REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. E048 OF 2021

MINISTRY OF LANDS & PHYSICAL PLANNING.....1ST APPELLANT

NATIONAL POLICE SERVICE.....2ND APPELLANT

ISAIAH OUMA.....3RD APPELLANT

VERSUS

SHABAN OPIYO KASSIM.....1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

(Being an appeal against the Judgment of P.N Gesora (Mr) Chief Magistrate delivered on 9th June 2021 in ELC NO. 94 of 2019 Before Chief Magistrates Court at Kisumu)

BETWEEN

SHABAN OPIYO KASSIM.....PLAINTIFF

VERSUS

MINISTRY OF LANDS & PHYSICAL PLANNING.....1ST DEFENDANT

NATIONAL POLICE SERVICE.....2ND DEFENDANT

COUNTY GOVERNMENT OF KISUMU.....3RD DEFENDANT

NATIONAL LAND COMMISSION.....4TH DEFENDANT

ISAIAH OUMA.....5TH DFENDANT

JUDGMENT

The 1st Respondent herein by way of an Amended Plaint filed a suit on 6th October 2020 wherein he stated that Kassim Were Abdallah his father is the registered proprietor of land parcel which borders Lake Victoria to the South; Land parcel number KISUMU/KOGONY/2678 to the West , land parcel number KISUMUY/KOGONY/2670 to the North -West; Nkrumah Road to the North and both Lake Victoria and Fisheries Pier towards the East and the Land Adjudication Committee confirmed that the Land belonged to the 1st Respondent's father. It is the 1st Respondent's case that the suit land was not registered in his father's name or his family as ordered by the Land Adjudication Officer and is now appearing on the map in respect of Kisumu/Municipality Block 2 with Kogony Registration Unit just besides land parcel number KISUMU/KOGONY/2670 which was also awarded to his father. Due to this omission, the 1st Respondent's family continuously faced unjustified interference and harassment by third parties aided by known Government Officials.

Aggrieved by the acts of the Government officials, the 1st Respondent moved to court through Kisumu Chief Magistrate MISC ELCCC NO.196 of 2018 where he obtained an order restraining the Respondents from harassing his family over the land and also to compel them to

implement the Land Adjudication Committee's decision but the 1st Appellant's officials refused to implement the said orders. The Regional Surveyor declined, refused and/or ignored to provide information to the 1st Respondent alleging that the suit property belongs to the Maritime Police Unit despite the fact that the director Land Adjudication and Settlement acknowledging the declaration notice of Kogony Adjudication Section covered the area described in the suit property.

The 1st Respondent therefore prayed for the following orders

(a) An order of permanent injunction restraining the Defendants, their agents, employees, subordinates and /or any other person whatsoever acting on the Defendant's behalf or under their mandate and/or instructions from alienating, transferring, leasing, allocating, selling or otherwise dealing with the land parcel number KISUMU/KOGONY/2678 to the West , land parcel number KISUMUY/KOGONY/2670 to the North -West; Nkrumah Road to the North and both Lake Victoria and Fisheries Pier towards the East.

b)A declaration that land parcel number KISUMU/KOGONY/2678 to the West, land parcel number KISUMUY/KOGONY/2670 to the North -West; Nkrumah Road to the North and both Lake Victoria and Fisheries Pier towards the East belongs to Kassim Were Abdallah, as specifically awarded by the Land Adjudication Committee and upheld by the Land Adjudication Officer, Kisumu.

c)An order directing the 1st Defendant , its relevant officers, agents, employees, subordinates and/or any other person whatsoever acting on its behalf , including the 5th Defendant to recognize and register Kassim Were Abdallah as owner of land parcel number KISUMU/KOGONY/2678 TO THE WEST , land parcel number KISUMUY/KOGONY/2670 to the North -West; Nkrumah Road to the North and both Lake Victoria and Fisheries Pier towards the East and to issue the Plaintiff with a certificate of title /Lease in respect of land parcel number KISUMU/KOGONY/2678.

d)This Honourable Court be pleased to order and hereby orders the 3rd and 4th Defendants, the County Government of Kisumu and the National Land Commission to allocate the suit parcel KISUMU/KOGONY/2678 to the West, land parcel number KISUMUY/KOGONY/2670 to the North -West; Nkrumah Road to the North and both Lake Victoria and Fisheries Pier towards the East to the Plaintiff and to issue him with a letter of allotment and certificates of lease in respect of the same.

e) An order declaring Part Development Plan Numbers N/9/82/44, N9/2006/6, N9/2014/01 and N9/201/01A invalid.

f) General damages from the 1st,2nd and 5th Defendants for failure to register the suit land as ordered during adjudication, harassment and consequent loss.

g) A declaration that the 5th Defendant is an oppressive, unfair and unresponsive public officer and is therefore unfit to hold public office.

h) Costs and interest at court rates.

