



**Seo and Sons Limited v M'Mburugu (Civil Appeal E047 of 2022)
[2023] KEHC 22518 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22518 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E047 OF 2022
TW CHERERE, J
SEPTEMBER 21, 2023**

BETWEEN

SEO AND SONS LIMITED APPELLANT

AND

FREDRICK KOOME M'MBURUGU RESPONDENT

*(An Appeal from the Judgment and Decree in Maua CMCC
8 OF 2019 by Hon. C.K.Obara (SPM) on 31st March, 2022)*

JUDGMENT

1. By plaint amended on 12th April, 2019, Respondent made a claim that on or about 24th January, 2018, Appellant had trespassed on his LR. No. Igembe/Ndoleli-athiru Ruujine/13369 using motor vehicles KCC 996J, KCB 835F and KCG 019L excavated therein and extracted sand, soil and other materials causing damages to the land. He therefore sought damages as follows:
 1. Special damages in the sum of KES. 6,930,577/-
 2. General damages for trespass
 3. Costs and Interest
2. Appellant by his statement of defence dated 26th March, 2019 denied the claim and urged that the same be dismissed.
3. After the trial, the court by judgment dated 31st March, 2022, the learned trial magistrate found Respondent's case proved and entered judgment against the Appellant for KES. 7.223,727/- costs of the suit and interest.
4. Appellant has appealed the award mainly on the ground that the judgment was against the weight of evidence.



Determination

5. I have considered the appeal in the light of the trial court record, the submissions and authorities cited by the parties.
6. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (See *Selle vs Associated Motor Boat Co.* [1986] EA 123, *Peters v Sunday Post Ltd* [1958] EA 424 and *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR).
7. At the hearing, Respondent established by way of a search certificate that he was the registered owner of Igembe/Ndoleli-Athiru Ruujine/13369 which is the subject matter of the dispute between the parties.
8. As rightly observed by the trial court, Appellant's witness confirmed that motor vehicles KCC 996J, KCB 835F and KCG 019L that Respondent claimed he saw excavating, extracting sand, soil and other materials on his land were indeed being used by the Appellant in the construction of Kiina-Garbatulla road. The witness did not know where Respondent's land was situated and could therefore not as a matter of fact dispute Respondent's claim that his land had been trespassed.
9. From the foregoing, I find that the learned trial magistrate's finding that Respondent had on a balance of probability proved that Appellant had trespassed on his land.
10. As a general preposition, 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*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. (See *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR).
11. Concerning damage to Respondent's land, , the trial magistrate found as a fact that a valuation report by Roma Valuers Ltd confirmed that indeed there was extraction of sand, soil and other materials from the land. The trial magistrate similarly found as a fact that the valuation report that assessed the damage caused on Respondent's land at KES.6,930,577/-was not controverted.
12. Consequently, I find that the award was supported by evidence and rightly awarded.
13. The trial magistrate rightly referred to the provisions in the in Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, which provides that: -
 - (a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
 - (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss. (Emphasis added)
 - (c)
 - (d)
 - (e)
14. My understanding of subsection (b) above is that having been awarded the actual damage that Respondent suffered, an award of general damages over and above the actual damages amounts to doubt compensation that Respondent was not entitled to.



15. From the foregoing, I the appeal partially succeeds and is hereby order:

1. The award of KES. 6,930,577/- and for special damages in the sum of KES. 380/- are upheld
2. General damages in the sum of KES. 300,000/- is set aside
3. Appellant shall pay ½ costs of the appeal

DATED AT MERU THIS 21ST DAY OF SEPTEMBER 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellant - Mr. Lesaigor for Hashim & Leisagor & Co Advocates

For Respondent - Mr. Njindo for Ngunjiri Michael & Co. Advocates

