



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mathwes v Ochiely (Civil Appeal 659 of 2019)  
[2023] KEHC 18755 (KLR) (Civ) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18755 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 659 OF 2019**

**DO CHEPKWONY, J**

**MAY 25, 2023**

**BETWEEN**

**DELILAH ACHIENG MATHWES ..... APPELLANT**

**AND**

**ARGWINGS KODHEK OCHIELY ..... RESPONDENT**

*(Being an Appeal from the Judgment/decree of Resident Magistrate Hon. Ofisi  
(Ms) delivered on 15th October 2019 in Milimani CMCC No.4165 of 2016)*

**JUDGMENT**

**Background**

1. By a plaint dated November 27, 2016, the plaintiff/appellant sought for the following prayers:-
  - a. Kshs.2,136,000/=
  - b. Aggravated/punitive damages
  - c. General damages
  - d. Interest on (a) above at court rates from July 2013 to date.
  - e. Costs of this suit
  
2. In her plaint, the appellant pleaded that on diverse dates between June 29, 2013 and July 19, 2013, the respondent forcefully, illegally and without any lawful cause evicted and or locked out the Appellant from her house otherwise known as Block MF 32 House F in Makadara Estate within Land Reference No.25980 Nairobi. That in the process thereof, the Respondent illegally and unlawfully confiscated,



attached and or detained her household items as particularized in Paragraph 3 of the Plaintiff amounting to Kshs.1,068,800/=.

3. According to the Appellant, the respondent contravened section 8 of the *Distress for Rent Act*, cap 293 and the special damage claim of Kshs.1,068,800/= should be doubled as provided for under the law to become Kshs.2, 136,000/=.
4. It is the appellants contention that the respondent undertook the said unlawful and illegal action in the pretext of execution of a sale agreement entered on May 10, 2013 between the appellant and the respondent. The appellant was rendered homeless, without any fixed abode and without any of her basic household necessities.
5. That by reason of the respondent's acts, the appellant suffered loss, special damages and general damages.
6. The respondent filed a statement of defence dated August 5, 2016 and filed in court on August 12, 2016. In the statement of defence, the respondent averred that he bought the suit property from the appellant and granted her reasonable time within which to vacate the same as per the terms of the sale agreement. He further stated that the appellant did voluntarily and without any force, compulsion or threat, vacate the suit property.
7. In his response, the respondent denied the allegation that he confiscated, detained and or attached the Appellant's property as particularized in Paragraph 3 of the plaintiff.
8. The respondent also averred that the suit is bad in law, statute barred, fatally defective and does not disclose a cause of action, hence it should be struck out.

### **Evidence**

9. The matter proceeded for hearing of the appellant's/plaintiff's case on February 6, 2019. The appellant called 2 witnesses who testified in support of her case. The appellant, Delilah Achieng Mathews testified as PW1 and stated that she is a retired citizen and resides at Mlolongo Great Wall Apartments. She told court that she had recorded her witness statement dated June 27, 2016 and had the same adopted it as her testimony in chief. She filed her list of documents dated June 27, 2016 and a further list of documents of dated June 12, 2017 which she sought adopted as exhibits in support of her case.
10. The Respondent objected to the production of the documents in the list of documents dated June 12, 2017 for reason that Counsel doubted their authenticity and requested that the issuers of the receipts be availed before court to produce the documents as the plaintiff was not competent to produce the receipts. Counsel cited sections 11 and 35 (3), (4) and (5) of the *Evidence Act*. The court stood down the witness and directed makers of the said documents be availed before court by the plaintiff.
11. On March 28, 2019, PW1- Delilah Achieng Mathews while proceeding with her testimony produced the documents as they appear in the list of documents dated June 27, 2016 and a further list of documents dated June 12, 2017 as exhibits. PW1 stated that she was served with an eviction notice, but there was no court order notifying her of the eviction. She also stated that she was not in the house when it was broken into. She was seeking for compensation of the items she lost as listed in the Plaintiff and the prayers thereof.
12. On cross examination, PW1 stated that she sold the house to the Defendant on May 10, 2013. She admitted that she signed the agreement and was not forced to sell the house. She received the purchase price of Kshs.5.5 million and was to surrender the house on July 27, 2013. She did not vacate the house on July 21, 2013. On July 1, 2013 she wrote a letter to the Respondent/Defendant to give her time to



