



REPUBLIC OF KENYA



KENYA LAW
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**County Government of Homa-Bay v Liech (Appeal 45 of 2021)
[2022] KEELC 15212 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
APPEAL 45 OF 2021
GMA ONGONDO, J
DECEMBER 7, 2022**

BETWEEN

COUNTY GOVERNMENT OF HOMA-BAY APPELLANT

AND

OKELLO ROBERT LIECH RESPONDENT

*(Being an appeal from the Judgment of the Senior Principal magistrate,
Hon. T. Obutu, delivered on the 15th day of July 2021 in Homa Bay Senior
Principal Magistrate's Court in Environment and Land case No. 18 of 2018)*

JUDGMENT

1. This appeal originated by the trial court's judgment delivered on July 15, 2021 where the learned trial magistrate reasoned in favour of the respondent against the appellant, *inter alia*;
 - a. Damages for trespass to land Kshs 3, 000,000/-
 - b. Mesne profits Kshs 900,000/-
 - c. Aggravated damages Kshs 300,000/-
 - d. Special damages Kshs 77,900/-
 - e. Costs
2. The appellant was aggrieved by the said decision hence through the firm of Aluoch Odera and Nyauke Advocates, mounted the appeal by way of a memorandum of appeal dated August 16, 2021 and filed herein on August 18, 2021 based on two grounds namely;
 - a. The honourable magistrate misdirected himself in law and in fact by holding the appellant liable to the respondent in any way.



- b. The appellants' functions do not cover primary schools.
3. So, the appellant has sought that the appeal be allowed with costs of the appeal and the costs in the subordinate court.
4. The respondent is represented by the firm of GS Okoth and Company Advocates.
5. Further to the court's orders and directions of July 19, 2022, the appeal was heard by way of written submissions.
6. By the submissions dated August 3, 2022 and filed in court on August 4, 2022, learned counsel for the appellant referred to the grounds of appeal and framed an issue for determination namely whether the appeal has merit. Counsel analyzed the issue in the affirmative and submitted that the learned trial magistrate, *inter alia*, erred in finding the appellant liable to the respondent while the Constitution is clear on the functions of the two levels of government, was misdirected by quoting provisions of the law which were not relevant to this case and erred in narrowing its judgment on the issue of ownership which was never in contention. Counsel cited part 1 rule 16 and part 2 rule 9 of schedule 4 of the Constitution of Kenya, 2010 thus, urged the court to allow the appeal with costs.
7. In the respondent's submissions dated July 28, 2022 and filed on August 5, 2022, Counsel relied on, *inter alia*, order 42 rule 13(4) of the Civil Procedure Rules, 2010, section 68 of the Civil Procedure Act cap 21 laws of Kenya and Delphis Bank Limited -vrs- Channan Singh Chatthe and 5 others (2009) eKLR and submitted that the appeal is incompetent hence, that the same be dismissed with costs to the respondent.
8. The appellant's counsel filed supplementary submissions dated October 24, 2022 on even date in response to the respondent's submissions which allegedly focused on the issue of procedure as regards omission of the trial court's record in the record of appeal. Counsel submitted that the omission was a technicality of procedure curable under article 159 (2) (d) of the Constitution of Kenya, 2010. That this appeal be allowed as prayed by the appellant.
9. It is established law that an appellate court has jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence, should stand. That however, the said jurisdiction should be exercised with caution; see *Peterson-vs-Sunday Post* (1958) EA 424 at 429.
10. In the foregone, it is the duty of this court to resolve whether;
 - a. the appellant compulsorily acquired the respondent's property without payment of compensation thereof and
 - b. the orders sought in the memorandum of appeal are available to the appellant.
11. In the original suit before the trial court, the respondent who was the plaintiff sued the appellant and another by way of a further amended plaint dated October 8, 2018 and filed in court on October 22, 2018 for the orders infra;
 - a. Kshs 77,900 special damages.
 - b. General damages for trespass to land and prevention of construction work on the land.
 - c. Compensation for compulsory acquisition.
 - d. Exemplary, punitive or aggravated damage due to wanton and reckless acquisition.



