



**Owino v Clara (Environment and Land Appeal 3 of 2017)
[2023] KEELC 21432 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21432 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 3 OF 2017
MAO ODENY, J
NOVEMBER 9, 2023**

BETWEEN

CAROLINE ADHIAMBO OWINO APPELLANT

AND

GREGORC CLARA RESPONDENT

(Being an Appeal from the judgment delivered by Hon L N. Juma, Resident Magistrate delivered on 17th January, 2017 in Kilifi SRMCC No. 358 of 2015)

JUDGMENT

1. This appeal arises from the judgment dated January 17, 2017 delivered by Hon LN Juma Resident Magistrate delivered in Kilifi SRMCC No 358 of 2015. The appellant herein being aggrieved by the judgment lodged a Memorandum of Appeal dated February 8, 2017 and listed the following grounds:
 - a. That the honourable learned magistrate erred both in law and in fact by dismissing the appellant claim.
 - b. That the honourable learned magistrate erred in law and in fact by finding that the respondent proved her case on a balance of probabilities.
 - c. That the honourable learned magistrate had erred both in law and in fact by finding that the respondent did not demolish the appellant’s kiosk.
 - d. That the honourable learned magistrate erred both in law and in fact in failing to:-
 - i. Consider properly the submissions made by the appellant’s /respondents advocates.
 - ii. Consider the contradictions in the evidence given by the respondent/appellant and her witnesses.



- iii. Make any proper findings on the evidence given in court
 - iv. Give any proper reasons for her findings and giving judgment in favour of the respondent/appellant.
 - e. That the honourable learned magistrate erred both in law and in fact in dismissing the appellants/respondents counterclaim
2. A brief background to this appeal is that the appellant filed a suit against the respondent in the lower court seeking the following orders:
 - a. The defendant be compelled by order of injunction directing the defendant to rebuild the kiosk on the same spot, size and in the same manner it was before the alleged act.
 - b. Special damages for value of the kiosk and daily sale of Kes 60,000/ and loss of business of Kes 15,000/ per day from the day of the alleged act until the date of Judgment
 - c. Damages
 - d. Costs of the suit.
3. On November 19, 2015 the respondent filed a defence denying the allegations by the appellant and sated that the alleged kiosk was demolished by the County Government of Kilifi after issuing a notice to the owner to demolish within 21 days but failed to do so.
4. The learned magistrate heard the case, delivered a judgment, and dismissed the appellant's suit, which is the subject of this appeal.
5. During trial the Appellant gave evidence and the respondent had one witness therefore three witnesses gave evidence in the lower court.
6. Counsel agreed to canvas the appeal vide written submissions, which were duly filed.

Appellant's Submissions

7. Counsel reiterated the testimony of the appellant in the lower court and stated that the respondent was known to the appellant as a neighbour and that she had valid licenses from the municipal council of Kilifi
8. Counsel further submitted that it was the appellant's evidence that on August 14, 2015 she found the defendant and four other men demolishing her kiosk and carried her goods.
9. Counsel urged the court to find that the appeal has merits as it was not possible for the county to bring ordinary people demolish a kiosk that they had licensed.

Respondent's Submissions

10. Counsel for the respondent also gave a chronology of the events and the proceedings at the lower court and submitted that the respondent told the court that he did not know the appellant but the kiosk was next to his house two meters away from his bedroom. He further stated that it would harbour thieves and people who smoked marijuana which issue he reported to the municipal council and that he was not present at the time of demolition.
11. Counsel relied on section 107(1) and (2) of the *Evidence Act* on the burden of proof, which lies on whoever desires judgment as to any legal right. In this case, counsel submitted that the appellant failed



to prove that it was the respondent who demolished the kiosk necessitating the case was dismissed with costs.

Analysis and Determination

12. I have considered the record of appeal, the submissions by counsel and this being a first appeal the court is cognizant of its primary role which is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way as was held in the case of [*Abok James Odera t/a Anj Odera & Associates v John Patrick Machira t/a Machira & Co Advocates*](#) [2013] eKLR.

13. Similarly in the case of *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 the court stated that:

“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 Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).

14. The Court of Appeal for East Africa took the same position in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O’Connor stated as follows:

“It is a 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 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.”

15. It is on record that the appellant admitted during her cross-examination in the trial court that the kiosk was erected on a road reserve. It is further on record that the appellant was served with a Notice by the Kilifi County government to stop and demolish the illegal structure within 21 days failure to which the county would take action to demolish.

16. There is no evidence on record to show that it is the respondent who demolished the structure. The appellant did not rebut the allegation that she had been given notice by the county government to remove the illegal structures on the road reserve.

17. Section 107(1) of the [*Evidence Act*](#) provides that:

“Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

18. In the case of *Susan Mumbi v Kefala Grebedbin*; (Nairobi HCC No 332 of 1993) it was held that;

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case



on a balance of probability and the fact that the defendant does not adduce any evidence is immaterial.”

19. It was incumbent upon the appellant to prove that it was indeed the respondent who demolished her kiosk on a road reserve. Unfortunately, the appellant failed to discharge this burden of proof. In the circumstances, I find that the appeal lacks merit and is therefore dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF NOVEMBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

