



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 32 OF 2015**

**RICHARD KARIMI NDIRITU.....APPELLANT**

**VS.**

**EUSTACE MWENENIA MWANGI.....RESPONDENT**

***Appeal from the Ruling of Hon. C. Wekesa SRM of 3<sup>rd</sup> August 2015 in Nyeri CMCC 55 of 2015***

**JUDGMENT**

By a plaint dated the 24<sup>th</sup> January 2015, the plaintiff now respondent sued the defendant now appellant the sum of Ksh 130,396 plus costs and interest.

That the cause of action arose out of his occupation and use of LR No. TETU/KABAGE/318. The Defendant bought the neighbouring parcel of land LR NO. TETU/KABAGE/322 and proceeded to 'encroach on the plaintiff's land, and to indiscriminately cut down trees that belonged to the plaintiff. As a result, the plaintiff suffered loss, the value of the cut trees, the value of crops destroyed, and the loss of the commercial, environmental and the aesthetic appeal of the land.

The defendant was found guilty of the charge of malicious destruction of property valued at Ksh 130, 361 in **Nyeri CMCR case no. 30 of 2011.**

The defendant filed defence dated on 6<sup>th</sup> May 2015. He denied the allegations and put the plaintiff to strict proof.

In an application dated the 22<sup>nd</sup> May 2015, the plaintiff filed an application seeking the striking out of the defence and the summary entry of judgment against the defendant.

The magistrate, relying on the judgment in the criminal case, s. 177 of the Criminal Procedure Code and s. 47A of the Evidence Act, struck out the defence and entered judgment against the defendant for the sum of Ksh 130,361 plus costs and interest.

Dissatisfied with this Ruling the defendant filed this appeal. He complained that the magistrate erred by determining the matter summarily, by finding that the plaintiff was entitled to the Ksh 130,361 without proof. He sought orders that the appeal be allowed, that the ruling of the subordinate court together with all the consequential orders be set aside and he be granted costs.

Parties agreed to dispose of the appeal by way of written submissions.

It is argued for the appellant that;

1. By demanding strict proof from the plaintiff, the defendant raised a triable issue that required a full hearing. Relying on the case of **Grace Njoki Gakuru & another (suing as Personal Representatives of the Estate of Francis Ritho Mugo (Deceased) vs. Corporate Insurance Co Ltd [2016] eKLR** where it was held that 'if a defendant shows a bona fide triable issue he must be allowed to defend it without conditions...'

2. That the value of the trees was a disputed issue which would have warranted a full hearing

3. That the legal principles which should guide the court in determining whether to strike out a pleading are settled, and now draw from the principles of justice enshrined in the Constitution, articles 47, 50 and 159, ... *that every court should pay homage to its core duty of serving substantive justice in the judicial proceeding before it...*as per Justice D Gikonyo in **Arabian Airlines Corporation vs. Sean Express Services Ltd [2014] eKLR** citing Madan JA in DT Dobie case- *that courts should aim at sustaining rather than terminating suits...courts should recognize the act of striking out a pleading completely divests a party of a hearing thus*

driving such party away from the judgment seat, which is a draconian act comparable to the proverbial drawing of the 'sword of the Damocles'. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurrer or something worse of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And the triable issue need not be one that which will succeed but one that passes the 'Sheridan J Test' in Patel v E. A Cargo Handling Services Ltd [1974] E.A 75 at page 76 (Duffus P.) that "a triable issue... is an issue which raises a prima facie defence and which should go to trial for adjudication."

4. That the defendant was denied the right to access to justice as contemplated by article 48 of the Constitution, and a fair hearing as per article 50(1).

Relying on the learned magistrate's case judgment, counsel for the respondent opposed the appeal on the grounds that the appellant was duly convicted for the charges in Nyeri CMCR case no 80 of 2011. Further that under s. 47A of the Evidence Act and s. 177 of the Criminal Procedure Code the trial court was empowered to proceed as it did.

That the trial magistrate was empowered under order 2 rule 15 of the Civil Procedure Rules and hence there was no error.

The respondent relied on reasoning of Graham Paul V.P in Churanjila & Co vs Adam (1950) 17 EACA. ... 'it is desirable and important that the time of the creditors and of the courts should not be wasted by the investigation of bogus defences.' That the reliance by the appellant on s. 1A, 1B of the Civil Procedure Rules and Article 159 of the Constitution were only meant to delay the disposal of the claim.

The issue for determination is whether the magistrate erred in summarily striking out the appellants defence.

Section 47A of the Evidence Act Cap 80 provides that;

*A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged. (emphasis added)*

It clearly states the judgment in the criminal proceedings is conclusive evidence of guilt for the offence. It does not say it is proof of liability for damages. The judgment is conclusive evidence of the appellant's guilt for the offence of malicious damage to property.

Section 177 of the Criminal Procedure Code speaks to the restitution of property found on accused person to the person the court finds is entitled to it.

*Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order—*

*(a) that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or*

*(b) that the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.*

Clearly this section of the Criminal Procedure Code not applicable to this case. No property was recovered and hence restitution does not apply. If any compensation was the issue under the criminal law regime, then the applicable section would have been section 31 of the Penal Code cap 63 which states:

*Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.*

The case of Joseph Marunga Gitonga vs The Administrators of the estate of Rahab Wanjiru Evans [2012] eKLR is therefore distinguishable.

The case of Peter Tharau Ngure vs Margaret Wairimu Magugu Milimani Commercial Courts Case No 457 of 2003 (UR) the claim was based on an agreement between the parties.

In this case, the plaintiff filed a suit to seek compensation. The Plaintiff alleged certain things, specifically the value of the trees, the loss of the aesthetic value of the land among other things. Some of these issues were not issues before the criminal court and were not determined as no specific evidence was led to prove the same. This was denied by the defendant, and the plaintiff put to strict proof thereof. The trial magistrate made the assumption that in the circumstances liability was absolute, by virtue of s. 47A of the Evidence Act.

In ROBINSON –Vs- OLUOCH [1971] E.A the Court stated-

*“The Respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying, as Mr. Sharma would have us say, that a conviction for an offence*

*involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. That is not what Section 47A states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident.”*

I would say that the subordinate court in this case found the appellant guilty of malicious damage to property but that does not close it up for the appellant to contest the value of the alleged property.

The defence was dismissed on the strength of s. 47A of the Evidence Act and 177 of the Criminal Procedure Code I am of the view from the foregoing that those two provisions do not apply to this case.

I agree with Justice Gikonyo that the striking out of a pleading is a draconian act that should only apply in the clearest of cases. It cannot be said to be so in this case as there is at least one thing that the appellant was disputing and which cannot be said to have been proved in the criminal proceedings.,

To throw out his defence without hearing him denied him the chance to be heard and amounted to being condemned without a hearing. Giving him his day in court to interrogate the issue in dispute was necessary as a matter of upholding and enhancing substantive justice.

Hence, it is my finding that the trial magistrate erred in striking out the defence and entering summary judgment against the appellant.

The appeal succeeds.

The ruling delivered on 3rd August 2015 together with all subsequent orders is and are hereby set aside.

The suit be set down for hearing.

The appellant to have costs of this application and the application in the lower court.

**Dated, delivered and signed at Nyeri this 25<sup>th</sup> day of May 2018**

**Mumbua T. Matheka**

**Judge**

In the presence of:

Court Assistant: Atelu

Counsel for appellant:

Counsel for respondent: