



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 29 OF 2016**

**KENYA PORTS AUTHORITY.....APPELLANT**

**VERSUS**

**1. RAPHAEL OBURE & TWO OTHERS**

**2. NORTHWOOD SECURITY SERVICES.....DEFENDANTS**

**J U D G M E N T**

1. This is an appeal against the judgment of the trial court, Hon. Kimanga (RM) dated 2/2/2016 by which the court found and decreed:-

**“Therefore the 1<sup>st</sup> defendant’s actions were as per the contract between the 1<sup>st</sup> and 2<sup>nd</sup> defendant’s. The action of the 1<sup>st</sup> defendant or its agents bound the 2<sup>nd</sup> defendants since there was no agreement of independent contractor produced in evidence to exclude the 2<sup>nd</sup> defendant. There was no evidence produced to show that indeed the 1<sup>st</sup> defendant was an independent contractor in legal sense...**

**Upon expiry of 29 days, they were found with no fault and they were released and given their tools back. It cannot be said that such detention and bond terms were fair. It cannot either be said that the confiscation of tools for a whole 29 days was justified. It’s therefore nothing but an illegality. The plaintiffs lost use of the tools as well as they lost capacity to work and are entitled to the damages they claim.**

**However the 1<sup>st</sup> defendant only arrested the plaintiffs but did not detain them. It’s the Police that detained the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs. Damages related to such detention in the cells and injuries allegedly suffered by the 3<sup>rd</sup> plaintiff in detention can only be blamed on the Police and its necessary that in order to recover such damages, the Director of Public Prosecution needs to be enjoined as a defendant on behalf of the Police. It’s not the case herein and I find award of damages in the respect unavailable in the circumstances. The 1<sup>st</sup> and 2<sup>nd</sup> defendants acted unlawfully and without justification. They are not agents of the forest department and besides these was no offence committed by the plaintiff as against the forest department since arrest through the 29 days there was no complaint filed by the said office nor were the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff prosecuted by the said offices for any offence. Therefore the excuse of illegality has not been proved. Upshot, it was proved sufficiently that the power saw was on hire at a rate of 4,200/= per day and was detained for a total of 29 days. The 1<sup>st</sup> plaintiff showed that he had to pay a total of 121,800/= to the owner of the power saw.**

**The 2<sup>nd</sup> plaintiff was entitled to daily earnings of Kshs.1,400/= per day. For the 29 days he was reporting to the Police Station he lost a total of Kshs.40,600/=. The 3<sup>rd</sup> plaintiff used to be paid Kshs.600/= a day as per the payment vouchers for the 1<sup>st</sup> and 2<sup>nd</sup> days and for 29 days he lost Kshs.17,400/=. Besides the plaintiffs suffered general loss and damage as a result of the actions of the defendants and I proceed to award a sum Kshs.300,000/= General damages to the plaintiffs jointly. Total damages awarded therefore is Kshs.471,800/= plus costs and interests till payment in full. I accordingly find and award”. (emphasis provided)**

2. Against that Judgment the Appellant raised some seven grounds in the Memorandum of Appeal filed on the 17/03/2018.

3. The grounds seeks of this court a determination of the following issues?

**i. Was the 2<sup>nd</sup> Respondent an agent of or an independent contract or to the appellant?**

ii. Did the suit comply with the provisions of Section 66 of Kenya Ports Authority Act?

iii. Did the plaintiffs plead and pray for special damages to be entitled to an award for same?

iv. Was the trial court entitled to make the award of Kshs.300,000.00 in general damages?

v. Did trial court gave regard to the submissions offered?

#### **Summary of pleadings at trial**

4. By a plaint dated 16/12/2005 and amended on the 21/3/2007 the 1<sup>st</sup> Respondents sued the Appellant and 2<sup>nd</sup> Respondent and sought the recovery of special damages in the sum of Kshs.179,800/= general damages as well as costs on the basis of alleged arrest and detention of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs for a whole day and detention of their tools of trade for a period of 29 days.

5. The special damages were particularized to be for the sum of Kshs.121,800/= paid to the owner of a power saw for the period of detention and Kshs.58,000/= being loss of earnings for the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs for a period of 29 days during which they were unable to work due to the need to report to the police station on a daily basis.

6. General damages were sought by the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiff on account of detention at the police station under hard conditions during which time they were allegedly severely beaten while the 1<sup>st</sup> plaintiff sought general damage for the temporary stoppage of his work.

7. When served, both defendants filed separate statement of defence. The 2<sup>nd</sup> respondent as the 1<sup>st</sup> defendant denied the alleged arrest by its officers, denied that the plot sued on belonged to the 1<sup>st</sup> plaintiff with a pleading that if ever the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs were arrested they were so arrested on reasonable suspicion that they were committing offence of felling trees on a property of the 2<sup>nd</sup> defendant without the relevant permits. All the pleadings in the plaint were all denied including the alleged detention and beating even the service of demand before action was denied.