The 1st and 2nd Appellants entered appearance and filed a joint Statement of Defence and counterclaim while the 2nd and 3rd Respondents filed separate Statement of Defence. They denied the 1st Respondents allegations and put him to strict proof. The 1st and 2nd Appellants in the counterclaim contended that the suit property was allocated to Marine related industries through the physical development plan that was approved for use by Kenya Marine Fisheries Research Institute (KEMFRI), Kenya Fisheries Officer, Fisheries Staff Houses, Marine Police Unit and Marine Police Unit Staff quarters. It was the 1st and 2nd Appellants' case that the Marine Police Unit are the rightful owners of the land demarcated as Plot No. "A" as per the approved Physical Development Plan No. N9/2014/01A and the same was approved by the Cabinet Secretary for Lands and Physical Planning on 9th August 2018. The 1st and 2nd Appellant therefore prayed for:

a) A declaration that the suit land is public and is not available for reallocation to a third party.

b) A declaration that the suit property belongs to the National Police Service (Marine Police Unit).

c) An order of permanent injunction restraining the Defendant to the Counterclaim their agents or any other person acting on behalf of the Defendant from interfering with the suit land.

d) Costs of the suit and interest at court rates.

e) **Any other reliefs that this court deems fit and just to grant in the interest of** justice.

Grounds of Appeal

Aggrieved by the decision of the lower court, the Appellants herein filed a Memorandum of Appeal which was based on the grounds that the Learned Trial Magistrate erred in both fact and law by:

1. Ignoring the evidence tendered by the Appellants witnesses specifically the notice of the re-description of the boundary of Kogony Adjudication set in 1981, the map of Kogony Registration Section, the boundary plan and the map of Kisumu Municipality published in 1961 which clearly demonstrated that the suit parcel was and within the Municipality and fell outside the Kogony Registration Section.

2. Ignoring the evidence tendered by the Appellant that the boundary between the adjudication area and done before the process of adjudication commenced.

3. Failing to appreciate that adjudication could only take place within the declared Adjudication Section and could not occur in respect of a parcel within the Municipality.

4. Failing to appreciate that any action that was partaken with regard to the suit parcel within the Municipality during adjudication was void ab initio as it was done in contravention to the Land Adjudication Act and at the finalization stage the said parcel was left out on the discovery that it fell within the Municipality. The Magistrate thus erred in arriving at his finding that there was a valid decision that was made in 1983, yet the mere fact that the parcel fell outside the declared Adjudication Section made all acts partaken illegal.

5. Failing to appreciate that a decision of the adjudication committee awarded the Respondent. Yet the committee is not the final stage of adjudication. Adjudication is finalized after publication of adjudication register and preparation of the adjudication record.

6. Failing to appreciate that a decision of the adjudication committee was based on ownership between individuals in Kogony Registration Section and not about the final registration of the parcel.

7. Failing to appreciate that the mandate of the Adjudication Officers was only limited to land within the Adjudication Section and erred in arriving at a finding that the Adjudication Officers failed to carry out their mandate.

8. Failing to appreciate that the parcel of land known as Kisumu/Kogony/2688 is unsurveyed and is non-existent in the Land Adjudication Register in respect of Kogony adjudication section was finalized. The said parcel was left out because it fell within Municipal land and thus the court made a declaration that is statutorily unlawful and un-enforceable.

9. Finding that it is not enough for the adjudication officers to casually state that the 1st Respondent had a remedy in law yet the adjudication officers advised the Plaintiff to follow the legal process of allocation before the National Land Commission and the County Government as they had no legal mandate over land within the municipality those were not mere casual statement. They were backed up by Land Adjudication Act, The Constitution and the discovery that the parcel fell within the municipality.

10. Finding that there was a consent order which could only be set aside in the manner a contract would yet the alleged consent was never adopted as an order of the court, it was never executed by all stake holders, the Ministry of Lands who was the 1st Defendant was excluded. It was signed on behalf of the National Police by an unauthorized person.

11. Arriving at a finding that there was a consent order and that the Deputy Inspector General letter disowning the consent was not enough to set aside yet it went into the vey root of the legality of the consent as it stems into the capacity of the person who signed the alleged consent. Additionally, the consent did not undergo a verification and adoption process to ensure that it was legal and capable of being allowed to operate as an order of the court.

12. Considering the evidence from the Plaintiff at the site visit whereas the court clearly indicated that the sole purpose of the site visit was to establish the locus in quo and not to do a hearing at the site.

13. Considering only the Plaintiff's evidence at the site visit considering that the visit was done in the absence of representatives of the Ministry of Lands in the County Government, the State Department of Lands from the National Government.

14. In ignoring that the letters from the County Government of Kisumu and the National Land Commission presented by the 2nd Appellant and the 1st Respondent gave conflicting and contradictory representations of the suit parcel.

15. Ignoring the Appellants' submissions that only the Ministry of Lands and Physical Planning were custodians of all land records and only the evidence presented by them would give the right representation of the suit property in light of the glaring contradictions.

16. Relying on the 2nd Respondent's Defence that they have no claims in the suit land by virtue of the fact that they had no knowledge of gazette notice yet only the national government set aside and or acquired land for public use and not the defunct Municipal council or the County Government.

17. Arriving to the finding that the 1st Respondent had proved his case on a balance of probability yet he ignored to apply

himself on the issues as to the position of the parcel against the weight of the evidence tendered by the Appellant that the parcel fell within the Municipality.

18. Arriving to the finding that the 1st Respondent has been harassed and have spent huge sums of money yet no evidence was provided to support that fact.

19. Arriving at the finding that the 1st Respondent is entitled to an award of damages of Kshs. 15,000,000/= yet there was no proof that the Respondents suffered any actual loss.

20. Making declaration that the suit property was specifically awarded by the Adjudication Committee be upheld by the land adjudication officers yet the said parcel falls within the municipality.

21. Ordering that the 1st Appellant do issue the Respondent with a certificate of lease or title yet adjudication was finalized in 1983. No adjudication record was prepared and the suit property is not within the adjudication section.

22. Ignoring the Appellant's submissions and evidence that the Cabinet Secretary was charged with approving Part Development Plans and that the PDP thereunder was approved by the Cabinet Secretary after due process was followed.

23. The trial court cancelled both approved and unapproved PDPs which have been used to allocate land to other Government institutions within the area including KEMRI, the Ministry of Agriculture and Environment as well as the National Cereals Board.

24. Finding that the Letter of allotment to the National Police Service was cancelled by the 4th Defendant because the land is private land or ancestral land whereas the allotment was cancelled solely for the reason that the PDP was unapproved.

25. Ignoring that the said parcel was allotted to the National Police Service (Marine Police Unit) which cancellation was done in a unilateral and unfair manner a fact that was protested by the national police and are still awaiting response from the National Land Commission thereby awarding the parcel to the 1st Respondent.

26. Ignoring all the evidence tendered by the Appellants and the written submissions.

1st Respondent's Grounds of Opposition

The 1st Respondent filed Grounds of Opposition in opposition to the Memorandum of Appeal where he stated that no single point of law has been raised in the Memorandum of Appeal. The 1st Respondent stated that the letter described as "re-description of the boundary of Kogony Registration Section' is neither a legal instrument/ order nor a gazette notice as envisaged under Section 3 and 5 (2) of the Land Adjudication Act. The letter was signed by Dr. T.O. Aroka who was not appointed and gazette by the Minister.

It is the 1st Respondent's case that the Director of Land Adjudication & Settlement in his letter dated 30th November 2018 stated that the suit property existed prior to adjudication process in Kogony by virtue of it being ancestral land. That the purpose of the adjudication process is not to confer rights/ownership but to recognize existing rights and land adjudication is the final and authoritative determination of the existing rights and claims of people to land.

It is stated that the 1st Respondent was being advised to seek allotment from the county Government and National Land Commission yet the advice was not being made in good faith as the Appellants were unlawfully processing title for the suit property in favour of Marine Police. That as per the consent dated 11th October 2019, the Appellants did not apply to set aside the same.

