Mbithi & another v Mweti (Environment and Land Appeal 30 of 2022) [2022] KEELC 12 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEELC 12 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND APPEAL 30 OF 2022

LG KIMANI, J

APRIL 28, 2022

BETWEEN

MWANGE MBITHI ..... 1ST APPELLANT

MOHAMMED MBITHI ..... 2ND APPELLANT

AND

MWANGANGI MWETI ..... RESPONDENT

(being an appeal from the Judgment of the Learned Senior Principal Magistrate Z. J Nyakundi, sitting in Mutomo PMCC NO. 100 of 2016 and dated the 14th May 2019)

JUDGMENT

1. The Appellant appeals to this court from the Judgment of the Learned Senior Principal Magistrate Z.J Nyakundi, sitting in Mutomo CMCC No.100 of 2016 and dated the 14th May 2019 and in the Memorandum of Appeal dated 8th June 2019 raises the following grounds:
    1. That the Learned Senior Principal Magistrate erred and misdirected himself on the law and the facts when he relied on inadmissible evidence contrary to the guiding principles in the relevant laws a misdirection that led to the wrong decision in the circumstances of the case.
    2. That the Learned Senior Principal Magistrate erred and misdirected himself on the law and the facts when he failed to appreciate that the assessed damage claimed by the Respondent had been done on a land whose ownership had not been determined and not as presented by the Respondent.
2. The Appellant prays:
    a. That the appeal herein be allowed.

b. That judgment and orders of the subordinate Court be reversed and/or set aside and the same be substituted with an order dismissing the Respondent's claim in the lower court with costs.

c. That the costs of this appeal be awarded to the Appellant.

3. The genesis of the dispute is that the Respondent herein filed a suit against the Appellants herein in the Trial Courtbeing Mutomo CMCC No. 100 of 2016between MwangeMweti versus MwangeMbithi and Mohamed Mbithi claiming judgement in the sum of Kshs 563,455/-. The suit arose out of out of the claim that the Defendants entered into the Plaintiffs farm without his consent and damaged his trees whose value was assessed at Kshs.563,455.

4. The Appellants filed a defence claiming that the land where they cut the trees belongs to them and that it was not the land that was in dispute in land case No. 54 of 2002.All the parties to the suit filed written witness statements which they relied upon together with oral evidence adduced in court. The Plaintiff testified and called three witnesses while the Defendants testified on their own behalf.

5. On 14th of May 2019 the Hon. Z.J Nyakundi delivered judgement and found that the Plaintiff had proved his case on a balance of probability, that he was the owner of the suit land and the Defendnats had damaged the trees on his land and that the value damaged trees had been ascertained at Kshs 563,455. Judgment was entered in favour of the Plaintiff for the said amount.

The Appellants' Submissions

6. The Appellants filed written submissions in support of their appeal and submitted as follows: -

7. On ground number one: - That the Learned Magistrate based his findings and judgment on inadmissible evidence, to wit that the verbal evidence of PW 1 who is a Forest Officer did not determine the acreage of the land where the subject damage occurred and that the assessment was done on a non-determinate area. They also state that the assessment of Ksh.563,455 was not based on any tangible and known principles of law and practice.According to them, such assessments could not include seeds that were valued at Ksh.105,000. They therefore submit that this evidence was inadmissible.

8. Regarding ground two of the Appeal, the Appellants submitted that the Trial Court is faulted for failing to establish both the ownership of the disputed land and the actual location where the appellants were found working. They maintained that the land where they were actually working was their land on an adjacent parcel of land separate from the one previously litigated upon before the Lands Disputes Tribunal.

9. The Appellants submitted that the ownership of the land where the trees were allegedly cut having not been proven, then there was no basis to make the award in favour of the Respondent. They therefore urged the court to allow the appeal with costs.

The Respondent's Submissions

10. The Respondent submitted that the sum of Ksh.563,455 was the value of the trees that were destroyed by the Appellants on the Respondent's parcel of land and that the value was arrived at by an assessment by the District Forest Officer Ikutha Division.The Respondent stated in his submissions that the he found the Appellants on the Land cutting down trees and burning charcoal and the same was also witnessed by PW 3 and PW 4.

11. It is the Respondent's submission that the issue of ownership of the land was determined by a Court Judgment and Decree arising from a case that had been filed before the Land Disputes Tribunal. The Tribunal determined that the land in question belonged to one MathekaNgui, which was awarded to

the Respondent after having bought the land. The decision of the Tribunal was then adopted as the judgment of the Court in CMCC Land Case No. L.54 of 2002. Consequently, they submitted that the Appellants became trespassers on the land.

Analysis and Determination

12. As the first appellate court, this court has the duty to re-evaluate the trial while at the same time appreciating that the Trial Court is the one that had the opportunity of actually hearing the testimonies and seeing the evidence. This duty was succinctly stated by the Court of Appeal in *Okeno – Vs– Republic* (1972) EA 32 as follows: - "An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"

13. The Appellants have set out two grounds of appeal in their Memorandum of Appeal dated 8th June 2019 which I consider to be the issues for determination hereunder: -

A. Whether the Learned Senior Principal Magistrate erred and misdirected himself on the law and the facts when he relied on inadmissible evidence.

14. The Appellants have questioned the credibility and admissibility of the evidence given by PW 1, who gave the assessment of the value of the destroyed trees and the report of the assessment was produced as Plaintiff's Exhibit 1. However, I note that during the hearing of the suit as PW 1 was giving his statement to the Court, Counsel for the Appellants did not raise any objection as to the admissibility or credibility of the report. I have not found and the Appellants Counsel has not pointed me to any requirement in law that mandates that an expert report must contain the method or formula that the expert used to arrive at their conclusion. In the event that the Appellant challenged the credibility and methodology used in arriving at the assessment the same would have been challenged by way of cross-examination. The said challenge does not appear on the courts record.PW1 further confirmed that the acreage of the land that he assessed was about 5 acres upon cross-examination by Counsel for the Appellants and this was not refuted or challenged.

15. In the case of *Christopher Ndaru Kagina vs Esther Mbandi Kagina & Another* (2016) eKLR, the Court stated that: -

> " Under the common law, for an expert opinion to be admissible it must be able to provide the court with information which is likely to be outside the courts' knowledge and experience, but it must also be evidence which gives the court the help it needs in forming its conclusions...The duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.
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> Under the common law, for expert opinion to be admissible it must be able to provide the court with information which is likely to be outside the court's knowledge and experience, but it must also be evidence which gives the court the help it needs in forming its conclusions. The role of experts is to give their opinion based on analysis of the available evidence. The court is not bound by that opinion, but it can take into consideration in

determining the facts in issue.....It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then rigidly judged with a mathematical precision."

16. Similarly,Mativo J the Court in the case of *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR analyzed expert evidence as such:

> " Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.
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> While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.
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> Firstly, expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.
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> Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.
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> Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.
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> Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.
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> A further criterion for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In Routestone Ltd. v. Minories Finance Ltd. and AnotherJacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." Where there is a conflict between experts on a fundamental point, it is the court's task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning.

> It is my view its correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculativeor manifestly illogical.Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable."

17. Going by the above precedents, the fact in issue was the damage done by the act of destroying the trees on the subject land. PW 1 gave his report as to the damage done and the value of the damage amounting to Ksh.563,455/= as a Forestry expert. The trial court found the evidence to be satisfactory as to determining the fact in issue and I am of the same opinion as the trial court since no questions arose as to the credibility of this evidence during the trial.The report was specific and gave a breakdown of trees cut down and value and/or cost of the said trees. I have been unable to note anything irrational or illogical on the report. The Appellants contention that seeds should not have formed part of the assessment is explained in the findings at number 3 as; 'that the damaged trees would have yielded approximately 30 KG of viable seeds.' In my opinion there is nothing that renders the assessment of damaged trees produced by PW 1 in the Trial Court as inadmissible evidence.

B. Whether the Learned Magistrate erred and misdirected himself by failing to determine the ownership of the land in dispute.

18. A look at the Plaint on record shows that the issue for determination by the court was the trees that were destroyed on the subject land. In order to determine whether the Plaintiff suffered loss, the Court had to determine the ownership of the trees which means that they had to determine the owner of the subject land where the trees grew.

19. The Appellant claims that the trial court erred in brushing over the issue of ownership and did not determine where the Appellants were found working and that the place they were working was different from the parcel of land previously litigated upon before the Land Disputes Tribunal. However, contrary to what is stated by the Appellants the court gave a detailed review of the evidence adduced in relation to the ownership of the land where the Appellants cut down trees. The court found that the land was owned by the Respondent herein and was the same one that was subject of the dispute in land caseNo. 54 of 2002.

20. In the trial Court, PW 2, the Respondent, gave his statement that he acquired the land by purchasing it from one Matheka Ngui in 1999. He produced the Agreement of sale and the decision of the Land Disputes Tribunal which was adopted as the Judgment in Kitui Chief Magistrates Civil Suit L.54 of 2002 that confirmed his claim. In fact, DW 2 upon cross-examination confirmed that their father lost the case and Matheka Ngui was given the land who later gave it to the Respondent. This is the evidence that the Trial Magistrate relied upon while determining that the suit property is the same one that was the subject of Land Case Kitui CMELC No L.54 of 2002.The trial court further found that the ownership of the land was confirmed and corroborated by the evidence of PW 3 and PW 4 and the fact that when PW1 went to assess the value of the trees destroyed they found the area assistant chief. All the evidence of all the witnesses taken together established and convinced the trial court that the land was owned by the Respondent herein. I am satisfied that the reasoning of the trial court was sound and have no reason to overturn the courts finding on this issue.

21. In my view the Appellants had the duty in the Trial Court to prove that it was not the Plaintiff's land that they entered and destroyed trees as they claimed in their Defence.The Court of Appeal in *Mumbi*

M'Nabea v David M.Wachira [2016] eKLR stated as follows while commenting on burden of proof in the Kenyan context and noted that:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows: -
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> "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."

22. The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows: -

> " 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."

23. The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi& Others v.Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that: -

> " Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

24. Similarly, the Court of Appeal in *Mbuthia Macharia v Annah Mutua Ndwiga& another* [2017] eKLR discussed the burden of proof as follows:

> " The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant. It was upon the appellant to prove that he did not affix his signature on the transfer of the suit premises in favour of the 1st respondent. "

25. I agree with the above precedents that the burden of proof lies on the person who wishes the Court to believe the existence of a fact. The Respondent in my view proved his case and discharged his burden of proof while the Appellants failed to prove that they were actually not felling trees and burning charcoal on the Plaintiff's land.

26. Further, the Respondent had discharged his burden of proofon a balance of probability that he owned the subject land where the trees were destroyed by the Appellants, the Appellants failed to discharge the evidential burden to disprove the Respondent's claim. The Appellants did not deny that they felled trees and were burning them as charcoal.

27. In conclusion, I find no reason to review, reverse and/or set aside the Judgment issued by the Trial Court on 14th May 2019 and find that the same should be upheld. I therefor find that the Appeal herein has no merit and the same is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 28TH DAY OF APRIL, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court in the presence of-

C. Nzioka: Court Assistant

Mwalimu Advocate for the Appellants

No attendance for the Respondent