Mburu v Ngángá (Civil Appeal E496 of 2021)
[2024] KEHC 16780 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 16780 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E496 OF 2021

NIO ADAGI, J

JULY 30, 2024

BETWEEN

DAVID NGÁNGÁ MBURU ..... APPELLANT

AND

THOMAS KINUTHIA NGÁNGÁ ..... RESPONDENT

(An Appeal from the Judgment of Hon. G. Mmasi (SRM) in Nairobi CMCC. No. 4864 of 2013 delivered on 12/11//2019)

JUDGMENT

1. The Appellant instituted a suit against the Respondent vide the Plaint dated 13/8/ 2013 seeking for the following orders: -

    1) Judgment to be entered in Plaintiff's favour as against the Defendant for special damages in the sum of Kshs.1,023,110/= (One Million and Twenty-Three Thousand One Hundred and Ten Shillings Only)

    2) General Damages

    3) Interest on (1) & (2) above at court rates from date of filing the suit till payment in full

    4) Costs of the suit and interest

2. The Respondent entered appearance and filed statement of defence on 5/9/2013 and denied all allegations in the Plaint, arguing that he never hired a Contractor and or Agent to commence the construction of residential house on the piece of land known as DAGORETTI/UTHIRU/1012 or commenced the process of excavation works with intention of preparing the ground for construction.

Appellant's case

3. The Appellant in his examination in chief averred that he is the owner of the parcel No. DAGORETTI/UTHIRU/1012 and he erected a perimeter wall in the year 2006. That the Respondent damaged the wall in the year 2010. He even reported the matter to the police station and the Respondent was to be charged with a criminal offence but when Appellant went with policemen to arrest him, he ran away.

   The Appellant admitted that Plot No. 1012 is subdivided in (a), (b), (c) and (d) and that (c) & (d) belong to the Respondent who became the proprietor 10 years after the Appellant had allegedly erected the perimeter wall.

   That the wall collapsed due to the Respondent's acts of omission or commission.

   That the wall collapsed hence the filing of the suit for special damages to the tune of Kshs. 1,023,110/ = which amounts were quantified by the Quantity Surveyor.

   The Appellant admitted that he reported a case of malicious damage to property to Kabete police station but when they took long to act, he resolved to file the civil suit against the Respondent.

   PW2 told the court that the Respondent commenced excavation work and damaged their perimeter wall. She said she saw the tractor at the site and went and enquired from the Respondent as to what he was doing but Respondent asked her to leave the scene.

Respondent's case

4. The Respondent in his defence denied having maliciously damaged the Appellant's perimeter wall. He averred that he was not a contractor, he denied having hired an excavator to do any works in his plot.

   The Respondent admitted that he was called to Kabete police station as a report had been made there by the Appellant for malicious damage to property but upon investigations being conducted the Respondent was not charged with offence of malicious damage to property.

   The Respondent testified that the claim was not justifiable and should be dismissed with costs.

5. Upon considering the evidence tendered by the Appellant and his witness and the Respondent's evidence, the trial court found that there was nothing exhibited by the Appellant to show that he ever erected the wall. The persons who erected the said wall were never called to testify. The receipts for material purchased were never produced as exhibit. The surveyor who allegedly came to the scene and the person who quantified the damages caused also never came to court to testify as to how he quantified the damages.

6. The photographs produced, the person who took the photographs never came to court to testify, further no certificate of their authenticity was filed in regard to when and where they were photographed.

7. This court was alive to the notion that he who alleges has to prove. The Appellant alleged he build the perimeter wall, but in court no receipts were availed for cement purchased or for any other materials purchased for building of the wall.

8. The Record shows that the Appellant did not produce any ownership document in the manner of Tittle deed or any document to prove ownership of the plot on which the purported wall was erected.

   In the trial magistrate's considered view, the suit was not proved on a balance of probabilities and he proceeded to dismiss the same with costs to the Respondent.