- e. Cost of the suit together with interest thereon at the rate of 14 % per annum from the date of filing suit until payment in full.
 - f. Interest on (a) (b) and (d) at the rate of 12% per annum from the date of filing suit in respect of;
 - a. and from the date of judgment in respect of (b) (c) and (d) until payment in full.
 - g. Such further or other alternative reliefs as the honourable court deems fit to grant.
12. In his evidence, the respondent (PW1) relied on his list of documents dated November 14, 2013 (P exhibits 1 to 8) which include title deed, building plans, notices and minutes. He stated in part, that he did purchase the suit land, LR No Kanyada/Kanyango/Kalanya 3780 from one Ochanda. That when Kendu-Bay –Homa-Bay road was being constructed, it became part of the 2nd defendant in the original suit, Rangwena Primary School.
 13. PW2, Tiberius Ndege the Land Registrar Homa-Bay referred to title and green card of the suit land registered in the name the respondent. He stated the land measuring 0.25 Ha didn't have any encumbrances.
 14. The appellant denied the respondent's claim in the statement of defence dated April 7, 2014 and filed herein on April 9, 2014. The appellant prayed that the suit be dismissed /struck out with costs.
 15. The appellant's counsel did not call any witness herein. However, he relied on the 1st defendant's pleadings as captured at paragraph 4 in page 2 of the trial court's judgment and the trial court's proceedings of May 13, 2021.
 16. It must be noted that by the trial court's judgment, the learned trial magistrate complied with order 21 rule 16 of the Civil Procedure Rules, 2010. At page 2' of the judgment, he noted thus;

“pursuant to section 100 (1) of the Basic adjudication (I think meant Education) Act 2013, the plaintiff's land was deemed to have been compulsorily acquired.....”
 17. The trial court, therefore, held that the appellant herein and the 2nd defendant in the original suit took the suit land which belonged to the respondent. That therefore, they were duty bound to compensate the respondent.
 18. The trial court held that the respondent was entitled to mesne profit. This court is aware of the meaning of “mesne profit” under section 2 of the Civil Procedure Act chapter 21 laws of Kenya and the decision in the case of Rioki Estate Co (1970) Ltd-vs-Kinuthia Njoroge (1977) KLR 146.
 19. It is important to note that the tort of trespass requires no proof of damage. The respondent was denied use of land hence the relief of “mesne profit” could arise. The same is a form of special damages as I echo the decision in Nakuru Industries Ltd-vs-SS Mehta & Sons (2016) eKLR.
 20. In Halsbury's Laws of England 4th edition volume 45 paragraph 26 at 1503, it is noted that the court has to compute damages in an action for trespass including recovery of nominal damages even if there is no actual loss. That general damages may be increased in aggravating circumstances.
 21. The appellant herein and the 2nd defendant in the originating suit compulsorily acquired the suit land which has to be used for the purpose for which it was acquired. Plainly, the use of the suit land is not for any other purpose as noted in Re Kisima Farm Ltd (1978) eKLR 36.
 22. The appellant's counsel raised issue of procedure as noted at paragraph 8 hereinabove. Indeed, matters of procedure are not normally of a fundamental nature; see Boyes-vs-Gathure (1969) EA 385 and article



- 159 (2) (d) *Constitution of Kenya*, 2010 and section 19(1) *Environment and Land Court Act*, 2015 (2011)
23. Notably, the fourth schedule to the *Constitution of Kenya*, 2010 sets out distribution of functions between the National Government and the County Governments. In part 1 of the schedule, National Government functions include primary schools while pre-primary education is a function of the County Governments as stipulated in part 2 thereof
 24. The respondent strictly pleaded special damages at paragraph 9 of the plaint. He is entitled to that limb of the claim since he strictly proved the same by PEXh7 as held in *Ratcliffe-vs-Evans* (1892) 2 QB 524, *Great Lakes Transport Co Ltd-vs-KRA* (2009) KLR 720.
 25. Be that as it may, he didn't strictly plead and prove mesne profit in light of, *inter alia*, *Nakuru Industries* case (*supra*) and *Halsbury's Laws of England* (*supra*). On that account the appellant is not entitled to mesne profit relief in this matter.
 26. So, the learned trial magistrate correctly observed that the appellant's actions failed the research paediatric centre as planned by the respondent. That thus, he was entitled to special, general and exemplary damages in the circumstances.
 27. In the foregone, it is the considered view of this court that the trial court's judgment delivered on July 15, 2021 is in line with the facts of the case and the principles of law save for mesne profit award which is hereby set aside. To that extent, I affirm the said judgment.
 28. *A fortiori*, this appeal is hereby partially dismissed taking into account the extent noted in paragraphs 25 and 27 hereinabove.
 29. The parties to bear their own costs of this appeal and in the original suit.
 30. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 7TH DAY OF DECEMBER, 2022.

G.M.A ONG'ONDO

JUDGE

Present

1. Ms Odhiambo holding brief for G.S Okoth Learned Counsel for the Respondent.
2. Okello, Court Assistant.

