**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.3 OF 2008**

**STANLEY CHERUIYOT & 5 OTHERS……..APPELLANT**

**VRS**

**MICHAEL D. O. ODHIAMBO……..RESPONDENT**

(Appeal from the Judgment and Decree in Kericho Principal Magistrate's Court Civil Case No. 836 of 2002 (Hon. K. Mogambi (SRM) delivered on 28th February 2008)

**JUDGMENT**

1. This appeal arises out of Kericho Principal Magistrate's Court Civil Suit No.836 of 2002. The respondent was the plaintiff in that suit while the appellants were the defendants. In his amended plaint dated 12th February 2003, the plaintiff/respondent alleged that on the 19th October 2000, at around 10.00 a.m, he had returned to his house from work and found it broken into. Property had been taken, which had never been recovered. He claimed a sum of Kshs.477,729 on account of several household items which he tabulated in his plaint and to which he assigned values. He prayed for the sum of kshs.477,729, costs of the suit and interest.

2. A defence was filed on behalf of all the defendants, the current appellants. They denied in their defence dated 9th May 2003 being aware of the contents of the plaint with regard to the plaintiff's house being broken into on 19th October 2000. They put the plaintiff to strict proof of his allegations.

3. In a further amended plaint amended on 26th August 2004, the plaintiff joined the 6th respondent, Brook Bond Limited, as the 6th defendant. His claim against the 6th defendant was that he leased or rented his residential house from the 6th respondent, who managed or controlled the operations of the estate. He sought in his prayers the sum of Kshs.477,729 or a return of the chattels trespassed upon by agents, servants or employees of the 6th defendant/appellant, working at Koruma Tea Estate, whom he alleged colluded with the 1st – 5th defendants to trespass upon his goods, for which he held the 6th defendant vicariously liable.

4. In its defence dated 27th September 2004, the 6th defendant denied the averments in the plaint and sought that the plaintiff proves his allegation that his goods were trespassed upon. It averred that the plaintiff's goods were moved to new premises with his full knowledge and kept at an alternative and convenient premises, and an inventory of the goods taken, which was within the plaintiff's knowledge.

5. In the judgment delivered on 28th February 2007, Hon. K. Mogambi, SRM, found for the plaintiff and awarded him the sum of Kshs.477,729 claimed in the plaint.

6. Aggrieved by the decision of the court, the appellants have filed the present appeal in which they raised eight grounds of appeal. However, in their submissions which are undated but were filed in court on 13th December 2016, they abandoned the rest of the grounds and argued grounds 2, 4 and 6 which are as follows:

> ***1. ….***
>
> ***2. The learned trial magistrate's finding that the appellants had failed to establish or say what items were recovered from the respondent's house has no basis in the face of the respondent own evidence on record that he followed his things to the store.***
>
> ***3. ….***
>
> ***4. The learned trial magistrate misdirected himself in law and fact by not finding that it was miscarriage of justice to admit and take into consideration documents which had been marked for identification but not produced in evidence.***
>
> ***5. ….***
>
> ***6. The learned trial magistrate erred in law and fact by failing to consider the submissions and authorities given to him by the appellants' counsel as he should have done and as a result came to unbalanced findings.***

7. As the first appellate court, I am under an obligation to assess the evidence presented before the trial court and reach my own conclusions. In doing so, I bear in mind that I have neither seen nor heard the witnesses, which the trial court has done – See **Selle vs Associated Motor Boat Co. Ltd 1968 E.A 123**.

8. The plaintiff testified and called three witnesses. His case was that he was a teacher at Changoi Primary School and resided at Changoi estate. In 2000, he was resident at the Koruma Labour Camp and teaching at Koruma Primary School. His landlord at the Labour Camp was the 6th defendant/6th appellant, to whom he paid monthly rent of kshs.200/-.

9. At around 10.00 a.m on 18th October 2000, he returned to his house at the Labour Camp to find that the door to his house had been broken and someone had gained entry. He was informed by neighbours that some people had taken his goods. He said they had put his things in a trailer. He recognized one Cheruiyot, Alfred Rop, David Soi, Stanley Cheruiyot and Daniel Ruto. He reported the incident to the D.O's office and on 27th November 2004, he reported to the police. He said that the people who took his things claimed he had not paid rent and that is why they had taken his goods. He enumerated the goods that had been taken and produced receipts in respect of some of the items, whose value he put as Kshs.477,709. He prayed that the court should grant him this amount, costs and interest.

