



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL APPEAL NO. 33 OF 2018

HABEL MUCHEMI NKOROI.....APPELLANT

VERSUS

STEPHEN MUCHINA....RESPONDENT/APPLICANT

R U L I N G

1. The appeal arises from the Judgment delivered on 15th March 2018 in Kerugoya Chief Magistrate's Court Civil Case No. 279/2015. The Appellant was dissatisfied with the Judgment and filed a memorandum of appeal dated 8th June 2011 raising the following grounds: -

a. That the learned trial magistrate erred in law and fact by making a decision as against the weight of evidence adduced by the plaintiff

b. That the learned trial magistrate erred in law and fact in disregarding the Plaintiff's evidence and witnesses thus arriving at an erroneous decision

c. That the learned trial magistrate erred in law and fact in disregarding the Plaintiff's evidence and documents thus arriving in an erroneous decision.

The appellant prays that the appeal be allowed, judgement and orders of the learned magistrate be set aside and costs of the appeal.

The appeal was admitted on 21st May 2019.

2. The Respondent filed a notice of Pre-liminary Objection dated 10th December 2019. The contention by the Respondent is that the record of appeal is defective hence rendering the appeal incompetent. The counsel for the Respondent opted to argue the Preliminary Objection along side the appeal. Consequently, the court gave directions on 10th December 2019. The court directed that the appeal be disposed off by way of written submissions. The matter came up to confirm filing of submissions on 25th February 2020. The applicant was absent without any explanation and he had not filed submissions. The court proceeded to give a date for the ruling. However, the court was supposed to give Judgment as directions on the hearing of the appeal were given.

3. In her submissions, the Counsel for the Respondent addressed all the four grounds as they all relate to the issue of evidence and whether it was disregarded.

4. Upon being served with the notice of Pre-liminary Objection dated 10th December 2019 the Appellant acknowledged receipt and filed a document on 10th December 2019 stating that each party to await the court's determination.

5. The brief background in this matter is that the Appellant moved the court vide a "**Small-Track**" plaint dated 9th November 2015 and filed in court on 16th November 2015 claiming compensation of missing and/or damaged items as set in paragraph 7 and costs of the suit. The facts giving rise to the claim are that the Plaintiff was a tenant of the Respondent in is premises at Kutus Mjini. At some point whose date is not indicated, the Respondent locked the premises and denied the Appellant access to the building to remove his items. The Appellant filed a reference in the Rent Restriction Tribunal at Embu, case No.93/2014.

6. The Tribunal ruled that the Respondent do release the Plaintiff's goods in the presence of an officer from the tribunal and the missing and/or damaged items to be pursued through a civil suit.

7. Upon visiting the premises the Appellant found items listed at paragraph seven (7) of the plaint missing and or damaged. These are: -

- a. Stovestand,
- b. Lamp
- c. Sony Radio.
- d. Paper Nylon and Meter Gauge
- e. Padlock
- f. 2 Blankets
- g. 1 Bedcover
- h. 1 sheet
- i. 1 mattress
- j. 13 Kg Hashi Gas
- k. Complete Gas cooker
- l. Water Pump machine (dyesin Hydra High Pressure Shp)
- m. 37 days in lodging
- n. 1 Mosquito net
- o. Bus fare 10 days court attendance
- p. Money that was in the house
- q. 3 Stools
- r. Tables and Sofa Set.

8. The Plaintiff claimed compensation for these items. The Plaintiff's list of documents included the Ruling of the Rent Tribunal and a list of the damaged items.

9. In a statement of defence filed on 19th November 2015 the Respondent stated that he released the Plaintiff's goods as directed by the rent Restriction Tribunal but denied that any of the goods had been damaged. The Respondent denies that the Plaintiff incurred transport expenses and lodging fees.

10. The trial magistrate after a full trial, held that the Appellant had failed to prove his case and dismissed it with costs. I have considered the appeal, the pre-liminary objection and the submissions. This is a first appeal. This court has a duty to re-evaluate all the evidence tendered in the lower court and come up with its own independent finding **Section 78(2) of the Civil Procedure Act** gives a first appellate court the same powers as those of the lower court and requires it to perform the same duties. The 1st appellate court is mandated to consider both facts and law. The Section provides:-

“Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of the original jurisdiction in respect of suits instituted therein.”

This duty was reiterated in the case of **Oluoch Eric Gogo -v-Universal Corporation Limited [2015] eKLR** where the court stated-

“ As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle and Another -vs- Associated Motor Boat Vo. Ltd & Another, (1968) E.A 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore make an allowance in that respect.....

From the above decision which echo Section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of witness is inconsistent with the evidence generally.”

11. The Appellant in his evidence chose to adopt the witness statement which he tendered in court in compliance with **Order 3 Rule 2** of the **Civil Procedure Rules**. This is expected to give the adverse party an insight of the evidence in support of the claim in order to enable him/her to prepare his defence.

12. In the statement, the Appellant replicated paragraph -7 of his statement of claim in his plaint. The Plaintiff attached a list of the items and their value making a total of Kshs.115,157/-. This includes a claim of Kshs.10,000/- stated to be court attendance loss, bus fare Kshs.990/-, money that was in his house Kshs.5000/-. Later the Appellant filed a list dated 15th December 2014 and claimed 15,000/- for following the case for ten days and the 1500/- forming a total of Kshs.15,000/-. He also claimed Kshs.14,800/- for hiring a lodging and Kshs.12,000/- for transport. A further list was filed on 25th July 2017 which had claimed additional items. The Appellant produced one exhibit, the order of the Rent Restriction Tribunal and the list filed on 25th July 2017.

13. The claims for following up the case in court were misplaced. These costs are claimed after the case is finalized and the court in its discretion has awarded the party such costs. The Appellant had not been awarded costs by the court and could not therefore claim costs even before the case was finalized.

14. It is trite law that the special damages must not only be pleaded but must be specifically and strictly proved with such particularity. The Appellant did not produce any receipts to support his claim. **Section 107 of the Evidence Act** places a burden of proof on a party who alleges to prove those facts.

It provides –

“ Whoever desires any court to give Judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.

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

The Appellant did not produce any receipts to prove his claim. The court of Appeal in the case of **Provincial Insurance Co. E.A Ltd -v- Mordekai Mwanga Nadwa KSM CACA 179/1995 UR** the court was emphatic on the need to prove special damages strictly. The court stated –

“ It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.”

The Appellant listed the alleged loss in the plaint but did not lead any evidence at all in support of the alleged loss and damage. The Appellant kept on filing lists of the items and figures without any evidence in support thereof. No credible documentary evidence in support of the alleged special damages was tendered.

15. The Appellant claimed items which are different from the ones he listed before. The Rent Tribunal; see letter he had written to the chairman produced as exhibit D 3. The Rent Inspector listed the items which were removed from the house. The Appellant carried all of them. There was no indication that some were damaged or missing. The trial magistrate found that the list in the plaint and the list filed by the Inspection Officer were different.

The Magistrate stated;

“ The Plaintiff did not advance any evidence of owning the items he alleges were lost. It was not clear which items were lost and which were damaged. He simply lumped them together without differentiating. A rent inspector was present when the plaintiff opened the locked house. It is not clear when he locked the house but more importantly there was no record of items claimed to be missing from the house in the presence of the inspector so that an inventory of the same could be taken.....

All in all I find that the plaintiff has failed to prove his case on a balance of probabilities and the same is dismissed with costs.”

My view is that the trial magistrate's finding was supported by the facts which were before him which can be seen from record. The Inspector from the Rent Tribunal was an independent witness who listed the items retrieved from the house. The appellant introduced new evidence in his submissions which was not pleaded in plaint. This was captured in the Judgment by the trial magistrate. Submission can only be based on the pleadings, the evidence tendered and the law. It is not an avenue of introducing new evidence. The trial magistrate was right in disregarding the untested evidence introduced belatedly in submissions by the plaintiff.

16. I find that the findings by the trial magistrate cannot be faulted as the Appellant failed to prove his case on a balance of probabilities which is the threshold of proof in civil cases. The Plaintiff failed to tender credible evidence in support of his claim.

17. On the preliminary objection which was argued together with the appeal, A preliminary objection is raised before trial and before the merit of a case is determined. The court does not take into account the merits of the suit. The *locus classicus* on preliminary objections is the Court of Appeal decision in the case of **Mukisa Biscuits Manufacturing Ltd v. West End Distributors Ltd [1969] EA 697** where it was stated as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In ***Avtar Singh Bhamra & Another –vs- Oriental Commercial Bank*** where the High Court of Kenya at Kisumu No.53 of 2004 stated that, **“a Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”**

In the case of ***John Mundia Njoroge & 9 others –vs- Cecilia Muthoni Njoroge & Another Nyeri High Court Succession Cause No. 127 of 1999*** delivered in 2016, **Mativo J.** listed six grounds upon which a Preliminary Objection may be raised which include;

- a. Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
- b. Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
- c. Insufficient specificity in a pleading;
- d. Legal insufficiency of a pleading (demurrer);
- e. Lack of capacity to sue, non-joinder of a necessary party or mis-joinder of a cause of action; and
- f. Pendency of a prior action or agreement for alternative dispute resolution.

In this particular matter the Respondent claimed that the record of appeal was defective rendering the appeal incompetent. The respondent argument was non-conformity of the record of Appeal However, in his submissions he did not address the preliminary objection.

The **Civil Procedure Rules Order 42 rule 13 sub rule 4** outlines the documents in the record of appeal.

(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

- (a) the memorandum of appeal;
- (b) the pleadings;
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs **(a), (b) and (f)**.

In the present appeal the appellant failed to include the plaint dated 16th November 2015 in his record of appeal. There was none compliance with rules by the appellant.

In this appeal if the preliminary objection was argued, it would have had the effect of dismissing the appeal. All in all, I find that the trial Magistrate arrived at the inevitable conclusion that the Appellant failed to prove his case on a balance of probabilities. In deed **Section 12 of the Evidence Act** provides that -

“ In suits in which damages are claimed any fact which will enable the court to determine the amount of damages to be awarded is relevant.”

Liquidated damages are special damages which must be strictly proved. The Appellant did not produce receipts, valuation reports and the nature of damages. Evidence which the Plaintiff failed to disclose and was tendered by the Respondent was that he recovered the items from the house without any complaints of the goods having been damaged or missing. The Appellant had no valid or credible claim. I find that the appeal is without merits and is dismissed.

Signed by: **HON. LADY JUSTICE LUCY GITARI.**

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Dated, signed and Delivered at Kerugoya by Hon Lady Justice J.N. MULWA on this 12TH Day of NOVEMBER 2020.