REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 158 of 2004

SOUTH C FRUIT SHOP LIMITED.....APPELLANT

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi

(Rawal, J) dated 4th June, 2002

in

HCCC. No.3490 of 1989)

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JUDGMENT OF THE COURT

South C Fruit Shop Limited, (the appellant herein) was in occupation of premises situate on L.R. No. 209/5877, which at the time was registered to Irene Waithira Wamae. The property had been charged to Housing Finance Company of Kenya Ltd, (the respondent herein), who brought suit, in 1983, against the registered owner and obtained a decree for vacant possession as a result of her default in payment.

In 1984, Irene Wamae let the premises to the appellant for a period of 2 ½ years. The appellant occupied the premises and was running the business of a fruit shop therein. On 15th December 1985, the appellant was evicted from the premises during which eviction, it claims, some of its goods (being stock in trade, furniture and fittings) were destroyed. The appellant therefore filed suit in the superior court for loss and damages, alleging inter alia that the respondent unlawfully terminated the tenancy and carried out an illegal eviction.

On the 4th of June 2006, the High Court at Nairobi (Rawal, J) dismissed the suit. The court made a finding that the claim was based on tort, and was therefore time barred under Section 4 of the Limitation of Actions Act.

The appellant then filed this appeal, laying several grounds in the memorandum of appeal, namely:

a) ***That the learned trial judge erred in law in holding that the Appellant was claiming damages in tort as the claim arose in contract arising from a relationship of landlord and tenant, and whereby the Appellant was unlawfully evicted despite its contract of tenancy being protected under the Landlord & Tenant (Hotels, Catering Establishments) Act (Cap. 301);***

b) ***The learned trial judge further erred in law in failing to appreciate and thus misdirected herself that arising from a privity of contract between the Appellant and Irene Waithira Wamae, the Respondent therefore stepped into the shoes of the of the said Irene resulting in a privity of estate between the Appellant and the Respondent in relation to the shop so occupied by the Appellant;***

c) ***The learned judge also failed to appreciate that the Appellant's claim was for a breach of a condition of it's tenancy which is governed by the aforesaid Act and that hence the claim was for breach of contract as indeed stated clearly in paragraphs 3, 4 and 7 of the Amended Plaint;***

d) ***The learned trial judge further misdirected herself in failing to appreciate that in any event the eviction of the Appellant by the Respondent was unlawful in that the tenancy was controlled by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and therefore any order for eviction was unlawful and also contrary to the provisions of section 90 of the Penal Code;***

e) ***The learned trial judge ought to have appreciated that for an order in favour for the Respondent (chargee) against the mortgagor does not and cannot effect the rights of a sitting tenant and therefore such eviction was unlawful.***

The appellant prays for orders that:

a) ***Its appeal be allowed with costs and also the costs in the superior court;***

b) ***The suit be remitted back to the superior court for assessment of damages;***

c) ***The order of dismissal of the suit be set aside.***

Counsel appeared before us on 14th February 2013. Mr. Hira, for the appellant, urged us to first determine that the appellant was a tenant. He submitted that at the time of the unlawful eviction, the appellant was in occupation of the suit premises. He submitted that at the relevant time, the suit property was occupied by the appellant. The terms of the tenancy, he said, which are outlined in a letter from Tahir Malik, advocate (which is contained at page 76 of the record of appeal) were that of a controlled tenancy under the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act. The tenancy was for a period of less than five years, and was therefore a controlled tenancy within the meaning of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act.

Counsel further submitted that it was the duty of the Respondent to inform the tenant in occupation by way of a notice as prescribed in the Act. The respondent however only acted under the provisions of the Mortgages (Special Provisions) Act, Cap 304 of the Laws of Kenya. The appellant contends that it was given no notice before the eviction, and that the decree against the borrower/landlady was never registered against the title.

Counsel urged that the claim was not based on tort, but rather on a contractual relationship. As a result, the issue of limitation could therefore not arise. Similarly, the decree obtained by the respondent was never brought to the attention of the tenant.

In opposition, the respondent, through Mr. Muriithi, submitted to us that the claim is statutorily barred since the claim was based on tort and not contract. The respondent had obtained an order for vacant possession requiring the defendant (Irene) to deliver vacant possession to the Plaintiff (Housing Finance) all that piece of land together with the buildings and improvements erected thereon on L.R. No

209/58577.

Counsel was of the view that there was no contract or tenancy between the appellant and the respondent, and that the appellant was not a proper tenant since it did not seek the approval of the respondent. He submitted that the only tenant who can rely on the provision of the law is a lawful tenant. He contended that the appellant was a tresspassor, hence notice was not necessary.

It was the finding of the superior court that the plaintiff (the appellant) had proved on a balance of probabilities that it was a tenant on the premises. It is common ground that at the time of the eviction, the appellant was in occupation of the premises and was running the business of a fruit shop. We are also satisfied that the appellant was a tenant of Irene Wamae.