pack and move out. She moved out in July, 2013. She signed a discharge and acknowledgment receipt dated 13<sup>th</sup> August, 2013. She admitted that she knows Peter Owino and told court that he assisted her in witnessing the signing of the discharge and acknowledgment receipt. She agreed that she sold her house. She indicated that the nearest police station was Nyayo Stadium and she reported the eviction incident *vide* OB 10/28/3/17. The report was made in 2017 while the case was filed in 2016.

13. She continued to state that she made the report in 2017 in preparation for the case before the trial court. Upon being asked by her lawyer in re-examination if she had reported the incident to the police station, PW1 responded that that is why she reported the matter in 2017. She said she was very ill that is why she did not report the matter in 2013. She filed a supplementary list of documents on 13<sup>th</sup> June, 2017. She confirmed that the Respondent/Defendant was never arrested and there are things she recovered in the house as listed in her statement but did not forget the receipts. She told court that Neville is her son. She also indicated that she bought an elephant portrait in 1997 and that Safaricom was not there in 1997. She agreed that the Safaricom number in the receipt is not valid and that the receipts are not dated.
14. In his testimony on May 14, 2019, PW2-Apollo Omondi stated that he resides in Embakasi and the Plaintiff is his aunt. He told court that he recorded his witness statement dated February 20, 2017 which had adopted as his evidence in chief.
15. On being cross examined, PW2 stated that his aunt lives in Madaraka estate. He said that his aunt told them that she had been evicted. He peeped through the grilled door as he did not want to go inside since he suspected it was a crime scene. He stated that the wooden door was slightly open and broken. He did not know if his aunt had sold the house. He did not report the incident to any police station since he was able to trace his aunt. He did not know how a sale agreement looks like and he was not sure if his aunt offered her house for sale. He was not aware if his aunt vacating the house on 1<sup>st</sup> July, 2013.
16. DW1 - John Okoth Atito testified on 20<sup>th</sup> June, 2019 and stated that he is a broker and knows the Plaintiff/Appellant. He told court that in 2012 they were repairing a house in Madaraka estate when he met the Plaintiff who informed him that he intended to sell her house. That in October, 2012 the Plaintiff gave him a go-ahead to sell her House MF-32 Madaraka Estate. DW1 told court that he saw the documents of ownership and was paid a commission and has a cheque regarding the transaction. The sale was advertised in the Standard Classified on 16<sup>th</sup> October, 2012, which elicited a number of buyers and Mr. Argwings Kodhek bought the house. He told court that the Plaintiff approached him to get a house for her near Madaraka estate. And he got a house called 20 Talents situated in Nairobi West and he saw the Plaintiff move into that house as she carried her things in a lorry. DW1 told court that he was not aware that the Plaintiff was evicted from her house and confirmed that they sold a number of houses and did not see anyone being evicted from the estate. He produced the newspaper advertisement, a copy of cheque and a memorandum of interest as PEXH1-3. He adopted his statement filed on 6<sup>th</sup> February, 2019 as his evidence in-chief.
17. On cross examination, DW1 he stated that the Plaintiff approached him to organize for the sale of her house but was not mandated to sell the property inside. He also said that he saw the items in the Plaintiff's house as he took many clients to view it but did not see everything in the Plaintiff's house and that he could not tell which items were taken away since that was not his mandate.
18. On re-examination, DW1 stated that he was able to go inside the house apart from one bedroom which he was told contained items belonging to her son who was abroad. He saw sofa sets, carpet, fridge, utensils and curtains. His interest was to sell the house. The things he saw in the lorry were from the Plaintiff's house.