The 1st Respondent stated that the land which is currently owned by the National Cereals and Produce Board was compulsorily acquired from the 1st Respondent's father and there was no PDP. The 1st Appellant confirmed this position in KISUMU H.C.MISC.No. 37 of 2001.The 1st Respondent therefore prayed that the trial court's judgment be upheld and this Appeal be dismissed with costs to the 1st Respondent and the general damages awarded by the trial court be increased.

1st Respondent's Written Submissions

The 1st Respondent in his submissions raised a number of issues to be determined by this court. On the issue of whether the 1984 PDP can legitimize the claim to the suit land by the 2nd Appellant, the 1st Respondent submitted that the 1984 PDP was not produced and that there is no law which permits the national Government to prepare a PDP on private land without first acquiring it through compulsory acquisition or transfer.

On whether the suit property is public land, the 1st Respondent submitted that the suit land does not meet the definition of a public land as provided for under Article 62 (1) of the Constitution as it is not un-alienated government land. That during the site visit by the court, it was confirmed that the 1st Respondent's family is in occupation of the suit property. The 3rd Respondent is constitutionally and legally mandated to manage and allocate public land on behalf of the National and County Governments and in a letter dated 21st December 2018, the 3rd Respondent stated that the suit property is private land and that the 1st Appellant should proceed to issue title documents to the 1st Respondent. In a letter dated 30th November 2018, the Director of Land Adjudication and Settlement acknowledged the declaration notice that the suit property has always been the ancestral land of Kassim Were.

On the issue of whether the land was demarcated, it was the 1st Respondent's submissions that the Appellants intentionally and maliciously destroyed or misplaced the demarcation map in respect of the suit property as they failed to produce it even after a Notice to produce the same was served upon them. On whether the Appellants are entitled to the reliefs sought, it was the 1st Respondent's submissions that prayers 1,3,4,5 and 7 in the Appellant's Memorandum of Appeal were neither pleaded nor sought in the lower court and are therefore not available in the Appeal stage. The Respondent further stated that the amount of Kshs. 15,000,000/= is not sufficient to compensate him and the family and relied on the case of **Grace Wambui Gichui v County Government of Kirinyaga & 2 Others (2018) eKLR** where the Petitioner was awarded Kshs. 10,000,000/= even though she was only 1 member of the family.

The 1st Respondent therefore prayed that the trial Court's judgment be upheld and the Appeal be dismissed with costs to the 1st Respondent and that the amount of general damages awarded to the 1st Respondent and his family be increased to Kshs. 144,000,000/=.

Appellant's Submissions

The Appellants raised a number of issues to be determined in their submissions and on the issue of whether the suit property falls within the Municipality or the adjudication section, the Appellants submitted that the court failed to consider the evidence tendered by their witnesses who clearly stated that the suit property falls within the adjudication section.

The Appellants further submitted that adjudication was not finalized in respect of the parcel and therefore no adjudication register was prepared. On the issue of whether the actions done by the adjudication officer with regard to the suit property in the municipality were legal, the Appellants submitted that the actions were illegal as the suit property falls outside the scope of their jurisdiction conferred by the Adjudication Act.

The Appellants stated in their submissions that the Part Development Plans were approved and PDPs are normally prepared in respect of public land for purposes of alienation and relied in the case of **Nelson Kazungu Chai & 9 Others vs Pwani University College (2014) eKLR** where the court held that Part Development Plan must be drawn ad approved by the Commissioner of Lands or the Minister of Lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is issued to the allottee.

The Appellants further submitted that the consent was not adopted as an order of the court as Counsel for the Attorney General objected to the consent on ground that the person who signed it had no authority to endorse it and the same consent had not undergone verification and adoption process by the court. On the issue of whether the Respondent proved harassment and loss warranting award for general damages, the Appellants submitted that the trial Magistrate applied wrong principles when he based the award on the fact that the Respondents have been harassed and spent huge sum of money seeking justice and the placed reliance in the case of **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs A.M. Lubia and Olive Lubia (1982-88) I KAR** at p. 730 where Kneller J.A stated as follows:

> ***"The principles to be observed in an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage".***

The Appellants further submitted that by the trial court finding that the 1st Respondent had proved his case on a balance of probability is erroneous since the Ministry of Lands and Physical Planning were custodians of all land records and only the evidence presented by them would give the right representation of the suit property in light of the contradictions from the County Government and the National Land Commission.

The Appellants therefore prayed that the orders sought in the Memorandum of Appeal be granted to them.

1st Respondent's Supplementary Submissions.

The 1st Respondent filed Supplementary Submissions in response to the Appellants submissions where he submitted that this is not a boundary dispute and if at it is a boundary dispute, the Appellants are in a wrong forum based on the provisions of the Land Registration Act on boundaries. It was further submitted that the PDPs that were cancelled by the trial court were already revoked by the 3rd Respondent and the court only declared them to be invalid.

The 1st Respondent further stated that the allegation that the PDPs were used to allocate land to other agencies is wrong and misplaced as the father to the 1st Respondent sold land to the National Cereals and Produce Board and to the Forest Department, the land that houses its offices and tree nursery. That section 8 (a) of the Land Act provides that in managing public land on behalf of the national and county governments, the 3rd Respondent shall identify land and prepare a database of all public land.

The 1st Respondent therefore prayed that the trial court's judgment be upheld and the Appeal be dismissed with costs to the 1st Respondent and the amount awarded to the 1st Respondent and his family as general damages be increased to Kshs. 144,000,000/=.

ANALYSIS AND DETERMINATION

This court has considered the pleadings filed and the submissions filed and on the issue of whether the suit property is public land;

This court agrees with the 1st Respondent herein that the suit property does not meet the threshold of public land since it's not un-alienated

Government Land.it is also clear that the suit property is not used or occupied by any state organ.

Article (62. (1) of the Constitution defines Public land as—

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

(c) land transferred to the State by way of sale, reversion or surrender;

(d) land in respect of which no individual or community ownership can be established by any legal process;

(e) land in respect of which no heir can be identified by any legal process;

(f) all minerals and mineral oils as defined by law;

(g) government forests other than forests to which Article 63 (2)

(d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(j) the territorial sea, the exclusive economic zone and the sea bed;

(k) the continental shelf;

(l) all land between the high and low water marks;

(m) any land not classified as private or community land under this Constitution; and

(n) any other land declared to be public land by an Act of Parliament—

(i) in force at the effective date; or

(ii) enacted after the effective date.

The 2nd Appellant vide a letter dated 4th November 2019, wrote to the National Land Commission confirming that the suit property is ancestral land belonging to the 1st Respondent's father and his family. The 2nd Appellant and other stakeholders executed a consent to that effect.

The National Land Commission having discovered that the Part Development Plan (PDP) was unapproved and in compliance with the court order dated 9th October 2019, cancelled the letter of allotment dated 11th March 2019 which it had prepared in favour of the National Police Service. The Part Development Plans (PDPs) can only be prepared in respect to Government land that has not been alienated or surveyed. The suit property belonged to the 1st Respondent's father which therefore means the same was private land.

Article 67 (2((a) of the Constitution provides that the National Land Commission is required to manage public land on behalf of the National and County Government. This court agrees with the trial court that the 3rd Respondent herein having cancelled the allotment letter issued to the 2nd Appellant was erroneous owing to the fact that the suit property was private land and not public land.

On the issue of whether the suit property was adjudicated, it is clear from the documents filed in court that Kogony Adjudication Section was created pursuant to the Land Adjudication Act. Adjudication of the suit property was done in the year 1982 and parties were issued with adjudication records.

It is the Appellants' case that the suit property parcel number 2688 was left out of the adjudication register because during the process of finalization, they discovered that the suit property was demarcated out of the adjudication section as it was within the municipality boundaries. This court has looked at the 2nd Respondent's Statement of Defence filed at the lower court where it clearly stated at paragraph 3 that the suit property does not being to the defunct Municipal County Council of Kisumu or the present County Government.

Pursuant to a letter dated 16th January 2019, the 2nd Respondent herein wrote a letter to the Regional Surveyor of Kisumu confirming that the

suit property belongs to the 1st Respondent's father and therefore it should be registered and a title issued in his name. The 2nd Respondent's Statement of Defence filed at the trial court further confirms that there are no records or gazette notices from the defunct Municipal Council of Kisumu acquiring interest in the sit property. This court finds that the suit property does not fall within the Municipality based on the letter dated 16th January 2019 from the County Government of Kisumu.

The Land Adjudication Committee Objection case No.9 of 1983 as consolidated with objection number 033 and 241 of 1983 dismissed the objection raised and ruled that the suit property belongs to the 1st Respondent's father and the Plaintiffs in the objection had a right of Appeal within 60 days which they failed to do so. On 21st December 2018, the National Land Commission wrote a letter to the District Land Registrar confirming that the suit property is private land and the registrar should proceed and issue title to the owner. Based on the evidence on record, the 1st Respondent has proved his case on a balance of probabilities and therefore this court finds that the suit property belongs to his father.

