REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 86 OF 2002

SOSPETER MWANGI MUCHINA.....APPELLANT

-VERSUS-

LAWRENCE OKOTH.....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate in Eldoret CMCC No. 1256 of 1995

delivered on 12 August 2002 by Hon. H.I. Ong'udi, SPM)

JUDGMENT

[1] This is an appeal from the Judgment and Decree of the Senior Principal Magistrate in **Eldoret CMCC No. 1256 of 1995**. The appeal was filed by **Sospeter Mwangi Muchina** (the Appellant herein and the Defendant before the lower court) against the Respondent, **Lawrence Okoth.** The Respondent had claimed before the lower court that on or about the **20 January 1995** at about 3.00 p.m., the Appellant had trespassed upon his property, known as **PLOT NO. LI/307 Langas Estate (the Suit Property)**, and without any lawful cause or justification, destroyed the structures thereon, to wit: 4 semi-permanent rental rooms, a toilet, a bathroom, a well, and the fence to the said plot. That as a result, he lost rental income that he was earning from his tenants on the property. It was further the contention of the Respondent before the lower court that in the process of the said destruction by the Appellant, a lot of property belonging to his tenants were destroyed; which losses he had to make good. He, accordingly, claimed General and Special Damages for his loss as well as interest and costs.

[2] After hearing the parties, their witnesses and the submissions made by respective Advocates, the Learned Trial Magistrate was satisfied that the Respondent had proved his case to the requisite standard. She thus concluded her determination thus:

> **"The Plaintiff has shown by Pexh. 5 that he paid Kshs. 9,500/= for the destruction caused to his tenant's things. He has also proved by a receipt book (PEXB 4) that he used to receive rent of 700/= per month from each of his 3 tenants i.e 2,100/= per month. It's the Defendants who caused him all this. He will be entitled to such rent for 12 months from date of destruction = shs. 25,200/=.**
>
> **The Plaintiff is also entitled to general damages. The cost of the destroyed buildings will also be recoverable from the defendant. A valuer's report PEXB 6 was produced. It was not challenged. The destroyed houses would not have been built free of charge. The Plaintiff has suffered loss. I would give a round figure of shs. 120,000/= for the loss of the buildings and the suffering caused to the Plaintiff as a result thereof...I therefore enter Judgment for the Plaintiff in the sum of shs. 154,700/= plus costs & interest against the Defendant."**

[3] Being aggrieved by the said decision, the Appellant approached this Court vide his Memorandum of Appeal dated **20 August 2002**, raising the following Grounds of Appeal:

> **[a]** That the Learned Trial Magistrate erred in law and fact in holding that the Appellant was liable for the demolition of the Plaintiff's structures when there was evidence to the contrary.
>
> **[b]** The Learned Trial Magistrate erred in law and fact in granting reliefs which the Respondent never sought in his Plaint.
>
> **[c]** The Learned Trial Magistrate erred in law and fact in failing to take cognizance of the Defendant's evidence, submissions and the authorities tendered in support thereof.

[d] The Learned Trial Magistrate erred in law and fact in awarding general damages wherein they were inappropriate and when a case for general damages had not been presented before her.

[e] The Learned Trial Magistrate erred in law and fact in awarding special damages which were neither pleaded nor strictly proved as required by law.

[f] The Learned Trial Magistrate erred in law and fact when she relied on the valuation report marked **PEXB 6** and yet did not enter judgment as per the contents thereof.

[g] The Learned Trial Magistrate's Judgment was against the totality of the evidence tendered and the damages awarded had absolutely no basis.

Accordingly, the Appellants prayed that the said Judgment of the lower court dated **12 August 2002** be set aside and/or substituted; and that the suit be dismissed with costs to the Defendant.

[4] The appeal was urged by way of written submissions pursuant to the directions issued herein on **25 July 2017**. Thus, the Respondent filed his written submissions on **20 September 2018** while the Appellant's written submissions were filed on **9 April 2018**. On behalf of the Appellant, it was argued that the Respondent had failed to discharge the burden of proving his case on a balance of probabilities. **Sections 107 and 108** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**, were relied on by the Appellant to support the submission that the burden of proof in the case before the lower court lay on the Respondent to prove all his assertions.

[5] On the authority of **Eastern Produce (K) Limited vs. John Lumumba Mukosero [2008] eKLR**; **Independent Electoral and Boundaries Commission and Leonard Okemwa (Returning Officer) vs. Stephen Mutinda Mule & Others, Civil Appeal No. 219 of 2013** and **Philip Aluchio vs. Crispinus Ngayo [2014] eKLR**, it was the submission of Counsel for the Appellant that the reliefs granted by the lower court were not commensurate with the evidence or the prayers sought by the Respondent. The Appellant also cited the case of **Hann vs. Singh [1985] KLR 716** for the holding that special damages must be specifically pleaded and strictly proved; and to support the submission that the subordinate court did not have any basis for awarding the special damages that it awarded.

