



**Third Bureau of China City Construction Group Co Ltd v Otieno (Civil Appeal E019 of 2024) [2024] KEHC 7340 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7340 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E019 OF 2024**

**KW KIARIE, J**

**JUNE 19, 2024**

**BETWEEN**

**THE THIRD BUREAU OF CHINA CITY CONSTRUCTION GROUP CO LTD ..... APPELLANT**

**AND**

**KENNEDY OUMA OTIENO ..... RESPONDENT**

*(Being an Appeal from the judgment and decree in Oyugis Senior Principal Magistrate's SPMCC No. E060 of 2020 by Hon. S.O. Ongeru –Senior Principal Magistrate)*

**JUDGMENT**

1. The Third Bureau of China City Construction Group Co Ltd, the appellant herein, was the defendant in Oyugis Senior Principal Magistrate's SPMCC No. E060 of 2020. This claim arose from trespassing on the respondent's premises and forcefully confiscating building materials worth Kshs. 1,813,000/= without any right. The learned trial magistrate delivered the judgment dated February 7, 2024. He found that the confiscation was illegal and awarded him Kshs. 1,000,000 general damages. Dissatisfied with this judgment, the appellant has filed an appeal.
2. The appellant was dissatisfied with the judgment and filed this appeal. The firm of Omusolo Mungai Advocates represented him. The following grounds of appeal were raised:
  - a. The learned trial magistrate erred in law and fact in granting general damages for malicious prosecution in the sum of Kshs.1,000,000/=, whereas the same had neither been specifically pleaded, prayed for, particularized, or proven.
  - b. The learned trial magistrate erred in law and facts in finding that the appellant had not proven ownership and/or possession of the building/construction material. The appellant had produced receipts as evidence of the purchase of the said building/construction material, clearly establishing their ownership.



- c. The learned trial magistrate erred in both fact and law in finding that the appellant did not have mechanisms to know how the trial suit property was stolen despite finding that the appellant had reported the theft to the relevant authorities.
  - d. The learned magistrate erred in both fact and law in finding that the confiscation of the trial suit property was illegal whilst ignoring the pleading that the confiscation was on account of the appellant's complaint to the police, whose investigative mandate authorized confiscation of the material as exhibits.
  - e. The learned trial magistrate erred in fact and law in failing to delve into the merit of the appellant's (defendant's) submissions dated January 25, 2024. Instead, the learned magistrate delved selectively and partially, thus failing to find that the appellant had proven ownership. Pursuant to said ownership, it complained to the Kenya Police, who, satisfied with the complaint having merit and in exercising their power to investigate, confiscated the goods and proceeded to charge the plaintiff.
  - f. That the learned trial magistrate hence erred in both fact and law by failing to consider and evaluate evidence that was placed before him in support of the appellant's defence in the trial suit.
  - g. The learned trial magistrate erred in fact and law in failing to decide the case against the weight of the evidence.
3. The firm of O.H. Bunde & Company Advocates represented the respondent. The appeal was opposed. It was contended it lacks merits.
  4. As the first appellate court, I understand my duty to review all the evidence in the case. I must consider that I did not have the opportunity to see the witnesses testify or observe their demeanour. I will rely on the principles established in the case of *Selle vs Associated Motor Boat Co. Ltd.* [1965] E.A. 123, which held that the first appellate court must reevaluate and assess the evidence presented in the trial court and reach its conclusions.
  5. I wish to reinstate the position submissions take in a trial. Submission cannot take the place of evidence. In the case of *Nancy Wambui Gatheru vs Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993, Mwera J (as he then was) stated:
 

Indeed, and strictly speaking, submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed, a court may well proceed to give its judgment. There are many cases, especially where parties act in person, where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case.
  6. This does not mean they are unnecessary; they guide the court to consider the case from the submitting party's perspective. Therefore, Giving submissions a higher premium than they deserve is unfair.
  7. The genesis of this case was on the 19<sup>th</sup> day of November 2020. The respondent contended that the appellant, through her agents, illegally went to his premises and confiscated some building materials worth Kshs. 1,813,000/= without any right. Amongst other prayers, the respondent prayed for general damages. He was awarded Kshs.1,000,000/= for this prayer.
  8. The learned trial magistrate did not make any award for malicious prosecution.



9. During the case hearing, the respondent contended that when the appellant's servants went to his premises and carted away his items, police officers were not present. He produced receipts for the items complained about. His evidence of purchase was supported by Erick Otieno (PW2) of Choice Master Hardware. He also called Stephen Onyango (PW3) of Kendaria Hardware, who provided evidence that he had bought some items worth Kshs. 667,00/=.
10. Daniel Kigida testified that he was an administrator with the appellant company. His evidence was that on the 19<sup>th</sup> day of November 2020, he reported on duty and found their camp broken into and some materials stolen. The matter was reported to the police, who followed in the footsteps of the respondent's home. He said their staff did not take possession of the items.
11. Though Daniel Kigida denied that they were the ones who took the items from the respondent's home, Stanley Masinde, who was PW3 in the criminal trial, testified that he escorted him (Daniel Kigida) to the respondent's house to recover the steel. The police were not, therefore, involved in the complained-of act.
12. The respondent was acquitted in the criminal case.
13. The learned trial magistrate arrived at the correct verdict; the appellant's servants effected the confiscation of the building materials from the respondent's home and not the police. This was unlawful, and the respondent was entitled to compensation for the wrong.
14. From the foregoing analysis of the evidence on record, the appeal lacks merit. It is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 19<sup>TH</sup> DAY OF JUNE 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

