



**Ng'ang'a & another v David (Civil Appeal 225 of 2023)
[2024] KEHC 12315 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 225 OF 2023
MA OTIENO, J
SEPTEMBER 26, 2024**

BETWEEN

FRANCIS KIMEMIA NG'ANG'A 1ST APPELLANT

SIMON KIBE MWANGI 2ND APPELLANT

AND

FIDELIS MUTUA DAVID RESPONDENT

(Being an Appeal from the judgment and Decree of Hon. O.J. Muthoni Adjudicator delivered on 30.6.2023 in the Thika SCCC No. E632 of 2022, as consolidated with Thika SCCC No. E631 of 2022 and Thika SCCC No. E632 of 2022))

JUDGMENT

Background

1. This Judgment is in respect of the instant appeal as well as two other appeals being, Thika HC Civil Appeal No. E190 of 2023: Francis Kimemia Ng'ang'a & Anor v John Kabata Wanjiku and the Thika Civil Appeal No. E223 of 2023 Francis Kimemia Ng'ang'a and Anor v James Kyalo Munini which were all consolidated with the directions that the instant file (Thika HC Civil Appeal No. 225 of 2023) be the lead file.
2. The Respondents in this appeal sued the Appellants at the lower court seeking compensation for what they termed as the Appellants' interference with their sand selling business in Gashagi area.
3. It was the Respondents' case in the lower court that on diverse dates between 1st October 2022 and 13th October 2022, the Appellants who owned a plot adjacent to the Respondents said place of business, hired goons who destroyed the Respondents' stock of sand worth Kshs. 187,000/= (as claimed in Thika SCCC No. E632 of 2022); Kshs. 259,000/= (as claimed in Thika SCCC No. E631 of 2022)



and Kshs.45,000/= (as claimed in Thika SCCC No. E633 of 2022, as well as their respective tools and equipment, thereby occasioning the Respondents loss and damage to property.

4. The Appellants, vide their statement of response to the claim dated 6th February 2023 denied the Respondents' claim. It was further the Appellant's case that the trial court lacked jurisdiction to deal with the matter since the dispute involved use and occupation of land as well as issues environment.
5. On 30th June 2023, the trial court rendered its judgment in the dispute in favour of Respondents finding the Appellant 100% liable for the damage. The court also awarded the Respondents the following amounts in damages; -
 - a. Thika SCCC No. E631 of 2022: - Kshs. 259,000/=
 - b. Thika SCCC No. E632 of 2022: - Kshs. 187,000/=
 - c. Thika SCCC No. E633 of 2022: Kshs. 45,000/=

The Appeal

6. Aggrieved by the decision of the trial court, the Appellants lodged the instant appeal on grounds that; -
 - i. The learned trial Adjudicator erred in law in rendering the Judgement without requisite jurisdiction due to effluxion of time contrary provisions of section 34 of the *Small Claims Court Act*.
 - ii. The learned trial Adjudicator erred in law in failing to down her tools the moment sixty (60) days lapsed after filing of the claim.
 - iii. The learned trial Adjudicator erred in law in rendering a judgement contrary to the evidence tendered.
 - iv. The learned trial Adjudicator erred in law in allowing the claim which was devoid any merits.
 - v. The learned trial adjudicator erred in law in shifting the burden of proof to the appellant before the said burden of proof could be discharged by the respondent in the trial.
 - vi. The learned trial adjudicator erred in law in making a judgement based on contradictory evidence and not supported by any credible evidence.
 - vii. The learned trial magistrate erred in law in rendering an incoherent, prejudicial and illogical judgement.
7. The Appellant therefore prayed that; -
 - i. The judgement and decree of the learned adjudicator delivered on 30th June 2023 be set aside
 - ii. The entire judgment be declared a nullity for having been rendered without requisite jurisdiction.
 - iii. That in the alternative to (ii) above, the entire claim be found to be unmerited and an order dismissing the claim dated 13th December 2022 be set aside.
 - iv. The Appellant be awarded costs of this appeal as well as the costs in the lower court.



