REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Civil Appeal 209 of 2009

ABUBAKAR A.H. MOHAMED …… APPELLANT

AND

AHMED MOHAMMED AL MOODY ……. 1ST RESPONDENT
JOHN WAMBUGU MACHARIA ……..…… 2ND RESPONDENT
MWARA INVESTMENT LTD. …….. 3RD RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Mombasa (Njagi, J) dated 22nd May, 2009

In

H.C.C.C. No. 551 of 1999)
****

JUDGMENT OF THE COURT

Abubakar A.H. Mohamed, the appellant herein, used to be a tenant of Ahmed Mohamed Al Moody, the 1st respondent herein, in premises known as Plot Number 1496 Malindi at a monthly rent of Kshs.3000/- According to the appellant, sometime in 1996, his then lawyer, Mr. J.A. Magolo, advised him not to pay rent to the 1st respondent; it is not necessary for us to relate the circumstances leading to that advice except to say that if the advice was in fact given by a lawyer, it was clearly an unfortunate one. According to the appellant, after the advice was given, he stopped paying rent and by 17th September, 1996, rent outstanding was K.shs.21,000/-. If the monthly rent was Kshs.3,000/- as the appellant said it was, then the appellant had not paid rent to the 1st respondent for some seven months. But from the record before us, it appears the 1st respondent was saying the rent outstanding from the appellant was Ksh.50,000/-.

So in order to recover the outstanding rent, on 17th September, 1996, the 1st respondent instructed John Wambugu Macharia, the 2nd respondent and Mwara Investments Ltd., the 3rd respondent, to levy distress on the appellant's goods in the premises. When the hearing of the appeal opened before us, we were told and there was sufficient material placed before us to show that John Wambugu Macharia had died on 26th July, 2009. The Court did direct the appellant to either have the appeal adjourned and have the deceased 2nd respondent substituted or choose to

proceed only against the remaining respondents. The appellant would not hear anything about the appeal being adjourned and the Court allowed him to proceed on the basis that the Court would not make any order affecting either the 2nd respondent or his estate. The 3rd respondent, though described as a limited company was clearly a business firm and the 2nd respondent must have been trading as Mwara Investments Ltd. One Esther Gathoni Gichimu is the one who now appears to be trading as Mwara Investment Ltd. We shall equally not make any separate order in respect of the 3rd respondent in the absence of the 2nd respondent. ***Section 14 (2)*** of the Auctioneers Act, **No 5** of **1996** provides that:-

> ***"14 (2). A licensed auctioneer shall carry on business in his own name or in the name of a firm all of whose partners are licensed auctioneers:-***
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> ***Provided that such licensed auctioneer or firm of auctioneers may employ a licensed auctioneer who shall nevertheless continue to be personally accountable to the Board."***

There is no provision in the Act for a limited liability company being licensed to carry out the business of an auctioneer. If the 3rd respondent was a limited liability company as was purported in the plaint, it is unlikely that the 3rd respondent would have been licensed. We are satisfied that the 2nd respondent or any other party involved with the 3rd respondent was merely trading in the firm name of the 3rd respondent. Accordingly we shall treat the appellant's appeal before us as being an appeal only against the 1st respondent, and the Court made that point abundantly clear to the appellant before he started to argue his appeal.

The appellant had alleged in his plaint that following the distress he took K.sh.21,000/- to the 2nd and 3rd respondents; he asked them to give him the costs of the distress. They rejected the K.sh.21,000/- and did not give him the costs either. His goods worth K.sh.1,500,000/- were sold and he was never given an account of how much money had been raised from the sale of his goods. It also appears that instead of locking up the goods in the shop where they were and giving the appellant fourteen days within which to pay the arrears of rent as provided in ***section 4*** of the Distress for Rent Act, **Cap 293** Laws of Kenya, the 2nd respondent straightaway carted away the goods and sold them at his premises.

On 1st April, 2009, the appellant gave evidence before Njagi, J. He was unrepresented. The appellant told the learned Judge:-

> ***"On 17/08/1996, 1st and 3rd Defendants broke into my shop in my absence. They took property worth more than K.sh.1,600,000/-. Among the items taken were TVs, videos, Radios, all electronics. Some of them were for sale and others for repair yet others for renting. I pray the court to order that my goods be returned to me, together with damages, and to compensate me for my psychological disease, which made me like a mad man.***
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> ***I want compensation since August, 1996 at the rate of Kshs.2000/- per day. That is all."***

He was then cross-examined on behalf of the 1st respondent. In cross examination, the appellant maintained:-

> ***"Yes, I said that 1st and 3rd Defendants broke into my house in my absence on 17/08/1996. It is not true that I withdrew the case against 3rd Defendant. It was Mr. Magolo who withdrew it. I said they took property worth Ksh.1,600,000/- i.e. Ksh.1,500,000 and Ksh.100,000/- cash. (COURT: Witness had not mentioned cash before).***
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> ***I reported to the police that the goods stated in paragraph 9 were taken away. But I do not have any police abstract to show that I reported.***
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> ***I did not pray for payment of Kshs.2000/- per day in the plaint. Before filing this case I had another case against Defendant. I am aware of CM Court case No. 4727/96, against the three defendants. I am the one who had filed that case immediately after the distress, asking for the same prayers as in this one. I filed this one on 8.12.1999."***

Surprisingly after the appellant had closed his case, Mr. Kariuki told the Judge as follows:-

> ***"On the part of the 1st Defendant we shall not call any evidence. I am ready to make my submissions."***

It was then submitted that the appellant had failed to make out any case against the 1st Defendant. It was submitted that while distress was levied on 17th August, 1996 and not 17th September, 1996 as claimed in the plaint, the said distress was levied by the 2nd and 3rd respondents, not by the 1st respondent. It was submitted that all the allegations were made against the 2nd and 3rd respondents and that with respect of the Ksh.100, 000/- it was the 2nd & 3rd respondents who should be responsible, not the 1st respondent. Nothing was said about the 2nd & 3rd respondents being agents of the 1st respondent and as a final shot, it was submitted that as the matter was based on tort, the suit ought to have been filed within three years from either 17th August, 1996 or 17th September, 1996. The suit having been filed in the High Court on 8th December, 1996, it was time barred. Nothing was said about the case filed in the Magistrate's court, namely Civil Case No. 4727 of 1996.

Njagi, J held, first that the appellant's suit was time barred and secondly that even on merit the appellant had not proved his claim. He had not proved what goods were distrained and how he had come by the sum of Kshs.1.6 million in the plaint and in his evidence. The learned Judge dismissed the appellant's case against the 1st respondent with costs. The appeal before us is brought against that decision.

On the issue that the appellant's suit was time-barred, we have looked at the pleadings of the parties, particularly the written statement of defence by the 1st respondent. Nowhere in that defence did the 1st respondent plead that the appellant's suit was time barred. The nearest the 1st respondent came to challenge the appellant's suit on legal points is paragraph 10 of his (the 1st respondent's) defence where it was pleaded that:-

> ***"10. The 1st Defendant avers that the Plaintiff's suit is materially defective, bad in law and/or discloses no reasonable cause of action as against the 1st Defendant and ought to be struck***

out. The 1st Defendant will raise a preliminary objection at the first hearing of this suit on points of law in that the Plaintiff's suit ought to be struck out."

We have carefully gone through the record of proceedings in the superior court and we find that at no stage was any preliminary objection taken to the competency of the appellant's suit. It was only in his final submissions after the appellant had closed his case that Mr. Kariuki, learned counsel for the 1st respondent, told the trial Judge:-

"Plaintiff has failed to prove any case against the 1st Defendant. This claim is in tort. Cause of action arose on 17/09/1996, or 17/08/1996 as per evidence. Case filed on 8/12/1999. As a claim in tort, it is time barred as it should have been filed within 3 years."

As far as we can see from the record, that was the very first time when the issue of limitation was being raised. Njagi, J accepted that contention and stated:-

"--- The first and most obvious aspect of this case, therefore, is that it is founded in tort and not in contract. Section 4 (2) of the Law of Limitation of Actions Act (Cap 22, Laws of Kenya) requires that actions in tort be commenced within three years of the date of the cause of action. According to paragraph 5 of the plaint, the cause of action arose on 17th September, 1996, but according to the plaintiff's evidence in court, it arose on 17th August, 1996. Assuming that it arose on 17th September, 1996, which is more advantageous to the plaintiff, the suit herein ought to have been filed on or before 16th September, 1999.

However, it was not filed until 8th December, 1999. This was hopelessly out of time and on that ground alone, the only fate of the suit is dismissal."

This conclusion was arrived at without any mention of the admitted fact that the appellant previously filed Civil Case No. 4727 of 1996 in the court of the Chief Magistrate at Mombasa. The learned Judge did not consider the question of whether the filing of that case in 1996 had any bearing on the issue of limitation.

Next, the learned Judge did not consider the provisions of **Order VI *Rule 4*** of the Civil Procedure Rules, the marginal note to which is "*matters which must be specifically pleaded*." . The rule provides:-

"4 (1). A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality –

(a)which he alleges makes any claim or defence of the opposite party not maintainable; or
(b) which, if not specifically pleaded, might take the opposite party by surprise; or
(c)which raises issues of fact not arising out of proceeding pleading."