[6] Counsel for the Respondent, on the other hand, was of the view that the only evidence on record before the lower court was that of the Respondent; and therefore that the Learned Trial Magistrate correctly directed herself in finding for the Respondent. Learned Counsel then proceeded to address the Court on each of the Appellant's Grounds of Appeal, which I shall revert to shortly, and cited, *inter alia*, the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR** for the holding that:

> **"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 at a figure which was either inordinately high or low."**

[7] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded, and yet giving allowance for the fact that this Court did not have the advantage of hearing and seeing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was expressed thus:

> **"...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..."**

[8] The Respondent testified before the lower court as **PW1**, and called 6 other witnesses in support of his case. It was his evidence that the bought the Suit Property in **1992** from one **Benjamin Tanui** and produced the Sale Agreement as **PEXB 2**. He then stated how, on the **20 January 1995**, between 3.00 p.m. and 4.00 p.m., the Appellant, a neighbour who was well known to him before that date, trespassed onto his plot accompanied by more than 10 other people, and without a word, started demolishing the structures on his plot using jembes. The Respondent added that he had built a 4 roomed semi-permanent structure on the plot for the purpose of earning rental income and had let them out, at **Kshs. 700/=** per month each, to tenants who were thus evicted and had some of their property destroyed by the Appellant. The Respondent also produced receipts and relevant documents to support his claim for both special and general damages.

[9] PW2 before the lower court was **Kipsem arap Sang**. He confirmed that he owned 20 acres of land in **Langas** and that he sold 7 acres of the land to the Appellant; and that later, his son sold a piece of the land to the Respondent. He admitted in cross-examination that it took a while for each of the buyers to be apportioned their pieces of land and allotted their respective plot numbers. Consequently, there was a dispute between the Appellant and the Respondent that was reported to the District Officer and the elders for determination; and that the elders resolved that surveyors be called in to determine the boundary between the two plots.

[10] Benjamin Tanui, PW3 before the lower court, confirmed that he sold the Suit Property to the Respondent in **1992** at **Kshs. 10,000/=** with the permission of his father. He also confirmed that the Appellant and the Respondent own neighbouring plots; that the Appellant had bought his plot from his father earlier; and that there had been a dispute as to the boundaries of the two plots. He further confirmed that the parties were advised by a panel of elders to call a surveyor to ascertain the boundaries of their respective plots to provide a lasting solution to their dispute.

[11] The Respondent also called a Valuer, **Mr. Kibichiy Cherasi Yator (PW4).** He told the lower court that he was approached by the Respondent to carry out a valuation of the Suit Property. Accordingly, he visited the site and there made his observations and carried out his measurements and later prepared his Valuation Report, which he produced as **PEXB 6**. He confirmed that when he visited the site, there was

no structure standing thereon, but that there were debris of what was a semi-permanent house. The Respondent also called his neighbour, **Chrisantus Oduor (PW5)**. He told the court that he was present on **20 January 1995** when the Appellant, who was also a neighbour, matched onto the Respondent's property accompanied by over 20 people and destroyed all the structures on the Respondent's plot and chased away the Respondent's tenants, some of whom had their property destroyed in the process. He added that the Appellant returned to the site three days later and flattened the demolished structures.

[12] PW6 was **Paul Dicken Otieno**, who was then employed by the then **Eldoret Municipal Council** as a Senior Legal Officer. His evidence was that he was asked to search the Suit Property and he did so, confirming that the owner was **Lawrence Okoth**. He produced as **PEXB 7** a letter dated **10 March 1998** that he prepared in that regard. The last witness for the Respondent was **James Menama (PW7),** an employee of the Department of Physical Planning, Eldoret. He produced before the lower court the map for Langas Estate in Eldoret (**PEXB 8**) and confirmed that the Suit Property was adjacent to the Appellant's plot.

[13] The Appellant also testified before the lower court. He denied the Respondent's allegations and contended that it was the Respondent who went to his plot in **Langas, Plot No. 205** and started digging a hole thereon; that he had the matter reported to the Assistant Chief and then to the District Officer; and that it was the District Officer, the Chief and the Administration Police Officers who uprooted the posts that the Respondent had erected on the disputed plot. The Appellant denied that the Respondent had put up any structures on the Suit Property; or that had any tenants. According to the Appellant, the Respondent had only rented a plot next to his; and that it was the Respondent who trespassed onto his property.

[14] In the light of the foregoing summary of the evidence, the issues for the Court to re-evaluate and make a determination on can be summarized as hereunder, given the Grounds of Appeal filed herein and the submissions made by the parties;

[a] Whether the Learned Trial Magistrate erred on the issue of liability;

[b] Whether the award of damages by the Learned Trial Magistrate was justified.

[a] <u>On the issue of trespass and liability</u>

[15] Although the Appellant denied before the lower court that the Respondent owned the piece of land abutting his, on which he had put up some structures, including a semi-permanent building which he had let out to tenants, there was credible evidence presented by the Respondent to the contrary. The Respondent himself testified as to his ownership of the Suit Property, which evidence was supported by the evidence of the original owner of the property **(PW2)** and his son **(PW3),** who sold the Suit Property to the Respondent. There were credible documents produced before the lower court confirming that the Respondent is the owner of the Suit Property and that it is a plot abutting the Appellant's, being **Plot No. 205**. The documents included the letters dated **16 January 1995** from the Department of Physical Planning and the letter dated **10 March 1995** from the Municipal Council of Eldoret, both of which confirm the ownership by the Respondent of **Plot No. LI/307 Langas Estate**. A map of the area was also produced before the lower court by **PW7** and marked **PEXB 8**, which confirmed that that respective plots of the Appellant and the Respondent are indeed adjacent to each other and therefore share a common boundary.

[16] On whether the Appellant committed trespass on the property of the Respondent, the Respondent gave an account before the lower court as to what transpired on the **20 January 1995**. He stated that the Appellant trespassed onto his plot accompanied by more than 10 other people, and without a word, started demolishing the structures on his plot using jembes. He called an eye witness, **PW5**, who told the lower court that he was present and witnessed the Appellant march onto the Plot of the Respondent's plot accompanied by about 20 other people who were all armed, and that they proceeded to demolish the structures that were on the plot. Thus, whereas it was alleged by the Appellant that the structures were demolished by the Chief, the D.O and policemen, that allegation was duly considered by the lower court and rejected. Here is what the lower court had to say in this regard:

"...On what basis did they find the Plaintiff to have trespassed yet they still required the services of a Surveyor. The map PEXB 6 and DEXB 1 clearly show the demarcation of plots 307 and 205. They are there. It is therefore for the Surveyors to go to the ground & show the parties the extent of their land. Without such finding by the Surveyors, it was wrong for the Defendant to take the law in his hand and go and demolish buildings on the land. If it was the D.O. & A.Ps who did so, they would have been identified as I believe they were on official duty. They ought to have been in uniform. There was nothing like that. the Defendant and his supporters took it upon themselves to unlawfully evict the Plaintiff and in the process destroyed the buildings standing thereon..."

[17] The decision of the lower court on liability was therefore well-founded and cannot therefore be faulted. It is manifest from its Judgment that the lower court took into account the evidence adduced by and the submissions made by both sides to the dispute. As has been pointed out herein above, the Appellant's contention that the demolition was done by law enforcement officers was duly considered and rejected by the Learned Trial Magistrate.

[b] <u>On Quantum of Damages</u>

[18] It was the contention of the Respondent before the lower court that he suffered damage and loss as a result of the wrongful actions of the Appellant. He in particular testified that he had structures on the Suit Property which were demolished and flattened by the Respondent, namely, a semi-permanent rental structure with 4 different rooms, a toilet, a bathroom, a well, and the fence to the said plot. His evidence in this regard was augmented by the evidence of his neighbour, **PW5,** who was a witness to the incident. The Respondent also called a Valuer, **PW4,** who visited the site and made an estimation, by way of his Valuation Report marked **PEXB 6** that the demolished structures were worth about **Kshs. 84,400/=.**

[19] The Respondent had also produced before the lower court an agreement between him and his tenants as **PEXB 5** as well as a receipt book marked **PEXB 4** to show that he had tenants on the property who were paying him **Kshs. 700/=** each. The Learned Trial Magistrate was also satisfied, by dint of the document marked **PEXB 5** that some of the Respondent's tenants had their property destroyed and that the Respondent had to compensate them to the tune of **Kshs. 9,500/=.** On the basis of the aforesaid evidence, the trial court awarded the

Respondent **Kshs. 9,500/=** being the value of the destroyed property belonging to his tenants; **Kshs. 25,200/=** being compensation for the rent he was unable to earn from the demolished building; and a global sum of **Kshs. 120,000/=** for the loss of the buildings and suffering caused to the Respondent.

[20] Thus, although the Appellant faulted the lower court for relying on the Valuation Report contending that the sum stated thereon was not specifically pleaded as is required of special damage claims, it is instructive that the Valuation Report was produced in evidence of the General Damage component of the Respondent's claim; and therefore the trial court rightly used it merely as a guide in assessing the quantum of damages payable to the Respondent. No counter-valuation having been done, the lower court cannot be faulted for making the assessment that she made in connection with the global sum of **Kshs. l20,000/=.** Indeed, in the case of **Gitobu Imanyara & 2 Others vs. Attorney General** (supra), it was held thus:

"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 some material respect, and so arrived at a figure which was either inordinately high or low."

[21] It was not shown, in my respectful view, that the figures arrived at by the lower court were inordinately high for the damage to the structures that were then standing on the Respondent's plot. The special damage components of **Kshs. 9,500/=** and loss of rent at the rate of **Kshs. 2,100/=** were not only pleaded but also specifically proved by the Respondent; and the award in respect thereof was in consonance with the principle that special damages must be pleaded and proved. A period of 12 months is not unreasonable granted the justification given for the award by the Learned Trial Magistrate. There is therefore no relief that was granted by the lower court which was not prayed for in the Plaint.

[22] Thus, upon re-evaluation of the pleadings and evidence presented before the lower court, I am satisfied that the Judgment and the resultant Decree issued by it were based on sound evidence and that the appeal dated **20 August 2002** is clearly devoid of merits. The same is accordingly dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JANUARY 2019

OLGA SEWE

JUDGE