REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 261 OF 2016

SAUL SEWE OCHIENG NYAMOGO..... APPELLANT

VERSUS

KIJOS HOLDINGS LIMITED. ..... RESPONDENT

(Being an appeal from the Judgment of the Hon. Chesang (Mrs) Resident Magistrate delivered on 20th April, 2016 in Milimani CMCC No. 2509 of 2015)

J U D G M E N T

1. Saul Sewe Ochieng Nyamogo, the Appellant herein, filed an action against Kijos Holdings Ltd, the Respondent herein, before the Chief Magistrate's Court vide the Plaint dated 5th May, 2015. In the aforesaid, the Appellant sought for judgment in the sum of ksh.24,500/- plus interest and costs being a refund of rent deposit and water deposit in respect of flat No. U10 Siwaka Annex Building, Madaraka, Nairobi.

2. The Respondent filed a defence to deny the Appellant's claim. Hon. M Chesang, learned Resident Magistrate heard the suit and dismissed the suit on 20th April, 2016.

3. Being aggrieved, the Appellant preferred this appeal and put forward the following grounds: -

i. That the learned magistrate erred in law and fact and misdirected herself by failing to grant an award of Kshs.9,900/- to the Appellant when the said amount was admitted by the respondent in its Respondent in its paragraph 3 of its statement of defence and was not a point of contest in the matter. Indeed the Respondent produced as an exhibit in court the original cheque drawn in favour of the Appellant which it stated was never collected by the Appellant.

ii. That the learned magistrate erred in law and fact and misdirected herself by failing to find that by virtue of the appellant having given a notice to vacate and sitting clearly that he expected a full refund of the deposits paid, the house being condition which he found it and in the absence of a response from the respondent to the contrary, it would only be assumed that the Appellant's position was as stated so that the receipts produced subsequently by the respondent justifying the repairs undertaken much after the Appellant vacated the suit premises would not be evidence of the house having been left in a condition not as found by the Appellant.

iii. That the learned magistrate erred in law and fact and misdirected herself by simply replying on receipts as evidence of the house having not been left in the condition in which it was found by the Appellant when it was quite clear that despite the appellant asking for a joint inspection between himself and the respondent before vacating the rental premises, him having clearly indicated that nothing was damaged, it was not only a matter of consideration of receipts being produced but what was important to establish was whether there were damages occasioned by the appellant which would necessitate the subsequent repairs made.

iv That the learned magistrate erred in law and act and misdirected herself by simply relying on receipts as evidence of repairs made without considering that there was a possibility that the Respondent would, without purpose use the opportunity to undertake repairs that would result improving the rental premises to its benefit well knowing that it would use the clause in the sale agreement that required the appellant to leave the rental premises in the state he found it, as a blanket cheque to bill the respondent to its advantage as the owner of the rental premises.

v. The learned magistrate erred in law and fact and misdirected herself in failing to find that the water bill deposit ought to have been refunded to the appellant, the respondent having failed to produce evidence of any outstanding bills incurred by the appellant to justify the non-refund of the deposit.

vi. That the learned magistrate erred in law and fact and misdirected herself by failing to consider that the appellant had

hardly stayed in the rental premises for six (6) months and ordinarily there would hardly be any repairs to be made to the rental premises.

vii. That the learned magistrate erred in law and fact and misdirected herself by finding that the respondent proved its case as against the Appellant when the resident had not filed a counterclaim while all that she needed to do was to consider whether the Appellant had proved his case on a balance of probability.

viii. That the learned magistrate erred in law and fact and misdirected herself in failing to consider all the material placed her in terms of evidence adduced and list of documents filed, in making a determination of the matters in question.

ix. That the learned magistrate erred in law and fact and misdirected herself by delivering a one page judgment that was lacking in substance, no reasoned in every material sense of the word and ambiguous in itself.

x. That the learned magistrate erred in law and fact and misdirected herself by failing to find that the respondent's unilateral inspection of the rental premises without any evidence that the appellant was invited for a joint inspection would only confirm that the house was left in the condition that the appellant found it as stated in his notice dated 30th November, 2014.

xi. That the learned magistrate erred in law and fact and misdirected herself by failing to take judicial notice that the issue of landlords refusing to refund rent deposits to tenants is a rampant problem in Nairobi as the landlords always know that they would refuse to refund rent deposits and get away with it since many of their victims (tenants) are ignorant and/or would find it expensive to seek redress in court especially on small claims of the nature of this matter.

4. When this appeal came up for hearing, this court gave directions for it to be determined by written submissions.

5. I have re-evaluated the case that was before the trial court and also considered the rival written submissions. Though the Appellant put forward 11 grounds of appeal, I am convinced that the Respondent has captured two main grounds that commend themselves for consideration.

a. First, is whether or not the Appellant left the house in the same condition he found it in accordance with the Tenancy Agreement.

b. Secondly, whether the Respondent incurred costs in carrying out repairs and in settling the outstanding water bills incurred by the Appellant.

6. On the first issue as to whether or not the Appellant left the residential premises in the same condition he found it in accordance with the tenancy. It is the submission of the Appellant that the learned trial magistrate erred when she failed to find that the Appellant having given a notice to vacate and stating clearly that he expected a full refund of the rent and water bills deposit since he was leaving the house in the state he found while taking occupation.

7. The Appellant also pointed out that the trial magistrate erred by accepting the Respondent's justification of repairs undertaken much after the Appellant vacated the demised premises.

8. The Appellant further argued that the Respondent had sufficient time to contest or justify the repairs to be undertaken before the Appellant vacated the rental premises but failed to do so until the Appellant vacated the premises.

9. The Respondent submitted that the Appellant vacated the premises before a joint inspection of the premises could be done and that he failed to notify the Respondent when he would be available for a joint inspection.

10. It is not in dispute that the Appellant gave the Respondent a notice to vacate the residential premise as per the tenancy agreement.

11. It is also not in dispute that the Appellant had paid a deposit of Ksh.22,000/- and Ksh.2,500/- for rent and water bills respectively and that the Appellant vacated the residential premise on 31st December, 2014.

12. The Respondent summoned one David Kariuki (DW 1) to testify in support of its defense. DW 1 pointed out that the Respondent's caretaker, one Magdalene requested him to inspect the house and carry out repairs which he did.

13. Alexander Ngure (DW 2) said he was too instructed by Magdalene Wangare, the Respondent's caretaker to carry out repairs on the plumbing works of the house previously occupied by the Appellant.

14. Magdalene (DW 3) told the trial court that the water deposit was to be spent on water used during the tenant's stay in the suit premises and that inspection was to be done after the tenant has left the house.

15. DW 3 admitted that there was no joint inspection of the premises since the Appellant failed to request for one. DW 3 also stated that the Respondent received the notice but it did not respond to it.

16. After a careful re-evaluation of the evidence presented by both sides before the trial court, it is apparent that the Respondent simply summoned witnesses to prove that it carried out repairs on the house the Appellant had vacated. The aforesaid witnesses, DW 1, DW 2 and DW 3 did not tender evidence showing how the premises looked like before the tenant vacated.

17. The Respondent had been notified by the Appellant that the premises was left in the state it was before occupation. There is no evidence tendered to show that the Respondent disputed the Appellant's assertion before moving in to carry out repairs.

18. Having failed to tender evidence to show the state of the premises prior to occupation and after the Appellant vacated, the Respondent cannot be justified to carry out repairs and deduct from the Appellant's deposit.

19. In the absence of cogent and credible evidence to controvert the Appellant's evidence and assertion, I am satisfied that the Appellant proved on a balance of probabilities that he left the Respondent's premises in the condition he found it at the time of occupation, therefore, he is entitled to a full refund of his rent deposit.

20. The Tenancy Agreement expressly states that rent and water deposits will only be refundable at expiry of the tenancy and delivery of the premises in accordance with the covenants contained therein. There was no evidence tendered by the Respondent that the Appellant had any outstanding water bills.

21. In the circumstances, the appellant is entitled to a refund of the water deposit. The learned trial magistrate, therefore, erred when she dismissed the Appellants claim.

22. The second issue which was left for the determination of this court is whether or not the Respondent incurred costs in carrying out repairs and settling outstanding water bills incurred by the Appellant. It is not in dispute that the Respondent incurred a sum of Ksh.10,120/- in carrying out repairs. I have already pointed out that the aforesaid repairs could not be said to restore the house to the state it was before occupation because the Respondent did not present evidence showing the state of the premises before occupation.

23. In the circumstances, it can be inferred that the Respondent may have carried out those repairs to improve the value of its residential premises beyond the condition it was before the Appellant took occupation. Consequently, those expenses cannot be attributed to the Appellant.

24. In the end, I find this appeal to be meritorious. It is allowed. Consequently, the order dismissing the suit is set aside and is substituted with an order entering judgment in favour of the Appellant as prayed in the plaint. Costs of the appeal is given to the Appellant.

Dated, signed and delivered at Nairobi this 16th day of August, 2018.

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J K SERGON

JUDGE

In the presence of

..... for the Appellant

..... for the Respondents