8. For the 2<sup>nd</sup> defendant (now Appellant) the defence filed denied ownership of plot no CR 34462 and license by the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs fell trees. On arrest of the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiff, the Appellant pleaded that if any arrest took place it was without its express or implied instructions, it then denied all the pleadings at paragraphs 9 – 22 of the plaint and invited strict proof. The Appellant then invoked the provisions of Cap 391 which it alleged were contravened and reserved the right to raise a preliminary objection that the suit demonstrated no cause of action against it.

#### **Summary of evidence lead at trial**

9. The plaintiffs, the 1<sup>st</sup> & 3<sup>rd</sup> gave evidence while only the 2<sup>nd</sup> defendant presented one witness to give evidence on his behalf. PW 1, 1<sup>st</sup> plaintiff, gave evidence to the effect that being the owner of plot no. 1380 he had on the material day detailed 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs to clear the land for development. They had a hired power saw from one Hamisi Kalumi at Kshs.6 per foot and for 700 feet he would pay 4200 per day. For the work he would pay the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs Kshs.1,4000/= and 600 respectively. On the material day they were arrested for allegedly felling trees on the Appellants' land and when he went to the Appellant he was referred to the 2<sup>nd</sup> Respondent who told him the people were arrested on the Appellants land for felling trees thereon. He produced payment vouchers and an invoice from the power saw owner. He denied that his people had trespassed onto the appellants' land.

10. Upon cross examination, the witness said he had no occurrence book copies and no document that they reported at Nyali Police Station for 29 days. He denied being present at the time of arrest and reiterated that it was the 2<sup>nd</sup> respondent's guards who effected the arrests. On the demand made to the Appellant the witness admitted that it did not demand any monetary compensation. When cross examined by the Appellants' advocate, he denied knowledge of the plot said to belong to the Appellant and that his workers were never on that plot. He however admitted there being no evidence of detention of the power saw.

11. 2<sup>nd</sup> plaintiff gave evidence as PW 2 and said that on the 4/5/2005 while working for the 1<sup>st</sup> plaintiff as a construction foreman he was arrested by guards of the 2<sup>nd</sup> respondent and taken to Nyali police station in the vehicle belonging to the 2<sup>nd</sup> Respondent. The two, 2<sup>nd</sup> & 3<sup>rd</sup> plaintiff were held at the police station overnight and released the next day on a cash bail of Kshs.2000/= and directed to report daily to the station for another 29 days. He was to earn Kshs.600/= for days worked and said that having not worked for 29 days he lost that income. He produced demand letters to the two defendants and a reply from the defendants. In cross examination the witness said he was arrested by the 2<sup>nd</sup> respondents guards in the absence of anybody from the Appellants and that at the police cells he was assaulted by the inmates.

12. For the defence, one Peter Jambu from security department of the Appellant gave evidence on its behalf. He said he was the incharge of external security with the appellant whose duty was to inspect security firms contracted to provide security to the Appellants property. He produced documents to show that the title No. CR 18004/1 and CR 835/11 belong to the appellant. He said the 2<sup>nd</sup> respondent was contracted to guard the property and that before deployment they were shown the extent the boundaries of the land they were to guard. To him the plaintiffs plot was never adjacent to the Appellants plot and that neither him nor the Appellant were involved in the arrest. He said that no instructions were issued by the Appellant for arrest and that the Appellant was not aware where the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff were arrested.

13. On re-examination, the witness repeated having not been present at the time of arrest that the plaintiffs plot was not adjacent to that of the Appellant and that the arrest was by the 2<sup>nd</sup> respondent.

## **Analysis and determination**

14. This being a first appeal, the court proceeds by way of a retrial. It has the duty and mandate to re-appraise; re-examine and re-evaluate the entire evidence on record based on the pleadings and come to own conclusions. In undertakings that task I propose to deal with the isolated issue in a seriatim manner.

### **Relationship between appellant and 2<sup>nd</sup> Respondent – Agent or an independent contractor?**

15. While it is true that there was no evidence adduced to prove the relationship between the Appellant and the 2<sup>nd</sup> Respondent, the law is that the burden rests on him who would lose if no evidence at all is led<sup>[1]</sup>. In this case, if the pleadings were filed and left to the court to make a determination without either side offering any evidence it, was the plaintiffs who would fail because it was the said plaintiffs who desired that a judgment be entered for them against the defendants from the complaints pleaded. It was therefore not open to the trial court to hold as it did that ‘the actions of the 1<sup>st</sup> defendant or their agents bound the 2<sup>nd</sup> defendant because *there was no agreement of independent contractor produced in evidence to exclude the 2<sup>nd</sup> defendant*’. In so holding, the trial court, with respect, laid the burden where it did not lie.

