Nyaega & another v Momanyi (Civil Appeal E003 of 2024)
[2025] KEHC 1909 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1909 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E003 OF 2024

WA OKWANY, J

FEBRUARY 6, 2025

BETWEEN

EVANS NYAEGA ..... 1ST APPELLANT

PATRICK NYAMANGO ..... 2ND APPELLANT

AND

KENNEDY MOMANYI ..... RESPONDENT

(Being an Appeal from the Judgment in the Chief Magistrate's Court at Keroka, Civil Suit No. MCCC E155 of 2021 delivered by Hon. C. Ombija, Senior Resident Magistrate on 17th August 2023.)

JUDGMENT

1. The Appellants herein were the Plaintiffs before the trial court where they sued the Defendant/ Respondent seeking the following orders: -

    i. Compensation for Special Damages in the sum of Kshs. 104,855.70.

    ii. General damages

    iii. Costs and interest at court rates.

2. The Plaintiffs' case was they are the grandsons of one Kemunto Gesimba (deceased) who was the sole registered owner of parcel No. Nyaribari Masaba/Bonyamasicho/476 (hereinafter "the Suit Land") where they had planted Eucalyptus trees. They stated that on 27th August 2021, the Defendant hired goons who descended upon the suit land and cut down the trees that had by then matured and were ready for lumbering. They placed the value of the destroyed trees at Kshs. 104,855.70.

3. The Respondent entered appearance, in person, and filed a Statement of Defence dated 11th November 2021 where he denied the Appellants claim.

4. The matter was set down for hearing and the Appellants presented the evidence of five (5) witnesses.

The Appellants' (Plaintiffs) Case

5. The 1st Appellant (PW1) testified that he planted the subject trees sometime in 2005. He explained that he received a report on the morning of 27th August 2021 that some people were cutting down the trees on his farm. He proceeded to the suit land where he found 20 people cutting down his trees. He reported the matter to the Police vide OB/02/27/02/21. The police did not act on his report and he thereafter engaged the services of a Forest Officer who assessed the damages done to his trees at Kshs. 104,855.70.

6. PW1 stated that the suit land was still registered in the deceased's name but that the deceased had granted him the permission to plant the trees. He produced a copy of the Demand Letter (P.Exh2), a copy of the Green Card (P.Exh3) and a bundle of photographs (P.Exh4) as exhibits.

7. Cynthia Mochari Ogechi (PW2) and Sanduki Maruti (PW3) witnessed the cutting down of the trees and stated that they learnt that the Respondent was the key figure behind the said exercise. They confirmed that the trees belonged to the Appellants.

8. Milka Bwari Moemi (PW4), the Appellants' mother, testified that the trees in question belonged to the Appellants and that she learnt that the Defendant was the one cutting down trees. She confirmed that the suit land belonged to the deceased and that a succession case was yet to be filed in respect to the deceased's estate. She stated that her husband had entered into a sale agreement with the Respondent in respect to the suit land and that her name appeared on the said agreement but she did not sign it. She produced the Sale Agreement as (P.Exh5).

9. Charles Mong'are Maticha (PW5), the Sub-County Forest Officer assessed the extent of damage tom the trees and made a report which he produced as P.Exh1.

The Defendant/ Respondent's Case

10. The Respondent did not tender any evidence or call any witnesses in support of his defence.

11. In the judgment rendered on 17th August 2023, the trial court dismissed the Appellants' case and held that the sale Agreement between the Respondent and the Appellants' father in respect to the suit land was null and void as it amounted to intermeddling with the deceased's estate. The trial court also noted that the Appellants were also not the registered owners of the suit land and that as such, none of the parties could lay a claim to the land in question or any part thereof.

12. Aggrieved by the trial court's decision, the Appellants filed the present Appeal vide Memorandum of Appeal dated 20th February 2024 seeking to set aside the said judgment/decree and an order for compensation of the cut trees in the sum of Kshs. 104,855.70, costs of the suit and the appeal. They listed the following grounds of appeal in their Petition of Appeal: -

    1. That the Learned Trial Magistrate erred in law and in fact in finding for the Respondent against the weight of the evidence on record.

    2. That the Learned Trial Magistrate erred in law and in fact in failing to evaluate the Appellant's evidence, the exhibits produced in court vis-a-vis the evidence of the Respondent.

    3. That the Learned Trial Magistrate erred in law and in fact in solely relying on the only defence of the Respondent when the Respondent did not file his written statement in court or call any

witness to adduce any evidence and did not file any witness statement in court in respect of the defendant's defence.

4. That the Learned Trial Magistrate erred in law and in fact in failing to consider the evidence of PW5, the Forest Officer, his assessment report for the trees cut down valued at Kshs. 104,855.70, which trees were planted by the Appellants at their ancestral land owned by their grandmother which were cut down by the Respondent even when the Respondent did not adduce any evidence or produce any exhibits or file submissions in court to confirm ownership or any relationship with the owner of land parcel described as Nyaribari Masaba/ Bonyamasicho/476 registered in the name of Kemunto Gesimba (deceased), the grandmother to the Appellants.