10. In cross examination, he stated that he was housed by Brooke Bond and was a teacher at the company school. He lived at the Labour Camp with the tea pluckers. He was not aware that the company wished to move teachers from the labourers' camp. He had moved to the camp when there were clashes, in 1992-3 and had not agreed to move to teachers' houses. He confirmed that he knew one Rop, but that Rop never told him that they were moving his things, but he saw him at a place called Store when they were carrying his things on a trailer. He was told that his goods had been taken to a store, but was not told they were taken to Koruma Primary School. He later reported the matter to the police at Litein, but was not told to go for his things.

11. In re-examination, he stated that he was one of the teachers residing on the labourers' camp. He was the only one moved out, and was not given notice to vacate.

12. Jackson Lukasa was the second plaintiff witness. His evidence was that he lived with then plaintiff/respondent at Koruma estate, their houses being next to each other. On 18th October 2000, he

was at his house at about 10 a.m. when he heard people whom he recognized breaking into the respondent's house. They had a company tractor and trailer. They put the respondent's household goods in the tractor and trailer and took them away.

13. According to Lukasa, while the respondent's goods were being loaded, the respondent came to his house. Lukasa followed his goods to the store. He further stated that there were other teachers at the camp, and the day after the respondent's goods were moved, another teacher came to the house. In cross-examination, he stated that he had been sacked from employment on 4th December 2003, but had no grudge against the defendants.

14. PW3, Paul Chenga Tambo, told the court that he was the plaintiff/respondent's neighbour at Chemogo estate. That on 19th November 2000, he had seen a tractor and trailer at the respondent's house. He also saw Ruto, Rop, Mr. Soi, the Deputy Headteacher of Koruma Primary and a Mr. Cheruiyot. He had not seen anything fishy.

15. The defendants called 4 witnesses. The first was Alfred Rop, a supervisor with the 6th respondent at its Kapkweny estate. His evidence was that on the 19th of October 2000, at about 10.00 a.m., he was sent to carry the plaintiff's goods to a new area. He went to the plaintiff's house at 7.15. a.m. with 12 workers and informed him that the workers would help him to arrange his goods to help him move to a new house. He then went to work.

16. When he returned at about 10.00 a.m., he found that the plaintiff had locked the house. He was told to break the door to the house by the manager, and he called the head teacher of Koruma Primary School where the plaintiff was teaching, and they broke the door. They took an inventory of the items in the house, loaded them on the trailer, took them to Koruma Primary School servant quarters and locked them in. The key was retained by the deputy head teacher. It was later that he learnt that the plaintiff had complained at Litein Police Station that his goods had been stolen.

17. The evidence of DW2, John Cheruiyot, a manager with the 6th appellant at Chemiyu estate, was that he had told the respondent to move from the labourers' camp to the teachers' compound where there was a vacant house. He had said that he had no means to move, and DW2 told him that he would provide transport. He instructed Stanley Cheruiyot, a field assistant, to provide transport, which was done. The plaintiff had, however, left when he saw the field assistant and three supervisors going to move him. He later got a complaint from the plaintiff that his house had been broken into, and that he did not want to move to the new house.

18. The third defence witness was Stanley Cheruiyot, who was a field assistant at the material time. His evidence was that he had been asked on 19th October 2000 by his then manager, John Cheruiyot, to go to Koruma Labour camp to move some household goods from the labour camp to the teachers' quarters. He sent a trailer to the plaintiffs' house where he found goods being loaded onto the trailer.

19. DW4 was David Soi, a teacher at Rehema Primary School. He was a colleague of the plaintiff at Koruma Primary school at the material time, where he was deputy head teacher. Most teachers at the time were housed in the school compound, but the plaintiff resided in company premises outside the school.