19. DW2-Argwings Kodhek Ochiely stated in his testimony that he works with Kenya Power Limited as an Internal Auditor. He knew the plaintiff after he saw an advert in the classified column of the Standard Newspaper on 16<sup>th</sup> October, 2012, where a three bedroom house in Madaraka Estate had been advertised as being sold. He responded to the advertisement and met the agent of Delilah who had placed the advert. He told court that on 20<sup>th</sup> October, 2012, he met John Okoth who took him to see the house and in the house he met the Plaintiff who told him that she was selling the house at Kshs.6.3 Million. They negotiated and settled at Kshs.5.5 Million. He did a search at the National Housing Corporation and established that the Plaintiff was the owner of the house. They entered into an agreement on 10<sup>th</sup> May, 2013 and the agreement stated the mode of payment. He was to move in on 21<sup>st</sup> June 2013. He paid Kshs.560,000/= by cheque and Kshs.200,000/= in cash. According to DW2, the Plaintiff signed the lease of transfer and informed him to pick the house keys on 21<sup>st</sup> June 2013. He went to the house with the Plaintiff and found she had removed everything except from her bedroom. The Plaintiff picked her belongings on 3<sup>rd</sup> July, 2013. He told court that he did not pick the Plaintiff's items since the house was empty as at July 15, 2013. Paragraph 3 of the Discharge dated 13<sup>th</sup> August, 2013 indicates the Plaintiff took all her belongings. He has never appeared before any criminal court in respect of the Plaintiff's assertions. He produced a sale agreement dated May 22, 2012 as DExh. 4, copies of bankers's cheques as DExh. 5, copy of transfer as DExh. 6, letter dated 1<sup>st</sup> July, 2013 as DExh. 7 and discharge acknowledgment as DExh. 8.
20. During cross examination, DW2 stated that Paragraph 5 of the Agreement of Sale indicates how completion will be done. As at June 21, 2013, the transfer documents had not been registered. A letter dated 1<sup>st</sup> July, 2013, addressed to him as at this date the plaintiff had not removed the items in her bedroom only. It was his contention that there was a contention over ownership of the house as he was in possession of the house as he bought it legitimately.
21. Upon considering the evidence adduced during the trial, the trial court delivered its Judgment on October 15, 2019. In its Judgment, the trial court stated that the evidence adduced by the Plaintiff had fallen short of the evidential standards required in civil proceedings to wit on a balance of probability. Consequently the Plaintiff's suit was dismissed with costs to the Defendant.

## **The Appeal**

22. The Appellant being aggrieved and dissatisfied with the Trial's court decision delivered on October 15, 2019 preferred an appeal before this court vide a Memorandum of Appeal dated 11<sup>th</sup> November, 2019. The appellant proffered the following grounds:-
  - a. That the Honourable Learned Magistrate erred in law and in fact by concluding that there was no evidence to prove that at the time the appellant was evicted from the suit premises, the goods forming part of the claim in the suit were still in the same house while giving no reason as to why she arrived at such a conclusion when to the contrary there was overwhelming evidence by the Appellant and his witness proving the said fact ad which evidence was not rebutted by the Respondent.
  - b. That the trial Magistrate erred in law and in fact in that he failed to extend or enlarge the time for hearing the suit when he had earlier ruled that there were triable issues that required the suit to be heard and consequently exercised his discretion on wrong principles.



- c. That the Honourable Learned Magistrate therefore erred in law and fact by disregarding the Appellant's evidence as adduced together with her witness without any reason and or justified explanation.
- d. That the Honourable Learned Magistrate erred in law and fact by not appreciating that the Appellant had proved her case on a balance of probability by confirming the confiscation of her house hold items by the respondent as corroborated by her witness, Apolo Opondo. The Respondent himself also confirmed that one of the rooms was locked with items while his witness John M. Okoth could not only tell what items were inside the locked room as he said he had no interest in the items that were left in the house but admits that one of the rooms was locked.
- e. That the Honourable Learned Magistrate erred in law and fact in failing to properly analyze the evidence as adduced in the manner therefore misconstruing the law in dismissing the appellant's suit even when it was clearly that the Appellant had lost all her household items, taken away and confiscated by the Respondent.

