IN THE COURT OF APPEAL

AT NYERI

(CORAM:, VISRAM, KOOME & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 306 of 2010

BETWEEN

MUNICIPAL COUNCIL OF THIKA…… APPELLANT

AND

ELIZABETH WAMBUI KAMICHA …… RESPONDENT

(Appeal against the Judgment of the High Court of Kenya at Nyeri

(Sergon J.) delivered on 17th September, 2010

in

H.C.C.C. NO. 313 OF 1998)

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JUDGMENT OF THE COURT

1. The respondent, as plaintiff, filed suit at the High Court against the appellant and one Teresia Wambui Mugi. The appellant was the 2nd defendant and Teresia was the 1st defendant. The suit property is House No. 1000 located at Kimathi Estate in Thika Municipality. At all material times, the appellant asserts that it is the owner of the house while the respondent claims she was allocated and assigned the house in 1986 by the Minister for Local Government. It is contended that the appellant evicted the respondent from the said house and fraudulently altered the records and allocated the house to Teresia Wambui Mugi and allowed the said Teresia to occupy the house.
2. The appellant filed its defence to the suit before the High Court and averred that the suit premises belong to it and it had demised the same to the respondent under a tenancy agreement. The appellant averred that it was a stranger to any transaction between the respondent and the Minister for Local Government. In its defence, the appellant averred that the respondent's plaint was bad in law *to wit* the particulars of fraud were not pleaded.
3. The hearing of the case was unique. The suit was scheduled for hearing on 29th June 2010. On this date, counsel for the appellant and the 1st defendant for different reasons applied for adjournment which was declined and the court directed the matter to proceed at 12.30 pm. At 12.30 p.m., there was no appearance by counsel for the appellant and the 1st defendant. As counsel for the defendants were absent, the court granted leave to the respondent herein, as plaintiff, to proceed

with the hearing. Before the hearing, an oral application by the respondent to amend the plaint was made. The amendment was to introduce two new paragraphs as paragraph 10 (A) and 10 (B) in the plaint in the following terms:

> ***10 (A) The plaintiff avers that the 2nd defendant on 28th June 2010 without any lawful justification purported to evict the plaintiff and took way her household goods.***
>
> ***10 (B) An order of restitution of those goods to be particularized during the hearing.***

4. The learned Judge allowed the amendment. It is worthy to note that the case was set down for hearing on 29th June 2010 and the amendments were allowed on the same day of hearing as the events giving rise to the amendment were alleged to have taken place on 28th June 2010 a day before the hearing.
5. Upon the learned Judge allowing the amendment, the hearing proceeded ex parte and the respondent as PW1 testified; she was the only witness for her case. At the close of the plaintiff's case, the learned Judge directed that written submissions be filed. The respondent, as plaintiff, filed her written submissions and the appellant, as the 2nd defendant, also filed its written submissions despite the hearing having been conducted ex parte.
6. The learned Judge entered judgment for the plaintiff in the following terms:

i. ***That the 1st defendant be evicted from house No. 1000 Kimathi Estate, Thika Municipality.***
ii. ***The plaintiff be restored to occupation of the aforesaid house.***
iii. ***The 2nd defendant is directed to rectify the register relating to the tenant of House No. 1000 Kimathi Estate by deleting the 1st Defendant's name and substituting with that of the Plaintiff.***
iv. ***The 2nd defendant is directed to restitute to the plaintiff the goods it carted away from the plaintiff's house on 28th June 2010.***
v. ***The plaintiff is awarded Ksh. 200,000/= representing damages for unlawful eviction.***
vi. ***Costs of the suit awarded to the plaintiff***.

7. Aggrieved by the judgment and orders made, the appellant lodged this appeal and to avoid obvious prolixity and grammatical, spelling and typographical errors, we recast the grounds of appeal as follows:

i. ***The learned Judge erred in law in disregarding the appellant's written submissions dated 12th July 2010 and filed in court on 16th July 2010.***

ii. ***The learned Judge erred in law in allowing in an ex parte hearing of an oral amendment to the suit on 29th June 2010 to introduce a new cause of action which allegedly took place on 28th June 2010 and proceeded to pronounce a judgment based on the amendment and arrived at a wrong conclusion.***

iii. ***That the learned Judge erred in law in failing to appreciate that the oral amendment to the plaint would be caught up by the law on limitation.***

iv. ***That the learned Judge erred in law in ordering restoration of the respondent's goods whereas there was no sufficient evidence to support the same.***

v. ***The learned Judge erred in law in not appreciating that the parties had not complied with Order X and or XIV of the Civil Procedure Rules (Cap 21).***

8. At the hearing of the appeal, learned counsel Gathoga Wairegi appeared for the appellant while learned counsel A.M. Nganga appeared for the respondent.
9. Counsel for the appellant outlined the background of the case and elaborated the grounds of appeal. It was emphasized that the hearing of the case was conducted ex-parte in the absence of

the appellant as the defendant in the suit. Counsel admitted that whereas the trial Judge had power to direct that the hearing take place ex-parte (having declined to adjourn the matter) it was an error of law for the Judge to allow an ex-parte amendment of the plaint on the date of hearing; the amendment introduced a new cause of action and the learned Judge proceeded to pronounce judgment based on the new cause of action. Counsel submitted that the appellant, as the defendant in the suit, did not have notice of the amendment, and was not given an opportunity to defend the new cause of action. Counsel emphasized that the amendment substantially affected the nature of the plaint and introduced a new cause of action based on an alleged eviction made on 28th June 2010 and a claim for restoration of allegedly attached and carted property. That the learned Judge erred in pronouncing a judgment based on the new cause of action which was not procedurally before the court. Counsel submitted that the learned Judge erred by failure to allow the appellant to defend the amended cause of action.

10. The appellant submitted that learned Judge further erred by awarding the sum of Ksh. 200,000/= as general damages when the said sum or claim was not proved. It was submitted that the respondent in her testimony before the trial court did not give evidence or address the court on general damages and neither did she pray for the sum of Ksh. 200,000/=. Counsel submitted that the learned Judge came up with the sum of Ksh. 200,000/= out of the blues and the basis and rationale for the award of the sum is unclear.
11. The appellant submitted that the learned Judge erred by failure to read and evaluate the appellant's written submissions. Counsel submitted that despite the fact that the hearing was conducted ex-parte, the learned Judge was under an obligation to read, analyze and evaluate the written submissions made by the appellant and filed in court on 16th July 2010. It was submitted that a reading of the judgment revealed that the learned Judge only relied on the written submissions of the respondent and made no reference to the appellant's written submissions. Counsel submitted that had the learned Judge read the appellant's submission, he would have arrived at a different conclusion since the respondent's cause of action had been caught by the limitation period of one year on account of claim against a local authority and a further limitation of three years on account of an action in tort.
12. Counsel for the respondent in opposing the appeal submitted that the trial court did not err in law by allowing the oral amendment to the plaint. It was submitted that on the hearing date, counsel for the appellant was present in court and it was incumbent upon the appellant to avail himself at 12.30 pm when the hearing proceeded. That failure to be in court during the hearing was a choice made by the appellant and the appellant should take the consequences of its action. The respondent submitted that no new cause of action was introduced through the oral amendment. Counsel stated that the cause of action as per paragraph 10 of the Plaint was for loss of user of the premises as the respondent had been denied use of House No. 1000 and continued to pay rent for alternative accommodation. It was submitted that the plaint contained a prayer for general damages and the trial court did not err in arriving at the sum of Ksh. 200,000/= as damages. The respondent submitted that the cause of action in the suit as per paragraph 9 of the plaint occurred in 1991 and was not caught by limitation as the claim related to land and twelve years is the limitation period applicable. It was also submitted that the issue of limitation was *res judicata* as the trial court had dealt with the issue in an interlocutory application.
13. We have considered the grounds of appeal and taken into account the submission made by counsel for the appellant and respondent. We have also examined the judgment and record of appeal and the authorities cited. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle v Associated Motor Boat Co. [1968] E A 123,*** thus:

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression***

based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).

14. On the issue of limitation as raised by the appellant, we note that in paragraph 4 of the plaint, the respondent aver that she was allocated House No. 1000 by the Minister for Local Government subject to the condition that she pays monthly rent to the appellant. The trial judge held that the relationship between the appellant and the respondent was one of tenancy. We agree. A party is bound by its pleadings and the respondent pleaded facts alleging existence of tenancy relationship. The limitation period is that which governs a tenancy relationship. The cause of action in this suit is founded on landlord tenant relationship.
15. The appellant contends that the Ksh. 200,000/= awarded as general damages was not proved. In the plaint, the claim for damages is pleaded in paragraph 10 in the following terms:

"The unlawful act of the two defendants have(sic) occasioned loss to the plaintiff in form of loss of user of the premises as the plaintiff has had to rent and continues to rent alternative residential premises; reason wherefore the plaintiff prays for general damages as per paragraph 10."

16. This Court stated in ***Jabane v Olenja [1986] KLR 661*** at pg 664, that:

"This court will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni v Kenya Bus Services (1982-88) 1 KAR 870."

17. Our reading of the claim in paragraph 10 indicates that this is a claim for loss of user which is a claim for special damages. In the case of ***Siree Limited –v – Lake Turkana El Molo Lodges (2002) 2E.A. 521*** the Court of Appeal stated :

"This court has said time and again that when damages can be calculated to a cent, then thy cease to be general damages and must be claimed as special damages".

18. In the case of ***Maritim & Another – v- Anjere (1990-1994) EA 312 at 316***, this Court emphasized:

"In this regard, we can only refer to this court's decision in Sande – v- Kenya Cooperative Creameries Limited Civil Appeal no. 154 where as we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."

19. In the present case, the plaint does not give particulars of the special damages and the trial court did not specifically state that it was awarding special damages. The issue at hand is why was the Ksh. 200,000/= awarded as general damages? In her testimony, the respondent did not address the issue of general damages; various receipts for payment of rent were produced as exhibits and the total of these receipts is not Ksh. 200,000/=. If these receipts are to be construed to have been tendered towards proof that alternative rent was being paid, then a claim for special damages ought to have been pleaded in the plaint with particulars thereof given. In the judgment, it is stated that the sum of Ksh. 200,000/= is awarded as general damages for unlawful eviction. We have examined the plaint and it does not contain a prayer for damages for unlawful eviction; even the amended claim as allowed on 29th June 2010 did not pray for damages for unlawful eviction. The trial judge erred in awarding the sum of Ksh. 200,000/= as general damages for unlawful eviction when the same was neither pleaded nor prayed for.

20. A further ground of appeal is that the learned Judge relied on the written submissions filed by the respondent and ignored the submissions filed by the appellant. We have read the judgment and the learned Judge in evaluating the evidence and submissions on record expressed himself as follows:

"At the close of the plaintiff's case, her learned counsel was granted leave to file written submissions which he duly filed. I have considered the evidence and the aforesaid submissions…."

21. A literal reading of the above statement shows that the trial Judge did not refer to the written submissions filed on 16th July 2010 by the appellant. It is the duty of the trial court to consider and evaluate the entire evidence on record and submissions filed by counsel. The fact that the hearing was conducted ex-parte did not disentitle the appellant from filing written submissions. It was incumbent upon the trial court to consider the submissions as filed by both parties. Failure to consider the appellant's duly filed written submissions was an error of law.
22. We now address the issue of the oral amendment to the plaint allowed on 29th June 2010. The amendment alleges that the appellant evicted the respondent from the suit premises on 28th June 2010 and carted away goods which have been specified in the judgment. We agree with the appellant that the amendment introduced a new cause of action in the plaint. In the case of ***D.T. Dobie & Co. (K) Limited – v- Muchina (1982) KLR 1***, this Court defined the phrase "cause of action" and stated "c*ause of action means an act on the part of the defendant which gives the plaintiff his cause of complaint*". In the present case, it is alleged that the appellant evicted the respondent on 28th June 2010 and carted away some goods. The application to amend the plaint is premised on the alleged conduct of the appellant done on 28th June 2010. In the judgment, the learned Judge made an order for restoration of the goods allegedly carted away on 28th June 2010; this aspect of the judgment is founded on the amended plaint.
23. The record shows that the oral application to amend the plaint was made ex-parte on 29th June 2010 and was allowed. The hearing of the case proceeded on the same day. The record also shows that after the amendment was allowed, no opportunity was given to the appellant to defend or reply to the new cause of action. In the case of ***Jane Muthoni Mungai & Sarah Njeri Mungai Civil Appeal No. 118 of 1999***, this court expressed itself on the same issue as follows:

> ***"The learned Judge erred. She could not have approved the amendment of the plaint and then fix the hearing the same day. The learned Judge did not take into account the age old principle that amendments are generally freely allowed even on oral applications when there is no prejudice to the other side."***

24. In the present case, the appellant was prejudiced when the hearing was conducted on the same day after the amendment of the plaint. It is trite law that a defendant must be given an opportunity to respond to any amendment to the plaint. This was not followed by the trial court and was a fatal error of law. The learned Judge further proceeded to pronounce judgment based on the amended claim and this compounded the error of law. On account of these errors, we set aside the judgment made on 17th September 2010 noting that the principle of *audi alterem partem* was not observed and the appellant was not given an opportunity to defend the new cause of action and the fresh allegations contained in the amended plaint. The rules of natural justice dictate that a party should not be condemned unheard. Where the principles of natural justice have been breached, any decision made shall be set aside. In the case of ***General Medical Council V Spackman [1943] 2 Aller 337***, Lord Wright at Page 345 stated:-

> ***"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared no decision. Similar sentiments were expressed by Lord Reid in the case of RIDGE v BALDWIN [1963] 2 ALLER 66.***

25. The next issue is what relief renders itself just in view of our setting aside of the judgment? We are guided by the overriding objective principle in ***Sections 3A and 3B of the Appellate Jurisdictions Act.*** Regarding that principle, this Court in ***DOUGLAS MBUGUA MUNGAI VS.HARRISON MUNYI, CIVIL APPLICATION NO. NAI 167 OF 2010,*** observed that:

> ***"We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly".***

26. Guided by the overriding objective, striking out the suit by the respondent would be a drastic action which we decline to take **(See *D.T. Dobie & Co. (K) Limited –v- Muchina (1982) KLR 1*,)**. All that is necessary is for the appellant to be given an opportunity to defend the amended plaint. We accordingly allow the appeal, set aside the judgment of the learned Judge delivered on 17th September 2010 and substitute it with an order that the respondent's plaint dated 23rd October 1998 as amended on 29th June 2010 be heard *de novo* and the defendants in the suit to file an amended defence within 30 days of the date hereof. The respondent shall bear the costs of this appeal.

Dated and delivered at Nyeri this 18th day of July, 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR