



**Gati v Pepeta Holdings Ltd & another (Civil Appeal 29 of 2022)  
[2023] KEHC 22757 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22757 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL 29 OF 2022  
RPV WENDOH, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**MOGOSI SERURI GATI ..... APPELLANT**

**AND**

**PEPETA HOLDINGS LTD ..... 1<sup>ST</sup> RESPONDENT**

**JAMAL HARET MOHAMED ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the original Migori CMCC No. 169 of 2019 Mogosi Seruri Gati vs Pepeta Holdings Ltd and Jamal Haret Mohamed, presided over by Hon. M. Obiero (SPM) judgement delivered on 24/3/2022)*

**JUDGMENT**

1. This appeal is in reference to the judgement and decree of Hon. Obiero (SPM) dated and delivered on 24/2/2022. Mogosi Seruri Gati (the appellant) sued Pepeta Holdings Ltd and Jamal Haret Mohamed (the respondents) vide a plaint dated 17/10/2019.
2. The appellant's claim mainly sought compensation for damages suffered following an alleged accident which happened on or about 28/9/2017. The appellant pleaded that the 1<sup>st</sup> respondent was the registered owner of motor vehicle registration number KCF 559Z (suit motor vehicle) while the 2<sup>nd</sup> respondent was the driver, servant, agent and/or employee of the 1<sup>st</sup> respondent.
3. It was further pleaded that on 28/9/2017 at 2350hrs along the Mabera - Mote Morabu murram road and in particular at Mumami area, the suit motor vehicle was negligently, and/or carelessly driven and/or managed that it lost control and violently knocked down the appellant's house on land parcel L.R. No. Bugumbe/Mabera/1006 (suit property) damaging it extensively. The appellant particularized the negligence of the 2<sup>nd</sup> respondent and particulars of material damage. The appellant prayed for special damages, costs of the suit, interest and any other relief.



4. The respondents entered appearance and filed a defence dated 22/6/2021. The respondents denied the particulars of each allegation set out by the appellant and asked the trial court to dismiss the suit with costs.
5. The suit proceeded for hearing with the appellant testifying as PW1. The respondents did not lead evidence in support of their case save for filing their statement of defence and written submissions. The trial court rendered its judgement and dismissed the appellant's case with costs to the respondents.
6. Being aggrieved with the judgement and decree of the trial court, the appellant preferred the following eight (8) grounds of appeal as follows:-
  - a. The learned trial Magistrate erred in law and in fact by holding that the plaintiff failed to demonstrate that he had locus standi to file the suit yet the appellant's testimony was unchallenged;
  - b. That the trial court erred in law by interpreting lapses in the evidence of the defendants in favour of the defence;
  - c. That the trial court erred in law and in fact by selectively analyzing the evidence of the appellant unfavorably, ignored the evidence that came on examination in chief and cross examination thus arrived at a wrong determination;
  - d. That the trial court ignored that the appellant's testimony was uncontroverted and all she stated in clarification of her exhibits remained unchallenged even on cross examination;
  - e. That the trial court erred in law and in fact by disputing the contents of a sale agreement which was adduced in evidence and explained by the appellant without any contradicting evidence in opposition;
  - f. That the trial court misdirected itself by solely relying on the submissions of the respondents and discarding the appellant's evidence on record and the submissions therein;
  - g. That the judgement delivered was contrary to the weight of evidence presented;
  - h. That the trial court greatly misdirected itself in treating the submissions of the appellants very superficially thereby erroneously arriving at a wrong conclusion in law.
7. The appellant prayed: -
  - i. That the appeal be allowed.
  - ii. The decree in the lower court be set aside and judgement be entered in favour of the appellant.
  - iii. The appellant be awarded costs of the lower court and the appeal herein.
8. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.
9. The appellant clustered the grounds of appeal and submitted on them. On grounds 1, 2, 4 and 8, the appellant submitted that his case remained unchallenged since the respondents did not produce evidence in rebuttal. The appellant faulted the trial court for finding that she did not prove liability against the respondents yet they did not offer any rebuttal.
10. On grounds 6 and 7, the appellant submitted that the judgement delivered was contrary to the weight of evidence; that the respondents failed to shift both the legal and evidential burden of proof, hence judgement ought to have been entered in his favour.



11. On the issue of locus standi, it was submitted that the trial court erred in finding that the plaintiff failed to demonstrate locus standi to lodge the claim; that the issue arose in the respondents' submissions but they did not plead that issue; that the trial court erred in finding that only the registered owner could maintain a case. The Appellant referred to the case of *Samuel Mwangi vs Jeremiah M'itobu* (2012) eKLR where the Court of Appeal held that it is not necessary that only the owner of the land should sue.
12. In opposing the appeal, the respondents submitted on three issues. On the capacity of the appellant to sue, the respondents submitted that the appellant lacked capacity since the suit land did not belong to him; that the purported sale agreement made between the appellant and one Magaiwa Nyamburi Murama on 19/6/1997 was not in relation to the instant suit parcel of land. The respondents also contended that the valuation report shows that the valuer was instructed by Magaiwa Nyamburi Murama but not the appellant herein.
13. The respondents further submitted that Magaiwa Nyamburi Murama is allegedly deceased according to the appellant but he did not adduce evidence thereof, hence, it would be a travesty of justice to issue orders in favour of such persons in the absence of evidence; that the appellant ought to have streamlined the issue of locus standi before filing this suit as he did not have the capacity to do so.
14. The respondents contended that since the appellant did not have locus standi, he was not entitled to the claims for special damages and loss of rental income per month. The respondents further stated that there was variance of the pleadings and the evidence as the valuation report shows that it is only the front shop which was damaged while the appellant prayed for loss of rental income for a fully damaged house. The appellant also submitted that the claim for Kshs. 25,000/= for the costs of the valuation report was not proved.
15. I have considered the grounds of appeal, the record of appeal and the submissions of both parties. The issues for determination are: -
  - i. Whether the trial court rightly addressed itself on the issue of locus standi.
  - ii. Whether the trial court considered the correct legal principles in dismissing the appellant's suit.
16. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. This was the finding in *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
17. On the role of the first appellate court, the Court of Appeal in *German School Society vs Helga Ohany* Civil Appeal No. 324 & 325 of 2018 (Consolidated) (2023) eKLR held:-
 

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court's conscious application of its 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 this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial 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.”
18. Locus standi means the right to appear and to be heard in court proceedings. Without the requisite locus standi, even if a party has a meritorious case, they cannot be heard. The respondents' argument



- on why the appellant lacks locus standi is two pronged: - that the suit property did not belong to the appellant and the appellant failed to take out letters of administration ad litem, to sue on behalf of the estate of Magaiwa Nyamburi Marama (deceased).
19. The appellant's claim was dependent on whether or not he was the owner or had any beneficial legal interest in the suit property in order to sustain a claim. The dispute was centered around the alleged destruction of the appellant's house by the 1<sup>st</sup> respondent's suit motor vehicle which was being driven by the 2<sup>nd</sup> respondent. The appellant testified that he purchased the suit land from a deceased person and produced the sale agreement dated 19/6/1997 as "Pexh4."
  20. The respondents took the position that the sale agreement does not indicate the suit parcel of land pleaded by the appellant and the certificate of title indicates that the suit land belongs to Magaiwa Nyamburi Marama. A cursory look at the agreement proves that it was between the appellant and Magaiwa Nyamburi Marama. However, the sale agreement does not indicate the parcel number of the land being sold. The appellant did not produce evidence to show that Magaiwa Nyamburi Marama is deceased but there was no other evidence that was led by the respondents to rebut this assertion by the appellant.
  21. The question therefore is whether it was necessary for the appellant to take out letters of administration ad litem in order to prosecute the suit before the trial court. Letters of administration ad litem are taken out if a person wishes to bring an action as an administrator or on behalf of the estate of a deceased person.
  22. The suit before the trial court was not brought on behalf of the estate of the deceased, for the appellant to be required to take out letters of administration ad litem in order to have the capacity to sue and to be sued. The appellant was not also making any claims in the estate of the deceased person; rather, the appellant was suing in his own capacity as the owner of the rental properties which were built on the suit land.
  23. The facts in *Nyangi John Juma & Another vs County Government of Migori & 6 Others* (2021) eKLR, *Masanga Atonga vs Lewkadia Milungi* (2021) eKLR are distinguishable in that in the aforementioned cases, the persons suing and being sued were making claims in the estate of the deceased persons. On that ground, the court held that the applicants ought to have taken out letters of administration ad litem in order to have capacity to sue the estate of the deceased person. In the present case, the appellant is not making claims in the estate of the deceased but he is suing in his own capacity as the owner of the rental properties built on the suit land. There is no legal requirement that a developer must be the owner of a particular parcel of land. The developer may as well as be a lessee or rent land for a short period in order to do particular developments.
  24. Looking at it differently, if the vendor of the suit land was still alive, sell the suit land to the appellant but fail to complete the transfer, would the appellant in her capacity as the owner and/or proprietor of the properties on the suit land not be entitled to sue for the damages incurred? Would it be expected that since the title to the suit land is still in the name of the vendor, the vendor would be required to sue on behalf of the purchaser by virtue of her name still being on the title? There would be no correlation of the damages being sought by the vendor since it is not her who incurred the loss; if at all she was to sue on the basis that she is the owner of the suit land but not the owner of the damaged properties on the suit land.
  25. It is therefore the finding of this court that the trial Magistrate erred in finding that the appellant was required to obtain letters of administration ad litem to claim his purchaser's interest.



26. In order to prove ownership, the appellant produced “Pexh4” being the sale agreement between himself and the deceased. There is no reference in the sale agreement of the land reference number of the suit land. This court is of the view that failure to have the sale agreement indicate the particular land registration number which the suit properties were built on, is not fatal. This was not a dispute over the ownership of the land which the trial court has been called upon to consider before reaching its findings. All that the appellant had to prove was that the damaged property belonged to him. It is therefore this court’s finding that on a balance of probabilities, the appellant proved that the damaged properties on the suit land belonged and/or were developed by him.
27. In this case, the respondent did not call any witnesses in support of its defence and to rebut the appellant’s case. Pleadings are generally mere allegations and of no probative value unless subjected to the required test of cross examination. In *North End Trading Company Limited (Carrying on the Business under the Registered Name of Kenya Refuse Handlers Limited vs City Council of Nairobi* (2019) eKLR the court held: -
- “A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff’s case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant’s evidence.”
28. See also *Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others* (2009) eKLR where the court held:-
- “It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleadings. In the same vein, failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”
29. Even if the respondent did not adduce any evidence, in support of the defence, the law imposes a duty on the appellant to prove his case on a balance of probabilities in terms of Sections 107 and 108 of the *Evidence Act*. In *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR it was held that:-
- “As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence.”
30. In his judgement, the trial Magistrate found that indeed the accident occurred and the respondent was to blame. At page 21 of the record of appeal, the Magistrate said:-
- “From the evidence of PW1, it is clear that the motor vehicle registration number KCF 559Z veered off the road and rammmed onto the house and damaged the house. As a matter of fact, there is no way that plaintiff may have contributed to the accident. I do find that the accident was caused by the negligence on the part of the driver of the motor vehicle registration number KCF 559Z and I do hold the defendants 100% liable for the accident.”
31. Having so found and without evidence to the contrary, the appellant proved his case and was entitled to compensation. He supported his claim for compensation by production of the valuation report.



32. The valuation report indicated the value of the damaged property was Kshs. 500,000/=. As I have observed, the appellant having proved that the suit property belongs to him, the question of who instructed the valuer to conduct the valuation is not fatal to the claim. It is common that valuation reports must contain the land reference number of the land being valued and the valuer can only rely on the title documents in his possession. The findings in the valuation report was not challenged by the respondents and this court adopts the report as it is.
33. The valuer opined that the damaged store building would cost an estimated Kshs. 500,000/= for replacement and/or repairs. I find that the appellant is deserving to be awarded the sum of Kshs. 500,000/= as damages for the replacement of the damaged part of the building. The appellant prayed for special damages of Kshs. 25,000/= being the amount paid for the valuation report and Kshs. 5,000/= per month for loss of rental income. It is trite law that special damages should be specifically pleaded and proved. There is no evidence that the appellant proved the amount by way of receipts. The claim for special damages therefore fails and it is hereby dismissed.
34. From the foregone, the appeal partially succeeds. The judgement and decree of Hon. Obiero dated and delivered on 24/3/2022 is hereby set aside. The following orders do issue: -
- a. The appeal is meritorious.
  - b. The decree in the lower court is hereby set aside and judgement is entered in favour of the appellant.
  - c. The Appellant is hereby awarded Kshs. 500,000/= as special damages.
  - d. Costs and interest of this appeal and the suit is hereby awarded to the Appellant.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**R. WENDOHO**

**JUDGE**

Judgment delivered in the presence of;

Mr. Singei for the Appellant.

Mr. Odero for the Respondents.

Emma & Phelix Court Assistants.