5. That the Learned Trial Magistrate ignored the Appellants adduced evidence, written submissions and authorities cited in the compensation of tress cut down by the Respondent.

6. That the Learned Trial Magistrate erred in law and in fact by basing his findings on conjectures, suppositions and extraneous matters.

13. The parties were directed to canvass the appeal by way of written submissions.

14. The Appellants submitted that his claim was not a land dispute but a claim for compensation for malicious damage to property. The Appellants contended that they had adequately demonstrated that the trees belonged to them and presented evidence of the loss that they had suffered following the cutting down of the trees. They faulted the trial court for, on one hand, finding that indeed the trees were cut down, and on the other hand, declining to grant them an award for the loss and damage that they had suffered.

15. The Respondent did not participate in this Appeal despite proper service being effected.

16. The Court of Appeal (of England) explained the duty of the first appellate court in the case of Coghlan vs. Cumberland (1898) 1 Ch. 704, as follows: -

> " Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

Analysis and Determination

17. I have carefully considered the Record of Appeal and the Appellants submissions. I find that the main issue for determination is whether the Appellants made out a case for compensation for their trees.

18. It is trite that the standard of proof in civil cases is on a balance of probabilities. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the Court of Appeal made reference to the decision by Lord Denning MR and held that:-

> " Denning J. in Miller vs. Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

19. Section 107 of the *Evidence Act* provides that:-

(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

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

20. The above section places the legal burden of proof on the Plaintiff who seeks compensation or redress from a court of law. In the present case, the Appellants presented the testimonies of PW1-PW4 who stated that they saw trees being cut on the material date. PW5, the Forest Officer, visited the suit land and confirmed that trees had been cut down. It was therefore not disputed that the trees were felled down on 27th August 2021.

21. It was also not disputed that the suit land belonged to the deceased who was the Appellants' grandmother and that trees belonged to the Appellants. PW4 testified that even though the suit land was still registered in the name of the deceased, her husband had sold the land to the Respondent contrary to the provisions of the *Law of Succession Act*. On cross-examination, she stated they informed the Respondent that the trees on the land belonged to the Plaintiffs at the time of sale.

22. The *Law of succession Act* provides at Section 45 that: -

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

23. In Veronica Njoki Wakagoto (Deceased) [2013] eKLR Musyoka J. held that:-

> " The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence."

24. While I agree with the trial court's finding that the sale of the suit land amounted to intermeddling with the deceased estate contrary to Section 45, the issue of the land sale was not one of the issues for determination by this Court. Suffice is to say that the sale was null and void. This means that the Respondent could not lay any claim to the land or the trees thereon and that the cutting down of the trees was unlawful.

25. I note that the defence filed by the Respondent amounted to mere denial as he did not present any evidence to support such denial. The legal burden of proof fell on the Appellants to prove their claim and once they presented their case, the evidentiary burden shifted to the Respondent to disprove the Appellants' assertions.

26. Sections 109 and 112 of the *Evidence Act* stipulates as follows:-

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

27. It therefore behoved the Respondent to present evidence to support his denial of the Appellants' claim or rebut their assertions. Failure to tender evidence meant that the Respondent did not displace or disprove the Appellants' case. I find that the Statement of Defence filed by the Respondent was not sufficient to controvert, disprove or rebut the Appellants' case. I am guided by the decision in Motex Knitwear limited vs. Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002, where Lessit, J. (as she then was) cited the authority of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 where it was held that:-

> " Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

28. Similarly, in Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. (as she then was) citing the decision in *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

29. The common thread that runs through the above cited cases is that while the Plaintiff bears the burden of proving his case, on a balance of probabilities, where such evidence is uncontroverted and remains solid in setting forth the claim against the defendant, it can safely be concluded that such a party has discharged their burden of proof to the required standards. In find that the Appellants herein proved their case on ownership of the trees , on a balance of probabilities, and that the trees were cut down by the Respondent.

30. In Kenya Wildlife Service vs. Joseph Musyoki Kalonzo [2017] eKLR the court referred to the ubi jus ibi remedium maxim held that: -

> " 17. The respondent could either lodge his claim through the Act, which he did but no remedy was forthcoming, or pursue the remedy under common

law through the courts. Every person has a right to pursue a remedy under common law, for a wrong or injury suffered.

Under common law there cannot be a wrong without a remedy - or in other words,

> Equity will not suffer a wrong to be without a remedy (ubi jus ibi remedium). The Respondent suffered a wrong; he went to the appellant seeking relief and he was repulsed"

31. Taking a cue from the above decision, I find that having established that their trees were destroyed by the Respondent, the Appellants proved their claim for compensation to the extent of damage quantified in the sum of Kshs. 104,855.70 and were therefore entitled to the orders sought. I will however not make any award of damages for trespass having found that the land in question did not belong the Appellants.

32. In conclusion, I find that the Appeal is merited and I therefore allow it and set aside the judgment of the trial court and enter judgment in favour of the Appellants as follows: -

    i. Special Damages - Kshs. 104,855.70.

    ii. Costs of the suit in the trial court and Appeal

    iii. Interest on (i) and (ii) above at court rates till payment in full.

33. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 6TH DAY OF FEBRUARY 2025.

W. A. OKWANY

JUDGE