Submissions

8. The appeal was canvassed by way of written submissions. The Appellants filed their submissions on 7th June 2024. However, the Respondents failed to file their respective submissions despite having been directed to do so by this court. In the circumstances, this appeal will be decided solely based on the Appellants' submissions as well as the material in the record of appeal.
9. In their submissions, the Appellants argued the seven grounds of appeal under three distinct heads. However, a careful scrutiny of the submissions reveals that the Appellants' main issue with the trial court's judgment is the court's finding on liability and the jurisdiction of the court in relation to the subject matter of the dispute.
10. The Appellants in their submissions appears to have abandoned the first two grounds in their memorandum of appeal, that is, the issue of jurisdiction of the trial court in view of the 60 days' statutory timeline. Consequently, I will only make determination on the issues taken up by the Appellants in the submissions.
11. The first issue I will deal with is the argument by the Appellants that the trial court erred in law by shifting the burden of proof to the Appellants before the said burden could be discharged by the Respondents in the trial, resulting in an erroneous apportionment of liability against the Appellants.
12. It was the Appellants case that pursuant to section 107 and 108 of the *Evidence Act*, Cap. 80 Laws of Kenya, the burden to prove any fraud, malice and negligence on the part of the Appellants rested on the Respondents. Referring to the evidence submitted by the Respondents in the lower court, the Appellants argued that none of the witnesses who testified for the Respondents never established any fault on the part of the Appellants neither did they tender any credible evidence proving that it was the Appellants who hired and or paid the goons all alleged in the Claim.
13. It was therefore the Appellant's case that Respondents having failed to discharge the burden of proof as by law required, the trial court ought not to have shifted the same to the Appellants in the manner that it did.
14. The second issue taken up by the Appellants in their submissions was that the trial court in awarding the damages to the Respondents, failed to take into account the fact that the documents submitted by the Respondents in support of the claim had glaring contradictions and inconsistencies and could therefore not support the amounts awarded by the trial court. The Appellants referred this court to pages 58,62 and 63 of the Record of Appeal in support of this position.
15. It was further the Appellants submissions that the trial court erred by failing to uphold the Appellants preliminary objection that the trial court did not have jurisdiction over the matter since the dispute was one which involved use and occupation of land, in respect of which the Environment and Land Court has exclusive jurisdiction.
16. Finally, the Appellants submitted that the trial court failed to consider and or take into account the Appellants submissions before arriving at its judgment contrary to Order 21 Rule 4 of the Civil Procedure Rules, thereby reaching an erroneous and incoherent finding. In support of this argument, the Appellant's referred this court to pages 57-61 of the Record of Appeal.



Analysis and determination

17. This is an appeal emanating from the Small Claims Court pursuant to section 38 of the [Small Claims Court Act](#) which provides as follows; -

- “(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.”

18. It therefore follows that in appeals originating from the Small Claims Court, this court can entertain appeals limited only to points of law in terms of Section 38(1) of the Small Claims Act. Consequently, the trial court’s findings on factual issues are therefore to be accepted by this court unless it is demonstrated to this court by an appellant that the trial court’s conclusions on the facts of the case are so perverse as to warrant the attention of this court, exercising its appellate jurisdiction as donated under the Act.

19. The duty of this court when dealing with appeals from the Small Claims Court under Section 38 of the Act is equivalent to that of the Court of Appeal when dealing with a matter on a second appeal. In [Kenya Breweries Ltd v Godfrey Oduyo](#) [2010] eKLR the Court of Appeal distinguished between matters of law and matters of fact as follows: -

“First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see [Selle and Another v Associated Motor Boat Company Ltd and Others](#) [1968] EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.” [Empasis added]

20. Again, in [Charles Kipkoech Leting v Express \(K\) Ltd & another](#) [2018] eKLR the Court of Appeal further clarified that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact by the lower court. That the court should not interfere with the findings of the trial on the factual issues unless it is apparent that, based on the evidence on record, no reasonable tribunal or court could have reached the same conclusion, in which case, the holding or decision would be bad in law and therefore qualify to be reviewed on a second appeal. The court stated that; -

“This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See [Maina v Mugiria](#) [1983] KLR 78, [Kenya Breweries Ltd v Godfrey Odongo](#), Civil Appeal No. 127 of 2007, and [Stanley N. Muriithi & Another v Bernard Munene Ithiga](#) [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of [Martin v Glywed Distributors Ltd \(t/a MBS Fastenings\)](#) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has



loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

21. In the circumstances, this court will first establish whether this appeal is one on law, to which this court has jurisdiction, or one involving factual issues and therefore outside the jurisdiction of this court pursuant to section 38 (1) of the *Small Claims Court Act*. I have considered memorandum of appeal, the evidence on record and the Appellants submissions in this appeal and note that the major issues for this court’s determination are three, that is; -
 - i. Whether the dispute was one which involved use and occupation of land and therefore fell outside section 12 of the *Small Claims Court Act*; and
 - ii. Whether the Respondents discharged their burden of proof to the standards required in law to warrant the shifting of the same to the Appellants.
 - iii. Whether the trial court’s findings on liability and on quantum was supported by the evidence on record.
22. Issues of jurisdiction and the burden of proof are obviously issues of law and therefore warrants the attention of this court exercising its appellate jurisdiction as donated by section 38(1) of the *Small Claims Court Act*. See the decision of the Supreme Court of Kenya in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR on the issue of jurisdiction and that of Mativo J. in *Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] KEHC 7 (KLR) regarding burden of proof.
23. In their joint submissions, the Appellants took the position that the dispute in the lower court was one which involved use and occupation of land and therefore the trial court lacked jurisdiction. I have reviewed the Statement of claim by the Respondents as well as the Appellants’ response thereto and note that this assertion by the Appellants, cannot in law be correct. From the pleadings, it is clear that the predominant claim is one involving ‘liability in tort in respect of loss or damage caused to property’ within the meaning of section 12 (1) (c) of the Small Claims Courts Act.
24. In deciding whether a dispute is about land to which Environment and Land Court (ELC) has jurisdiction, courts have developed the “Pre-dominant Purpose Test.” In *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, a five-judge bench adopted the decision in *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR and stated the following in relation to the pre-dominant purpose test; -

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of



the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

25. Adopting reasoning in the above cases, this court finds and holds that the trial court had jurisdiction of the dispute. This argument by the Appellants is therefore found unmeritorious and therefore fails.
26. On burden of proof, it was the Appellants' submissions in this appeal that the Respondents failed, at trial, to discharge, to the standards required, the burden of proof placed on them by the law so to warrant the shifting of the burden of proof to the Appellants in the manner that the trial court did.
27. The Appellants also attacked the trial court's finding on the quantum in their submissions. According to the Appellants, the evidence tendered by the Respondents in support of their respective claims in the lower court had glaring contradictions and inconsistencies and could not therefore support the amounts awarded by the trial court.
28. As rightly submitted by the Appellants, it is an established principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107, 108 and 109 of the [Evidence Act](#) are unequivocal on this and provide as follows: -

“ 107. Burden of proof.

1. 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
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

108. Incidence of burden.

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

109. Proof of a particular fact.

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.”

29. In this case, the burden of proving that the Respondents sand was destroyed and or damaged by the Appellants rested squarely with the Respondents. This being a civil claim, the Respondents needed to demonstrate by way of evidence that on a balance of probability, the Appellants were responsible for the destruction of their sand business. It is only after the Respondent discharged that burden, the legal burden, to the required standards, that the Appellant would then be called upon to rebut the same by way of evidence. The Court of Appeal in *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR stated the following regarding the burden of proof: -

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”



30. The Halsbury's Laws of England, 4th edition, Volume 17 at paras 13 and 14 discusses the burden of proof as follows; -

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he had failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

31. I have reviewed the pleadings and the proceedings in this matter as contained in the record of appeal and note that on liability, Mr. Fidelis Mutua David, the Respondent in the instant appeal, produced and adopted as evidence in chief, his witness statement dated 13th November 2022. It was his testimony that he is a sand dealer and that from June 2021, the Appellants who owned a plot adjacent to his place of business at Gashagi area threatened to evict him alongside other sand owners and sellers, if they failed to pay to the Appellants a monthly fee of Kshs. 3,000/= . That on various occasions, this threat by the Appellants was reported the police and other government representatives who directed the Appellants to cease the threat since the are the Respondents were not operating on the Appellants' land, but on a road reserve. That despite the directive by the government representatives, the Appellants on diverse dates, including 13th October 2022 hired goons and a tractor registration number KHMA 249R which swept away and destroyed the Respondents sand.
32. The Respondent also produced as exhibits 1-10 the documents in his list of documents dated same 13th November 2022. The documents produced in evidence by the Respondent included copies of minutes of 2nd September 2021 and that of 13th October 2022 held at Makongeni Police Station demonstrating that the dispute between the Gashagi community and the sand harvesters had been reported to various government agencies including the local police, the area district officer and to local roads authority. The Respondent also produced in evidence an OB extract and investigations diary dated 24th October 2022 from Makongeni Police Station where it was reported by one John Kabata (the Respondent in Thika HC Civil Appeal No. 190 of 2023). According to Investigations diary, the report to the police was that Mr. Kimemia (presumably, the 1st Appellant herein), had hired tractor registration number KHMA 249R which carried away and destroyed/damaged, the Respondents' sand.
33. Having reviewed the Respondents' witness statements and the supporting documents submitted at trial, I note that there nothing in the minutes implicating or in any way connecting the Appellants with the damage to the Respondents' property, sand. What I see from the minutes is general dispute between land owners and the traders. Apart from the investigations diary mentioning a Mr. Kimemia to be the person who hired the subject tractor, there was absolutely nothing in the evidence in support of this assertion by the Respondents. Further, I also note that apart from being named in the pleadings, there was no evidence adduced by the Respondents against Mr. Simon Kibe Mwangi, the 2nd Appellant.



34. In the circumstances, I find that the Respondents failed to discharge the legal burden of proof on a balance of probabilities as required under the Evidence Act, Cap. 80 Laws of Kenya and trial court committed an error of law by shifting the burden of proof to the Appellants in the manner that it did. I find this limb of the Appeal is therefore meritorious and hereby succeeds.
35. On whether the trial court's findings on liability and on quantum was supported by the evidence on record. I wish to say no more, particularly in view of my finding that the Respondents failed to adduce sufficient evidence at the trial court in support of their claim.
36. Accordingly, I find that the holding by the trial court that the Appellants liable for the damage to the Respondents' sand to be erroneous in law and against the evidence on record.
37. For the reasons set out above, the appeal herein succeeds. Consequently, the trial court's Judgment of 30th June 2023 is hereby set aside in its entirety.
38. The Respondents shall bear the cost of this appeal which is hereby assessed at Kshs. 30,000/-
39. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 26TH DAY OF SEPTEMBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses – Court Assistant