The statute of limitation, i.e. the Limitation of Actions Act **Cap 22** Laws of Kenya, makes a claim not maintainable in law not because there is no merit in the claim but simply because the claim has been instituted outside the prescribed time. If the 1st respondent wanted to rely on the statute to defeat the appellant's claim, then the 1st

respondent was obliged to specifically plead that issue as is mandatorily set out in the above rule. The issue was not pleaded and no preliminary objection was taken regarding the competency of the appellant's claim. It was, accordingly, wrong for the 1st respondent's counsel to as it were, spring that issue upon the appellant at the very final-end of the case. With respect, it was equally wrong for the learned Judge to accept that claim without even considering the provisions of the above cited rule and without considering the fact that an earlier suit had been filed in the court of the Chief Magistrate at Mombasa.

On the merits of the claim, the learned Judge found that the evidence given by the appellant fell far short of discharging the burden of proof upon a balance of probability. He said appellant had not proved that the distrained goods were those alleged in paragraph nine of the plaint and not as set out in paragraph five of the 1st respondent's defence. The Judge insisted that the appellant should have produced an abstract of his report to the police on what goods had been taken away.

We think the approach adopted by the learned Judge was not fair to the appellant. We have already set out the evidence of the appellant. He had pleaded fully in his plaint the goods which he said had been taken from his shop. He stated in his short evidence that goods had been taken from the shop and he listed some of those goods as:-

> ***"TVs', Videos, Radios, all electronics. Some of them were for sale and others for repair and yet others for renting ------."***

He put the value of the goods taken at Ksh.1.5 million and that was what he had pleaded in the plaint. It was admitted that the 1st respondent had instructed the 2nd and 3rd respondents to levy distress on the appellant's goods and that distress was in fact levied. We do not know whether the learned Judge wanted the appellant to repeat word for word the items he had listed in his plaint. It is true as the learned Judge said, that in paragraph 5 of their joint defence the 2nd and 3rd respondents had listed the items which they said had been taken from the appellant's shop but as we pointed out at the beginning, none of the respondents came to testify before the learned Judge. The allegations in their respective defences remained no more than allegations. They did not come to court to produce before the Judge the inventory of the goods they had seized and the sum raised from the sale of the goods, whether the money raised from the sale was more or less than the sum for which distress had been levied and if more what had happened to the balance. We note from the record that after the distress and the consequent sale of goods no more money was demanded from the appellant as arrears of rent.

Moreover it is clear from the evidence on record that instead of taking possession of the goods and leaving them locked up in the shop the 2nd and 3rd respondents carted away the distrained goods on the very same day that the distress was levied. Under ***section 4*** of the Distress for Rent Act, the 2nd and 3rd respondents were required to leave the goods distrained in the shop of the appellant and only remove them from the shop after fourteen days from the date of the

distress. An earlier removal of the goods from the shop could only occur if either the owner of the goods distrained or the landlord requests for such removal. The 2nd and 3rd appellants carted away the goods on the same day that they levied the distress. There is no evidence at all in the record that they went back to the shop after levying distress and removed the goods on that second occasion. The 2nd and 3rd respondents in acting the way they did, acted unlawfully and that rendered the distress unlawful. The learned Judge did not consider that aspect of the matter.

The 1st respondent admitted in paragraph three of his defence that he instructed the 2nd and 3rd respondents to distrain for arrears of rent. The 2nd and 3rd respondents were clearly agents of the 1st respondent in the recovery of the rent arrears and in the process of carrying out his instructions, the 2nd and 3rd respondents acted unlawfully. The 1st respondent was clearly liable to the appellant for the unlawful acts of his agents. The 1st respondent benefited from the unlawful actions of his agents and he must be vicariously liable to the appellant.

What was the appellant entitled to? He said the value of the goods distrained was Ksh.1.5 million and repeated that in his evidence. He had also claimed that Ksh.100,000/- in cash was stolen from the shop but he did not say where that money had been kept and how it had come to be in the shop. On our own assessment of the recorded evidence, we are not convinced that the appellant had Kshs.100,000/- in the shop.

Again the appellant admitted that he owed the 1st respondent rent arrears in the sum of Kshs.21,000/- We take it that the 1st respondent must have recovered that sum or even the Ksh.50,000/- for which he distrained from the sale of the appellant's goods.

Taking into account all the circumstances of the case, we allow the appellant's appeal, set aside the judgment and decree of the superior court dismissing the appellant's case with costs and substitute therefor a judgment for the appellant in the sum of Ksh.1,500,000/- being the value of the goods taken from his shop less the Ksh.21,000/- which he admitted owing as arrears of rent. He neither pleaded nor proved the claim for K.sh.2000/- per day as damages and we reject that claim. We award to the appellant the costs of the appeal and of the suit in the superior court. For the avoidance of any doubt, this judgment is entered only against the 1st respondent. Those shall be our orders in the appeal.

Dated and delivered at Mombasa this 12th day of March, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.