



REPUBLIC OF KENYA



KENYA LAW
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**Osumba v Macao Properties Limited (Civil Appeal E172 of 2024)
[2025] KEHC 5899 (KLR) (Civ) (13 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E172 OF 2024

SM MOHOCHI, J

MAY 13, 2025

BETWEEN

FREDRICK HA OSUMBA APPELLANT

AND

MACAO PROPERTIES LIMITED RESPONDENT

*(Being an appeal from the judgment of Honourable D. Mosse (SRM)
delivered on 12th May, 2023 in Nakuru CMCC No. E1083 of 2021)*

JUDGMENT

1. The appeal herein arises from the judgement of 12th May, 2023 following the Appellant institution of Nakuru CMCC No. E1083 of 2021 against the Respondent by way of Complaint dated 29th September, 2021.
2. It was the Appellant's claim that on the morning of 13th November, 2020 and 9th April, 2021 the Respondent in the company of its employees and police officers without cause or notice invaded and trespassed on the Appellant's houses constructed on LR No. Nakuru/Municipality/Block 7/332 and demolished them and looted goods.
3. The Appellant sought:-
 - a. An order that the demolition was unprocedural,
 - b. an order of compensation for absolute destruction and vandalism of the developments in the suit property
 - c. An order for compensation for damaged and looted properties
 - d. An order for compensation for loss of rent/income from the demolished property



- e. costs and interests of the suit at court rates
4. Despite service, the Respondent failed to enter appearance and on 24th June, 2022 the Court entered interlocutory judgement. On 11th October, 2022 the case proceeded to formal proof hearing with the Appellant calling 2 witnesses to adduce evidence.
5. The Court thereafter found that the Appellant had failed to prove his claim to the required standards and dismissed the same with no orders as to costs.
6. Obviously aggrieved with the decision, the Appellant vide Memorandum of Appeal dated 31st July, 2024 filed the instant appeal on the following grounds:-
 - i. That the Learned Magistrate completely misunderstood the evidence before Court, wrongly analyzed evidence and came to a wrong conclusion of facts and law;
 - ii. That the Learned Magistrate erred in law and in fact in finding that the Appellant had not given sufficient reasons;
 - iii. That the Learned Magistrate erred in law and in fact in finding that the Appellant failed to prove the existence of the Respondent and items destroyed and how the figures were arrived at;
 - iv. That the Learned Magistrate erred in law and in fact in arriving at a judgement that was against the weight of evidence on record;
 - v. That the Learned Magistrate erred in law and in fact by disregarding all the evidence that was adduced by the Appellant as proof that the Appellant's properties were demolished by the Respondent herein and how the figures for compensation were arrived at;
 - vi. That the Learned Magistrate erred in law and in fact in finding that the Appellant herein failed to prove his case on a balance of probabilities;
 - vii. That the Learned Trial Magistrate erred in law and in fact in totally ignoring the explanation put forth by the Appellant during hearing, to be considered, for granting of compensation for structures illegally and unfairly demolished by the Respondent herein and finding the Respondent liable;
 - viii. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate the significance of the documentary evidence tendered in support of the Appellant's case;
 - ix. That the decision demonstrated partiality and bias.
7. The Appellant therefore seeks that the appeal be allowed, judgment of the Trial Court be set aside and costs of the appeal and the trial Court case be awarded to him.
8. Despite service, the Respondent never entered appearance or defend the Appeal. The Appeal was heard by way of written submissions.

Appellant's Submissions

9. The Appellant submitted in favour of the appeal contingent on four issues:-
 - i. Whether the Learned Magistrate failed to consider the evidence and the exhibits of the Appellant before Court
 - ii. Whether the Respondent is a lawful owner of the suit property



- iii. Whether the Magistrate failed to consider the issues and the consequence of the interlocutory judgement which had already been entered against the Respondent
 - iv. Whether the Respondent was rightfully sued
10. As regards failure to consider evidence, it was submitted that the Trial Court overlooked the assessment and valuation report and that the evidence of the Appellant was not challenged. That the Respondent deliberately refused to defend the claim. Reliance was placed in *Selle v Associated Motor Boat Company Limited* [1968] EA 123 and *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR on the principles guiding the Court at first appeal.
 11. As regards the second issue, it was submitted that the title to land has not been challenged and being the registered proprietor of the property, he has legal right over it as stipulated in Article 40 of *the Constitution*.
 12. On the issue of the consequences of the interlocutory judgement, it was submitted that the Appellant adduced evidence sufficient to sustain the suit, thereafter the burden of proof reverted to the Respondent to rebut which it did not and so the Court must hold the presumption unless sufficient evidence is adduced.
 13. Finally on the issue of whether the Respondent was the right Party to sue, it was submitted that the Respondent introduced themselves and brandished a Court order which they did not serve the Appellant or tenants. That up to date the service has never been done.

Analysis and Determination

14. Having considered the Record of Appeal and the material before Court, as the first Appellate Court in this case, the Court is not bound to agree with the finding of fact by the Trial Court but obligated to re-analyse and re-consider and re-evaluate the evidence adduced before the Trial Court and reach its own independent conclusion while taking due regard to the fact that the Trial Court had the benefit of hearing the witnesses.
15. The Appellant's grievance if understood correctly, is that as a result of the actions of the Respondent, that is demolition and destruction of walls, the Appellant's property was destroyed and looted. He listed particulars of damage incurred as follows; Household item worth Kshs. 1,244,844, Livestock/ Poultry worth Kshs. 802,000 and Electronics worth Kshs 477,233. That figure was based upon the attached valuation report dated 16th March, 2021.
16. Section 107 of the *Evidence Act* demonstrates the legal burden of proof. Further Sections 109 and 112 of the *Evidence Act* captures the evidentiary burden of proof.

“ 107

- (1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

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 that 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 that fact is upon him.
17. The burden of proof was on the Appellant to prove:
- a. Existence of the Respondent
 - b. Trespass into the property by the Respondent;
 - c. Damage or destruction of walls and looting;
 - d. Linkage of the damage and destruction to the Respondent
 - e. Rationale at arriving at the amount in the particulars of damage.
18. The Court in *D.T. Dobie Company (K) Limited Vs Wanyonyi Wafula Chabukati* [2014] eKLR cited the case in *Miller vs Minister of Pensions* [1947] wherein the Court analyzed the degree of proof and held that:-
- “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’, thus proof on a balance of probabilities means a win however narrow.”
19. The Trial Court stated that for the Appellant to prove his case, he had to prove that the Respondent existed and it was in fact them that destroyed the property or that even the property was destroyed to the extent of the damage. They also needed to prove the items that were destroyed and how the particulars were arrived at
20. The Court notes that in the list of documents dated 29th September, 2021 and filed on 5th November, 2021 produced and marked as PExh 1-13, the list did not have the CR12 of the Respondent to prove existence of the company but surprisingly the said document was presented on Appeal
21. Section 78 of the *Civil Procedure Act* provides that the Court on appeal has powers to take additional evidence or require additional evidence to be taken. Order 42 Rules 27 of the Civil Procedure Rules provides that:-
1. the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if
 - a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgement, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
 2. Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred, the court shall record the reason for its admission.
22. The Appellant has to seek leave to be allowed to introduce new evidence on appeal. the Appellant cannot sneak in evidence without first seeking leave and then fault the trial court for not considering it. The Appellant failed to demonstrate the existence of the Respondent which the Trial Court noted.



The Appellant has also not given any justification why the Court should consider this new evidence at this stage.

23. Besides the blurry photographs showing semblance of vandalism, it is not clear that there was trespass by the Respondent or an entirely different third party.
24. The incident is said to have taken place on 13th November, 2020 and 9th April, 2021. What happened in between? The proceedings are incomplete and the Court does not have the benefit of the sworn testimony of PW1 which is presumed is the Appellant.
25. The Appellant relied on a valuation report and the photos attached as proof of vandalism within valuation report does not in any way prove that the Respondent its agents or even the police at Kaptembwo Police Station were the agents of destruction. The photos are equally not clear and it is hard for the Court to tell what is happening.
26. The Court in *Erdemann Property Limited v Kanyi* [2023] KEELC 18698 (KLR) had the following to say:-

“The law on special damages is well spelt out. Special damages must not only be specifically pleaded but must be strictly proved. In the case of *Hahn –Vs- Singh* (1985) KLR 716, the Court of Appeal held that:-

“special damages must not only be specifically claimed (pleaded) but must also be strictly provedfor they are not the direct natural or probable consequence of the act complained of and many not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

In *Total (Kenya) Limited formally Caltex Oil (Kenya) Ltd – Vs- Janevans Ltd* (2015) eKLR the court insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide proforma invoices sent to the party by a third party.?

27. The valuation report was not produced by the maker. Even so, even if the Court had allowed the report to be produced by the Appellant the basis of the list of items vandalized or looted and the figures in the list of vandalized or destroyed property has not been substantiated. Were there receipts of purchase for the items? What informed the amounts listed? These figures are merely estimations which fails the test of time
28. The contention from the valuation report is that the property was rented and that the Appellant was losing annual rental income. Are those the tenants’ properties or the Appellant’s listed as looted? were the list of vandalized items inside the premises rented by the tenants or in the premises solely occupied by the Appellant?
29. The fact that there are more questions than answers is manifest that the Appellant did not discharge the burden of proof. None of these questions were answered and the Appellant failed to show how he arrived at the figures claimed or that the looted property was his to claim loss or that the vandalism, damage, looting and trespass was actuated by the Respondent.
30. This Court is a creature of evidence and before any decision can be made, a party has to convince the Court with evidence that they are deserving of the orders sought. There are a number of OB reports but there reports of the results are not availed to Court to show that after investigations the Respondent were indeed the agents of destruction.



31. Although the decision to prefer criminal charges against a party does not have bearing in a civil case, something to corroborate the evidence of the Appellant would have assisted the Court. Due diligence dictated that the Appellant had to directly link the Respondent to the alleged acts of destruction of property.
32. The Appellant argued that the Respondent presented themselves and brandished a Court Order but him, his family members or tenants were never served with the order. Without the Order being availed to Court, it is difficult for the Court to make orders concerning the “Court Orders” that were neither seen by this Court nor the Appellant.
33. The Appellant has also faulted the Trial Court for failing to take into consideration of the interlocutory judgment and take it as that he had discharged the burden of proof thereby reverting it to the Respondent. That by the Respondent failing to enter appearance of file a defence the Court should have held the presumption that the Appellant had discharged the burden of proof.
34. Emukule J, in *Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] KEHC 595 (KLR) observed: -

“I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption...”
35. At formal proof hearing if the Court finds that a party has not with evidence raise sufficient proof of fact and law, there is nothing left for the Court to do other than dismiss the suit for lacking merit.
36. In the end the Appeal is found to be lacking merit and is hereby dismissed. There shall be no orders as to costs.

DATED, SIGNED & DELIVERED AT NAKURU THIS 13TH DAY OF MAY, 2025

MOHOCHI. S. M.

JUDGE

