Ndegwa v Nyeri Municipal Council (Civil Appeal 45 of 2017) [2024] KEHC 9842 (KLR) (6 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9842 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 45 OF 2017

S MBUNGI, J

AUGUST 6, 2024

BETWEEN

FRANCIS JAMES NDEGWA .... APPELLANT

AND

NYERI MUNICIPAL COUNCIL .... RESPONDENT

JUDGMENT

1. The appeal is from a judgement of Nyeri Chief Magistrate Hon. W. Kagendo delivered on 11th October 2017 in Nyeri CMCC No. 128 of 2015. The appellant was the plaintiff whereas the Respondent was the Defendant in the said suit.

2. The claim arose from a plaint filed on 18th February, 2013. In the plaint he stated that the Defendant clamped his motor vehicle KAQ 539D for alleged obstruction on 25th September 2010 on a day that was not an official working day. The Plaintiff stated that he incurred towing costs and impound for eight days and released on 2nd October 2010 after payment of Ksh. 10,600/= being obstruction and impounding services. That due to the impounding of his vehicle he spent Ksh. 125,000/= on taxis. He sued seeking damages for moneys spent on taxi services while the car was impounded by the Defendant.

3. The respondent denied the paragraph 3,4,5,6,7,8,9,10,11,12,13,14,15,16 and 17 of the plaint and alleged that the plaintiff willfully disregarded by laws by obstructing the road.

4. In her judgement, the learned Trial Magistrate reasoned that the main point was whether the clamping and impounding of the said motor vehicle was justified.

5. The court observed that the photograph showed that the vehicle was parked on the road on the outer side without any warning whatsoever in light of the allegation that the vehicle had broken down. The court found that the Defendant/Respondent dd not breach any right of the plaintiff and that the amount fined was due and owing and therefore is not entitled to any general damages. The court found that he paid Ksh. 11,600 for special damages and that the receipts of Ksh. 125,000/= had errors and had

no stamp duty receipts and thus disallowed. The court found that the Plaintiff did not prove his claim as the existence of the Defendant was questioned. The court reasoned that the County Government Act sets its date of commencement as the 4/3/2013 and that the Plaintiff ought to have amended his plaint accordingly. The court found the entire suit legless and dismissed it with costs to the Respondent.

6. The Appellant appealed against this decision citing eleven (11) grounds of appeal as contained in the Memorandum of Appeal dated 10th November, 2017 and received on 13th November, 2017. The record of appeal has an undated record of appeal with no titular citing that it is an amended memorandum of appeal which can be summarized as follows:

    a. That the learned Magistrate erred in law and fact in failing to find the respondent did not file appearance nor a defence within 14 days after summons.

    b. That the learned Magistrate erred in law and fact in that the firm of Muthoga Gaturu and Company advocates was not duly appointed to act for the Respondent nor duly served a letter of appointment on the Appellant and thus nor properly on record.

    c. That the learned Magistrate erred in law and fact in allowing the aforementioned firm into court after dishonoring an order having them come on record, 4 months and 4 days after.

    d. That the learned Magistrate erred in law in considering that the firm was duly appointed but did not produce a letter of appointment.

    e. That the learned trial court erred in law and fact by considering that the Respondent fined the Appellant Ksh. 11,600/= contrary to the law at Article 2(4)

    f. That the learned trial court erred I law and fact by not considering that the Respondent detained the receipts that were issued by the taxi drivers used by the appellant during the impound period amounting to Ksh. 125,000/=.

    g. That the learned trial court erred in law and fact by not considering tat the Respondent did not bring any witness to give evidence in court and thus the prayers remain unchallenged.

    h. That the learned trial court erred in law and I fact by not considering that the County Governments came into office proceeded in the names of their predecessors/defunct Municipal and City Councils without amendments.

Summary of Evidence

7. The three witnesses testified for the Plaintiff's case.

8. PW1, Francis James Ndegwa adopted his statement. He produced and relied on documents Pexhibits 1-5. He stated that photographs 1 and 2 that the car was on the side and not obstructing. E stated that his vehicle broke down and asked people to push it to the extreme left. He further stated that the seizure was illegal. He stated he was subjected to mental torture. He stated that the municipal council imposed a fine of Ksh. 2,000/= and that he could not pay instantly and that is why he further incurred charges of Ksh. 10,600/= and totaling to 11,600/=. He further claimed that obstruction is a traffic offence and ought to have being prosecuted by the police and not by the council.

9. On the cross examination he stated that he did not produce any receipt or logbook to prove that the vehicle KAQ 539D is his. He knew that obstruction is an offence. He did not know if the municipal council is mandated to maintain order within the municipality. His vehicle was impounded on 25/9/2010. He did not see any charge document on the vehicle. He was verbally told that the fine was Ksh. 2,000/=. In 2010 he was doing many things such as managing properties in Nairobi, a 40-

acre farm and running matatus and other things. He did not pay the fine upfront as he did not have the money with him. He commuted using taxis to go about his business and showed receipt dated 27/9/2011. That on 29/9/2016 he paid Ksh. 34,000/= as he was going to Nyahururu. He used less than Ksh. 2,000/= to fuel his car. He did not know that it was in the public domain that one could hire a car for Ksh. 6,000/=. He had lived in Nyeri town for 45 years. He stated that the council usurped the courts role. He admitted that the council has bylaws.

Submissions

Appellant's Submissions

10. The court directed that parties submit orally. The appellant submitted that the Nyeri Municipality did not enter appearance and file a defence as required by law. The Appellant stated that during the hearing of the suit before the Chief Magistrate on 11/4/2018 he raised a preliminary objection to the effect that the firm of Muthoga Gaturu was not properly before the court and they were ordered to regularize the same and pay throw away costs. The firm filed a Notice of Appointment letter dated 18/5/2016 and filed on 21/9/2016 but did not file a defence. The appellant contended that the judgement entered by the trial court was rendered without considering that the firm of Muthoga Gaturu was not compliant with orders given and therefore illegal for Nyeri Municipal Council had not responded to this case. He prayed that the lower court judgement be disturbed. He further submitted that the current lawyer on behalf of the Respondent is not properly before court. He contended that the advocate did not serve him with a letter of appointment and that should have been appointed by Nyeri County Council. He submitted that by virtual of Article 33 of *the constitution* and Order 9 rule 1, rule 4(2) and rule 6 of the *civil procedure rules* 2010, Mr. Wahome Gikonyo advocate, was not properly on record before court for the respondent.

Respondent's Submissions

11. The Respondent argued that what is before court is an appeal against the judgement and orders of the trial court dated 11/10/2017. The respondent stated that the issue of representation by the firm of Muthoga Gaturu was dealt with by an interlocutory ruling by the Chief Magistrate and the Chief Magistrate rendered herself in 4 rulings as captured in her judgement at page 46 at line 4. He further stated that that issue was dealt with and no appeal was preferred on those rulings and therefore cannot be the subject of this appeal on his appearance. The respondent contended that the Appellant filed an application dated 10/1/2020 seeking the firm of Wahome Gikonyo be struck out. The applicant/ appellant was heard by Mshila J. by way of written submissions and rendered herself on 15/4/2021 as she dismissed that application with costs and is now Res Judicata.

12. On the issue that the defendant/respondent did not tender evidence the respondent stated that it was the onus of the plaintiff to prove his case and that the learned magistrate cannot be faulted. He stated that the appellant's motor vehicle was parked in undesignated area and caused obstruction and that the bylaws allowed the clamping and impounding of a motor vehicle. Further, that there was no issue of violation of his rights. The respondent prayed that the appeal be dismissed with costs.

13. In the right to reply, the appellant contended that his rights were violated under Article 31 of *the constitution*. That *the constitution* is the supreme law and overrides any act of parliament. He stated that Muthoga Gaturu was not appointed by Nyeri Municipal Council and that is a proper appeal against the ruling of the Chief Magistrate.

Analysis and Determination

14. It is now settled that the duty of the first appellate court is to reconsider the evidence of the trial court, re-evaluate it and make its own conclusions. Again, an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on misapprehension of the evidence or the trial court acted on wrong principles in arriving at its findings. The Court of Appeal in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968) EA 123 held that:

> " A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion." (See also LAW JA, Kneller & Hancox Ag Jja In Mkube v Nyamuro [1983]

15. In the revered case of *Peters v Sunday Post* [1958] EA 424 at p. 429, E Sir Kenneth O'Connor P. said: -

> " It is a strong thing for an appellate court to differ from finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction originally to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

16. From the evidence adduced before the trial court as well as the respective submissions, I isolate the issues for determination as;

    Were the firms of Muthoga Gaturu and Co. Advocates and Messers Wahome Gikonyo and company advocates on record properly for the defendant cum respondent?

17. The appellant has consistently throughout the trial court and throughout the appeal maintained that the respondent was not on record properly. The firm of Wahome Gikonyo maintained it was properly on record for the Respondent. The record reflects a notice of change of advocates from Muthoga Gaturu advocates to Wahome Gikonyo & company advocates by the notice of change of advocates dated 31st October 2018 and received into court on 1st November 2018. Further, the court file has a memorandum of appearance dated 8th March 2013 wherein the firm of Muthoga Gaturu and company advocates entered appearance for the Nyeri Municipal Council. A statement of defence was filed in court, dated 17th April 2013 and received on 19th April 2013. There also is a notice of appointment filed by the firm of Muthoga Gaturu and company advocates dated 18th May 2016. On this score I find that the firm of Muthoga Gaturu is properly on record and that they had filed a defence contrary to the averments of the appellant. Secondly, the firm of Wahome Gikonyo is properly on record contrary to the allegation by the appellant as the notice of charge was received by court. Further, the appellant filed an application dated 10/1/2020 seeking the firm of Wahome Gikonyo to be struck off from the record as appearing for the Respondent. The applicant/appellant was heard by Mshila J. by way of written submissions and rendered herself on 15/4/2021 as she dismissed that application with costs and found that Messer's. wahome Gikonyo and Co. advocates were properly on record. Thus, court on this issue is now functus officio as the issue is *Resjudicta*. Justice Mushila sitting as judge of the High Court rendered the decision as a court of equal status as the one hearing this appeal would therefore have the appellant proceed to the Court of Appeal to determine the same, for the High Court rendering itself on 15/4/2021 rendered itself functus officio on the issue of representation. The Supreme Court in the

case of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 4 others* [2013] eKLR while discussing the doctrine *functus officio* had this to say;

> " We, therefore, have to consider the concept of "*functus officio*," as understood in Law. Daniel Malan Pretorius, in "The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept:
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> "The functus officio doctrine is one of the mechanisms by means of which the law give expression to the principle finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. such a decision canon be revoked or varied by the decision-maker."

18. The Court of Appeal in the case of *Telkom Kenya Limited v John Ochanda (Suing on His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR stated thus; "*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon"

Was the Plaintiff's claim merited before the Lower Court

19. The plaintiff claimed that his vehicle broke down whilst on the road and parked it on the side as he sought a mechanic to come and sort it out. It is when the respondent clamped and towed it away for eight days. As a result, the Appellant incurred taxi costs. He further stated that this vehicle was clamped, towed and impounded on a day that was not an official working day to wit 25th September 2010 at 7.30p.m. The photographs produced as exhibits showed his vehicle on the outer left side of the road at the roundabout and clamped. Indeed, this is an obstruction on the face of it. The plaintiff however did not produce evidence that the alleged vehicle was broken down by either erecting hazard signs as is required by the law and neither did he bring the alleged mechanic whom he had gone for to sort out mechanical issues with the car. I should find it interesting, through not expressed by either party, that the car when released after impoundment, was working fine as there is no indication that a mechanic visited and fixed the vehicle and gave it to the appellant to drive out. The probability is that the appellant did drive it out the respondent's impounding lot area.

20. The allegation by the plaintiff that his vehicle was impounded on an unofficial day, to wit 25th September 2016 is frivolous. The bylaws and national laws are not suspended on unofficial working days. The Appellant by his own evidence is that he parked on the side of the road, an area that is not designated as a parking area and he did not put a warning sign.

21. The Respondent was right to clamp and tow the Appellant's motor vehicle for the Law mandated it. (See Nyeri Municipal Council general nuisance by law 17(4) and by law 18).

22. The clamping and the towing were not done maliciously and out of bad faith.

23. I have no reason to disturb the trial court finding that the Respondent was executing, its mandate and thus not liable to pay the Appellant any general damages, and if he had proved his case I would not disturb the award proposed by the trial court.

24. On the issue of special damages, the Respondent similarly is not liable even if the Appellant had successfully proved them in the Lower Court.

25. All in all, I find the appeal has no merit and I do dismiss it. Each party to bear its own costs for the appellant seemingly lacked sound legal advice, if he had perhaps, he would have thought twice before suing the Respondent. Right of appeal 30 days.

DATED, AND DELIVERED ON 6/8/24 IN KAKAMEGA HIGH COURT, VIRTUALLY

HON. MR. JUSTICE S. MBUNGI.

JUDGE

In the presence/absence of;

The Appellant- Absent

Respondent/Advocate- Wagie Njuguna holding brief for Wahome Gikonyo for the Respondent - Present

Court Assistant- Elizabeth Angong'a