Maalim v Musila (Civil Appeal 31 of 2023)
[2024] KEELC 6942 (KLR) (23 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6942 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CIVIL APPEAL 31 OF 2023

EK MAKORI, J

OCTOBER 23, 2024

BETWEEN

BATHIA NUNOW MAALIM ..... APPELLANT

AND

NICHOLUS MUSILA ..... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment delivered on 14th June 2023 by the Hon. J.M Kituku – SPM Kilifi. In the Lower Court, the said judgment declined all the prayers sought by the Respondent but awarded the Respondent Kshs. 500,000/- General Damages for unlawful constructive eviction.

2. The Memorandum of Appeal underscores the following pivotal issues:

    a. The Learned Senior Principal Magistrate erred in law and fact in holding that the appellant did not comply with Section 152E of the Land Law (Amendment) Act, 2016, by issuing the Respondent a three (3) Month Notice.

    b. The Learned Senior Principal Magistrate erred in law and fact in treating the Appellant's action in fencing part of her parcel of land for security reasons as forceful eviction.

    c. The Learned Senior Principal Magistrate erred in law and fact in making an award never sought in the Respondent's prayers.

    d. The Learned Senior Principal Magistrate erred in law and fact in impliedly holding that there was a Landlord/Tenant relationship between the Appellant and the Respondent.

    e. The Learned Senior Principal Magistrate erred in law and fact in awarding the Respondent Kshs—500,000/= without detailing how he arrived at that amount.

f. The Learned Senior Principal Magistrate erred in law and fact in considering extraneous issues which were not part of the Respondent's case before him.

g. The Learned Senior Principal Magistrate erred in law and fact in arriving at a decision that was contrary to the weight of the evidence on record.

3. The Court directed that parties file written submissions. They complied.

4. The role of this Court is to re-evaluate the evidence and make its independent conclusion. In the often-cited case of Okeno v Republic [1972] EA 32 at 36, the East Africa Court of Appeal stated the duty of the Court on a first appeal as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

5. From the materials and submissions placed before me, the issues I frame for the determination of this Court are as follows: Did the trial Court arrive at the correct decision based on the evidence placed before it? Should the award of Kshs 500,000/- for constructive eviction stand, and who should bear the costs of this appeal?

6. The Respondent in the Lower Court testified that he was a tenant of one Rosemary Njoki Mwangi on the disputed property for over 13 years. On 20th August 2021, he was arrested with another tenant, Peter Munya (who was later to be released after he voluntarily moved out of the disputed premises). He left his wife to operate the shop. On his return, he found that the Appellant had blocked the shop with a fence around the front. Several of his items were locked in the shop by the Appellant, who had failed to follow appropriate eviction procedures, hence the suit before the Lower Court, where an award of Kshs 500,000/ was made for constructive eviction.

7. The Appellant testified in the Lower Court that her husband, the late Nathif Hassan, had an ownership dispute with one Rosemary Njoki over that piece of land, which, after several Court battles, is now registered in the Appellant's name. During those lengthy Court proceedings, Rosemary Njoki put up some structures, which, after the subdivision, fell on what remained with the Appellant. By a letter dated 17th October 2020, the Appellant gave the said Rosemary Njoki three (3) months' notice pursuant to Section 152 E of the Land Law (Amendment) Act, 2016. Rosemary Njoki, in reaction to the letter, filed CMCC (Msa.) Land Case No. E.006 of 2021 - per the plaint thereof, which was part of the Appellant's list of documents. This is the matter that was heard and determined (I reckon from the submissions by me when I was Chief Magistrate Mombasa); it was dismissed together with the counterclaim given the decision in Mombasa ELC No. 141 of 2011, which had dealt with similar issues. After the said judgment aforesaid, both Rosemary Njoki and the Appellant herein reconciled and accepted what became of the implementation of the decree in Mombasa ELC 141 of 2011.

8. After analyzing evidence from both sides, the Trial Magistrate arrived at the following verdict:

> "I have not seen any application for execution, and that means what the Defendant did (fencing the plot) on 2oth of August 2021 was not in pursuit of execution of the decree of the High Court.
>
> Attempting to take possession by erecting a fence to the Plaintiff's shop amounted to constructive eviction of the Plaintiff without a Court order."

9. The Trial Court, by quoting several judicial decisions, concluded that eviction cannot be undertaken without proper notice and that an award of damages was appropriate, hence the sum of Kshs. 500,000/=.

10. In Munaver N. Alibhai T/A Diani Gallery v South Coast Holdings Limited [2020] eKLR, cited by the Trial Court for example, the Court held that:

> "A tenancy vests upon the tenant a property right which like all possessions ought not to be deprived arbitrarily. In Gusii Mwalimu Investment Co. Ltd vs Mwalimu Hotel Kisii Ltd, [1996] eKLR, the Court of Appeal, while addressing the right of a landlord to re-entry, had this to say: -
>
> "to obtain possession by carrying out illegal distress is per se wrong. ...if what the landlord did in the case is allowed to happen, we will reach a situation where the landlord will simply walk into the diminished premises, exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is a trite law that unless a tenant consents or agrees to give possessions, the landlord has to obtain all orders from a competent court or statutory tribunal (as appreciate) to obtain an order for possession."
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> Similarly, In the Case of Ripples Limited vs Kamau Mucuha Nairobi HCCC 4522 of 1992, it was held that;
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> "the landlord should only take one course against the defaulting tenant, i.e., either to distrain for rent or institute an action for forfeiture of the lease/tenancy and repossession. Here, the defendant/response took both reliefs to his benefit. It cannot be. The law does not permit it, and this court cannot allow it."
>
> In the absence of a court order, I find that the Defendant acted in total disregard of the Law when it unlawfully locked up the Plaintiff's premise, thereby depriving the Plaintiff of his possession. I am inclined to agree with the Plaintiff that it was actually constructively evicted from the suit premises. Since the proprietors of the suit premises did not obtain a court order for possession, the Plaintiff's eviction from the suit premises was illegal, unlawful, and thus tortious.

11. The Appellant, in submissions, faults the Trial Court's findings and contends that the Respondent was served with a three (3) months' notice according to the Land (Law Amendment) Act, 2016 provisions. The Appellant knew that the Respondent and two others were occupying the said structures as tenants and served them with separate notices specifically addressed to them, dated 17th October 2020 - Appellant's Exhibit No. 6. The Trial Court was in error when at paragraph 38 of the judgment said that he had seen the alleged document dated 3rd April 2020 which had been issued to Rosemary Njoki. It is dated 17th October 2020 and not 3rd April 2020, and it was not meant for the Respondent and his fellow tenants. The Court also erred when it held that the service of this notice was disputed, which

is not the case. The Respondent never disputed the service of any notice. According to the Appellant, the Respondent also relied on the same document in his list of documents. See the Respondent's list of documents from pages 168-226. The Appellant argues that the Respondent could not deny the service and knowledge of Defence Exhibit 4. Perhaps the Court confused document No. 4 with document No. 8. The Appellant's document No.4, i.e., notice to Rosemary Njoki, and document No. 6, i.e., notice to Julius Wario, Nicholus Musila (The Respondent), and one Mr. Peter, were served on the same day. The one addressed to Rosemary was challenged by the aforementioned suit, while the one addressed to the tenants was ignored. Mr. Peter left immediately, and Julius left later, while the Respondent closed his shop and opened one nearby, which he christened Supa Duka. The Appellant asserts that the logical conclusion is that Mr. Julius and the Respondent were pegging their hope on the outcome of Rosemary Njoki's case. The Appellants submit that the requirement of Section—152E of the Land Law (Amendment) Act,2016 was never disregarded. The learned Magistrate, in his ruling dated 11th January 2022 on the Respondent's application for interlocutory injunction dated 25th August 2021, had, when dismissing the same, made the following finding in paragraph 23:

> " I so make a finding that the plaintiff and other tenants were served with the notices to vacate, but only the plaintiff declined."

12. The Respondent submits that the Appellant did not comply with Section 152E of the Land Law (Amendment) Act, 2016, by failing to issue him notice to vacate the said premises or by failure to seek eviction orders from the Court since the shop and the premises existed on the said land before the decision of the Court in Msa. ELC 141 of 2011, and he was not a party to that case. He avers that the following documents back his argument:

    a. The findings, judgment, and proceedings of the Criminal Court at Shanzu—Case No. 996 of 2021 clearly show that the Appellant did not serve an eviction notice. The Appellant's daughter, Sofia Hassan, and the police inspector, Joyce Kawira, confirmed that he was not notified.

    b. Respondent's 2008 Trade Licence proves that he started operating his shop in 2008 before Msa.ELC No. 141 of 2011 was instituted.

    c. Case No E006 of 2021 at Mombasa Law Court- shows the premises existed before the commencement of the said case.

13. The Respondent submitted that the Appellant was obligated to serve proper notices on him and any other person affected by that Court judgment. The alleged notices the Appellant produced at the Lower Court never served on him. The alleged notice dated 17th October 2020 was addressed to him and two other persons; the Appellant did not explain in the Lower Court who served that notice, who among the three people received it on behalf of others, and why she chose to serve one notice to all the parties as if they had joint business. A notice dated 3rd April 2019 was never served on him, and it contained threats and intimidation messages aimed at him. That alleged notice shows it passed through the Chief's office, Kikambala, but it does not have the Chief's official stamp to show that it genuinely passed through him. He submitted that those alleged notices emanated from the office of the Appellant's lawyer and were intended to defeat justice after he lodged the subject matter at the Lower Court. The alleged reconciliation between her and Rosemary Njoki through oral submissions to implement the decree cannot be proven in this Court. Even if there were such negotiations, he was not a party to the same, and therefore, the Appellant was obligated to make sure the affected party was duly served the notices, but this was not done.

14. I have reviewed the evidence and the documents produced as exhibits before the Trial Court. The final decision by the Magistrate stated that:

> " I decline to order that she removes the fence erected on the suit property. That is inconsistent with the proprietary rights. Plaintiff can access his shop as pleaded by Defendant.
>
> On losses, that may have been incurred, the Plaintiff was under a duty to mitigate the losses by opening the shop and taking away his belongings as the other tenants did. I award Nil.
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> However, for the unlawful constructive eviction and guided by the above authorities, I award Kshs. 500,000/= as General Damages...."

15. Throughout the proceedings in the Lower Court, evidence shows that the Respondent was not a tenant of the Appellant. He was a tenant of one Rosemary Njoki, who had been wrangling with the Appellant in Court cases over the suit property. They were settled. The Appellant was awarded a portion of the suit property. A survey was done. The title deed was issued to her on the portion acquired through prescription. Part of the portion where the Respondent's shop and other tenants were standing was found to belong to the Appellant. Notices were issued in letters dated 17th October 2020 and 3rd April 2019. The other tenants voluntarily left, but the Appellant stayed put. Nothing on record shows how a tenant-landlord relationship was created between the Respondent and the Appellant. As envisaged by the authorities, relied on by the Magistrate, a landlord cannot evict a tenant without notice. Nothing shows he was paying rent to the Appellant.

16. The Respondent was aware of the existence of the Court cases and the verdicts. As can be seen from the record, these were protracted proceedings, and the Respondent cannot be heard to state that there were no proper notices, his former landlord having ceded the portion in their possession as tenants to the Appellant -thanks to the decision in Msa.ELC No.141 of 2011. The record shows he had even moved to a nearby shop he christened Supa Duka. He, in my considered view, deliberately refused to vacate.

17. The Trial Court recognized the knowledge of the notices by the Respondent in its ruling dated 11th January 2022:

> " I so make a finding that the Plaintiff and other tenants were served with notices to vacate, but only the Plaintiff declined. He did not rebut those allegations by way of a supplementary affidavit."

18. The record shows that the notices were issued to the Respondent and other tenants. He chose to stay, and he is the author of his misfortune. To my mind, he should not have been awarded Kshs 500,000/= for constructive eviction. The Appellant did not require further court orders because of the earlier matter, which was significantly Msa.ELC No. 141 of 2011 and the decree emanating therefrom under implementation.

19. The Appellant further asserts that the blockage was not meant to evict the Respondent. It was to secure her security and that of her children. The shop was accessible. The Respondent could enter and leave, even carting away his belongings.

20. Looking at the plaint, there is nowhere that the Appellant pleaded for General Damages—the plaint sought losses as may be assessed upon opening of the premises, costs of the suit, and any other relief. Nothing on record shows that any of his goods were destroyed or missing. As correctly stated by the Trial Court, he ought to have mitigated his losses by accessing the shop and taking away his goods. As noted, the Appellant in the Lower Court demonstrated that the Respondent had the right to entry.

The damages alluded to in the plaint were never proven, as it sounds to me to be Specific Damages based on the shop's reopening.

21. The upshot is that the current appeal has merit. It is hereby upheld to the extent that the Lower Court judgment against the Appellant is set aside in its entirety and that the Respondent will bear costs here and in the Lower Court.

22. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 23RD DAY OF OCTOBER 2024

E.K. MAKORI

JUDGE

In the Presence of:*

Mr. Odongo, for the Appellant

Mr. Musila - Respondent (in person)

Happy: Court Assistant