IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, O'KUBASU & GITHINJI, JJ.A.)
CIVIL APPEAL NO. 29 OF 2002

BETWEEN

GUANDAI KARUGU ……....……..….. APPELLANT

AND

LIHASI BIDALI …….. RESPONDENT

(Appeal from the Judgment of the High Court of Kenya

at Nairobi (Justice Kasanga Mulwa) dated 26th October,

1999

in

H.C.C.C. NO. 1048 OF 1993)

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JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Mulwa J) delivered on 26th October, 1999, in which the appellant herein, Guandai Karugu was ordered to pay Shs.300,000/= to the respondent, Lihasi Bidali , together with costs of the suit in the superior court. This is a landlord-tenant dispute in which the respondent as the tenant sued his landlord asking for:-

"(a) An injunction to restrain the defendant from selling the goods.

(b) A declaration that the plaintiff is entitled to remain in the premises.

(c) The return of the goods or of the payment of the Shs.459,820/= being their value."

The landlord filed a defence in which he denied the respondent's claim asking for dismissal of the suit. The appellant then put in a counter-claim in which he sought judgment in the sum of Shs.143,000/= .

The facts of the case may be briefly stated. The respondent herein was the tenant of the appellant on premises known as Dagoretti/Karandani/31. The respondent carried on his business on the said premises and with the consent of the appellant had various items which he kept on the premises. Sometimes in 1992, the respondent ran into arrears of rent to the tune of Shs.220,000/= but when he offered to pay the

appellant refused to accept the same. A reference was filed in the Business Premises Rent Tribunal but the reference was dismissed for non-attendance. The respondent then made some payment to the appellant's lawyers by cheque but he (respondent) stopped the cheque as the appellant's lawyers were demanding a further payment of Shs.28,000/= as legal fees. The cheque which was stopped by the respondent was for Shs.143,000/= . Then on 23rd February, 1992 the appellant sent auctioneers to the premises who forcefully took away the respondent's goods and on 4th March, 1992 a sale was advertised to the effect that the respondent's goods would be sold on 5th March, 1992 . The goods were auctioned for Shs.65,346/55 and the auctioneers demanded Shs.22,228.48 as their fees.

It is this forceful removal of the respondent's goods from the premises that triggered this suit in the superior court.

The agreed issues in the superior court were:-

"(1) Whether the Plaintiff owed the Defendant the sum of K.Shs.143,000/= being arrears of rent as at July, 1991.

(2) Whether the defendant gave plaintiff adequate notice of the intended distress for rent.

(3) Whether the distre ss and subsequent sale of the Plaintiff's goods by the Defendant were lawful and or fraudulent."

The learned Judge considered the evidence before him and then proceeded to deal with the agreed issues. As regards the first issue, the learned Judge found as a fact that the respondent owed the appellant K.Shs.143,000/= being arrears for rent. As regards the second issue, the learned Judge found that there was no notice and consequently, the third issue was to be answered in the affirmative in that the distress and subsequent sale of the respondent's goods by the appellant were unlawful.

In concluding his judgment the learned Judge stated:-

> ***"Having found that the distress was unlawful the Plaintiff will be entitled to a Judgment with a view to redress for wha t he may have suffered as a result of the distress. The plaintiff agreed in his evidence in chief that he has not paid the arrears of rent which gave rise to the distress.***
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> ***Accepting that the goods are taken from his premises and doing the best under such circumstances I will assess the value of the goods collected as 300,000/=.***
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> ***In arriving at the figure I have taken into account that the defendant did not challenge the number of times claimed by the Plaintiff and as listed in his list in the plaint."***

Being dissatisfied with the foregoing, the appellant lodged this appeal citing the following three grounds of appeal:-

> ***"1. The learned Judge misdirected himself when he valued the Plaintiff/Respondent's distrained goods at K.Shs.300,000/=.***
>
> ***2. The learned Jud ge erred in law and in fact when he failed to find that the Defendant/Appellant had proved his counter -claim and was therefore entitled to the sum of K.Shs.143,000/= being outstanding rent arrears payable to the Plaintiff/Respondent.***
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> ***3. The learned Judge err ed in fact in finding that the Plaintiff/Respondent had no notice of the distress."***

In his submission before us, Mr. Kamere, for the appellant, simply amplified the three grounds of appeal and asked us to allow the appeal and set aside the judgment of the superior court.