Section 2 (1) of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act defines a "controlled tenancy" as a tenancy over a shop, hotel or catering establishment which:

(a) which has not been reduced into writing; or

(b) which has been reduced into writing and which -

(i) is for a period not exceeding five years; or

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or …

The terms of the tenancy agreement were contained in the letter from Tahir Malik dated 6th June 1984. At the outset, it states that the term of the lease was to be for a period of 2 years 6 months, commencing on 16th June 1984. Moreover, there was no lease per se; just a letter setting out the terms upon which the appellant was taking up the premises. This, coupled with the fact that the appellant was in possession of the premises up until 18th December 1985, the date of its eviction, are enough to satisfy us that the tenancy was a controlled tenancy, and therefore termination of the tenancy could only be done under the provisions of the Act.

What then is the effect of the provision in section 5 of Cap 304 and does it override the provisions of Cap 301?

The Mortgage (Special Provisions) Act (Cap 304) at section 5 provides for decrees of possession as follows:

5. Decree for possession

(1) At any time after the expiration of twenty-one days after the summons has been served on the defendant, the company may apply to the Court for a decree for possession of the mortgaged property, and on such application the Court shall read the affidavits filed and shall pass a decree for possession accordingly, unless it is satisfied on such reading that the specified conditions do not exist, or that there is reasonable doubt whether they exist, in which case the Court shall grant leave to defend, either unconditionally or on such terms as to giving security or time of trial or otherwise as the Court may think fit.

(2) Notice of the application shall be given in writing to the defendant if he filed an affidavit in response to the summons.

(3) A decree for possession passed under subsection (1) of this section shall have the effect of conferring on the company the sole right to possession of the mortgaged property, and, upon its being registered under the law under which the title to the property is registered, it shall have the effect of determining every lease, tenancy agreement and licence to occupy, whether registered or not, which is then subsisting in respect of the property (other than the lease (if any) under which the property is held

by the mortgagor):

Provided that this subsection shall not apply where the lease, tenancy agreement or licence to occupy is between the person in debt and an approved tenant.

Our interpretation of section 5 of the Mortgage (Special Provisions) Act is that the effect of a decree of possession, as was given to the Respondent, gives the right of sole possession to the decree holder. In addition, rights of the mortgagee will only crystallise upon the decree being registered against the title. This did not happen.

Section 5 (3) of the Mortgage (Special Provisions) Act sets out the rights that are conferred upon the decree holder. In particular, the company shall have the right to exclusive possession of the property in question, and the decree shall have the effect of determining every tenancy which subsists at the time. This right shall however accrue upon registration of the decree against the title of the property. In this case, the decree was never registered against the title, a fact that has not been contested by the Respondent. In our considered opinion, the rights of the mortgagee under the Mortgage (Special Provisions) Act, which would have included the right to determine any tenancy that was not approved, never accrued.

For the same reason, we find the respondent's argument that under section 7 of the Mortgage (Special Provisions) Act, the said Act applies irrespective of any other law is not tenable when the respondent had not complied with provisions of that Act.

It has been argued by the respondent that the appellant was a tresspassor and that it was not an approved tenant. It is common ground that the Respondent obtained its order for vacant possession on 11th February 1983. However, the eviction took place in 1985, after the tenant had already gotten into the premises.

The tenant was not a tresspassor and had rights known in law which were capable of protection. At the time of eviction, the tenant enjoyed rights which could not be brushed aside or eroded in the manner the Respondent did.

In any event, the decree of possession had been made against Irene Wamae, the registered owner, and not the appellant, who was actually in possession of the property. It is our considered view that bearing this in mind, and in the absence of registration of the decree against the title, it was incumbent upon the Respondent to inform the appellant of the existence of this decree, and afford it an opportunity to challenge it. In the absence of this, the Respondent took over the obligations of the owner with regard to the tenancy, and was bound to apply the provisions of the Landlord and Tenant (Shops, Hotels & Catering Establishment) Act in the termination of the tenancy.

In so far as the appellant was concerned, the respondent was a stranger with no capacity to enforce the relationship between the tenant and landlady. There was no notice given by the person who put the appellant into the premises. There is no evidence that the respondent had taken over the rights and liabilities of the legitimate owner of the premises. It was not possible for the appellant to know that its relationship with the former landlady was terminated or taken over by a new entity. If it was done, the parties had an obligation and/or responsibility to bring it to the attention of the appellant. That was not done, consequently we are entitled to conclude that the appellant had no knowledge or notice in the relationship between the respondent and the former owner of the premises. The law cannot and does not envisage a situation where a party takes over and/or inherits a right behind a third party who is interested in the relationship. In our view, where a right or liability affects a 3rd party, the relationship must be brought to the knowledge and/or attention of the said party. It would be an absurdity to say that a new landlord would enforce a statutory power without the knowledge of a tenant who is rightly and validly in possession of the suit premises. Such a situation is likely to result in grave and immeasurable injustice to 3rd parties. A court of law cannot condone and/or countenance such an illegality.