16. The court essentially misapprehended where the burden rested and thereby shifted it. I do find that if there was a contestation as to the relationship between the two, Appellant and 2<sup>nd</sup> Respondent, the duty was upon the plaintiff to prove what that relationship was. There was no obligation upon the defendant to prove anything unless to disprove what was provided by the plaintiff. The 1<sup>st</sup> respondents did not prove liability against the Appellant and it was wrong for the trial court to enter judgment against the Appellant. This finding would have been sufficient to despire the appeal but I am inclined to consider other grounds as well.

### **Was there compliance with Section 66 of Cap 319?**

17. There was the letter dated 06/05/2005 and a response to it dated 10/6/2018. The two letters show that there was a notice of intention to file suit duly served and acknowledged. The period between the date the letter of demand was issued, the date it was acknowledged and the 12/7/2005 when the plaint was lodge in court did in fact give to the Appellant a period of at least 30 days as the statute provides.

18. However to this court even if the such notice led not been issued and served, that alone would not be a basis to defeat the suit and claim. Mere failure to a notice in the context of the right to access to justice guaranteed under the constitution cannot be a basis to deny a litigant the right to be heard.

19. It is of note that the spirit of section 66 is the same enacted under Section 13A of the Government Proceedings Act which has been held to be no bar to the right to access justice.

20. Majanja J, had this to say of Section 13A Government Proceedings Act:-

***“viewed against the prism of the constitution, it also becomes evident that Section 13A of Government Proceedings Act provides an impediment to access to justice”.***

21. Being of the view and opinion that the intendment and purpose of that provision and Section 66 Cap 391 are the same, I have no hesitation on holding that even if the plaintiff had not served a notice, that by itself would not have been enough to defeat their suit against the Appellant and the 2<sup>nd</sup> Respondent. This ground lacks merit as is dismissed.

### **Special damages**

22. In the amended plaint, there is a specific pleading at paragraph 8 a, b & c and prayer 1 which specifically sought the recovery of the sum of Kshs.179,800/=. It thus cannot be candidly and honestly be said that no special damages had been sought as the law demands. Maybe it would be different had there been a challenge on the proof of such special damages. However in its appeal, there is no challenge based on lack of proof. But even if there had been such a challenge, the evidence by PW 1 & PW 2 were to this court adequate, on a balance of probabilities, that the 1<sup>st</sup> plaintiff had employed the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs on a daily rate of 1,400/= and 600/= respectively, it was equally proved and not sufficiently controverted that for some 29 days they were required to report to the police station and did in fact so report. This ground of appeal would equally fails for lack of merit.

### **General damages**

23. That the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs were arrested on the 4/5/2005 on the suspicion of having trespassed upon the appellant’s property and handed over to the police at Nyali Police Station where they spent one night is not in dispute. It was equally not in dispute that at the police station they were granted cash bail of Kshs.2000/= each and ordered to report there on a daily basis for some 29 days. The question the trial court was bound to pose and answer and which he did not answer is whether there was reasonable suspicion by the 2<sup>nd</sup> respondent’s guards that there had been trespass and felling of trees without requisite permits. Throughout the record of proceedings at trial, the fact that there was felling of trees was not denied but was common place.

24. However there was no attempt to assert that there was permit for such felling instead the 1<sup>st</sup> plaintiff was content to say that the trees belonged to the said plaintiff and not Kenya Forest Services. Such an attempt would have gone a long way to show that the decision to arrest had no probable or reasonable suspicion but otherwise accentuated by ill will or malice. It is not enough to assert that the trees did not

belong to Kenya Forest Services. The law within local authorities then, was that a permit was required to fell any tree indigenous or exotic, planted on naturally occurring. Additionally it is a duty of every Kenyan to take steps to prevent commission of criminal acts[2]. The guards of the 2<sup>nd</sup> respondent were within the law to effect arrest if there was reasonable suspicion.

### **General damages**

25. The trial court having held that the arrest was by the 1<sup>st</sup> and that the detention was by police who were not sued, it is difficult to understand what the damages of Kshs.300,000/= was on account of. Worse still how could there be a joint judgment for all the plaintiffs. That award was wholly erroneous.

26. However there was never any iota of evidence to connect the Appellant and the arrest. This was a case where there was never an allegation of joint wrong between the two defendants. There was also no evidence of joint tort between them. It was therefore a case where even if liability had been proved, the court was expected to enter a several and not joint judgment. I have found that there was no liability proved against the Appellant of the wrongs pleaded hence there was no basis to enter any judgment against the appellant.

27. That being the case and my other finding on other two grounds of appeal notwithstanding, the judgment entered against the Appellant had no basis in law and it is hereby set aside and in its place substituted a judgment that the plaintiffs suit against the Appellant, as second defendant at trial is dismissed with costs.

28. I award to the Appellant the costs of this appeal.

**Dated and delivered at Mombasa this 12th day of October 2018.**

**P.J.O. OTIENO**

**JUDGE**

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[1] Section 108, Evidence provides:

[2] Section 392 Penal Code