Mr. Mbugua, for the respondent, asked us to dismiss the appeal with costs as, in his view, the learned Judge was correct in his valuation of the goods. It was his submission that the distress was not lawful and sought to rely on two authorities, viz Kanji Noran Patel vs. Noor Essa and Another [1965] E.A. 484 and Nthenge v. Wambua [1984] KLR 799 .

We have now considered this matter very carefully and in our view, the main issue was whether what took place on 23rd February, 1992 was in accordance with the relevant law governing such a situation. It was not in dispute that the appellant was the respondent's landlord. It was also not in dispute that the respondent had fallen into arrears of rent.

As a result of that relationship the appellant sent auctioneers to the premises and the auctioneers carried away the respondent's goods. It was the respondent's complaint that he was not given any notice before the auctioneers raided the premises.

Section 4(1) of the Distress For Rent Act (Cap. 293 - Laws of Kenya) provides:-

> ***" 4.(1) Where any goods or chattels are distrained for rent reserved and due upon a grant, demise, lease or contract, and the tenant or owner of the goods or chattels so distrained does not, within fourteen days after distres s has been made, and notice thereof (stating the cause of the making of the distress) left on the premises charged with the rent distrained for, pay the rent together with the costs of the distress, or replevy them, with sufficient security to be given to the bailiff according to law, the person distraining may lawfully sell on the premise or remove and sell the goods and chattels so distrained for the best price which can be obtained for them , towards satisfaction of the rent for which they are distrained, and of the charges of the distress, removal and sale, handing over the surplus (if any) to the owner."***
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> ***(underlining provided)***

As alr eady stated earlier in this judgment, the auctioneers visited the premises on 23rd February, 1992 and without giving any notice carried away the respondent's goods. It is to be noted that the sale was advertised on 4th March, 1992 and the sale took place on 5th March, 1992. In our view, the learned Judge was perfectly entitled to make a finding to the effect that the whole process of levying distress was wrong in law.

Having so stated we can now quickly deal with the three grounds of appeal. As regards the first ground, we are satisfied that the learned Judge did not misdirect himself in his assessment of the respondent's goods which were carried away. The respondent set out the items which were carried away and in his evidence attempted to give estimate value of these items. The learned Judge considered that evidence and doing the best he could in the circumstances came to the figure of Shs.300,000/= .We see no valid reason to warrant any interference with that valuation.This ground must fail.

As regards the second ground of appeal, we think there is merit in this ground. Since the learned Judge made a finding to the effect that the respondent was in arrears of rent to the tune of K.Shs.143,000/= , then this meant that the appellant had succeeded in proving his counterclaim.We think that the learned Judge overlooked that very important point and in so doing denied the appellant what was rightfully his. We therefore find in favour of the appellant on this second ground.

As regards the third ground, we have already observed that there was no notice to the respondent and hence what took place on 23rd February, 1992 was indeed not in accordance with the applicable law. It follows that this ground must fail.

The final position is that the appellant has partially succeeded in that he was entitled to his counter-claim in the sum of Shs.143,000/=.

Hence the sum of *Shs.300,000/=* awarded to the respondent by the superior court must be reduced by

Shs.143,000/= . This means that we allow this appeal, set aside the judgment of the superior court and substitute thereof judgment in favour of the respondent in the sum of *Shs.157,000/= (and not Shs.300,000/=)* . The appellant will have costs of this appeal and half the costs in the superior court.

Dated and delivered at Nairobi this 5th day of December, 2003.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR