REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 173 OF 2005

PAUL MAGETO OBWANGI ……..……..APPELLANT
-VERSUS-
CLERK KISII MUNICIPAL COUNCIL……..…… 1st RESPONDENT
KISII MUNICIPAL COUNCIL ……..…… 2nd RESPONDENT
JOHN SIMBA ……...……. 3rd RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Senior Resident Magistrate Hon. A.A. Ngutya dated 23rd July, 2005 in Chief Magistrate's court at Kisii in Civil suit no. 674 of 2001)

By an amended plaint dated 16th February, 2004 and filed in court on 3rd March, 2004, **Paul Mageto Obwogi,** hereinafter ***"the appellant"*** sued the **Clerk - Kisii Municipal Council**, **Kisii Municipal Council** and **John Simba** hereinafter the respondents jointly for ***"general damages and loss of professional tools"*** and ***"costs of this suit be provided for"***. The suit was initiated in the chief magistrate's court at Kisii and the facts which informed the same according to the amended plaint were that at all material times the appellant was the owner of kiosks built behind and next to Getembe Petrol Station. He had been paying to 2nd respondent occupation licence fees since 1988. However sometimes in 1998, the 3rd respondent, his workers and or agents whilst fencing his parcel of land interfered with the electricity supply line to the appellant's kiosks aforesaid. The 3rd respondent was given notice to remove his fence but he declined to do so. Instead, he conspired with the 1st and 2nd respondenst to unlawfully chase away the appellant and had even threatened to demolish and or remove his kiosks by virtue of a notice issued to him. To the appellant, the notice for demolition was ***ultra vires***, bad in law, frivolous, vexatious and an abuse of the law as the said notice was meant to demolish kiosks along the General hospital road and not like those of his at Getembe Petrol Station.

In response and through **Messrs Nyamweya Osoro & Nyamweya Advocates**, the 1st and 2nd respondents filed a joint statement of defence. As expected they denied all the allegations proffered against them by the appellant and put him to strict proof. They maintained that the appellant's suit did not disclose any cause of action, was bad in law and ought to be struck out. The 3rd respondent however, neither filed an appearance and or defence in response to the appellant's claim. The record also does not show whether he was ever served with summons to enter appearance and or interlocutory judgment having been entered against him as a consequence.

Be that as it may, the hearing of the suit commenced before **A. A Ingutya, SRM**, on 13th September, 2004. The appellant testified that he used to run some business opposite Shabana Hardware in a kiosk. That kiosk was however subsequently razed to the ground. The 2nd and 3rd respondents destroyed the same. He used to pay for the licence due to the 2nd respondent and tendered in evidence a bundle of receipts in verification of the fact. However, he was not present when the kiosk was razed to the ground. In the process he lost his tools of trade. He thus prayed for compensation.

Cross-examined he conceded that the kiosk was razed down on 24th April, 2002. He never saw who did it though.

Thereafter the case was adjourned severally until 18th July, 2005. On this occasion, though the case had been set down for further hearing, counsel for the 1st and 2nd respondent did not appear. **Mr. Sagwe,**

learned counsel for the appellant closed his case and sought for a date for judgment. The learned magistrate duly acceded to his request and set the date for judgment on 18th August, 2005. Come that day and in a terse ½ page judgment the learned magistrate in dismissing the appellant's claim delivered himself thus ***"…….by the time of the trial, going by the testimony of the plaintiff, the plaintiff had already been evicted. That being the case and the act sought to be prevented having already taken place, I do not find the remedy sought herein applicable to this case. One would have expected the plaintiff to amend his plaint before trial….."***

The dismissal of the appellant's suit aforesaid triggered this appeal. 5 grounds of appeal were proffered by the appellant in his memorandum of appeal dated 5th September, 2005 and filed in court on 7th September, 2005. They were:

"1. The trial magistrate erred in law and infact (sic) as the judgment was based in(sic) a wrong plaint which evidence was tendered upon the amended plaint dated 16th day of February, 2004.
2. That the trial magistrate erred in law and infact by citing wrong prayers of injunction to be granted against the defendant restricting its agents, servants, or itself from inlawfully (sic) evicting the plaintiff, costs and interest instead of General damages and loss of professional tools, costs of the suit.
3. The trial magistrate erred in law by pronouncing a defective judgment
(i) Does not contain a proper concise statement of the case.
(ii) Without points for determination.
(iii) The decision far from the true state of things (sic).
(iv) Without assigning better reasons
4. The trial magistrate failed in appreciating the evidence adduced by the appellant without any evidence rebutting the same.
5. The trial magistrate's judgment was bad in law and for (sic) against the weight of evidence……..".

When the appeal came up for directions on 28th June, 2010, **Mr. Sagwe,** learned counsel for the appellant and **Mr. Bosire,** learned counsel for the 1st and 2nd respondent's agreed to canvass the appeal by way of written submissions amongst other directions. They subsequently filed and exchanged written submissions which I have carefully read and considered.

I have no doubt at all that the complains raised by the appellant with regard to how his claim was treated by the learned magistrate are valid and legitimate. It is quite apparent that the learned magistrate crafted his judgment on the basis of the original plaint yet the same had subsequently been amended pursuant to a consent order recorded on 8th April, 2004. In the amended plaint, the appellant abandoned the main prayer in the original plaint which was for injunction to restrain the respondents from unlawfully evicting him. In the amended plaint he prayed for the orders set out at the beginning of this judgment. In basing his judgment on the unamended plaint, the learned magistrate gravely erred.

As already stated elsewhere in this judgment, the judgment was a terse ½ page. The learned magistrate's judgment failed to capture a proper and concise statement of the case, points for determination, the decision thereon and reasons for the decision. These are the very minimum ingredients of a valid judgment. To the extent that the judgment delivered by the learned magistrate did not accord with the above prescriptions it was fatally defective.

The foregoing is sufficient to dispose of this appeal. However there are certain nagging concerns in my mind. Even if I was to allow this appeal, of what use will such order be to the appellant. I say so because, the decision of the learned magistrate notwithstanding, the appellant's suit was doomed to failure in any event on other grounds. First and foremost I do not think that the plaint as filed by the appellant disclosed any cause of action known in law against the respondents. I do not see how the 3rd defendant by fencing his piece of land and in the process ***"Obstructing the plaintiff's electric line entering the kiosks***" can be held accountable for the subsequent loss incurred by the appellant if any. Indeed in the said plaint, the appellant did not allege that as a result of the 3rd respondent's obstruction aforesaid he suffered loss and damage. A careful reading of the plaint discloses that the appellant was merely apprehensive that the respondents were upto some mischief. There was no pleading that, that mischief came to pass. In any case the mischief was in the main perpetrated by the 3rd respondent. However, there is no evidence that the said 3rd respondent was ever served with the suit papers. That being the case, how could he and the other respondents have been held to account by the appellant?

It is trite law that whatever is put in evidence should support what has been pleaded. An award or

indeed a relief will only issue when what has been pleaded is proved. To get the relief, the plaintiff was duty bound to prove what he had pleaded. In the instant case, the appellant prayed for damages without corresponding pleadings of facts in support of that prayer. Unless the matter is pleaded in the body of the plaint, evidence thereon is inadmissible. Inadmissible evidence is inadmissible whether the suit is contested or not. In all cases before court, they must be adjudicated upon on the basis of settled decree of proof and only on admissible evidence. It matters not therefore as submitted by counsel for the appellant that ***"the record of appeal show that the respondent never tendered any evidence in defence at all….."***

In any event, the appellant did not specifically plead in the amended plaint the professional tools lost and their value thereof, neither did he in his oral evidence specify the tools lost and their estimated value thereof. Once again a party can only be awarded what he has pleaded and specifically proved. Further the appellant testified that his kiosk was razed down. This was a complete departure from his pleadings. It is trite law that a party is bound by his pleadings. The appellant having departed from his pleadings in his evidence, his claim remained unproved. It was upto him to amend further the amended plaint to capture those developments. In the absence of such amendment, the appellant's claim was doomed to failure.

The appellant too testified that though his kiosk was razed down, he was not present and did not know who had committed the act. He never pointed a finger at the respondents or any one of them. That being the case how could the respondents be held accountable? Much as the appellant in the amended plaint pleaded that the 3rd respondent conspired with the 1st respondent to chase him away, he never at all in his testimony said anything about the conspiracy. All he could say was that his kiosk had been razed down in his absence.

In the upshot much as it may be true that the trial magistrate crafted his judgment on the assumption that the plaint had not been amended and much as the judgment itself left a lot to be desired, it is however the duty of this court as a first appellate court to evaluate the evidence tendered in the trial afresh and reach its own conclusion on whether the appellant proved his claim in the amended plaint of course bearing in mind that it never saw the appellant as he testified. Having done so I am satisfied that the appellant's claim was doomed to failure on the grounds above stated which are quite different from those that the learned magistrate assigned in his order of dismissal. Accordingly, I find no merit in this appeal and dismiss it with no order as to costs.

Judgment dated, signed and **delivered** at Kisii this 30th day of September, 2010.

ASIKE-MAKHANDIA

JUDGE