On the issue of general damages, this court does not agree with the trial court that an award of Kshs. 15,000,000/= is sufficient to compensate the 1st Respondent for loss, pain and suffering payable by the 1st Appellant herein. The figure of 15,000,000 appears to have been picked from the blues and granted to the 1st respondent. The learned magistrate did not demonstrate how he arrived at the figure.

This being a first appeal, the court is obliged pursuant to **Section 78 of the Civil Procedure Act**, to re-assess and re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it neither saw nor heard the witnesses as they testified.

This legal principal was pronounced in the case ***Francis Ndahebwa Twala vs Ben Nganyi, Siaya Civil Appeal No. 5 of 2017,*** where the court stated thus;

> ***"……. This being a first appeal, this Court is mandated by Section 78 of the Civil Procedure Act and as was espoused in the case of Kenya Ports Authority Vs Kushton (K) Ltd (2009) 2 EA, 212 wherein the Court of Appeal stated; inter alia: -***
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> > ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

In the current appeal, the appellant is challenging the quantum of damages. The appellant's contention is that the damages awarded are inordinately high thus the court should review the same. It must be pointed out that there is no uniformity at the moment in the general method of approach and award of general damages in Kenya.

It is trite law the award of damages is a discretionary exercise that can only be disturbed by an appellate court if it is established that the trial court misdirected itself, or took into consideration irrelevant facts or omitted to take into consideration facts which it ought to and as a result ended up in a wrong conclusion.

This principle was enumerated by the court of Appeal in ***Child Welfare Society of Kenya vs Republic, Ex-parte Child in Focus Kenya & AG & Others [2017] eKLR*** which cited with approval the decision in ***Mbogoh & Another vs Shah [1968] EA 93***, as follows: -

> ***"37. Sir Clement De Lestang V-P in Mbogoh & Another Vs Shah [1968] EA 93 stated thus:***
>
> ***"I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

The court President, ***Sir Charles Newbold*** in the same case stated:

> ***"For myself, I like to put in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in the exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of the discretion and that as a result there has been a misjustice."***

Subsequently, ***Madan JA (as he then was) in United India Insurance Co. Ltd Kenindia Insurance Co. Ltd and Oriental Fire & General Insurance Co. Ltd Vs East African Underwriters (K) Ltd (1985) eKLR*** developed the principle further urging appellate courts to resist the temptation of readily substituting the discretion of their members of the trial court. He thus stated:

> ***"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at the first instance, would or might have given different weight to that given by the Judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following mattes are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of or consideration of which he should not have taken account; fourthly, that he failed to take account of or consideration of which he should have taken account; fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

It is clear from the above case law that a figure reached by the trial court is not to be disturbed on appeal unless it is based on some erroneous principle that it is too low or so excessive that it must have been based on some incorrect reasoning. That is to say, an award of general damages must not be interfered with unless the trial judge acted on an erroneous principle, or the award is too low or so high as to amount to an entirely erroneous estimate. The onus is therefore on the appellant to show that the estimate is to tinged with errors as to make it incumbent on the appellate court to interfere. See ***Richard Kuloba, Measure of Damages for Bodily Injuries, Law Africa Publishing (K) Ltd, 2006*** **at 25-28.**

It is on this premise that the court in ***Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 held that:***

> ***"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect."***

The question that arises therefore is whether the trial magistrate in awarding general damages at Kshs. 15,000000, acted on wrong principles or misapprehended the facts or did for these or other reason made a wholly erroneous estimate of the damage suffered.

The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in ***Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730*** where it was held that:

> ***"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated…The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."***

The figure of Ksh 15,000,000 was awarded due to the fact that the 1st respondent was harassed and spent a huge sum of money but the harassment was not demonstrated by the 1st respondent. Moreover, there was no evidence that the 1st respondent spent a huge sum of money due to the harassment.

CONCLUSION

In the upshot, this court upholds the decision of the trial court save on the general damages of Ksh 15,000,000 which are hereby set aside. The court finally dismisses all grounds of appeal save ground number 19. The appellant to pay half costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28th DAY OF FEBRUARY, 2022.

ANTONY OMBWAYO

JUDGE

THIS RULING 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 2020.

ANTONY OMBWAYO

JUDGE