Gor & another v Makori & 3 others (Civil Appeal 111 & 115 of 2018 (Consolidated)) [2024] KEHC 6141 (KLR) (Civ) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6141 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 111 & 115 OF 2018 (CONSOLIDATED)

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

SETH OMONDI GOR ..... APPELLANT

AND

CYRILLUS MACHUKI MAKORI ..... 1ST RESPONDENT

KIMANGA & CO ADVOCATES ..... 2ND RESPONDENT

INSIGHT AUCTIONEERS ..... 3RD RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 115 OF 2018

BETWEEN

CYRILLUS MACHUKI MAKORI ..... APPELLANT

AND

SETH OMONDI GOR ..... RESPONDENT

(An appeal from the Judgement and Orders made on the 31st January, 2018 by Hon. G.A Mmasi (SPM) in Milimani CMCC No. 6010 of 2007)

JUDGMENT

1. These appeals arise from the judgment and decree entered by Honourable G. A. Mmasi on 31st January, 2018 in Nairobi CMCC No. 6010 of 2007. In the suit, the appellant in Appeal No. HCCA 111 of

2018 was the plaintiff, while the respondents were the 1st to 3rd defendants respectively. For the purpose of this Appeal, the appellant in HCCA 111 of 2018 shall be referred as the "appellant", the appellant in HCCA 112 of 2018, shall be referred as the '2nd respondent' and the appellant in HCCA 115 of 2018 shall be the '1st respondent".

2. The summary of the trial Court suit is that the appellant herein was a tenant in property known as LR. Number 82/ 648, in Sunrise Estate Nairobi, owned by the 1st respondent. The 2nd respondent was the advocate of the 1st respondent, while the 3rd respondent (Auctioneers) was an agent of the 1st and 2nd respondents.

3. Sometimes in November, 2005, the appellant fell in arrears and the 1st respondent, acting through Kimanga Advocates, instructed Warleen Traders(K) Ltd (Auctioneers) to levy distress for rent on the appellant's goods. The appellant in response paid the arrears through the auctioneers. However, on 20th December, 2005, the 1st respondent, acting through its advocates, once again instructed Chaka Agencies Auctioneers to levy distress of the same rent that had already been paid to Warleen Auctioneers. It is averred that Chaka Auctioneers noted that the rent had been paid and aborted the distress.

4. On 23rd June, 2006, the 1st respondent, through the 2nd respondent, instructed the 3rd respondent, Insight Auctioneers, to distress for rent arrears of Kshs. 93,000. The Auctioneers herein, cart away with several household items and destroyed some in the process.

5. He stated that through the said proclamation, the Appellant lost a sum of Kshs 174,225/= being arrears paid, legal fees, auctioneers fees and value of goods damaged during the process of taking them away.

6. All respondents filed separate defences, however the 1st respondent, filed a defence and counterclaim seeking to be given vacant possession of his house for the reason that the appellant is a habitual rent defaulter, who has refused to comply with the terms of the tenancy agreement.

7. After hearing the parties, the trial Court found in favour of the appellant and held that as at 23rd June, 2006, the appellant had paid all his rent due and had no arrears, as such the proclamation was illegal and awarded the appellant the Kshs 174,225/= sought in the plaint together with costs. On general damages the Court declined to award it, on the basis that the claim had not been satisfactorily proved. The counterclaim on the other hand was dismissed in its entirety and all the respondents were ordered to jointly meet costs of the suit.

8. All parties save for the 3rd respondent were aggrieved by the decision of the trial Court and filed separate Appeals. The First Appeal, HCCA 111 of 2018, was lodged by Seth Omondi Gor, through a Memorandum of Appeal dated 1st March, 2018, based on the following grounds; -

    1. The learned Magistrate erred in fact and in law in holding that the plaintiff failed to satisfactorily prove general damages.

    2. The learned magistrate erred in law in failing to award the plaintiff general damages.

9. The 1st respondent equally lodged Appeal No. 112 of 2018, which parties agreed by consent on 3rd December, 2018 to have the same considered as a cross Appeal. This Appeal is expressed by a Memorandum of appeal dated 28th February, 2018, setting out the following grounds of appeal:

    1. The Learned Trial Magistrate erred in law and infact by failing to appreciate that the period of indebtedness of the Plaintiff was during the year 2005 and not after 2005 and thereby misdirected herself by applying a different and subsequent payment for other months to hold that the Plaintiff was not in arrears for rent due for earlier months.

2. The Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's evidence that the Plaintiff fraudulently and maliciously submitted empty envelopes without enclosing any cheque with a view of creating a false impression of payments of rent and the only evidence that could displace that was evidence by a bank statement proving the alleged Bankers Cheques were encashed by the Appellant.

3. The Learned Trial Magistrate erred in law and fact in passing Judgment and Orders against the Appellant's advocate when infact he had not been mentioned directly by the Plaintiff or any witnesses on his direct participation during the entire proceedings.

4. The Learned Trial Magistrate erred in law and fact in failing to consider the evidence taken earlier before the Honourable L. Kassan wherein the Plaintiff expressly admitted being in arrears for the months in question.

5. The Learned Trial Magistrate erred in law and fact in failing to appreciate the crux of the matter was whether the amount allegedly paid to Warleen Traders was indeed remitted to the Appellant and indeed if Warleen Traders failed to settle the arrears in issue auctioneers were the agents of the Appellant or the landlord at the time of the alleged payment in 2006.

6. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that an agent is not liable where the principal was disclosed and the enjoinment of the Appellant was for purposes of vexation and harassment as clearly demonstrated in the previous matters initiated by the Plaintiff in other courts that had been dismissed.

7. That in any event the Plaintiff having stated that the advocates were given costs of Kshs. 6,225/= there is no reason why the Learned Magistrate passed Judgment against the Appellant for Kshs. 174,000/.

8. The decision of the Learned Magistrate is against the weight of evidence adduced.

9. The Learned Trial Magistrate erred in law in failing to appreciate that the suit had abated, the 3rd defendant having died in the year 2006 before the institution of this suit and without the representative of the late auctioneer being substituted as required by the law.

10. Cyrillus Machuki Makori, preferred an appeal against Seth Omondi Gor in HCCA 115 of 2018 via a Memorandum of Appeal dated 27th February, 2018. The Grounds of Appeal are as follows; -

1. The Learned Trial Magistrate erred in law and in fact on what months the Respondent was actually in arrears and thereby misdirected herself that the Respondent had paid rent when the alleged payment related to a different period.

2. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the Respondent had already admitted being in arrears and the only question that remained to be determined was whether the sum of Kshs. 93,000/= was remitted by Warleen Traders Auctioneers and if the said Warleen Traders Auctioneers were the agents of the landlord their authority having been expressly revoked in front of the Respondent's Advocate.

3. The Learned Trial Magistrate erred in law and in fact in taking the Appellant's replies that he could not remember on account of time as a sign of not being owed whereas in fact the actual and crux of the matter was the Plaintiff had admitted being in arrears and the only issue to be determined was whether the monies Claimed to be remitted by the Respondent through a third party was actually remitted to the Appellant.

4. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the civil suit was a sham and pretentious litigation malicious calculated to create impression that rent had been paid.

5. The Learned Trial Magistrate failed to appreciate and take into account that the Respondent had previously made false claims in other courts which claims were held to be untrue.

6. The Learned Trial Magistrate erred in law and fact in failing to determine issues in question including whether there was an agreement to utilize part of the rent as electricity or water which excuse the Respondent used to justify not to remit rent and fell in arrears.

7. The Learned Trial Magistrate erred in law and fact by incoherently conducting the trial without due regard to what had transpired in the previous proceedings before the outgoing magistrate.

8. The Learned Trial Magistrate erred in law and in fact in relying on evidence that had not been produced.

9. The Learned Trial Magistrate's decision is against the weight of the evidence adduced by the parties.

11. On 3rd December, 2018, Appeal against the 3rd respondent was withdrawn by a Notice of withdrawal dated 2nd October, 2018. On 27th February, 2019, Appeal No. HCCA 111 of 2018 was consolidated with Appeal No. 115 of 2018 Thereafter, both appeals and cross appeal were canvassed by written submissions.

Appellant's Submissions

12. The appellant herein filed his submissions dated 18th August, 2021 through the firm of Ng'ani & Oluoch Advocates. In it, counsel submitted that the trial court erred in declining award of general damages, when in the Judgment, it rightly found that the appellant was up to date with his rent payment as such was not in arrears. Therefore, since the court found the distress for rent was wrongful, it followed that, he was entitled to damages. In support of this, Counsel relied on the case of *C.Y.O Owayo V Aduda Auctioneers & Another* [2007] eklr, where the Court of Appeal, in looking into what constitutes illegality of distress for rent, stated that ,we must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. In *Halsbury's Laws of England, 4th Edition Volume 13* paragraph 368 it is stated:

> " 368. Circumstance in which distress is illegal-
>
> An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrear..."

13. Accordingly, since no rent was in arrears, the Landlord, trespassed on his property through the illegal distress, hence, the appellant ought to have been paid general damages. In support of this view, counsel relied on *C.Y.O Owayo V Aduda Auctioneers & Another* (Supra), where the Court cited the decision

of *Interoven Store Co. Ltd. vs. Hibbard and Another* (1) (1936) 1 All ER at page 270, where Hilbery J. stated:

> "An illegal distress has always been a trespass and an action would always lie. (See note to Trespass to Goods, 1868, Bullen & Leak P. 114) And where there is a trespass to goods, though no actual damage results, the law gives a right to recover damages not limited to actual damages sustained, but a right to recover substantial damages even though that is no proof of actual loss."

14. Based on the above case law, counsel submitted that, in the current case, there were supervening circumstances that aggravated the illegal distress. First that the auctioneer did not proclaim the goods before distraining them and secondly that upon illegal impounding and carting away, the Landlord, attempted to evict the appellant from the property. Therefore, the appellant deserved to be paid damages because equity does not suffer a wrong to be done without a remedy.

15. It was argued that had the trial court addressed itself to the issue of damages, it would have arrived at a different conclusion. Counsel proposed an award of Kshs 1,000,000/= as general damages.

16. Counsel also prayed for a refund of electricity bills paid every month and refund of estimated value of the goods wrongfully distrained being Kshs 500,000/=, which the court did not award. He prayed for the said damages to be awarded by this court.

17. Regarding the cross appeal, counsel, submitted on each of the grounds and on the first ground, he submitted that the trial court found the appellant in arrears of two months, January and February, 2005, which was paid in full through Warleen Traders (K) Ltd Auctioneers, the agent of the 1st and 2nd respondents. Contrary to the arguments by the respondent, counsel submitted that the envelopes submitted indeed contained cheques he deposited with the landlord, with matching bank statements confirming the money was indeed transferred to the landlord.

18. With regard to ground three he submitted that the 2nd respondent's advocate was sued because, he was the one that instructed the auctioneers to distress for rent, a fact which Makori advocate admitted in his defence.

19. On ground 5 and 6, counsel submitted that Warleen Auctioneers, were acting on instructions of the 2nd respondent, as such any issue of remittance of funds, would be dealt with between the principal and agent, who are the 2nd and 3rd respondent's respectively. He added that an advocate is generally an agent and should not be held liable unless they breach their professional conduct, such as misadvising a client as was done in this case and even being part of the people that attempted to evict him from the property.

20. On ground number 9, counsel submitted that they withdrew the appeal against the 3rd respondent, who is no longer a party to the Appeal.

1st Respondent's submissions

21. The 1st respondent herein filed his submissions dated 7th June, 2022 through the firm of Nelko Misati & Company Advocates. In the submissions counsel submitted that the basis of the appellant's cause of action at the subordinate court was an allegation of wrongful and irregular distress for rent against him. He argued that the appellant in his testimony admitted to being in rent arrears in respect to the distress for rent actions against him and sought the indulgence of the auctioneers to make payments.

22. Counsel contends that no bank statements were tendered by the appellant during the trial. Thus, it was erroneous for the trial magistrate to refer to impugned existence of bank statements in her judgment. He argued that the trial magistrate failed to appreciate the evidence of the appellant as captured by the L. Kassan (SPM) who first partly conducted the hearing of the matter, where the appellant's documents filed were successfully challenged from being produced as exhibits. The documents could not therefore be relied upon by the court.

23. Counsel submitted that the appellant having admitted and acknowledged being in rent arrears and later settled the arrears cannot be heard to complain of the distress for rent to have been wrongful. In any event the appellant was duty bound to prove his allegation of not being in arrears by producing proof of rent payments. That the appellant failed to produce any evidence as to how he made payment or proved that the alleged cheques were liquidated in favour of any of the respondents.

24. He reiterated that the evaluation of evidence by the trial magistrate is outrightly contrary to the evidence and testimony of the appellant during the trial. He thus urged this court to find that the appellant's Appeal lacks merit and dismiss it with costs to the 1st respondent and accordingly allow the 1st respondent's Appeal.

2nd Respondent's submissions

25. The submissions herein are dated 1st November, 2021, having been filed by Maosa and Company Advocates. Counsel submitted that the indebtedness of the appellant was during the year 2005 and not years after, as such the trial court erred in relying on the bank statement of December, 2005 to 2008, when the arrears in issue were for the months of January, February, June and August, October and November of 2005.

26. It was argued that the appellant alleged to have paid the arrears to Warleen auctioneers, through cheques, but that no evidence was shown to demonstrate that the said cheques were cashed.

27. Counsel further submitted that the appellant wrongly sued, its firm of advocates instead of suing the individual advocates, considering that the firm was formed by a partnership deed. Therefore, that the suit against the respondent's firm, was a non-starter for want of proper service upon Gerald Kimanga advocate and for suing an entity not capable of being sued in law.

Analysis and Determination

28. This being a first appellate court, I am guided by the dictum in the case of Selle vs. Associated Motor Boat Co. Ltd. & others [1968] E.A. 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusion:

29. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

30. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I find the issues for determination to be as follows:

i. Whether the proclamation of 20th December, 2005 and 23rd June, 2006 were illegal.

ii. Whether the Joinder of the 2nd Respondent firm was proper.

iii. What remedies, if any, should be awarded.

31. In order to determine the issues above, the first question that needs to be answered is whether the Appellant, was in rent arrears. The 1st respondent (Landlord) stated that the appellant herein became a habitual rent defaulter, leading to several distresses for rent. The respondent however, did not specify the months, in which the appellant was in arrears. I have perused the record and note that during hearing, the appellant admitted to being in rent arrears for the months of August, September and October, 2005. Therefore, its settled that indeed the appellant was in rent arrears.

32. Was the proclamation done on 20th December, 2005 legal? Both the appellant and the 1st respondent admit that four auctioneers were instructed at different times to levy distress for rent. The first auctioneers were Recovery Auctioneers, the second was Warleen Auctioneer, the third was Chaka Auctioneers and the fourth was Insight Auctioneers, (the 3rd Respondent herein). It is also on record that all these auctioneers were instructed by the 2nd respondent on retainer of the 1st respondent. There is no information on when and how the first auctioneers distressed for rent. Similarly, no record is shown of when Warleen Auctioneers was instructed, though a letter dated 17th November, 2005 is on record, in which the said Auctioneer forwarded a copy of a cheque of Kshs 36,000/=, for payment of rent arrears, which cheque was stopped by the letter of 23rd November, 2005 and another cheque of Kshs 8,000/= was issued in its place.

33. Later, on 13th December, 2005, the appellant forwarded two cheques of Kshs 27,000/= and 3500/=, for payment of rent arrears of Kshs 28,000/= and auctioneers fees of Kshs 2500/=. On 13th January, 2006, Warleen auctioneers wrote a letter to Kimanga Advocates and enclosed other cheques of Kshs 66,500/=. cumulatively there was a sum of Kshs. 105,000/= being rent arears and auctioneer's fees forwarded to the respondents. Whether the money was forwarded to the 1st and 2nd respondent's, cannot be on account of the appellant because the 3rd respondent was acting as an agent of the 1st and 2nd respondent's.

34. To now answer the question whether the distress for rent for 20th December, 2005 was legal, I am persuaded that since the appellant admitted on oath, during hearing that he was in arears for the months of August, September and October 2005 and only paid after auctioneers were sent to his premises, I believe the distress was proper and legal.

35. It is to be noted at this point, that the appellant stated that the goods that were proclaimed were not carried away, presumably because, he paid the rent arrears within the notice period given.

36. On the second distress carried out on 23rd June, 2006, it was argued that the 1st respondent once again instructed his advocate to pursue rent arrears of Kshs. 93,000/=, In turn, the 2nd respondent instructed, Insight auctioneers, (the 3rd respondent). The appellant stated that, he was by then up to date with his rent. The 1st respondent on the other hand maintained that the arears had accumulated for months but the number of months and particular months in default was not indicated.

37. Section 107(1) of the *Evidence Act* on the burden of proof provides as follows;

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."

38. Section 108 on incidence of burden of proof provides thus;

> " The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

39. Lastly, section 109 on proof of a particular fact provides thus;

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

40. Having indicated that the appellant was in rent arrears, it behooves the 1st respondent to indicate with precision, the months and amount due to guide the court in making an informed decision. None was indicated in this case.

41. The appellant states that in fear of his goods being taken away, he paid the said alleged arrears, together with auctioneers' fees and legal fees. He exhibited two receipts of Kshs 93,000/= and Kshs 35,000/= issued by Insight auctioneers on 24th June, 2006 and a follow up letter of 24th June, 2006, addressed to Insight auctioneers and copied to the 1st respondent and Warleen auctioneers. On 26th June, 2006, the appellant's goods were released to him.

42. I have carefully perused the record and I note that the appellant herein tendered a bundle of 12 payment slips issued by Barclays bank, marked as Plaintiff's Exhibit 11. I have perused the said receipts and I note that they are made from the month of January, 2006 to December, 2006 on various dates but each was for Kshs. 18,000/= the rent amount. Having tendered proof of payment of rent, I am clear in my mind that the appellant herein was up to date with his rent and I therefore agree with the trial court that the rent payment for the year 2006 was up to date. Therefore, the distress for rent done on 23rd June, 2006, was illegal.

43. In looking into what constitutes illegality of distress for rent, *Halsbury's Laws of England, 4th Edition Volume 13 paragraph 368* it is stated:

> " 368. Circumstances in which distress is illegal- An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrear; or for a claim or debt which is not rent; as a payment for the hire of chartels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise...a distress levied or proceeded with contrary to the law of Distress..."

44. In the case of *C.Y.O Owayo v George Hannington Zephania Adudat/A Aduda Auctioneers & another* [2007] eKLR illegal distress amounted to a trespass and the appellant is in law entitled to general damages arising from the trespass upon his premises and his goods.

45. In the case of *Interoven Store Co. Ltd. vs. Hibbard and Another (1)* (1936) 1 All ER at page 270 Hilbery J. stated:

> " An illegal distress has always been a trespass and an action would always lie. (See note to Trespass to Goods, 1868, Bullen & Leak P. 114) And where there is a trespass to goods, though no actual damage results, the law gives a right to recover damages not limited to actual damages sustained, but a right to recover substantial damages even though that is no proof of actual loss."

46. Having proved that the last distress for rent was illegal, and being that some of his goods were taken away and damaged, and even though no evidence of the exact damages was tendered in Court, I am guided by the holding in *C.Y.O Owayo v George Hannington Zephania Adudat/A Aduda Auctioneers & another* (supra), where the Court of Appeal observed that;-

> " ... there is, as we have stated, proof of actual loss as indeed goods were taken and although no receipts were produced in court to ensure strict proof, profoma invoices were produced in respect of some goods. The auctioneer alleges that he sold the goods he admittedly removed which were one old sofa set with four pieces, one big coffee table, and four small ones also old, one old Sony T.V., one old round drum, ten old table chairs, two table chairs, one big wall coffee frame and remote control for the T.V at a total of Kshs. 50,400.00... Doing the best we can in the circumstances, we feel that an award of Kshs. 300,000/= in respect of special loss would meet the ends of justice. We also award Kshs. 400,000/= as general damages for trespass to goods.'

47. Similarly, in this case, the appellant stated that some of his household goods were destroyed in the process of the illegal distress. The trial court denied the appellant general damages on the basis that it was not proved. On the contrary, general damages for illegal distress which is tantamount to trespass to goods need not be proved strictly as held by the court. Thus, that the appellant ought to have been paid general damages. I will therefore award him general damages for trespass to goods in the sum of Kshs 300,000/=.

48. On joinder of the 2nd Respondent Advocate, Alnashir Visram J, (as he then was) in the case of *Kariuki Associates Advocates Vs Kithungururu Farmers' Co-Operative Society Ltd*[2004] Eklr held that;-

> " ....from the nature of practice, Advocates are professional men who act on the instructions of their clients and except in very clear cases where it is shown that they acted without instructions it is not proper to call upon them to shoulder costs of an act for which they are instructed. He may carry out the instructions wrongfully but so long as he is acting on instructions he should not be made personally liable for them."

49. Similarly, in this case, the 2nd respondent was retained by the 1st respondent to distress for rent from the appellant. Nothing on record shows that the 2nd respondent misadvised the 1st respondent and/or gave improper instructions to the 3rd respondent. Without such demonstration that the advocate herein acted unprofessionally, the said advocate cannot be held personally liable for acts that occurred while he was carrying out his professional duties.

50. In conclusion, the Appeal by Seth Omondi Gor succeeds in that general damages of Kshs 300,000/= are awarded against the 1st respondent. The cross-appeal also succeeds to the extent that the 2nd respondent should not have been condemned jointly and severally to pay the decretal award. Appeal HCCA 115 of 2018 on the other hand fails in its entirety and is dismissed.

51. The Judgment of the trial court is hereby set aside and substituted with a Judgment in the following terms:

    i. The appellant is awarded the following against the 1st respondent.Kshs 174,225/- special damagesKshs 300,000/= general damages

    ii. The cross petition by the 2nd respondent succeeds to the extent that the claim against him is dismissed with costs.

    iii. HCC No. 115 of 2018 lacks merit and is dismissed with costs.

    iv. The appellant to be paid costs in both the lower court and high court.

52. Interest at court rates.

53. Orders accordingly.

DELIVERED VIRTUALLY, DATED SIGNED THIS 30TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE