



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HIGH COURT CIVIL APPEAL NO. 35 OF 2015**

APHAXARD KANAMPIU RIMUNYA .....1<sup>ST</sup> APPELLANT

OBEDI RIUNGU ZAKAYO.....2<sup>ND</sup> APPELLANT

PETER MIRITI LEONE.....3<sup>RD</sup> APPELLANT

BERNARD NJERU NGAINE.....4<sup>TH</sup> APPELLANT

VERSUS

SAMUEL KITHINJI BOORE.....RESPONDENT

***(Being an Appeal from the Judgment of the Senior Resident Magistrate's Court at Chuka (Hon. C.K Obara - SRM) delivered on 11/11/2015 in Chuka SPMCC No. 43 of 2013).***

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

1. Alfaxard Kanampiu Rimunya, Obed Riungu Zakayo, Peter Miriti Leone and Benard Njeru Ngaine the appellants herein have launched this appeal against the decision of Hon. C.K. Obara Senior Resident Magistrate delivered on 11<sup>th</sup> November, 2015 in Chuka SRM's Court Civil Suit No. 43 of 2013. In that suit Samuel Kithinji Boore, the Respondent herein had sued the appellants herein for a tort of malicious damage to property and damages in compensation of the same. The trial court after trial found for the respondent herein and awarded the respondent a sum of Kshs.50,064/- costs and interests. The appellants felt aggrieved and preferred this appeal.

2. Before I look at the grounds of appeal, it is important to have a brief look at the background of this appeal and the case in the lower court against the appellants herein. The proceedings of the court below reveal that the respondent had filed a suit against the appellants jointly and severally for malicious damage to property. The respondent claimed that the appellants jointly and severally damaged some 52 fencing posts and wire and some trees whose total value in his view was Kshs.397,500/-. The respondent's case mainly hinged on the fact that the appellants had been charged with a criminal offence vide Chuka CM's Court Criminal Case No. 883 of 2011 and convicted with the said offence of malicious damage to property contrary to **Section 339(1) of the Penal Code** and that the appellants never appealed against both the conviction and the sentence meted against them. The appellants denied the respondent's claim. However while conceding that they were charged and convicted of the said offence, they disputed the respondent's claim on the assessment of damages submitting that in their view the experts had put the value of damages at Kshs.32,064/-. The trial court agreed with the appellants on the question of quantum and assessed the properties damaged at Kshs.32,064/- but added Kshs.12,000/- being the amount

of fees paid for the assessment reports and Kshs.6000/- being fees for demand letters. The total amount awarded as damages by the lower court was therefore assessed at Ksh.50,064/-

3. The appellants felt aggrieved and listed the following grounds in their memorandum of appeal namely:-

*i. That the learned magistrate erred in law and fact by failing to consider that the appellants were charged for implementing court orders issued by the hon. court.*

*ii. That the learned magistrate erred in law and fact by failing to consider the evidence adduced by Lands Registrar Meru South and Maara, District Surveyor, Chief Murugi Location, Assistant Chief Munga Sub-location and Murugi East Ward representative in Criminal Case No. 883 of 2011.*

*iii. That learned magistrate erred in law and fact by failing to consider that the respondent had benefitted for many years by illegally using public road as personal base at the expense of residents including its respondent.*

*iv. That the learned magistrate erred in law and fact by failing to consider that the respondent selected only 4 of over 30 residents and made them to be charged with no explanation why the others were not.*

*v. That the learned magistrate by failing to consider that the value of the damaged property as per sheet was Kshs.120,000/- and that government officers valued them at Kshs.32,064 but the respondent exaggerated the value to Kshs.417,968/-.*

*vi. That the learned magistrate erred in law and fact by failing to consider that the respondent has never denied that public road is clearly adjudicated adjacent to his plot.*

4. This appeal was canvassed through written submissions. The appellants made their joint written submissions dated 18th November, 2016. The appellants in their written submissions have dwelt much about their Criminal Case No.883 of 2011 instead of focusing their attention to the civil suit that gave rise to this appeal. The appellants have faulted the learned magistrate for disregarding the evidence rendered in the said criminal case. It is submitted that the appellants were carrying out a lawful order which was in their view implemented by the District Lands Registrar.

5. The respondent has further submitted that the trial court relied on the evidence tendered in the criminal trial and in his view led the trial court to give an award of Kshs.50,064/- instead of the amount he had claimed in the suit.

6. In their first ground of appeal, the appellants have contended that they were charged in the criminal case for implementing a court order. I have however considered this ground and noted that the appellants appear to be faulting the learned trial magistrate under the illusion that the civil court had a hand in the decision in the criminal case No.883 of 2011. The appellants as aforesaid had been charged in a criminal court Criminal Case No. 883/2011 and were convicted by **Hon. Murage N.N.** Ag. Principal Magistrate on 20<sup>th</sup> February, 2012. The learned magistrate in convicting the appellants herein made the following observations.

*".....going by the evidence in court though the accused persons had an award in their favour they intentionally ignored the last orders of the court and thus liable for the charges with which they are charged with."*

The appellants were satisfied with the criminal court's finding in their guilt and this clearly set in motion the operation and the application of **Section 47A** of the Evidence Act(Cap. 80 Laws of Kenya) which states as follows:-

***" 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 therein whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."***

7. The trial court in the civil case giving rise to this appeal cannot be faulted for finding that the appellants' culpability capability and/or liability to the respondent had been proved based on the evidence of the criminal case tendered at the trial. The appellants cannot at this stage fault the findings made at the criminal trial because it is not only belated but irrelevant in so far as this appeal is concerned. If the appellants were dissatisfied with the findings of the trial court in the criminal case, they should have preferred an appeal thereof. They could not have waited until after being found liable in the subsequent civil case to raise the issues they have raised in this appeal.

8. The appellant's have further faulted the trial court for not considering the evidence tendered in the criminal case and have pointed out the evidence of some witnesses. This however is an irrelevant issue because what was important in the criminal case was the final verdict. If the appellant felt that some of the evidence tendered at the criminal trial was good for their defence, they should have adduced the same evidence in the civil suit including the benefits if all the respondents may have got from using a public utility. I have perused the statement of defence filed by the appellants and they did not plead any of the issues now raised in grounds 1, 2, 3, 4, and 6 of the memorandum of appeal. The appellants cannot therefore fault the learned magistrate for failing to consider issues which were never raised in the first place. Where a party in litigation desires the court to make a finding in his/her favour he/she has duty and legally bound to plead and prove those facts and give the opposing party a chance to defend or respond to the same. That is what the rules of procedure under the provisions of order 2 **Civil Procedure Rule** provides. This court finds that the appellants have raised new issues in their appeal which were not part of the issues raised at the trial and there is nothing that stopped them from raising the same issues at the trial. That ground can't therefore stand.

9. The appellants have contended that they had a valid court order in their favour but no evidence were tendered to show that the appellants had been given the task as court bailiffs to execute a lawful court decree of any. The appellants appeared to have been eager to have the decree executed but in their eagerness, they forgot or ignored to follow the law in the execution process by taking the law in their hands and in the process committed an offence with which they were charged and correctly found guilty as charged. They ought not to have carried out the execution on their own without an express order from court and that is where they faltered and found themselves on the wrong side of the law.

10. I have also considered the quantum of damages awarded and find that the trial magistrate overruled the respondent's claim of Kshs.417,960/- and found in favour of the appellants' own assessment of damages being Kshs.32,064/-. The trial court correctly added to this figure the other proven special damages of Kshs.12,000/- and Kshs.6,000/- respectively totaling to Kshs.50,064/- The special damages pleaded at the trial was Kshs.417,960/- but the total amount proved was Kshs.50,064/-. This in my view was the correct finding as the decision of the lower court was supported by evidence/facts presented and the law.

In the premises, I find no merit in this appeal. The same is dismissed with costs to the respondent.

***Dated and Delivered at Chuka this 8<sup>th</sup> day of March, 2017.***

**R. K. LIMO**

**JUDGE**

Judgment read in open court in the presence of Mr. Mugo Advocate for the Respondent and 2nd & 3rd Appellant appearing in person.

**R.K. LIMO**

**JUDGE**

**8/3/2017**