



**Giathi v Mwirikia (Environment and Land Appeal 28 of 2023)
[2024] KEELC 6505 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6505 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 28 OF 2023
YM ANGIMA, J
OCTOBER 3, 2024
(FORMERLY NYAHURURU ELCA NO. 20 OF 2022)**

BETWEEN

SAMUEL KAHIA GIATHI APPELLANT

AND

ISAAC MUORIA MWIRIKIA RESPONDENT

(Being an appeal against the judgment and decree of Hon. Aloyce Peter Ndege (PM) dated 20.09.2022 in Nyabururu CM ELC No. 60 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. A.P. Ndege (PM) delivered on 20.09.2022 in Nyabururu CM ELC No. 60 of 2018– Isaack Muoria Mwirikia -vs- Samuel Kahia Giathi. By the said judgment, the trial court found for the Respondent and consequently awarded him a sum of Kshs.425,900/= being the value of his demolished houses and Kshs.10,000/= per month with effect from February, 2011 for loss of use and loss of income. The trial court also awarded the Respondent one half of the costs of the suit.

B. Background

2. The record shows that vide a plaint dated 13.02.2013 the Respondent sued the Appellant seeking the following reliefs:
 - a. Kshs.425,900/= being the total loss incurred by the plaintiff from the unlawful demolition.
 - b. Kshs.10,000/= per month from February, 2011 being loss of use and income.



- c. General and punitive damages for unlawful and malicious demolition.
 - d. Costs of the suit plus interest.
 - e. Any other or further relief that this honourable court may deem and just and fit to grant.
3. The Respondent pleaded that at all material times he was the registered owner of Title No. Nyandarua/ Melangine/3502 & 3503 (the suit properties) which bordered the Appellant's land. He pleaded that in 2010 he constructed 15 semi-permanent rooms on the suit properties which fetched him a monthly rent of Kshs.2,500/= each.
 4. He pleaded that in the month of February, 2011 the Appellant's sons and other hired goons invaded the suit properties and demolished 4 of his rooms, destroyed a lorry of ballast and carried away the building materials as a result of which he suffered loss whose particulars were itemized in the plaint. The Respondent further pleaded that he had also suffered loss of income in the sum of Kshs.10,000/= per month for the 4 rooms with effect from February, 2011 as a result of the Appellant's said actions.
 5. The Respondent pleaded that inspite of issuance of a demand and notice of intention to sue, the Appellant had failed to make good his claim thereby rendering the suit necessary.
 6. The Appellant filed a written statement of defence dated 22.03.2013 denying liability for the Respondent's claim. He denied that the Respondent had built 15 rooms on the suit properties and that each room was being rented out for Kshs.2,500/= per month and put the Respondent to strict proof thereof. He further denied that his sons and some hired goons had demolished some of the Respondent's rooms.
 7. The Respondent pleaded that some of the Respondent's rooms were built on a road reserve whereas others were on his (Respondent's) land. It was his case that when the anomaly was pointed out to the Respondent he requested him (the Appellant) to remove the said 4 rooms and relocate them to the suit properties since he did not have the financial ability to do himself. He denied the Respondent's claim for special damages and damages for loss of user as baseless and exaggerated. The Appellant further pleaded that it was the Respondent who had trespassed onto his land hence he was not entitled to compensation. He consequently prayed for dismissal of the Respondent's suit with costs.
 8. The Respondent filed a reply to defence dated 02.04.2013 in which he joined issue with the Appellant on his defence. He denied that he had constructed his rooms on a road reserve or on the Appellant's land and put him to strict proof thereof. He also denied having authorized the Appellant to demolish any of his rooms and contended that the demolition was illegally done without any notice to him or his tenants. As a result, he prayed for dismissal of the Appellant's defence and for entry of judgment in his favour as prayed in the plaint.

C. Trial of the Action

9. The record shows that upon a full hearing of the suit the trial court found that the Appellant had illegally demolished the Respondent's 4 rooms since there was no credible evidence to demonstrate that they were constructed on either a road reserve or the Appellant's land. The trial court was not satisfied that the Respondent had authorized the Appellant to demolish the structures on his behalf. As a consequence, the trial court entered judgment for the Respondent and awarded him the reliefs as indicated in paragraph 1 hereof.



D. Grounds of Appeal

10. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 28.09.2022 and amended on 18.10.2022 raising the following grounds:
- a. That the learned trial magistrate fell into grave error of law and fact in failing to appreciate that the plaintiff deliberately failed to call very material witnesses to his case and in particular the fundi who purportedly constructed his building, the chief, the purported tenants, the person who purportedly called him about the demolition among others and the trial magistrate therefore had a duty to find the plaintiff's claim not proved to the required standard.
 - b. That the learned trial magistrate fell into grave error of law and fact by without any basis in law or otherwise blindly accepting and admitting the evidence of the plaintiff even when he never raised any alarm on the demolition, reported the same to village elders, chief or police a very clear indication that he was aware and had permitted the demolition as per the evidence of the defendant and his witnesses.
 - c. That the learned trial magistrate erred and fell into grave error of law and fact by misconstruing the honesty, truthfulness and candidness of the defendant and his witnesses as an admission of the plaintiff's claim when the same in terms of evidential value, confirmed that all the activities of the defendant in relation to the impugned demolition as having had the consent and concurrence of the plaintiff.
 - d. That the learned trial magistrate erred and fell into grave error of law and fact by failing to appreciate that the plaintiff's case could not be proved nor attract any damages without any evidence of ownership of the land on which his structures were erected.
 - e. That the learned trial magistrate erred and fell into grave error of law by upholding the plaintiff's claim despite a finding by the court that "The demolished structures seemed to cover or block the road and also appeared to encroach on the Appellant/Defendant's land."
 - f. That the learned trial magistrate erred and fell into grave error of law by disregarding the defence evidence that a surveyor and DW3 had pointed out the beacon marks for their respective plots which showed that the plaintiff had built his structures on both the public road and encroached on the Defendant's land and thus his consent to have the same removed.
 - g. That the learned trial magistrate erred and misdirected himself in fact and law in failing to find that the wooden structures the Appellant/Defendant brought down from his land were available to be collected by the Respondent/Plaintiff hence there was no loss in the value as they were left near the site.
 - h. That the learned trial magistrate erred and misdirected himself in fact and law by awarding damages to the Respondent that were manifestly excessive.
 - i. That the learned trial magistrate erred in failing to consider and critically analyze the submissions made on behalf of the defendant and thus arrived at an unjustifiably high award.
 - j. That the learned trial magistrate erred in law and in fact in awarding damages that were neither properly pleaded nor sufficiently proved as by the law required.
 - k. That the learned trial magistrate erred in law and in fact in failing to find that the Plaintiff/Respondent had failed to make out his case hence dismissed the same.



- l. That the learned trial magistrate was in error of law and fact in failing to take into account certain considerations material to an estimate of evidence.
 - m. That the learned trial magistrate was in error of law and fact in awarding the plaintiff/ Respondent interest yet the delay in concluding the matter was largely caused by the court itself and loading interest when the court delayed judgment for well over 4 years has resulted in manifest injustice to the Appellant.
 - n. That the learned trial magistrate was in error of law and fact in failing to find or enter a mistrial having regard to the time the court took to write the judgment and the pressure that was brought to bear upon the court by Plaintiff/Respondent on account of the delayed judgment.
11. As a result, the Appellant sought the following reliefs in the appeal:
- a. That the appeal be allowed.
 - b. That the judgment of the trial court be set aside and the Respondent's claim be dismissed.
 - c. That in the alternative, the court do order a retrial of the suit before a different court.
 - d. That the costs of the appeal be borne by the Respondent.

E. Directions on Submissions

12. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 13.07.2024 whereas the Respondent's submissions were filed on 13.09.2024.

F. Issues for Determination

13. Although the Appellant raised 14 grounds in his memorandum of appeal, the court is of the view that the appeal may be effectively determined through resolution of the following issues:
- a. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim to the required standard.
 - b. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim for special damages.
 - c. Whether the trial court erred in law in awarding the Respondent interest on the decretal amount.
 - d. Who shall bear costs of the appeal.

A. Applicable legal principles

1. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at page 126 as follows:

“...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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. Similarly, in the case of *Peters –vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

"...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who 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 the 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..."

16. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in *Watt –vs- Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

17. In the case of *Kapsiran Clan -vs- Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:

- a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.



H. Analysis and Determination

a. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim to the required standard

18. The court has considered the material and submissions on record. Whereas the Respondent supported the holding of the trial court on the issue of liability, the Appellant contended that there was no sufficient evidence before the trial court to hold him liable. It was contended, inter alia, that the Respondent had failed to call some crucial witnesses in support of his case; that the Respondent had not proved ownership of the suit properties; and that he had failed to report the demolition to either the chief or the police service hence he had not proved his claim to the required standard.
19. The court is aware that the trial court having seen and heard the witnesses who testified at the trial it was better placed to assess their credibility and the probative value of their evidence. The fact that the Respondent did not call some other material witnesses cannot be held against him. He and his legal advisors were at liberty to formulate a winning strategy without calling all the witnesses under the sun. If he considered that 2 witnesses were sufficient to prove his case on a balance of probabilities, he was not obligated to call 4 or 6.
20. The court finds it strange that the Appellant is purporting to challenge the Respondent's ownership of the suit properties in the appeal whereas he did not at the trial. The record shows that by paragraph 3 of the plaint, the Respondent pleaded that he was the registered owner of the suit properties. In response thereto, the Appellant pleaded in paragraph 5 of his defence that "paragraph 3 of the plaint is not denied". As a result, the court finds both lack of merit and good faith in this aspect of the appeal.
21. Although a citizen may report alleged destruction of his property to a location chief, the police service or village elders, there is no legal obligation to do so in any every case. Thus, where a citizen decides to seek a civil remedy for compensation he cannot be driven from the seat of justice simply for failing to report the tortious act to the local administration or the police service. The standard of proof in civil cases is usually on a balance of probabilities and not beyond reasonable doubt.
22. The court has re-evaluated the entire evidence which was placed before the trial court. The court is of the opinion that the only way the Appellant would have escaped legal liability for the demolition was by demonstrating, on a balance of probabilities, that the Respondent's structures were on a road reserve or on his property. There was no credible, expert evidence to demonstrate that the Respondent's structures had gone beyond the boundaries of the suit properties and encroached upon the road reserve or the Appellant's land. Consequently, the court finds no fault with the holding of the trial court that the Respondent had proved his claim against the Appellant on a balance of probabilities.

b. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim for special damages

23. The court has considered the material and submissions on record on this issue. Whereas the Respondent contended that his claim for damages was properly proved the Appellant contended otherwise. In particular, the Appellant contended that the claim for special damages was not pleaded with particularity and strictly proved at the trial.
24. The court has noted that the Respondent's claim for special damages was properly particularized in paragraph 7 of his plaint giving a total claim of Kshs.425,900/=. He also pleaded his claim for loss of income at the rate of Kshs.10,000/= per month for the 4 rooms in paragraph 8 of the plaint. As part of his evidence to prove his claim he produced a valuation report dated 01.11.2012 prepared by M/S



Mbugua & Associates. The material on record shows that the Appellant did not produce any valuation report to rebut the contents of the Respondent's report.

25. The court has further noted that even though the Respondent's valuation report assessed the value of the demolished rooms at Kshs.415,900/= the respondent chose to claim a lower sum, to wit, Kshs.386,000/=. The trial court was perfectly entitled to award the lower figure of Kshs.386,000/= which was pleaded in the plaint. In the premises, the court finds no fault on the part of the trial court in finding and holding that the Respondent had adequately proved his claim for special damages. The same applies to the claim for loss of income which was also supported by the Respondent's valuation report.

c. Whether the trial court erred in law in awarding the Respondent interest on the decretal amount

26. The Appellant's primary grievance was that the trial court erred in awarding the Respondent interest on the decretal amount because the delay in delivery of the judgment was occasioned by the court itself. Section 26 of the *Civil Procedure Act* (Cap.21) stipulates as follows on the discretion of the court to award interest on the decretal amount:

- “(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
- (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”

27. The court finds no evidence on record to demonstrate that the trial court committed any error of principle in awarding interest on the decretal amount. There is no indication on record to suggest that the rate of interest awarded was excessive or arbitrary. The usual rate of interest is usually court rates unless a higher rate is pleaded and justified. The mere fact that there was delay in delivery of the judgment per se cannot disentitle a successful litigant to interest on the decretal amount. In the premises, the court finds no substance in the Appellant's complaint on the award of interest.

d. Who shall bear costs of the appeal

28. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Respondent shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

29. The upshot of the foregoing is that the court finds no merit in the Appellant's appeal. As a consequence, the Appellant's appeal is hereby dismissed in its entirety with costs to the Respondent.



It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM THIS 3RD DAY OF OCTOBER, 2024.

In the presence of:

Mr. Mugo holding for Mr. Ndegwa for the Appellant

Mr. Gakenia Gicheru holding brief for Mr. Waichungo for the Respondent C/A - Carol

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Y. M. ANGIMA

JUDGE

