Airtel Kenya Limited v Angíla & another (Civil Appeal 91 of 2019)
[2023] KEHC 27496 (KLR) (4 October 2023) (Judgment)

Neutral citation: [2023] KEHC 27496 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL 91 OF 2019

KW KIARIE, J

OCTOBER 4, 2023

BETWEEN

AIRTEL KENYA LIMITED ..... APPELLANT

AND

JACK ANGÍLA ..... 1ST RESPONDENT

PAUL OJIGI OMANGA ..... 2ND RESPONDENT

(Being an Appeal from the judgment in Homa Bay Chief Magistrate's CMCC No. 90 of 2015 by Hon. R.B.N Maloba–Senior Resident Magistrate)

JUDGMENT

1. Airtel Kenya Limited, the appellant herein was the defendant in Homa Bay Chief Magistrate's CMCC No. 90 of 2015. The respondents had sued for compensation on account of trespass. The learned trial magistrate delivered a judgment dated the October 24, 2019 and awarded each respondent Kshs.500, 000/= as general damages.

2. The appellant was aggrieved by the said judgment and filed this appeal. The company was represented by the firm of Rogo Okelloh & Wangari Advocates. The following grounds of appeal were raised:

    a. That the learned trial magistrate erred in law and in fact in awarding kshs.500, 000/= as general damages to each of the plaintiffs when no evidence of trespass was produced before her.

    b. That the learned magistrate misdirected himself [*sic*] in her appreciation of the nature of the cause of action and as to whether it was severable between the plaintiffs against each of the plaintiffs.

    c. That the learned trial magistrate erred in law and in fact in holding that the 1st respondent had proved that he was the owner of the land despite the evidence tendered before her.

d. That the learned trial judge erred in law and fact in failing to find and hold that the respondent had not made out a proper case for trespass.

e. That the learned trial magistrate erred in law and in fact in awarding general damages that are inordinately high as to amount to an erroneous estimate of damages.

f. The learned trial magistrate erred in law and in fact in failing to consider all the issues raised by the appellant in the written submissions before her.

g. The learned trial magistrate proceeds on demonstrable wrong principles in reaching her decision.

3. The 1st respondent was represented by the firm of Geoffrey O. Okoth & Company, Advocates while the second respondent was represented by the firm of Odhiambo Ogutu & Company, Advocates. They both opposed the appeal.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The genesis of this case was an allegation of the painting of the premises owned by the 1st respondent by the appellant. It was contended that the appellant painted the premises with her colours and logo without the permission of the respondents. This, it was argued caused confusion to the 2nd respondent's customers and occasioned loss to his business. In turn, he failed to renew his lease with the 1st respondent owing to the depressed business.

6. Jack Ang'ila, the 1st respondent proved on a balance of probabilities that he was the owner of the premises which are the subject of this appeal. This was by the production of a rate demand notice addressed to him and a rate clearance certificate in respect of land parcel number L.R 14832/177 situated in Homa Bay Township.

7. The second respondent, Paul Ojigo Omanga, exhibited a liquor license in respect of the premises which are the subject of this appeal.

8. I, therefore, find that both respondents established their locus standi with respect to the premises standing on land parcel number L.R 14832/177 situated in Homa Bay Township.

9. Both respondents averred that they did not give any consent or authority to the appellant to paint the premises.

10. The appellant did not adduce any evidence.

11. In the course of the hearing of the case before the trial learned trial magistrate, the appellant attempted faintly to introduce John Kumu during cross-examination. Though not much was said about him, it would appear that it was being suggested that he was the one who gave authority for the painting. However, this line of evidence was abandoned. The appellant did not displace the respondents' contention that they had not given consent for branding of the premises by the appellant.

12. It was contended for the appellant that the respondents did not adduce evidence as to the state of the property before the trespass. The court was referred to the case of *Philip Aluchio vs. Crispinus Ngayo* [2014]eKLR where Obaga J. said:

> The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately before and immediately after the trespass or the cost of restoration, whichever is less. See *Hostler – VS – Green Park Development Co.* 986 S. W 2d 500 (No. ct App. 1999).
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> The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.

I however notice that the appellant quoted the above decision selectively. He omitted this other part:

> There was no evidence adduced on the nature of house which the defendant has constructed on the suit land. The court is at a disadvantaged position in reaching at a cost which might be reasonable for restoration of the property to its former state. However as I have found that the plaintiff is entitled to general damages for trespass, I will award a nominal sum of Kshs. 100,000/= as general damages for trespass. This cost will go towards restoration of the suit land to its former state.

13. The business that was being conducted in the premises of the 1st respondent by the second respondent was a liquor-selling business. It was therefore incompatible with the branding of the premises by the appellant. It is common knowledge that the appellant is in the telecommunication business. I agree with the finding of the trial court that this branding with the logo and colours of the appellant may have made the customers of the second respondent to be confused. The claim of loss of business was real. This in turn affected the income of the first respondent when the second respondent failed to renew the lease owing to loss of business.

14. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In *Butt vs. Khan* [1981] KLR 349 on page 356 Law JA stated:

> ...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.
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> In the instant case, I do not find the award inordinately high.

15. The upshot of the foregoing analysis of the evidence is that the appeal lacks merit and the same is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 4TH DAY OF OCTOBER 2023

KIARIE WAWERU KIARIE

JUDGE