter was the basis for assessing the quantum of that general damages and we think that is what the trial court meant when it said that the second respondent did not adduce “*clear evidence to the effect of costs* However the plaintiff did not have the proposal or the amount,” - sentiments that are difficult to appreciate. We too agree, like the learned Judge did agree that the second respondent was entitled to award of general damages. In the English case ***Koufos v. C. Czarnikow, Ltd, (1967) 3 All E.R. 686***, it was stated as follows on the principles that guide the court when considering whether or not to award general damages in cases of

breaches of contract:

“The general principle on which damages are assessed for breach of contract is succinctly stated by Parke, B., in *Robinson v. Herman* (158):

“Where a party sustains a loss by reason of a breach of contract, he is so far as money can do it, to be placed in same situation with respect to damages as if the contract had been performed.”

In this case, the wrong done was eviction of a tenant against the contractual obligation agreed by the parties. In such a situation, the second respondent who pleaded at paragraph 5 of her plaint that she claimed special damages of Ksh.211,440/=,

“together with general damages for loss of business, inconveniences, and loss of employment,”

had the obligation to demonstrate approximate proceeds that she was getting from the business and what inconvenience she suffered, for example she needed to show for purposes of assessing the general damages, whether she was making any profits from the business and what efforts she made to secure any other business or means of income. In short, she had to show her situation before and after the incident and thus the effect of the incident upon her business to enable court properly assess the general damages suffered. Perhaps that is what the learned Magistrate meant when he said the plaintiff did not have the proposal or the amount. In our view, that the second respondent suffered general damages is clear. Any person whose shop is without notice and for no legal reason suddenly closed down and refused access to the same clearly suffers loss. The learned Judge ordered the parties to submit evidence and legal authorities on such general damages for the High Court to assess the general damages. We do not understand the legal basis for that order which was clearly opening fresh hearing on that aspect of general damages. In our view the parties had presented their evidence at the trial and the learned Judge should have acted on the same. If it found it inadequate, then it should have taken appropriate action on that inadequate evidence. We think it was not in law appropriate to hold fresh hearing on an issue that was already available for the parties at the hearing in the subordinate court simply because the parties did not avail themselves that opportunity.

We have considered the entire complaint. In our view, as the second respondent did not put before the trial court proper evidence to enable the court assess the proper quantum for general damages, all she was entitled to was minimum amount in respect of that claim. In our view, and in considering the entire case, we think an amount of Kshs.2,000/= (Two thousand) would be appropriate in the circumstances of the case and we so award the same.

In conclusion, this appeal is allowed to the extent that orders (a), (b), (c) and (d) of the High Court are set aside whereas order (e) is substituted with an order that Ksh.2,000/= be paid to the second respondent as general damages. For clarity Orders (i), (ii) and (iii) of the learned Resident Magistrate are hereby restored save that the order dismissing claim for general damages set aside as indicated herein. The appellants to have half the costs of this appeal and half the costs in the High Court.

Dated and Delivered at Kisumu this 18th day of July, 2014.

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

Sole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR