Ong'ou v Abong'o & 3 others (Civil Appeal E037 of 2023)
[2024] KEHC 4901 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4901 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E037 OF 2023

RE ABURILI, J

APRIL 11, 2024

BETWEEN

JACK OMONDI ONG'OU ..... APPELLANT

AND

DANCAN OCHIENG' ABONG'O ..... 1ST RESPONDENT

PETER OTIENO ONYANGO ..... 2ND RESPONDENT

PETER ODIRE ..... 3RD RESPONDENT

DENIS OMONDI ..... 4TH RESPONDENT

(An appeal arising out of the judgement and decree of the Honourable S.O. Temu in the Senior Principle Magistrate's Court at Nyando delivered on the 9th February 2023 in Nyando SPMCC No. 316 of 2019)

JUDGMENT

Introduction

1. The appellant filed suit against the respondents for cost and value of his buildings and stock destroyed/ stolen by the respondents valued at Kshs. 290,000 as well as general damages. It was the appellant's case that on the 22nd July 2015, the respondents unlawfully demolished and/or caused his shop at Awasi to be demolished causing him loss and damage.

2. In response, the respondents filed their defence denying the averments stating that it was the County Government of Kisumu that destroyed the temporary structures within Awasi market to pave way for the construction of a modern market and not them. It was their case that even though they had been found guilty in the criminal case, they had filed an appeal before the High Court at Kisumu Criminal Appeal No. 23 of 2019 which appeal had not been determined and such conviction could not be conclusive proof of their guilt.

3. The trial court in its judgement found that the appellant did not know the value of the alleged damages nor did he prove the worth of the properties destroyed and as such, had not proven the special damages pleaded. Further, that based on the pending appeal, the court could not grant him general damages based on the conviction in the criminal court and thus his suit against the respondents failed.

4. The appellant being dissatisfied with the decision of the Trial Court filed a Memorandum of Appeal dated 27th February 2023 raising the following grounds of appeal:

    i. The learned trial magistrate erred in law and in fact in arriving at th finding that the appellant did not prove his case on a balance of probabilities.

    ii. The learned trial magistrate erred in law and fact when he failed to make a finding that the respondent's actions caused the plaintiff to suffer loss and damages.

    iii. The learned trial judge erred in law and in fact in that he relied on evidence that was not before the court and in particular stating that there was appeal on the criminal case number Nyando 314 of 2016 which evidence was not placed before court.

    iv. The learned trial magistrate erred in law and in fact when he failed to analyse in total all the documents presented to him in making his determination.

    v. The learned trial magistrate erred in law and in fact when he erroneously failed to consider and appreciate that in the circumstances of the case, the appellant had proved his case and that his evidence was not rebutted by the respondents.

    vi. The learned trial magistrate totally erred in law and in fact in that he failed to consider or sufficiently consider the material placed before him and as a result came to wrong conclusions and prejudiced the appellant.

5. The appeal herein was canvassed by way of written submissions but only the appellant filed submissions.

The Appellant's Submissions

6. The appellant submitted that none of the documents that he produced to support his case were contested by the Respondents whereas the Respondent's statement of Defence was only full of mere denials. It was further submitted that from the evidence adduced, it was clear that the Respondents were liable for the damage that the Appellant suffered.

7. It was submitted that it was an error in law and in fact for the trial court to have arrived at a finding when there was no evidence that had been adduced before him specifically that there existed an appeal from Nyando PMC Cr, No.314 of 2016 wherein the respondents had been held liable for the demolitions.

8. Reliance was placed on the case of Kilgoris Criminal Case No. 154 of 2011 that settled the issue that the accused person (Samwel Ntalamia Olonana) was an agent for the appellant company and that the fact that no appeal was preferred against the conviction and sentence in the criminal case means that the finding of the criminal court remains as the true factual position.

9. The appellant submitted that the Trial Magistrate erred in law and in fact in failing to consider the evidence before him as he failed to analyze the evidence adduced by the Appellant and that had the Trial Magistrate analyzed the evidence adduced by the Appellant, he would have come to the conclusion that the Appellant had proved his case as pleaded in his plaint and awarded the prayers sought.

10. It was submitted that the Trial Magistrate descended into the arena and took evidence not before him, failed to analyze the evidence adduced before court by the Appellant and therefore came to a wrong conclusion by not finding in favour of the Appellant who had proved his case on a balance of probabilities.

Analysis and Determination

11. This being a first appeal, this Court has the duty, as stipulated in section 78 of the *Civil Procedure Act*, to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for that. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013]e KLR, the Court stated as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, 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."

12. Having considered the pleadings, evidence on record and submissions as filed, the issue for determination is whether the trial court erred by dismissing the appellant's suit on grounds that he did not prove his case on a balance of probabilities.

13. It the law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase *Onus Probandi* and when we talk of burden we sometimes talk of onus.

14. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to *Phipson on the Law of Evidence*, the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

15. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

16. In the instant case, the appellant sought judgement against the respondent for the costs and value of building, goods and stock destroyed and or stolen by the respondent as well as general damages. The appellant pleaded in his plaint that the actions of the respondents caused him loss and damage of

over Kshs. 290,000. The appellant further averred that the respondents were jointly charged with the offence of stealing contrary to section 268 (1) as read with section 275 in Nyando PMCR No. 314 of 2016 and convicted of the same.

17. However, during cross-examination, the appellant testified that he wanted compensation for lost properties worth Kshs. 1,100,000. The appellant also produced receipts as PEx1 – PEx6 which included invoices when added together totalled to Kshs. 337,640.The receipts for the specifi pleaded items total Kshs 220,000.

18. PW2 testified that he issued receipts produced as PEx1 – 3 stated that he did not issue the appellant with receipts produced as PEx4 – 6 which dealt with food. These were however, invoices and not receipts added up to Kshs. 116,840.

19. It is my view that the loss claimed by the appellant was in the nature of special damages. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit. (See *Capital Fish Limited v Kenya Power and Lighting Company Limited* [2016] eKLR).

20. In P*rovincial Insurance Co. EA Ltd v Mordekai Mwanga Nandwa*, KSM Civil Appeal No 179 of 1995, the court stated:

> It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.

21. I have considered the evidence on record on this issue. It is my view, and I agree with the appellant that the trial court erred in law and fact in dismissing his suit wholly. This is because although the appellant pleaded for more and in his testimony asked for more saying he lost property worth more than a million, what was important for the court was to consider what was pleaded vis avis what was proved by way of receipts. In this case, PEX1, 2 and 3 are receipts procedure by PW2 without any dispute and the court did not discredit those receipts at all. The appellant pleaded for more but proved less. PEX4,5 and 6 are invoices not receipts and invoices are not evidence of payment for any purchase hence they cannot be relied on to prove payment. They only show what is pending payment.

22. The appellant having proved the costs of 80 iron sheets, 4 pieces of steel door and 8000 pieces of building bricks, there is no reason why the trial court did not award him these proved specials. I find that the trial court erred in dismissing the appellant's suit for want of proof.

23. On account that the respondents' appeal from the conviction for the offence of stealing the appellant's goods was pending in the High Court and that therefore it could not be proof of guilt. I find that conclusion erroneous. the standard of proof in civil cases is different from that in criminal cases and whereas one may be acquitted in a criminal case, he or she can still be found liable in civil claim. To conclude that in the absence of a conviction being upheld by the High Court is a defence for the respondents is to lift the standard of proof in criminal cases to that of beyond reasonable doubt.

24. I find that holding to be erroneous and I proceed to set it aside.

25. On the claim for general damages, I find no basis upon which this claim was sought and the same is not allowed.

26. In the end, I allow this appeal to the extent that the order dismissing the appellant's suit with costs is hereby set aside and substituted with an order allowing the appellants' claim against the respondents jointly and severally as follows:

a. Special damages Kshs 220,000 plus interest at Court rates from the date of filing suit in the lower court until payment in full.

b. Each party shall bear their own costs of this appeal.

27. This file is closed and the lower court file to be returned with a copy of this judgment.

28. This file is closed.

29. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 11TH DAY OF APRIL, 2024

R.E. ABURILI

JUDGE