



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 245 of 2004

MARY MUTHONI APPELLANT

VERSUS

MUNICIPAL COUNCIL OF NAKURURESPONDENT

JUDGMENT

The appellant Mary Muthoni was the plaintiff in Nakuru CMCC No.153 of 2004 in which she had sued the respondent for Kshs.83, 200/= being in respect of a claim for damages for the value of a crop of spinach and sea kales. The appellant alleged that the crop was destroyed by the respondent maliciously.

The respondent in their defence denied having destroyed the crop and in the alternative alleged that, if any crop was destroyed, it was destroyed after a lawful court order which was prevailing at the time and order, had not been set aside.

The suit proceeded to a full hearing. The appellant gave evidence in support of her claim and also relied on the evidence by one, **Luka Rotich PW2** an officer from the Ministry of Agriculture who assessed the cost of damage of the appellant's crop and submitted a report dated 10th September, 2001. He approximated the value of the crop as Kshs.83, 200/=. On the part of the respondent, they relied on the evidence by **Isaac Kimani [DW1]** a Health Officer attached to the Municipal Council of Nakuru. This witness confirmed that he, in the company of the Chief Magistrate visited the appellant's premises at Mayani Estate within Nakuru Municipality, and found that the appellant was growing vegetables namely sukuma wiki using raw sewage in Manyani Estate. **DW1** told the court that he applied for an order for the destruction of the said vegetables pursuant to the Provisions of the Public Health Act Cap 242 and Food Drugs and Chemical Substance Act Cap 242. He said both statutes mandate the Public Health Officer to ensure the safety of food being consumed by the public. This witness said these were his routine duties which did not require a court order. He said that the defendant was not involved with the destruction of the vegetables but it was a matter of the Public health Act that food that is unsuitable for public consumption be destroyed.

After consideration of the above evidence and the submissions by the counsel for the parties, the learned trial magistrate found that the appellant's suit was time barred. The court also found that the verifying affidavit was also defective and that the appellant failed to give the particulars of malice. For those reasons the suit was dismissed with no orders to costs.

The appellant being dissatisfied with the judgment has appealed to this court and raised the following grounds of appeal to wit;

1. That the learned trial magistrate erred in law and in fact in failing to consider the entire evidence on record and thereby arrived at a wrong conclusion.
2. That the learned trial magistrate erred in law and in fact in dismissing the appellant's suit and misdirected her mind on law.
3. That the learned trial magistrate erred in law in considering matters not pleaded by the parties in
4. That the learned trial magistrate erred in law and appreciate the appellant's evidence in its entirety and her witnesses.
5. In all the circumstances of the case the Judgment of learned trial magistrate is against the weight of the evidence.
6. The learned trial magistrate erred in law and in fact in holding that the respondent had proved its case on a balance of probabilities.

Learned counsel for the appellant submitted further, that the trial court erred by considering issues that were not pleaded, in particular counsel drew the attention of this court to the fact that the defence did not raise the issue of the limitation of time in their pleadings. In this regard it was submitted that the court was therefore wrong to take into consideration this issue in its judgment. For this preposition, counsel relied on the case of **Stephen Onyango Achola & Another vs. Edward Sule Hongo and Kisumu Municipal Council Civil Appeal No.209 of 2001, NRB**. In that case, the court of Appeal held that under the provisions of Order 6 r 4 (1) and (2) of the CPR rules a party is obliged to plead limitation based on statute. The court also adopted with the approval the text in **Halsburys Laws of England 4th edition volume 36 at paragraph 48 page 33** headed:

“Matters which must be specifically pleaded: The defendant must in his defence plead specifically which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise, or which raises issues of fact not arising out of the statement of claim. Examples of such matter are performance, release, and any relevant statute of limitation, fraud or any act showing illegality. Other matters which must be so pleaded are the statute of Fraud, and the provision of the law of property Act, 1925 which requires contracts for the sale or disposition of land to be in writing, and, it seems, any ground of objection to the jurisdiction of the court.”

Counsel for the appellant also faulted the trial court for considering that the verifying affidavit was not dated which issue was not brought up during the hearing and therefore the appellant had no opportunity to respond and as such it was a drastic step which led to the dismissal of the suit.

This appeal was opposed by counsel for the respondent. He urged the court to uphold the decision by the trial court on the grounds that under **Order 6 rule 8 1 [b]** of the CPR the appellant failed to plead the particulars of malice. Counsel submitted that the provisions of the law are in mandatory terms, and as long as the appellant alleged malice upon the respondents, it was incumbent on her to particularize the said malice.

Similarly counsel submitted that the appellant had a duty to ensure the verifying affidavit was properly executed and dated as per the provisions of Cap 15 section 5. The respondent therefore had no duty to invite the appellant to make the explanation why the verifying affidavit was not dated. Counsel also distinguished the authorities cited by the appellant and asked this court to dismiss this appeal.

This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own decision while bearing in mind that it never heard or saw the witnesses testify and make due allowance for that. The principles to be followed by the first appellate court have been set out in several decisions and one such leading authority is the case of **Peter vs. Sundy (1958) E.A. Page 429:**

“It is a strong thing for an appellate court to defer from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”

The issues raised in this appeal are threefold: *Firstly* whether the court was wrong to consider that the suit was statute barred. *Secondly* whether the court was wrong to hold that the verifying affidavit which was not dated was incompetent, and *thirdly* whether the court erred by finding that the particulars of malice were not particularized in the plaint.

Counsel for the appellant was of the view that the issue of limitation of period should never have been raised since it was never pleaded and the provisions of Order 6 r 4(1) and (2) CPR clearly spell out the matters that should be pleaded. In addition, the authorities that were cited by the appellant are relevant and correctly state the position of the law regarding the application of the statute of limitation in cases which for example, involve, performance, release, payment fraud inevitable accident act of God. The parties who desire to rely of the statutory limitation must plead to give the other side an opportunity to respond.

I gratefully accept this as an accurate position of the law and agree with the counsel for the appellant that the trial court was wrong to consider in the judgement a drastic issue which the other side had no opportunity to respond to. I now turn to the second issue on whether the verifying affidavit which was not dated by Commissioner for oaths was sufficient reason for the trial court to dismiss the suit. By a dint of the provisions of section 5 of the Oaths and Statutory Declarations Act Cap 15 the Act provides:

“Every Commissioner for oaths before whom any oath or affidavit is taken or made under this Act, shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

Perhaps this is a minor discrepancy which if it was addressed at the trial court, it would not have led to the drastic decision of dismissing the suit. However the rhetorical question that begs for an answer is whose responsibility was it, to ensure that the pleadings and the verifying affidavit was in accordance with the provisions of the law. I agree with counsel for the respondent that they were under no obligation in law to invite the appellant to make an explanation why the verifying affidavit was not properly dated. The appellant and her counsel had a duty to ensure that their pleadings were in compliance with the law.

On the third issue, the appellant’s claim was for a specific amount of money which was based on the allegation that the plaintiff’s crop of spinach and sea kales were destroyed by the respondent maliciously, illegally and unreasonably in order to impoverish the respondent.

Under Order 6 r 8 (1) (b)

“where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.”

The matters relied upon by the appellant to prove her claim, ie malice, unreasonableness was obviously conditions of the mind and the appellant ought to have given the particulars of the same. In this regard I am in agreement with the decision of the trial court that failure to give the particulars was fatal.

Upon evaluation of the entire evidence including the defence by the respondent, I find that the issue of the destruction of the crop pursuant to the court order was not given consideration by the trial court. Since this issue was pleaded and evidence was led by DWI on this issue it ought to have been considered as the provisions of the Public Health Act were even cited as the basis upon which the crop was destroyed. Taking into consideration the defence in addition to other issues set out in this judgment I am in

agreement with the trial court.

The decision of the trial court is hereby upheld. The appeal filed herein lacks merit and is hereby dismissed with costs to the respondent.

Judgment delivered and dated 23rd day of March, 2007.

M. KOOME

JUDGE