



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 45 OF 2019

HALFAN MKIWA.....APPELLANT

VERSUS

PROFESSOR PHILIP NYINGURO.....RESPONDENT

(Being an appeal from the judgement of Honourable D.A Ocharo, Senior Resident Magistrate, delivered in the Chief Magistrate's Court at Nairobi on 14/11/2017 in CMCC No.1103 of 2014)

JUDGEMENT

1. This appeal arose from the decision of the Honourable D.A Ocharo, Senior Resident Magistrate, delivered in Nairobi on 14/11/2017 in **CMCCC No. 1103 of 2014**. The facts of that case were that the parties were in a tenant/landlord relationship over house number 36 erected on the land known as Nairobi Block 72/654/36 Maasai Estate, Lang'ata, Nairobi ("the Suit Property") from 2003 to 2013. In February 2013, the Appellant wrote to the Respondent proposing to increase the rent to Kshs. 40, 000/= while giving the Respondent the option to move out of the Suit Property at the end of that month if he was not agreeable to the new terms of the lease. The Respondent gave the Appellant two months' notice to vacate the Suit Property but the Appellant objected that the Respondent was only entitled to a month's notice since there was no written lease agreement between them and so he contended that the tenancy was therefore periodic.
2. The Respondent contested the increment and impending eviction vide **Rent Restriction Tribunal Case No. 95 of 2013**. The Tribunal issued conservatory orders restraining the landlord from interfering with the tenancy pending hearing of that case. The orders remained in force until July 2013. The Appellant filed an appeal in the High Court against the Tribunal's decision but his appeal was dismissed.
3. On 2/08/2013, the Respondent moved out of the Suit Property. The Appellant sued him before the Magistrates Court and contended that he moved out of the house without giving notice and without paying the August rent. Additionally, that he had not repaired and painted the house. The Appellant sought Kshs. 153,205/= comprising one month's rent in lieu of notice, repair and repainting costs and rent for August 2013. The Respondent denied the claim and contended that he had orally agreed with the Appellant that his deposit of two months' rent would be utilised to paint and cover other repairs in the house. After hearing the case, the court dismissed the Plaintiff's claim.
4. Through the Memorandum of Appeal dated 14/12/2017, the Appellant challenged that judgement on the grounds that the Learned Magistrate erred in dismissing his suit and in disregarding his evidence in the suit. He sought to have the order for the dismissal of the suit substituted with judgement in his favour in terms of the plaint and any other order that this court would deem appropriate to grant.
5. Parties canvassed the appeal through written submissions which the court has looked at. The Appellant submitted that the Learned Magistrate erred in holding that the Respondent did not need to give him any notice on the basis that the Appellant was not privy to the contract between the Respondent and his mother, Emily Mbashu. He submitted that the Respondent did not challenge the existence of a contract between him and the Appellant in his pleadings and that it was the court which brought up the issue of privity of contract *suo moto* and based its decision on that issue which was wrong because courts could only determine issues that were specifically pleaded and proved. He contended that he was not given an opportunity to submit on that issue hence the finding on it should not be allowed to stand.
6. The Appellant also submitted that the Respondent himself sued him before the Rent Restriction Tribunal which was an indication that the Respondent had not challenged the aspect of privity of contract. Further, that even if the issue of privity of contract were to succeed, then the tenancy would be deemed as a periodic one under Section 57(2) of the Land Act, 2012; for in the absence of an agreement in writing, the Appellant would still be entitled to a month's notice of termination of the lease as the owner of premises who permitted exclusive occupation of the premises by the Respondent at a monthly rent.
7. The Appellant faulted the Learned Magistrate for holding that the Respondent only vacated the house upon the lapse of the conservatory orders and submitted that the orders granted by the Rent Tribunal maintained the *status quo* and as such the Respondent needed to give notice if he elected to terminate the tenancy in the manner he did. Further, that the trial court erred by holding that the Respondent did not need to issue any notice since the notice issued by the Appellant was valid. The Appellant contended that that notice expired on 28/02/2013 and the Respondent continued staying in the Suit Property and argued that receipt of the monthly rent paid by the Respondent converted the tenancy to a month to month tenancy and such a tenancy would require a month's termination notice.

8. The Appellant also submitted that the Respondent was under a duty to repair the house and the court's conclusion that both parties had made arrangements as to how the house would be repaired using the Respondent's deposit was arrived at without evidence since there was no supporting evidence from the Respondent to prove that assertion. It was submitted that the Plaintiff did not discharge the burden of proof contemplated by Sections 109 and 112 of the Evidence Act. The Appellant also faulted the court for failing to make a determination on the issue of the rent for August 2013 yet the Respondent vacated the house on 02/08/2017 when rent for the month of August had fallen due.
9. On the issue of notice, the Respondent submitted that he vacated the Suit Property upon the lapse of the conservatory orders issued by the court and that based on the Appellant's notice to vacate issued on 01/02/2013, he was not obliged to issue another notice. He submitted that he vacated the Suit Property on 02/08/2020 before the rent became due on the standard date for payment of rent which was the fifth day of the month.
10. On the issue of repairs and painting, the Respondent submitted that the Learned Magistrate correctly applied his mind when he made a finding that the rent deposit retained by the Appellant was to be utilised towards repair. He further submitted that the parties had jointly assessed repairs with their respective handymen and agreed that the Respondent's deposit of two months' rent of Kshs. 68, 000/= would suffice for repairs and painting of the house.
11. The Respondent submitted that the Learned Magistrate correctly made a finding on the issue of privity of contract since the issue of the lease agreement between the Respondent and the Appellant's mother was brought up by the Appellant during the hearing of the suit.
12. The Respondent placed a lot of emphasis on the ground that the appeal was incompetent because the Appellant did not include a decree in his record of appeal, which was a mandatory and primary document in line with Order 42 Rule 13 (4) of the Civil Procedure Rules. In response to this issue, the Appellant filed supplementary submissions and annexed a supplementary record of appeal that had the decree annexed to it. The court notes that an order for the filing of a supplementary record of appeal was made on 29/01/2019 when the Appellant was granted leave to extract the decree.
13. The court has considered the appeal together with the submissions filed and the authorities. What falls for determination is whether the Learned Magistrate applied the law and evidence correctly in arriving at the decision appealed against. The Appellant contended that the Learned Magistrate based his decision on the issue of privity of contract which was not an issue pleaded by the parties. Looking at the decision, it is clear that the Learned Magistrate only mentioned the issue of privity of contract but he did not base his decision on it. The court record shows that the issue of privity of contract was raised by the Respondent when he testified that the initial lease over the Suit Property was between him and one Emily Mbasho who was the Appellant's mother. He stated that in 2007, the Appellant's mother orally informed him to pay rent to the Appellant. There was no written agreement to effect those changes. This therefore was not an issue that the court raised on its own motion.
14. On whether the Appellant was obliged to issue a notice, the Magistrate found that it was not necessary to issue one because the Appellant had issued one in January and the conservatory orders in place had lapsed. In **Muslims For Human Rights (MUHURI) & 2 Others v Attorney General & 2 Others High Court Petition No. 7 of 2011**, Ibrahim, J (as he then was), in considering the circumstances under which a court should grant conservatory orders, observed that a conservatory order was not an injunction as known in civil matters or generally in other legal proceedings but was an order that tended to and was intended to preserve the subject matter or the set of circumstances that existed on the ground in such a way that the constitutional proceedings and cause of action would not be rendered nugatory.
15. The conservatory orders issued by the Rent Restriction Tribunal were to preserve the status quo, being the tenancy between the Appellant and the Respondent based on the previous terms of the tenancy. It was those conservatory orders that allowed the Respondent to continue staying in the Suit Property while paying monthly rent of Kshs. 34,000/= to the Appellant. Had the Respondent not obtained orders from the Rent Tribunal restraining the Appellant from evicting him from the Suit Property, he would have been compelled to either sign the new lease in line with the notice and pay the increased rent or vacate the premises.
16. The Learned Magistrate found that it was not necessary for the Respondent to issue another notice to vacate the Suit Property to the Appellant because it was the Appellant who issued a notice to the Respondent intimating that the Respondent was required to vacate the premises if he was not agreeable to the increment of the rent to Kshs. 40,000/= per month. The court notes that on receipt of the notice from the Appellant of the intended increment of rent, the Respondent gave the Appellant two months' notice of his intention to vacate the Suit Property at the end of February 2013. The Appellant countered the notice by asking the Respondent to move out at the end of that month.
17. The Respondent obtained orders from the Rent Tribunal barring the Appellant from evicting him from the Suit Property. During the trial the Respondent stated that his delay in moving out of the premises was due to the appeal which the Appellant lodged at the High Court against the decision of the tribunal. In this court's view, the Respondent needed to have issued a fresh notice to the Appellant since the earlier notices issued in January and February 2013 had lapsed or had been overtaken by events once the Respondent obtained orders from the tribunal which allowed his continued stay in the Suit Property.
18. Although the Plaintiff refuted the claim that there was a joint oral agreement between him and the Respondent on the issue of the deposit being used to paint the house, the Magistrate found that there was an agreement that the money held as a deposit would be enough to repair and paint the house. This court notes that the Respondent's advocates' letter dated 19/08/2013 addressed to the Appellant's advocates does not depict such an agreement. The letter stated that the Respondent was not interested in the rent deposit which he suggested should have gone towards any repairs. Without inspecting the premises and obtaining a quote on the estimate cost of the repairs to be undertaken, the Respondent could not possibly have determined at the time that his deposit was sufficient to cover the cost for both repairs and painting of the house.
19. While the Appellant claimed that the Respondent had only paid Kshs. 21,000/= as deposit, the Respondent testified that he paid a deposit of Kshs. 68,000/=. The Appellant did not controvert the Respondent's evidence so this court will go by the sum of Kshs. 68,000/= as the Respondent's deposit. Rent deposits are ordinarily paid as a security to the landlord to be used in case of arrears or for repairs for damage to

the premises. It is usually refundable provided the tenant settles all outstanding bills, rent arrears and leaves the premises in the condition it was in at the time he moved in. The Appellant tendered receipts in evidence in his bid to prove the costs he incurred on repairs and painting of the premises. The Respondent did not challenge those receipts. The Appellant proved on a balance of probability that he expended Kshs. 106, 205 on repairs and repainting of the house. He is entitled to repair costs of Kshs. 38,205/= being the difference between the cost of repairs of Kshs. 106, 205/= and Kshs. 68, 000/= which he held as the Respondent's deposit.

20. On whether by the time the Respondent vacated the house on 02/08/2013, the rent for August had fallen due, this court finds that it had become due. The Respondent conceded that he handed over the keys to the Suit Property to the Appellant after 19/8/2013. The lease was a periodic tenancy in terms of Section 57(2) of the Land Act which means that it was a month to month tenancy because the rent was being paid monthly. The Appellant was entitled to the rent for August 2013.

21. The upshot of this is that the Appellant was entitled to a month's rent in lieu of notice, the costs of repairs and repainting of the house, rent for August 2013 less the deposit paid by the Respondent.

22. Since the Appellant has substantially succeeded on his appeal, the Respondent will bear the costs of the appeal and those of the suit in the Magistrates Court.

DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF FEBRUARY 2021.

K.BOR

JUDGE

In the presence of:-

Mr. Eric Amati for the Respondent

Mr. V .Owuor- Court Assistant

No appearance for the Appellant