9. Aggrieved by the said judgment, the Appellant lodged this appeal raising 8 grounds of appeal as follows.

    1. That the Learned Magistrate erred in law and fact by handling this matter as an -ownership Claim despite the fact that this matter canvasses issues relating to negligence and trespass by the Respondent.

    2. That the Learned Magistrate erred in law and in fact in holding that the Appellant did not produce before Court ownership documents of the land and receipts to prove purchase of construction materials for the perimeter wall despite this being not in contention.

    3. That the learned Magistrate erred in law and fact in dismissing the Appellant's application to move the court to conduct a site visit and witness the Appellant's assertions first-hand through a Ruling issued on the 13th day of June 2018, the result being wrongful dismissal of the Appellant's claim.

    4. That the Learned Magistrate erred in law and in fact in disregarding the evidence proffered by the Appellant which sought to prove that there were sufficient grounds to grant the Orders desired by the Appellant, the subject of the entire suit being strict liability in which injury/ damage is the only ingredient that ought to be proved as dictated by law.

    5. That the Learned Magistrate erred in law and in fact in dismissing the Appellant's Suit without substantively considering the pertinent grounds raised consequently occasioning an irreparable injustice to the Appellant and his right to quiet enjoyment of his property.

    6. That the Learned Magistrate erred in law and in fact by failing to appreciate the Appellant's efforts aimed at ensuring that the matter was resolved through the police reports in which the Respondent blatantly disregarded on a number of times consequently occasioning the filing of this Civil Suit.

    7. That the Learned Magistrate erred in law and in fact by relying solely on the Respondent's testimony which was not corroborated by any other witness as compared to the Appellant's.

    8. That the Learned Magistrate erred in law and in fact by dismissing the Appellant's pictorial evidence of the site by claiming that the same was presented without an accompanying certificate, a requirement that is only subject to criminal matters by dint of Section 78 of the *Evidence Act*, Cap 80 Laws of Kenya.

10. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & another v Associated Motor Boat Co. Ltd.& others and in Peters v Sunday Post Limited (1968) EA 123, (1958) EA page 424

11. In the case of Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that:-

> A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and

pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

12. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

13. I have perused through the grounds of appeal and to me the Appellant seems to be challenging the entire judgment and the main issues that stand out for consideration by this court are:

    i. Whether the learned magistrate erred in law and in fact in holding that the Appellant did not produce any document of ownership of land and receipts of proof of purchase of construction materials for the perimeter wall.

    ii. Whether the learned Magistrate erred in law and fact in dismissing the Appellant's application to move the court to conduct a site visit.

    iii. Whether the Learned Magistrate erred in law and in fact by dismissing the Appellant's pictorial evidence of the site by claiming that the same was presented without an accompanying certificate, a requirement that is only subject to criminal matters by dint of Section 78 of the *Evidence Act*, Cap 80 Laws of Kenya.

    iv. Whether the learned magistrate erred in law and in fact in holding that the Appellant did not produce any document of ownership of land and receipts of proof of purchase of construction materials for the perimeter wall.

14. It cannot be gainsaid that in civil proceedings the standard of proof is one on a balance of probabilities as emphasized in the case of Kanyungu Njogu Vs Daniel Kimani Mwangi [2000] eKLR where it was held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

15. As regards the question of burden of proof Section 107(1) of the *Evidence Act* (Cap 80) is instructive providing thus:

> " Whoever desires 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."
>
> Sub-section 2 of the foregoing provision adds as follows:
>
> "When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

16. The Appellant in this case was expected to prove that he indeed had land on which he could have erected the purported perimeter wall and or existence of the said wall. The only way the Appellant would have done so was either by producing proof of ownership of the land being a title deed or such other evidence like receipts of materials he bought for building of the perimeter wall. On this issue therefore, I find that the learned magistrate was right in holding that the Appellant did not produce

any document of ownership of land and receipts of proof of purchase of construction materials for the perimeter wall.

Whether the learned Magistrate erred in law and fact in dismissing the Appellant's application to move the court to conduct a site visit.

17. The proceedings of 21/2/2018 at page 25 of the Record of Appeal show that after re-examination of PW2, the Appellant's counsel urged the court to conduct a site visit and that they didn't wish to raise any new issues.

18. The Respondent's counsel opposed the request for the reason that the same had been overtaken by events and the same would be an exercise in futility. He argued that pre-trials had been done and the suit commenced for hearing. He prayed that the application be disallowed.

19. The ruling was reserved for 9/3/2018 and a very brief ruling was delivered on 13/6/2018 in which the learned magistrate declined to grant the orders for site visit giving reasons why. First the Appellant had not stated any reasons why he wanted the court to visit the site and the he agreed with the Respondent's counsel that same would be an exercise in futility. He observed that the application should have been made before the hearing commenced.

20. In disallowing a similar application, the Judge in the case of Atek Otech Richard & 11 others v Stelco Properties; M-Oriental Bank Limited (Interested Party) [2022] eKLR cited the case of Parkire Stephen Munkasio & 14 others Vs Kedong Ranch Ltd & 8 others (2015) eKLR, the court while considering an application of this nature stated that it is the duty of litigants to place material in support of their case before the court. The court does not have the mandate to go on a fact-finding mission.

21. In Beatrice Ngonyo Ndung'u & another Vs Samuel K Kanyoro & 2 others (2017) eKLR, the court stated that :-

> " If the court visits a site, it can only be for purposes of receiving evidence which will assist in make a just decision. So long as a site visit is incapable of yielding any evidence or for that matter any admissible evidence, then the Judge will be no better than a tourist satisfying curiosities and taking photographs during a site visit. A court in session must perform judicial functions and must restrict distractions that take it away from its mission."

22. The court went further to the state that, "a visit to the site by a Judge who is not a survey expert and who is not armed with survey equipment would not yield anything. An expert report by a surveyor complied with the aid of survey equipment would certainly be more useful."

23. In the instant case, the application for the court to visit the site was been made after the hearing of the case had commenced. The Appellant and his witness had testified and even closed the Appellant's case. The application was made orally, from the bar and no reasons for the court's site visit were given.

24. I am equally convinced that a site visit at that point in time was not necessary and I will not fault the learned magistrate for declining the grant the orders.

iii. Whether the Learned Magistrate erred in law and in fact by dismissing the Appellant's pictorial evidence of the site by claiming that the same was presented without an accompanying certificate, a requirement that is only subject to criminal matters by dint of Section 78 of the *Evidence Act*, Cap 80 Laws of Kenya.

25. Pictorial and photographic evidence are electronic in nature and have to be accompanied by a Certificate of authentication in order for them to be admitted in evidence.

Section 106B (4) of the *Evidence Act* is couched in mandatory terms that a certificate is I ssued in order to have electronic records admitted in evidence.

The Court of Appeal in County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR while discussing the application of Section 106 (B) observed that:

> " Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer."
>
> In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced".

26. The court proceeded to consider the requisite contents of a certificate meeting the conditions in the section before stating that:

> " The *Evidence Act* does not provide the format the certificate required under sub-section 106B (2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder."
>
> Section 78A of the *Evidence Act* on admissibility of electronic evidence states as follows.
>
> "Admissibility of electronic and digital evidence
>
> (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
>
> (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
>
> (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
>
> (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
>
> (b) the reliability of the manner in which the integrity, electronics and digital evidence was maintained;
>
> (c) the manner in which the originator of the electronic and digital evidence was identified; and
>
> (d) any other relevant factor.
>
> (4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and

rebuttable proof of the facts contained in such record, copy, printout or extract.

27. I find the Appellant's ground of appeal on the issue of Certificate of authentication to be misplaced and without any basis. An accompanying certificate of authentication is not requirement that is only subject to criminal matters by dint of Section 78 of the *Evidence Act* but also in any civil, administrative or disciplinary proceedings under any law. This ground of appeal must fail.

Accordingly, I find that the appeal lacks merit and is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF JULY 2024

NOEL I. ADAGI

JUDGE