23. The Appellant prays for the following Orders:-

- a. The Judgment/Decree delivered on 15<sup>th</sup> October, 2019 dismissing the Appellant's suit with costs be set aside and in place thereof the Appellant's prayers (a), (b), (c) and (e) in terms of the Complaint filed in Nairobi CMCC No.4165 of 2016 be allowed.
- b. The Respondent be condemned to pay costs of this appeal and the costs in Nairobi CMCCC No.4165 of 2016.

24. This appeal was canvassed by way of written submissions. The Appellant's submissions are dated July 20, 2022 whereas the Respondent's submissions are dated October 6, 2022. I have read through the grounds of appeal and the submissions which will be considered in the analysis of this case.

### **Analysis and Determination**

25. Having considered the grounds of appeal and the written submissions by the Appellant, this Court finds the sole issue relevant for determination before this court is whether the Appellant's appeal is merited.

26. The judicial duty expected of this court as the first appellate court is to re-appraise, re-evaluate and re-consider the evidence adduced and draw its own inferences.

27. In the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013]eKLR, the Court of Appeal held as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

28. It is trite law that an appellate Court will only interfere with trial's Court decision if it is proved to have been founded on the wrong legal principles or the wrong interpretation of the law. This was the



position in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR where the Court held that:-

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”

29. This court will therefore be guided by the principles outlined in the above case in its determination of this appeal, whereby section 107 of the *Evidence Act* provides that:-

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.”

Section 108 provides that:-

“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”.

Further, Section 109 of the *Evidence Act* provides that:-

“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”.

30. On the issue of burden of proof reliance is placed on the case of *Muriungi Kanoru Jeremiah v Stephen Ungu M'mwarabua* [2015]eKLR, where the Court held as follows:-

“....As I have already stated, in law, the burden of proving the claim was the Appellant's including the allegation that the Respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the Appellant.....The Appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the Respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court Magistrate held that the Respondent bore burden to prove that he deposited the sum of Kshs.98,200/= the debt being claimed herein.”

31. In the instant case it is not in dispute that the Appellant sold her house to the Respondent. The only contention is with regard to the items alleged to have been lost upon her eviction of the Appellant by the Respondent.

32. According to the Appellant, she was to surrender the house on 21<sup>st</sup> July, 2013 and indeed she moved out of the house in July, 2013. It was also her evidence that she reported the eviction incident to the Police Station in 2017 yet the case before the trial court was filed in 2016. On the other hand, DW2's evidence was that the Appellant signed the lease of transfer and was handed over the house keys on 21<sup>st</sup> June, 2013 and the Appellant picked her belongings on 3<sup>rd</sup> July, 2013.



33. This Court has keenly perused through the evidence of PW1-Delilah, Achieng Mathews and PW2-Apollo Opondo on the Record of Appeal. It has further perused the evidence of DW1-John Okoth Atito as well as that of DW2-Argwings Kodhek Ochiely.
34. Upon perusal of the evidence adduced before the High Court by the witnesses, it is noted that there is a lot of inconsistency in the evidence of PW1 and PW2. On the other hand, the Respondent's evidence was water tight and very consistent. In short, the Appellant's case was devoid of any

**Evidence to Controvert it.**

35. It was the evidence of the appellant that she was evicted from her house in 2013 but made a report with the police regarding the eviction in 2017, which is years later after the institution of the suit before the trial court. This alone, leaves a lot of unanswered questions as to why the Appellant had to wait for such a long period of time to report the eviction.
36. Based on the evidence that was adduced before the trial court, it is this Court's considered view that the Appellant failed to prove her case on a balance of probability as required by law, hence it cannot fault the trial's court finding in dismissing the Appellant's suit.
37. Having said so, this Court arrives at the conclusion that the trial court's finding was based on cogent evidence as was presented, and thus finds no fault in the decision.
38. In the end, the Court makes a finding that the Appellant's appeal has no merit and is hereby dismissed with no orders as to costs.

Orders accordingly.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 25TH DAY OF MAY , 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Kiplangat counsel for the Respondent

Court Assistant - Martin