Under the Landlord and Tenant (Shops, Hotels & Catering Establishment) Act, a controlled tenancy can

only be determined by either of the parties in the manner stipulated by the Act. Section 4 of the Act provides:

4. (1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.

(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

This Act was passed to ensure the protection of tenants of premises from eviction or from other exploitation.

A controlled tenancy can only be terminated by issuing the notice prescribed under the Act. See the holdings of this court in ***Tiwi Beach Hotel Limited v Juliane Ulrike Stamm [1991] KLR 658; Munaver N. Alibhai t/a Diani Boutique v South Coast Fitness & Sports Centre Limited [1995] eKLR (Civil Appeal 203 of 1994)***.

It is apparent that the appellant had been informed, by word of mouth, that the Respondent intended to take over the premises. This of course did not amount to notice as is envisaged under Landlord and Tenant (Shops, Hotels & Catering Establishments) Act.

Even if the appellant was not an approved tenant as has been contended by the Respondent, we are still of the view that it ought to have been given appropriate notice before eviction.

In ***Caledonia Supermarket Ltd v Kenya National Examination Council [2000] 2 EA 351***, this court differently constituted considered a case on the termination of a controlled tenancy. In that case, the Kenya National Examination Council, who was the appellant, had acquired property upon which Caledonia Supermarket Ltd, the respondent, was carrying on the business of a supermarket. The tenancy held by the respondent was a controlled tenancy. The court held that in order to terminate a controlled tenancy, the appellant had to comply with section 4 of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act. The court also considered that even if the supermarket had lost its status as a protected tenant, then the Council was still obliged to give notice to the appellant. The court expressed itself as follows:

"… But even assuming for the sake of argument only that the appellant had lost its status of a protected tenant… then even in that situation the Council was obliged by law to issue a proper notice of termination in accordance with section 106 of the Law of Property Act of 1882."

We are of the considered view that this principle enunciated by the Court fully applies to the circumstances of the present appeal. The appellant was carrying out the business of a fruit shop, a fact that was well within the knowledge of the respondent. Even assuming that it was in doubt that the appellant was a protected tenant, the respondent still ought to have given appropriate notice to the appellant of its intention to take over the suit premises.

The next issue for consideration is what the cause of action was based upon, and whether it was limited in time. The action herein arose out of an illegal eviction. The claim is for damages and loss that occurred as a result of that illegal eviction.

We have stated that the appellant in this case was entitled to the benefits conferred upon him as a protected tenant. It was entitled to notice, but as a result of lack of notice, it is claimed that the appellant suffered loss and damage. It is our finding that the cause of action arose out of a breach of a tenancy agreement and hence a breach of contract. We therefore find and hold that the trial judge erred when she found that the claim was based on tort and dismissed the plaint.

The appellant sought damages for loss of stock in trade, furniture, fixtures and fittings, goodwill and loss of profit. It is trite law that to succeed in an award for damages, and in particular special damages, under which head these may fall, one must specifically plead and prove the same. (See ***Sande v Kenya Co-operative Creameries Ltd LLR No. 314 (CAK) (Case No. 154 of 1992 (Court of Appeal of Kenya); P.A. Okelo & M.M. Nsereko t/a Kaburu Okelo & Partners v Stella Karimi Kobia & 2 others [2012] eKLR; and Bank Of Baroda (Kenya) Limited v Timwood Products Ltd [2008] eKLR (Civil Appeal 132 of 2001))***

The basis of damages is to return the aggrieved party to the position it would have been in had the wrong complained of not occurred. The appellant led evidence that at the time of eviction, it had stock in trade of about Kshs 385,616.00. The appellant had been in business for a period of 1 ½ years, and still had another year left on the lease. This evidence was not controverted during cross-examination, save that it was acquiesced that during the eviction, its workers were able to salvage about Kshs 35,000.00 worth of stock. We find that the appellant proved loss of stock in trade at Kshs.385,616.00, and furniture and fittings at Kshs 64,100.00.

We have heard and considered the submission on whether or not to refer the matter back to the High Court for assessment of the amount of damages to be awarded to the appellant. We have considered all the relevant and pertinent factors i.e. the time taken since the matter was filed and determined against the need to ensure that matters are determined expeditiously and whether any purpose would be served in remitting the matter back for retrial, against the evidence by the appellant and defence by the respondent. Having taken into consideration all the relevant factors we are minded not to refer the matter to the High Court. In our view, the appellant's cause of action, evidence and the law are quite clear. We think no purpose would be served and that such a decision would result in substantial prejudice to the appellant and administration of justice.

After considering all the facts and the applicable law, we enter judgment for the appellant against the Respondent for the sum of Kshs 449,716.00 being stock in trade and furniture, fixing and fittings.

The appellant shall have costs and interest on this amount, as well as the costs in the High Court.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of MAY, 2013.

M. WARSAME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR