



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO. 98 OF 2018

An Appeal from Judgment and decree in original Kimilili PMCC No. 49 of 2015 delivered on 22.11.2018 by Hon. D. Onyango [SPM].

KENNEDY J. WAMALWA.....APPELLANT

VERSUS.

RURAL ELECTRIFICATION AUTHORITY.....RESPONDENT

JUDGMENT

Kennedy Wamalwa the Appellant in this appeal and the Plaintiff in the Magistrate's court sued the Respondent/Defendant in the Lower Court seeking the following;

- a. Damages for trespass.**
- b. A permanent injunction against the defendants, its agents and/or anybody claiming through it from trespassing into the plaintiff land, cutting the plaintiff trees and fence and in any other manner dealing with the plaintiff property.**
- c. An order directing the defendants to restore the plaintiff fence and uproot the posts erected in the plaintiff farm.**
- d. Costs.**

By statement of defence dated 9.9.2015 the Respondent/Defendant denied the claim and any malice on the part of the Respondent.

The evidence before the trial court was that Pw1 Kennedy J. Wamalwa was the owner of land Parcel No. Bungoma/Tongaren/1386. On 28.3.2015 he heard people digging holes in his shamba. He went there and was informed that they were employees of Kenya Rural Electrification Authority the Respondent. They dug holes and erected poles on his land. They also cut down his trees. He reported to the Sub-county Forest Officer. He now wants the Electricity poles removed as he had not given them permission or signed way leave consent.

The defendant did not offer any evidence for defence. Both parties however, filed their respective submissions. The Learned Trial Magistrate in dismissing the plaintiff claim stated in his Judgment;

“A reading of the plaint shows that the date when the alleged incident giving rise to the case is not indicated. Though the Plaintiff testified that the incident was on 28/3/2015, in cross examination he was not sure of the exact date. The failure to indicate the date when the facts giving rise to the case occurred is in my view a fatal omission as the part of the plaintiff. This being a tortious claim, it was incumbent upon after the plaintiff to plead with exactitude when the cause of action arose.

I also note that though the plaintiff testified that he was informed by an armed person that officers of the defendant were responsible for the damage on his land, he never called the said person as a witness. The evidence implicating the defendants is hearsay and therefore inadmissible. It is therefore my finding that the plaintiff has failed to discharge the burden of proof.

Aggrieved by the Judgment and decree this appellant filed this appeal citing the following grounds;

- 1. The learned trial magistrate erred in law and fact by not resolving the entire evidence procured by the appellant.**

2. The learned trial magistrate erred in law and fact by neglecting the fact that the 42 trees cut and the damaged caused clearly demonstrated pension.

3. The learned trial magistrate erred in law and fact by producing a fact that the appellant's evidence was hearsay when in fact the trees were cut down by the respondent who did not testify and instead brought a statement in court hence the dismissal of the suit was unfair and unlawful.

4. The learned trial magistrate erred in law and fact to appreciate that the fence was cut down and trees cut which culminated to damage to compensated by general damages.

5. The learned trial magistrate erred in law and fact by not considering the fact that the damage trees were within environment of land parcel Bungoma/Tongaren/1386 which has a genuine Title of the appellant.

By Consent the appeal was canvassed by way of written submissions. Both parties filed their respective submissions. Mr. Simiyu Wafula for the appellant submitted that the standard of proof in civil cases is on balance of probability. He further submitted that the evidence tendered was up to the standard required. The same was not challenged. He submitted that the failure to indicate the date the trespass was committed was not fatal. He urged the court to set aside the Judgment.

Mr. Kalya for the Respondent submits that in Civil cases parties are bound by their pleadings and can only lead evidence in support and not at variance with their pleadings. He submitted that trial court properly refused the production of a report whose contents was not referred to in the pleadings as evidence. Counsel submitted that the appellant failed to prove his case on a balance of probability and that burden of proof lay on him and he was unable to disclose the same.

This is a first appeal. The role of the first appellate court was stated

In the case of Sielle Vs Associated Motor Boat Company Ltd [1968] EA 123 by Sir Clement De Lestang, it was held that:

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

The plaintiff in his plaint dated 9.4.2017 averred;

1. The Plaintiff is the owner of Land known as Bungoma/Tongaren/1386.
2. The defendant have a mandate to supply electricity to the public.
3. The defendant, their agents have without consent or person of the Plaintiff trespassed and cut trees and the fence belonging to the plaintiff.
4. It is the plaintiff case that the conduct of the plaintiff is malicious and pure trespass.

PARTICULARS OF MALICE OF THE DEFENDANT:

- i. Entering the Plaintiff land without his consent and/or authority.
- ii. Cutting down the Plaintiff trees without his consent and/or authority.
- iii. Erecting electric post on the plaintiff land without express authority from the plaintiff.
- iv. Cutting down the plaintiff fence without his authority.
- iv. AND the plaintiff seek for damages.

His evidence in support of the suit was that;

“Pw1 I went to the scene and found persons digging holes. They told me they come from Kenya Power. I asked for a permit. I visited Kenya Power offices. I was told that they were from Rural Electrification Authority Personnel. Rural Electrification Authority is the defendant. The parcel had indigenous trees planted on it. The intruders had cut trees. I took photographs of the cut trees. I wish to produce same as exhibit.

Nasiloli: I have no objection to the production of photographs.

They had dug holes and erected poles on the parcel. The parcel had sugarcane crops. I had not authorized them to

encroach on my parcel. The encroachment was unlawful. 42 trees were cut down. I reported to the sub-county forest officer to assess the damages. He visited the parcel and prepared a report dated 26/5/2015.”

The issue for determination in this appeal is whether the appellant proved his case on a balance of probability. The standard of proof in Civil Cases has been stated in several decision of the court.

Lord Denning J. in **Miller –vs- Minister of Pensions (1947) 2 ALL ER 372**, discussing that burden of proof had this to say-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

In this suit the appellant in paragraph 5 of the plaint averred Defendant/Respondent agent trespassed onto his land and cut trees and the fence belonging to the Appellant. His claim was therefore premised on trespass. He in paragraph 6 enumerated the acts of trespass and in paragraph 7 sought for damages. In his prayer (a) the specifically sought for damages for trespass.

The learned trial magistrate dismissed the appellants suit on two grounds first that he did not indicate the date of alleged trespass in the plaint, and secondly, he did not adduce evidence implicating the officers of the respondent as it was hearsay and therefore inadmissible.

The plaintiff in his witness statement filed in court and his evidence in chief testified that he was the owner of the land. He further testified that on 28.3.2015 he was at home when he heard of people on his land and went there and found people digging holes. They were alleged to have been working for the Rural Electrification Authority. He took photograph of damages caused. This is the evidence by the appellant. The appellant did not tender any evidence to challenge the evidence of the appellant. This evidence is therefore not challenged.

In a claim for trespass the plaintiff must prove (1) He is the owner of the premises (2) The defendant has entered the premises (3) That the defendant had no permission from the plaintiff or had no justifiable reason to do so (4) That as a result he has suffered and/or continued to suffer damages.

The Appellant in his evidence testified that he is the owner of the land, and that officers from the Respondent Authority entered on his land and cut trees to set up a power line over his land; he testified that the Respondent had not obtained way leave consent from him. The Respondent though they filed witness statements did not call any witness to challenge the plaintiff contention in his evidence. I am satisfied that the Plaintiff’s Plaint and evidence adduced indicated trespass by officers at the Respondent. I therefore set aside the dismissal of the plaintiff’s claim by this Learned Trial Magistrate.

In Nakuru Industries Limited -vs- S S Mehta & Sons [2016]eKLR court observed:-

“In tort, damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.”

Halsbury 4th ed, Vol 45 at para 26, 1503 provides as follows on computation of damages in an action of trespass:-

- 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.
- c. Where the defendant has made use of the plaintiffs land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
- d. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- e. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

In **Nakuru Industries Limited** (supra) the court cited the case of **Duncan Ndegwa V Kenya Pipeline HCC No. 2577 of 1990 (Nairobi)** where the court held:-

“The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm.”

On quantum of damages, the plaintiff did not in the plaint or his evidence indicate the number of trees cut. There was no assessment report on damages filed or produced. There was therefore no claim of Special damages claimed or proved. The court can only therefore award general damages for trespass. Having found that the Respondent did commit trespass on the appellants land. I award the appellant 200,000/= General damages for trespass and costs of this appeal and the Magistrates court.

Dated, signed and delivered at Bungoma this 5th day of June 2020.

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S.N. RIECHI

JUDGE