



**Maina & another v Kamera & 2 others (Civil Appeal E300 of 2020)
[2023] KEHC 27415 (KLR) (Civ) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 27415 (KLR)

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

CIVIL

CIVIL APPEAL E300 OF 2020

DO CHEPKWONY, J

JUNE 15, 2023

BETWEEN

AGNES WAMBUI MAINA 1ST APPELLANT

MIMOSA TIMBER SALES LTD 2ND APPELLANT

AND

HANNAH WANJIKU KAMERA 1ST RESPONDENT

VERONICA MUMBI 2ND RESPONDENT

MARY WANGUI 3RD RESPONDENT

*(Being an Appeal from the Judgment and decree of Hon. Gicheha (RM)
delivered on 23rd October 2020 in Milimani CMCC No. 5571 of 2018)*

JUDGMENT

Background

1. The Plaintiffs/Appellants hereinafter referred to as “the Appellants” initiated a suit before the trial court by way of a plaint dated 12th June 2018, seeking for the following prayers;
 - a. Permanent injunction restraining the defendants and or its agents and servants from interfering with the plaintiff business premises and operations along Gitanga road Kawangware known as Mimosota Timber sales Plot No. 1222 Kawangware.
 - b. Ksh 350,000.
 - c. Interest and costs of this suit.



2. In their Complaint, the Appellants pleaded that on 13th May 2018, the 1st, 2nd and 3rd Respondents jointly and severally by themselves and or their agents or servants illegally, unlawfully without any color of right and or maliciously invaded the appellants' business premises and destroyed, interfered, damaged and occasioned loss to the Appellants' valued at Ksh 350,000/=.
3. According to the Appellants, the Respondents and their agents' destruction and loss of their timber goods was unlawful and tainted with illegality. As a result, the Appellants' business operation was adversely affected and the Appellants sought for compensation for loss of property.
4. The particulars of loss and damage included timber wood products and goods valued at Ksh 350,000/= which the Appellants claimed from the Respondents severally and jointly.
5. The Respondents filed a joint statement of defence dated 13th June, 2019. In their defence, the Respondents denied the contents of the Complaint and the allegations that they acted unlawfully and illegally leading to loss of timber wood goods and products valued at Ksh 350,000/=. The Respondents asked the court to strike out the Complaint for not disclosing any cause of action.

Evidence

6. The matter proceeded for hearing on 14th October, 2019. The Appellants called a total of four (4) witnesses to testify in support of their case. PW1-Agnes Wambui Maina testified that she resides in Satellite and trades in timber. She recorded a statement and a supplementary statement, both of which she adopted as her evidence in-chief. She relied on the documents filed which she produced as exhibit in support of her case. It was her evidence that her property was damaged by the Respondents which in the night and in the company of goons. There are criminal charges that were preferred against two goons who among them was the Respondents' neighbor while the other one was their caretaker.
7. She testified that she has been in business for about 40 years. She came to court before she was evicted. They have since erected stalls. She used to pay the city council and was not claiming the land but her property. It was on a road reserve. She took the land in 1979 and the Respondents took the land behind her. The Respondents did not produce any title. She prayed for compensation of two (2) million and a permanent injunction that she be reinstated. Kenya Urban Road Authority had indicated that was a road reserve. Their problem started when their father died in 2016.
8. During cross examination, PW1 stated that it is the Respondents who evicted her and that there are suspects who had been charged in the criminal court at Kibera. She stated that on the charge sheet, the value of the goods was indicated as Ksh 99,356/= for the damage of the fence. She told the court that she operates as Mimosa Timber Sales Ltd and has not done an audit. They reported the matter at Muthangari Police station. They got a notice from Kenya Urban Roads Authority to pull down the structures. She had no letter from the Respondents asking her to leave. Her license indicates that her business is on Plot No. 1226 but the business is on the road reserve. She was not present when the incident occurred. On re-examination she stated that nobody had been evicted by Kenya Urban Roads Authority.
9. PW2-Fredrick Chomba Kariuki testified that he resides at Satellite estate in Nairobi and opted to rely on his statement as recorded. He told the court that the Appellant is his mother and he knows the documents she has filed. He continued that there are three criminal cases; two of assault and another one on malicious damage.
10. During cross examination, PW2 stated that there are two suspects who were charged before Kibera court. He told the court that the Respondents were present at the scene at 3.00am and it is them who wanted them out. He confirmed that Kenya Urban Roads Authority did write to them in 2014 and



- they did construct a road. In re-examination, PW2 stated that the road was constructed and the Respondents took advantage and had them evicted.
11. PW3-Keziah Wairimu Kamau stated that she resides in Kikuyu and does business. She also had recorded a statement which she adopted as her evidence in-chief. She testified that the Appellant is her sister and also does timber business. It was her evidence that the Appellant was evicted by the Respondents who never produced any evidence to prove ownership.
 12. PW4-Racheal Njoki testified that she does business in Kawangware. She recorded a statement and she adopted the same as her evidence in-chief. It was her evidence that the Appellant was her neighbor at her place of business and she was evicted by the Respondents. She stated that she was present when they demolished the premises. In cross-examination, PW4 stated that she saw the Respondents demolish the premises. It happened in the night but the following day they came there.
 13. After the close of the Appellants' case, the Respondents' called one witness to testify in support of their case. DW1-Mary Wangui Kamela testified that she had the authority to testify on behalf of the other Respondents. She stated that on 13th May, 2017 she heard fracas as people were removing structures from the road. She told court that the Kenya Urban Roads Authority had given notice for people to remove their structures from the road side but they were not given a notice. That she went outside to check but it did not bother her.
 14. On cross examination, DW1 said that she was in court when the appellant testified. She heard the four witnesses. She stated that when the road was being done, they had several meetings with Kenya Urban Roads Authority (KURA), chief and landowners. She also stated that they were to remove all the structures on the road side but Agnes was insisting that her timber yard be brought to their land. That she went to KURA and told them not to allow someone onto their land yet the claim against her is not for ownership of land. It is DW1's evidence that the Appellant was running a timber yard and she did not complain to the local chief about the timber yard. She stated that the photos do not show destruction as their timber is arranged and not scattered. She contended that they were not charged with malicious damage but were charged with assaulting Fredrick Kariuki. She confirms that her name does not appear on the charge sheet and that she did not destroy property. She did not know Mimosa Company Limited and resolution by directors to sue. The Respondents closed their case without calling any other witness to testify.
 15. The trial court delivered its Judgment on 30th October, 2020, dismissing the Appellants' suit.

The Appeal

16. Being dissatisfied with the decision, the appellants appealed to this court *vide* an amended Memorandum of Appeal dated 14th January, 2022, on the following grounds;
 - a. That the trial court erred in law and fact by finding that the Appellants had not proved their case whereas the evidence on record taken holistically and in totality proved the Appellants case on a balance of probabilities.
 - b. That the trial Magistrate erred in law and fact by requiring the Appellants to prove their case beyond the balance of probability by producing an eye witness and audit report of the damage loss.
 - c. That the trial court erred in law and fact by disregarding the Appellants evidence pointing to the Defendants directly, by pictures, by criminal charges, by admissions, by inferences and or circumstantial evidence as persons liable for the damage and loss.



- d. That the trial court erred in law and fact by disregarding the appellants' evidence and receipts to prove special material loss and damage, and finding that loss can only be proved by an audit report and not receipts.
 - e. That the trial court disregarded the evidence of PW2 and PW4 and the exhibit pictures which pointed the Respondents as the persons involved in the destructions with their agents and servants.
 - f. That the trial court erred by contradicting itself there was no liability on part of the Respondents yet making a finding that the appellants were evicted by the Respondents while the suit was pending.
 - g. That the trial court erred by ignoring the entire appellants' submissions on liability, trespass to goods, damages and conversion.
17. The Appellants pray for the following reliefs: -
- a. The appeal be allowed.
 - b. The Judgment of the trial court be set aside wholly and varied accordingly and Judgment be entered in favour of the Appellants against the Respondents as prayed in the Plaint and submissions with costs in the lower court and the High court.
18. On 13th May, 2022, this court directed this appeal be canvassed by way of written submissions. Both parties complied and filed their respective submissions in support and in opposition of the appeal. I have read through the grounds of appeal and the submissions alongside the cited authorities for consideration in the analysis and determination of the appeal.

Analysis and Determination

19. As the first appellate court, this court is under an obligation to reconsider the evidence, evaluate and draw its own conclusions. The principles was enunciated in the case of *Selle & another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123;
- “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...”
20. The appellate court will not ordinarily interfere with a finding of fact of a trial court unless it is clearly shown to have been arrived at based on misapprehension of evidence or wrong interpretation of the principles of law. In the case of *Ephantus Mwangi & another v Wambugu* (1983) 2 KCA 100, the Court of appeal held that;
- “This court will not normally interfere with a finding of fact by the 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 the findings he did.”
21. This court has considered the grounds of appeal and the written submissions by both parties as well as the cited authorities, and finds the following issues relevant for determination before this court;



- a. Whether the Appellants proved their case on a balance of probabilities.
 - b. What remedies are available to the parties.
22. On the issue of whether the appellants proved their case on a balance of probabilities, the relevant provision on burden of proof is Section 107 and 108 of the *Evidence Act*, which provide that;
- “ 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.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side,”
23. Further, Section 109 and 112 of the same Act provides for evidential burden and states as follows;
- “ 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.”
24. The aforementioned provisions were clearly explained by the Court of Appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* (2004) eKLR
- “ As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act.”
25. Therefore, based on the above provisions the plaintiffs and now the appellants in this appeal were required to prove their claim against the Respondents on a balance of probabilities. This is a duty bestowed upon them by the law. This was the position expressed by the court of appeal in the case of *Kirugi & another v Kabiya & 3 Others* (1987) KLR 347
- where it stated:
- “ The burden on a Plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. The Plaintiff must adduce evidence which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”



26. Similarly, in the case of *William Kabogo Gitau v George Thuo & 2 Others* (2010) eKLR

“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 is 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.”

27. In this instant appeal, the appellants prayed for compensation of two million and an injunction that they be reinstated on the suit premises. Having perused the evidence on record and it is noted that PW2-Fredrick Chomba Kariuki in his evidence stated that there are two criminal cases, being two of assault and one for malicious damage. From the record Veronica Mumbi Kamera and Mary Wangui Kamera, who are the 2nd and 3rd Respondents respectively in this appeal were charged with the offence of assault causing actual bodily harm. The brief facts were that on 16th May 2018, at Kawangware Congo area within Nairobi County at 1000hrs jointly, unlawfully assaulted Fredrick Chomba Kariuki occasioning him bodily harm.

28. The other important thing worth mentioning is that those who were charged with malicious damage to property were Samuel Mwangi and Stephen Mbuthia. The brief facts were that on 14th May, 2018, at Kawangware Congo area within Nairobi county, jointly with others not before court willfully and unlawfully damaged a wooden kiosk and timber, all valued at Ksh 99,600/=, the property of Agnes Wambui Maina. The two were never parties to the matter before the trial court or to this appeal. None of the Respondents were ever charged with a claim on malicious damage to property.

29. In his evidence, PW2-Fredrick Chomba Kariuki stated that the Respondents were captured in the evidence of photographs adduced before the trial court. This court has had the opportunity to peruse the evidence and notes that the evidence is not compliant with Section 106B (4) of the *Evidence Act* on the admissibility of electronic records. The said Section provides as follows;

“In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

- a. identifying the electronic record containing the statement and describing the manner in which it was produced;
- b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- c. dealing with any matters to which conditions mentioned in subsection (2) relate; and
- d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”



30. Further, Section 106 B (1) of the Act, provides that:-

“Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.”

31. This court puts reliance on the case of *Samwel Kazungu Kambi v Nelly Ilongo the Returning Officer, Kilifi County & 2 Others* [2017] eKLR, where the court stated that:

[21]. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.

[22]. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.

[23]. The conditions set down in Section 106B were not met by the Petitioner. He could not therefore be allowed to produce the photographs. His claim that the respondents were estopped by virtue of Section 120 of the *Evidence Act* from challenging the evidence having not raised the issue at the pre-trial conference is not valid. The production of evidence did not feature in the pre-trial conference. Knowing the kind of the evidence he intended to rely on, it was upon the Petitioner at that early stage to bring up the discussion. He did not do so. The respondents never gave him any hint that they would not be opposing the production of the photographs. The estoppel envisaged by Section 120 of the *Evidence Act* is therefore not applicable in the circumstances of this matter.”

32. There is nothing on record to show that the appellants complied with the conditions as set out in Section 106 B of the *Evidence Act*. In the absence of such compliance the evidence failed to meet the threshold on admissibility of electronic evidence.

33. Turning to the evidence of PW4-Racheal Njoki who is alleged to have witnessed the incident by PW1-Agnes Wambui Maina, she adopted her witness statement recorded on 24th July, 2019. In her testimony she stated that she was present when they demolished the premises. On cross-examination she stated that she saw the Respondents demolish the premises and that it happened at night but the following day they came there. I have perused her witness statement and find nowhere where it is mentioned that she witnessed the incident.

34. Based on the above analysis of the evidence that was adduced before the trial court, this court finds no fault on the trial court for making a finding that dismissed the Appellants’ suit. This court also reiterates that the Appellants failed to prove their case on a balance of probabilities.



35. The totality of the above is that, the Appellants' amended appeal dated 14th January, 2022 is without merit and it is hereby dismissed with costs to the Respondents.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 15TH DAY OF JUNE 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

No appearance for and either party

Court Assistant – Mwenda

