Rotich v Cheboi (Civil Appeal E002 of 2023)
[2025] KEHC 4985 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4985 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E002 OF 2023

RB NGETICH, J

APRIL 24, 2025

BETWEEN

JOHANA ROTICH ..... APPELLANT

AND

PHILIP CHEBOI ..... RESPONDENT

((being an Appeal against the Judgment of Hon. V.O Amboko, SRM and delivered on the 16th of January, 2024 in Kabarnet SRM Civil Case No. E002 of 2019))

JUDGMENT

1. The Appellant herein filed suit in the subordinate court against the defendant Respondent seeking general and special damages for destruction of crops in his farm by the defendantRespondent's goats on 7th August 2017.The particulars of special damages is kshs 15,000 for 6 bags of maize and cost of production kshs `12,000 making a total of kshs 27,000. Upon trial, by judgment delivered on 16th January, 2023,the trial court dismissed the plaintiff's suit.

2. Being aggrieved by the trial court's decision, the appellant filed notice of appeal on 30th January 2023 and Memorandum of Appeal dated 3rd June, 2024 filed on 4th June 2023 setting out the following grounds of appeal:

    i. THAT the Learned Magistrate erred in law and in fact in failing to uphold the Appellant's claim in the trial suit.

    ii. THAT the Learned Magistrate erred in law and in fact in failing to evaluate, consider and determine the issued raised.

    iii. THAT the Learned Magistrate erred in law and in fact by not appreciating that the Appellant had established his claim on a balance of probability hence rendering erroneous the said judgment.

iv. THAT the Learned Magistrate erred in law and in fact in failing to consider the evidence that ought to have been adduced by the Agricultural Officer, namely the Assessment Report.

v. THAT the Learned Magistrate erred in law and in fact in failing to afford the aforesaid crucial witness, namely the Agricultural Officer, the opportunity to fully present are evidence in its entirety, which evidence would have been crucial in resolving the real issues in controversy in a just and fair manner.

vi. THAT the Learned Magistrate erred in law and in fact appreciate that the then Appellant's Advocate's failure to evidence andor testimony from a crucial witness, Agricultural Officer was prejudicial to the Appellant.

vii. THAT the Learned Magistrate erred in law and in fact appreciate that the then Appellant's Advocate's failure to evidence andor testimony from a crucial witness, in failing to elicit crucial namely the Agricultural Officer amounted to permitting the inadvertent mistake of counsel to be visited upon an innocent litigant.

viii. THAT the learned Magistrate erred in law and in fact in upholding in favour of the Respondent and thereby exhibiting impartiality hence the favourable decision to the Respondent.

3. That the trial court dismissed the appellant's claim on ground that there was no basis for the claim of Kenya Shillings fifteen thousand as the crop damage report was not produced as an exhibit by the maker. The Appellant prays that the entire judgment andor decision be set aside and an order for general and special damages for negligence be awarded to the Appellant with costs to the Respondent.

Appellant's Submissions.

4. The Appellant submitted that the issue for determination whether the Appellant proved his case on a balance of probability. The appellant submits that when crops are destroyed either an estimated amount which went to farming is done at the scene and parties agree out of court or suit filed if parties fail to agree; that the case was proved by the statement sworn during trial.That during trial he sorely put reliance and trust on his then advocate, the firm of J.J Chesaro & Company advocated to prosecute his case and that is why this crucial piece of evidence was left out; he blames ignorance, though no defence

5. The appellant submits that he adduced evidence which was and it was corroborated and it is undeniable that the Respondent was responsible for the destruction of his crops. He relies on the provisions of Section 107 (1) of the *Evidence Act* and submits that the courts have the discretion to consider evidence whether produced or not and that PW3 in his last paragraph of cross-examination stated that he was present during the assessment of the damaged crops. That the Assessment report was marked for identification however for reasons he could not gather, the Agriculture Officer could not make it and the court closed his case. He submits that he proved his case sufficiently on the balance of probability save for the rule of evidence.

6. The appellant submits that prove on balance of probabilities was stated by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:-

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance

of probabilities. He has established that it is probable than not that the allegations that he made occurred."

7. The appellant further submits that the livestock that destroyed the Appellant's crops belonged to the Respondent and that he proved his case on a balance of probability.Further in the case of Kurui & another v Chebotibin (Civil Appeal E011 of 2022) [2024] KEHC 3586 (KLR) (22 March 2024),the court pronounced itself on the fact that the assessment report was in question and found that the respondent proved on a balance of probabilities that the appellants are liable for destruction of his seedling.

8. It is the Appellant's humble submissions and prayer that this court finds

   a) the Appellant proved his case on a balance of probability; and

   b) costs be awarded to the Applicant.

Respondent's Submissions.

9. The Respondent filed written submissions and frames the following issues for determination:

   a. Whether this appeal was filed out of time.

   b. Whether an order for general damages and special damages for negligent should be awarded.

   c. Whether the Judgment delivered on 16th January, 2023 should be set aside.

   d. Who should bear the costs of this appeal?

10. On whether this appeal was filed out of time, the Respondent submit that the Judgment in Kabarnet SRM Civil Case No.6 of 2019 was delivered on 16th January, 2023 and the Appellant filed a Notice of Appeal on 30th January, 2023 then filed memorandum of appeal on 4th June, 2024 which is a period of 1 year, 4 months and 12 days after the Judgment was delivered. They place reliance in Section 79G of the *Civil Procedure Act* and submit that the present appeal was filed out of time without the leave of Court and it is therefore incompetent and should be struck out.

11. On whether an order for general damages and special damages for negligence should be awarded, the Respondent rely on the case of Gitobu Imanyara, Njehu Gatabaki & Bedan Mbugua v Attorney General (Civil Appeal 98 of 2014) [2016] KECA 557 (KLR) (19th May 2016) (Judgment) and in Bangue Indosuez vs DJ Lowe and company Ltd [2006] 2KLR 208 and submit that from the trial court's proceedings, PW5 stated that he received a letter from the chief which requested for an assessment report. She visited the farm on the 10th August,2017 and compiled a report on the 16th August,2017. She assessed the value of the damaged crops at Kshs. 15,000=. She was however stood down during her testimony as the report was not an original document and was not recalled to produce the report as an exhibit.

12. On argument that the trial magistrate did not consider report by the agricultural officer, the Respondent submitted that the trial court was right in declining to consider the assessment report made by the Agricultural Officer since it was not an original document and was not produced as an exhibit making the agricultural officer's evidence baseless and could not have added any value to the Appellant's case; and the court cannot award special damages out of the blues; that the Appellant neither proved the special damages nor made out a case for general damages.

13. On Whether the Judgment delivered on 16th January, 2023 should be set aside, they rely on Order 10 Rule 11 of the Civil Procedure Rules, 2010 and submit that Judgment can only be set aside on terms

that are just. That the present appeal stems from a special damage claim which was dismissed at the lower court since the Appellant herein did not prove his case on a balance of probability against the Respondent and the lower court proceedings will demonstrate that the Appellant failed to produce evidence in support of the special damages claimed. The Respondent submit that that the Judgment delivered on 16th January, 2023 was sound and ought to be upheld.

14. On who should bear the costs of this appeal, the Respondent submit that it is trite law that costs follow the event unless the court or judge shall for good reason otherwise order as per Section 27 (1) of the *Civil Procedure Act* and urged this court to dismiss this appeal with costs to the Respondent.

Analysis And Determination.

15. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter while bearing in mind the fact that unlike the trial court, the appellate court did not have the advantage of taking evidence first hand and observing the demeanor of witness. For that reason, due allowance should therefore be given by the appellate court. The principles that govern the first appellate courts were set out in the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123) where the court stated as follows: -

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

16. I have perused and considered pleadings, proceedings, judgment, grounds of appeal, submissions and the authorities cited by the parties herein. I wish to consider two issues:-

    a. whether this appeal was filed out of time

    b. whether the appellant proved his case on a balance of probabilities

(i)whether the appeal was filed out of time

17. Section 79G of the *Civil Procedure Act* provide that an appeal to the High Court shall be instituted within 30 days of filing the notice of appeal where the appeal is as of right; or 30 days after the grant of certification, where such certification is required. A respondent shall file grounds of objection, an affidavit, or both, within 14 days of service of the petition. Record show that judgment was delivered on 16th January, 2023.The Appellant filed a Notice of Appeal on 30th January, 2023 then filed memorandum of appeal on 4th June, 2024 which is a period of 1 year, 4 months and 12 days after the Judgment was delivered. There is no doubt that the memorandum of appeal was filed out of time and no leave of Court was sought by the appellant to file memorandum of appeal out of time. The memorandum of appeal was therefore filed out of time and this appeal is therefore not properly before this court.

(ii)whether the appellant proved his case on a balance of probabilities

18. Record show that the appellant filed a claim that on or about the 7th August,2017 alleging that the DefendantRespondent while grazing his cows and goats so negligently, carelessly andor deliberately caused the cows and goats to enter into the plaintiff'sAppellant's farm and ate all the Plaintiff's crops including maize, millet, grass and bananas. The DefendantRespondent denied the claim and the matter

proceeded for trial where all the parties were given the opportunity to avail the witnesses and produce their supporting documents.

19. The trial court in its judgment delivered on 16th January 2023 dismissed the PlaintiffAppellant's suit with costs on a finding that the plaintiff did not prove his case against the Defendant on a balance of probability. The trial magistrate found that the agricultural officer's crop assessment report was only marked for identification and not produced. The court indicated in its judgement that the Agricultural officer was stood down and was not recalled to produce the crop assessment report as an exhibit and therefore there is no basis for a claim of Kshs.15,000= as the crop damage report was not produced as an exhibit by the maker.

20. The trial court further stated that there was no receipts produced by the plaintiff as proof of costs of production of Kshs.12,000= which were specifically pleaded as special damages and the general damages that the Plaintiff prayed for were not proved.

21. The rule of production of documents demands that the documents have to be produced as exhibits either by the consent of the parties or under the rules of evidence. In Migori High Court Civil Case No. 13 of 2015 County Government of Homa Bay vs. Oasis Group International & Another (2017) eKLR the court held thus: -

    47. In this case all parties filed various documents and entered into two pre-trial consents on the 16092015 and 29092015. Since the twin consents did not expressly state how the documents filed through the parties' Lists of Documents were to be transformed into exhibits, I hold that the documents were hence left to the prevailing rules of evidence. It therefore means that despite the currency of the so many documents on the record, this Court would only deal with those 16 documents that were taken through the rigors of identification and were eventually produced as exhibits thereby becoming part of the judicial record.

    48. The foregone position has been fortified by the Court of Appeal in the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR which decision his Lordships rightly held on the issue: -

    16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"

    17. The respondents' contention is that he appellant by failing to object to the three documents marked as "MFI 1", "MFI 2 and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

    18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case" Any document filed andor marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called

upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they has simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification .....' (emphasis added).

22. Record show that the Agricultural officer who testified as pw4 stated that she assessed damages on the appellant's farm but he did not have the original report which he said she issued to the farmer. she was stood down to avail the report on assessment but was not availed again to produce the report which

was to show the extend of the damage. The assessment report did not therefore form part of evidence to be considered by the trial court. The claim by the plaintiffappellant was for special damages and in the absence of assessment report, the court could not have guessed the damage and in my view, the trial magistrate did not err in finding that the appellant failed to proof his claim on a balance of probabilities.

23. The upshot is therefore that the plaintiff's Appeal lacks merit and it is hereby dismissed with costs to the Respondents.

24. Final Orders: -

Appeal is hereby dismissed with costs to the Respondent

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET HIGH COURT THIS 24TH DAY OF APRIL 2025.

RACHEL NGETICH

JUDGE