



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. 24 OF 2018

BETWEEN

JOSEPH OPIYO WENDEAPPELLANT

AND

GABRIEL ODONGO OWIDI.....RESPONDENT

(Being an Appeal from the judgment and decree in Oyugis Chief Magistrate's CMCC No. 3 of 2016 by Hon. J.P Nandi –Senior Resident Magistrate)

JUDGMENT

1. The appellant was the defendant in Oyugis Chief Magistrate's CMCC No. 3 of 2016. He had been sued for special damages arising from a case of malicious damage to property where he had earlier been convicted. The respondent was awarded Kshs.625,575/=.
2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Bana & Company Advocates. He raised six grounds of appeal as follows:
 - a) That the learned trial magistrate erred in law in awarding special damages which had neither been specifically and exhaustively pleaded in the plaint nor proved during hearing.
 - b) That the learned trial magistrate erred in law in basing the award of special damages on a previous conviction in a criminal case which did not assess the damages so awarded.
 - c) That the learned trial magistrate erred in law in holding that failure to give specific details of special damages was not fatal to the respondent's case.
 - d) That the learned trial magistrate erred in law in awarding special damages when such damages were not conclusively proved by evidence.
 - e) That the learned trial magistrate erred in law and misdirected himself when he held that a grant of orders enlarging time to file suit at an *ex parte* stage was an exhaustive and conclusive determination on the issue of limitation of actions and thus wrongly and erroneously gave himself jurisdiction to hear and determine the case before him.
 - f) That the judgment went against the weight of evidence.
3. The appeal was opposed by the respondent through the firm of H.O Mimba & Company Advocates. The respondent contended that the appeal lacks merit, was brought in bad faith and an abuse of the due process.
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. When a court grants *ex parte* orders for leave to file a suit out of time, this does not become conclusive. The defendant has the right to challenge the same *inter partes*. This is why Gikonyo J, remarked in the case of **Mohamed Abdikadir Mohammed vs. Sammy Kagiri & another [2016] eKLR** as follows:

It is already settled law that an *ex parte* order of extension of time to file suit should be challenged at the trial of the suit. This is an exception to the rule that a party against whom an *ex parte* order has been made should apply to the court which made the order to set it aside. The trial court will then consider all the facts and evidence before it and may or may not disturb the extension of time that had been granted. Therefore, I refuse any suggestion or insinuation that, once *ex parte* leave to file suit out of time has been granted, it cannot be disturbed by the trial court. That would be a dangerous proposition of law. But, the defence of limitation must be pleaded specifically by the Defendant...

I have perused the record and did not see anywhere the appellant raised the issue of limitation of time. The only attempt was during cross examination. This ought to have been raised at the earliest opportunity before the hearing commenced and the court invited to make a ruling. The appellant cannot be allowed to bring up this issue during the appeal.

6. Section 47A of the Evidence Act provides:

A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

7. The respondent did not produce the proceedings and judgment as evidence of conviction. Had he proved that indeed there was such a conviction, the only issue would have been to prove the special damages claimed. I am taking judicial notice that most of the values in criminal proceedings are arrived at through estimation. In **Richard Karimi Ndiritu vs. Eustace Mwenenia Mwangi [2018] eKLR** the court [Matheka J] stated:

I would say that the subordinate court in this case found the appellant guilty of malicious damage to property but that does not close it up for the appellant to contest the value of the alleged property.

8. In this case the respondent had a duty to show why he thought his property was valued at Kshs.625,575/=. He did not discharge this duty. Ordinarily, this appeal will however not turn on the issue of lack of a scientific valuation, had this been the only issue. Since the respondent did not produce the judgment in the criminal court which he relied on, he did not prove his claim.

9. It is abundantly clear that the respondent did not prove his case to the required standards. I set aside the judgment of the trial court and allow the appeal with costs.

DELIVERED and SIGNED at HOMA BAY this 14th day of June, 2021

KIARIE WAWERU KIARIE

JUDGE