



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 67 OF 2017

BETWEEN

HENRY NYABUTO ONDIEKI.....APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

(Being an Appeal from the Judgment and Decree in Nyando SPMCC 149 OF 2016

by Hon. M.C. Nyingei (RM) on 30th August, 2017)

JUDGMENT

1. The Appellant's case at the lower court was that on 05.02.16, one Maurice Otieno Opiyo, chief Chemelil Location led and provided security to persons that trespassed into his house and destroyed property. As a result, thereof, he prayed for damages for loss of property and special damages.

2. The Appellant's claim was denied and in a judgment dated 30.08.17, the trial court found the Appellant's case not proved and dismissed it with costs to the Respondent.

3. The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal in which he faults the trial court for dismissing his case. I directed the parties to dispose off the appeal by way of written submissions which the Appellant dutifully filed.

Analysis and Determination

4. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**).

5. It is not in dispute that the Appellant did not witness the trespass and remove of property from the house he had been allocated by his former employer Chemelil Sugar Company. He stated that he had sued the State since he had received information that Maurice Otieno Opiyo, chief Chemelil Location was present during the incident.

6. In his defence, Maurice Otieno Opiyo, chief Chemelil Location stated that the eviction was carried out by the security officers of Chemelil Sugar Company and that he was called to witness the incident only for the reason that he was the chief of the area.

7. I have carefully considered the evidence that was tendered before the trial court. The Appellant conceded that he was not present during the incident complained of. The person that allegedly informed him that the chief took part in the removal of his property was not called as a witness.

8. It is trite law that "whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** states as follows:

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.

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

9. Further **Section 109** in narrowing down to proof of particular facts stipulates:

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.

10. **Section 110** further provides that:

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

11. Regarding the incidence of burden, **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.

12. It is therefore apparent that the burden to prove that the chief took part in the removal and destruction of Appellant's property lay with the Appellant, a duty which the trial court correctly found was not discharged.

13. From the foregoing analysis, I am persuaded that the Appellant's claim was based on hearsay evidence which evidence is irrelevant and inadmissible and its rejection by the trial court was well founded and I have no reason to interfere with that finding.

DISPOSITION

9. In the end, I find that this appeal has no merit and is dismissed with costs to the Respondent.

DELIVERED THIS 23rd DAY OF April 2020

T. W. CHERERE

JUDGE

Court Assistant Appellant Respondent

- Ms. Amondi/Ms. Okodoi

- In person

- The AG

Order

This judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID - 19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March, 2019.