20. According to Mr. Soi, he was informed that the company wanted to move the plaintiff to a new house at the school, and he was wanted at his house to help move his things. He informed the plaintiff and he left for his house. The deputy head teacher also went to the house and found the goods being loaded onto the trailer, and then they were taken to the school and put into a new house. The house was locked and the keys given to the head teacher. DW3 later heard that the plaintiff had complained to the police

21. In his judgment dated 28th February 2007, the trial magistrate set out the plaintiff and defence cases as set out above. He noted that there was no denial by the defendants that the plaintiff's house had been broken into in his absence and the goods put in a house that the plaintiff did not want. He also observed that the plaintiff's house was broken into in his absence, which act was illegal. He noted that the

defendants had failed to say or establish what items they removed from the house. Further, that if the items were intact in the house in which they were kept, then the defendants should prove that. He also noted that the plaintiff had receipts for most of the items he had purchased, and concluded that on a balance of probability, the plaintiff had established his case. He therefore entered judgment for the plaintiff for the sum of Kshs 477, 729, costs and interest.

22. As noted earlier, the appellants canvassed three grounds of appeal and abandoned the rest. Their first ground was that the trial court erred in finding that the appellants had failed to establish what items they took from the respondent's house. This was so in light of the respondent's own evidence that he had seen the people who had taken his goods and that they had put them in a trailer, and that he saw a cupboard in the trailer but could not see other things and was told they had been taken to a store.

23. Their second ground was that the respondent had a burden to prove that he had lost the 110 items set out in the plaint. He had not proved the 110 items to support his claim of Kshs 477,729. He had a burden under section 107 of the Evidence Act to prove that he had indeed lost the 110 items that he alleged he had lost.

24. The last ground canvassed by the appellants was the ground of jurisdiction. Their argument is that as the respondent claimed that his goods had been taken despite his having paid his rent in full, the matter fell outside the jurisdiction of the trial court. The appellants submitted that pursuant to the provisions of section 29 as read with section 37 of the Rent Restriction Act, Cap 296 of the Laws of Kenya, the matter fell outside the jurisdiction of the Resident Magistrate's Court.

**Determination**

25. I have considered the record of the court and the submissions of the appellant in this matter. The respondent did not file submissions even though there is an affidavit on record indicating that his advocates were served with mention and directions notices in respect of the filing of submissions.

26. What I discern from the record is that the respondent was working as a teacher in a school, Koruma Primary School, which appears to have been in one of the 6th respondent's estate. He resided in a house in a labour camp, as opposed to within the school compound. It appears that a decision was made to relocate him from the labour camp to the school compound.

27. The appellants' version of events is that the respondent had been informed that he would be moved from the labour camp to the school compound. According to the appellants, he did not protest at the move, indicating only that he did not have transport. However, on the day he was moved, he was not present, but arrived at around 10.00 a.m to find his goods being loaded onto the trailer.

28. The appellants concede that they broke into the respondent's house in his absence, loaded his goods onto a trailer, took them to a store or a house at Koruma Primary School, and left an inventory and the keys to the deputy headteacher or head teacher of the school. There is some contradiction in the appellants' evidence with respect to who was left with the inventory and the keys to the house where the goods were kept. DW1 says the keys and inventory were left with the deputy head teacher, while the deputy head teacher says the inventory was left with the head teacher. At any rate, the person who was left with the inventory did not produce it, and the court was left, as is this court, with the two versions of events.

29. The respondent's contention is that the appellants broke into his house on 19th October 2000, took away his goods, and refused to return them. He alleges that they did this because he was in rent arrears, though he maintains that he did not owe any rent. He concedes that he saw his goods on the trailer, but did not follow them to where they were taken. He did not ask the manager of the 6th respondent where his goods were, nor did he report the alleged theft to the police until much later.

30. From the judgment of the court, it appears that the court accepted the respondent's version of events, having noted in particular that the appellants had broken into the respondent's house, which was

unlawful.

31. In the first ground argued in this appeal, the appellants argue that the court erred in finding that the appellants had failed to establish what items they took from the respondent's house. In their view, the court should have found in their favour given the respondent's own evidence that he had seen the people who had taken his goods and that they had put them in a trailer, and that he saw a cupboard in the trailer. However, the court had before it a list from the plaintiff/respondent of items taken by the defendants/appellants. In this case, given the conflicting versions, the appellants had a duty to produce before the trial court the inventory of goods they had taken from the respondent's house.

32. Looked at from the distance of almost seventeen years, the incident in question having taken place in October 2000, the parties in this matter acted in a manner that does not seem so wise, and would never have found themselves in the present situation had a little thought been put to the actions of the parties, particularly the appellants. They wrong-footed themselves when they decided to break into the respondent's house, in his absence, and carry away his goods. They compounded matters when they failed to produce any evidence before the trial court with respect to the goods that they had taken from the respondent's house. Given the facts that were before the trial court, whatever impression one may, from the facts, form about the conduct of the respondent, I am unable to find for the appellants on their first ground of appeal.

33. The appellants argue that the respondent had a burden to prove that he had lost the 110 items set out in the plaint, in order to support his claim of Kshs 477,729. This burden, according to the appellants, is imposed by section 107 of the Evidence Act which provides that ***"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***."

34. It seems to me that the appellants are on stronger ground on this point. From the record, the respondent enumerated some goods, and produced some receipts before the trial court, which the trial court found established his claim against the appellants. He was, however, unable to produce evidence in respect of the cost of some of the items he alleged had been taken away by the appellants. His explanation was that the goods were in a briefcase that had been taken away with other goods by the respondent.

35. The record of appeal before me is unclear with respect to the items that the respondent was able to produce receipts in respect of. I have, however, read and considered the original record of the trial court, and the exhibits produced by the plaintiff/respondent. I note that he produced receipts in respect of some nineteen items, which included a motor vehicle engine, spare parts for a vehicle and other items related to a motor vehicle, as well as receipts for a t.v., radios and clothes. As noted earlier, there was no inventory of the goods that the appellants had taken from the respondent's house.

36. However, the respondent was only able to produce evidence in respect of the items mentioned above, the total value of which was Kshs 197,874. Given those facts, it was an error for the trial court to find that the respondent had proved the loss of all the items listed in the plaint, which had been valued at Kshs 477,709/=. In the circumstances, I am inclined to find that the trial court erred in entering judgment for the amount claimed in the plaint. The respondent was, in my view, only entitled to the items receipts in respect of which he had been able to produce, which amounted to Kshs 197,874. Accordingly, the award of the trial court is reduced to this amount.

**Jurisdiction**

37. The final ground of appeal related to the jurisdiction of the trial court. The appellants argue that, in accordance with section 29 as read with section 37 of the Rent Restriction Act, this matter should have been before the Rent Restriction Tribunal as the respondent alleged that the appellants had alleged that he was not up to date with his rent and that is why they took his goods. The appellants rely with respect to jurisdiction on the case of **The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1.**

38. Section 29 of the Rent Restriction Act, which is titled **"Penalty for subjecting tenant to annoyance"** provides as follows:

> ***A landlord and any agent or servant of a landlord who evicts a tenant without the authority of a tribunal or wilfully subjects a tenant to any annoyance with the intention of inducing or compelling the tenant to vacate the premises or to pay, directly or indirectly, a higher rent for the premises shall be guilty of an offence and liable to a fine not exceeding six thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.***

39. Section 37 provides as follows:

> ***The Chief Justice may make rules prescribing the procedure for enforcing determinations or orders of a tribunal under section 33, prescribing the time within which an appeal to a court may be brought and the procedure to be followed and the fees to be paid on such an appeal.***
>
> ***(2) Where jurisdiction or power to deal with any matter is conferred by this Act on a tribunal, no proceedings with respect to that matter shall be taken in any court except by way of an appeal under section 8 (2).***

40. Section 29 creates an offence for subjecting a tenant to annoyance, while section 37 reserves the jurisdiction of the Tribunal. I make two observations on this point. First, the respondent was not alleging annoyance on the part of the appellants. He was claiming his goods which had been taken away by the appellants when they broke into his house and took the goods away.

41. The second observation relates to the point at which a question of jurisdiction should be raised. While the appellants argue that they had raised the issue of jurisdiction in their submissions, it is evident that the jurisdiction of the court was not raised, as it should have been, at the earliest opportunity, in the defence, or at least in the course of the proceedings. In **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the Court of Appeal expressed the following view:

> ***"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."***
>
> (Emphasis added).

42. I am therefore unable to find in favour of the appellants on this ground either.

**Conclusion**

43. The upshot of my findings is that the appeal partially succeeds. The respondent is only entitled to the amount in respect of his goods which he was able to produce receipts in respect of, which together amounted to Kshs 197,874 together with costs and interest thereon.

44. As the appellants were partly successful, I direct that the parties bear their own costs of the appeal.

**Dated, Delivered and Signed at Kericho this 21st day of April 2017.**

**MUMBI NGUGI**

**JUDGE**