**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT NYERI.**

**CIVIL APPEAL NO. 18 OF 2011.**

**JOSEPH MATHAIYA MWAI.....APPELLANT**

**VERSUS**

**MUNICIPAL COUNCIL OF NANYUKI.....RESPONDENT**

**(*An appeal from the judgment of the CM in Nyeri CMCC No. 420 of 2008*)**

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

1. The **plaintiff** being dissatisfied with the judgment in Nyeri CMCC No. 420 of 2008 delivered on 26th day of January, 2011, filed his Memorandum of appeal on 27th May, 2013.

This was after the Magistrate had heard the parties to the suit and determined that the suit had not been proved on a balance of probability.

2. The appellant raised the grounds of appeal enumerated below;-

***i) The learned Chief Magistrate erred in law and fact in failing to find the defendant liable for the loss of the Defendant's goods in the closed premises and failing to order for monetary compensation of the same. A miscarriage of justice was occasioned.***

***ii) In so far as the Defendant's action of closing the premises had been found unwarranted and had been ordered to open the premises vide Meru High Court Civil Case No. 252 of 1990 by way of a Judgment dated 23rd September, 1991. The learned Chief Magistrate erred in law and in fact in holding and finding that the plaintiff was not entitled to compensation and that he had leased the premises. A miscarriage of justice was thereby occasioned.***

***iii) In so far as the Defendant's Town Clerk had conceded in a replying affidavit in Meru HCC. Case No. 253 of 1990 that the plaintiff's properties had been secured in the premises by the defendant, the learned Chief Magistrate erred in law and in fact in holding that the plaintiff had not proved that he had properties in the premises or that the properties were his. A miscarriage of justice was thereby occasioned.***

***iv) The Learned Chief Magistrate erred in law and in fact in holding and finding that the plaintiff had sub-let the premises, when no such evidence was adduced or proved. A miscarriage of justice was thereby occasioned.***

***v) The Learned Chief Magistrate erred in law and in fact in not holding that the Defendant had delayed in issuing the plaintiff with a licence for the premises until February, 1993 thus leading to loss of income and as such the plaintiff was entitled to damages for loss of income. A miscarriage of justice was thus occasioned.***

***vi) The learned Chief Magistrate's Judgment is not supported by evidence on record. A miscarriage of justice is thereby occasioned.***

3. The parties to the appeal agreed to proceed by way of written submissions.

4. The appellant's learned counsel Mr. Wahome submitted that:-

***1) An inventory was produced showing the items found in the premises contrary to the finding made by the learned magistrate.***

***2) No evidence was adduced in the lower court to show that the appellant had sub-let the premises or anyone else was claiming the properties the subject of his claim. The Magistrate therefore erred in finding that the plaintiff (appellant) had sub-let the premises.***

***3) The witness for the Respondent one Eston Nyaga, DW1, said he was not in the employment of the respondent when the events took place and had worked for one year at the Municipal Council of Nanyuki as at the time he gave evidence. DW1 conceded that he had no documents to show that the alleged sub-tenants were the respondent's tenants and that the affidavit by the Town Clerk confirmed that the plaintiff's goods were intact. In view of this, the trial Magistrate was wrong in failing to find the Respondent liable for the loss of the appellant's goods in the closed premises and failing to order for monetary compensation of the same.***

***4) The Learned Magistrate was wrong in holding that the loss of income for the delay in issuing the licence was res-judicata in Meru HCC Case No. 252 of 1990 and failing to award the appellant the same.***

***5) The appellant prayed for the appeal to be allowed and the judgment of the lower court to be set aside and be substituted with Judgment as prayed as follows;-***

***i. Value of lost property at Ksh.355,963.00***

***ii. Loss of income at Kshs.90,000.00***

***iii. Costs of the appeal and the suit in the Lower Court.***

5. The law firm of Gori and Ombongi Advocates filed written submissions on 8th July, 2015 on behalf of the Respondent. The said submissions stated that;-

***(i) There was no miscarriage of justice as the appellant did not prove the case on a balance of probability as required by law. The Respondent had no knowledge of assets locked in there (sic) at the time the premises were locked. Even though the appellant produced receipts he failed to prove that the alleged assets were in the rooms at the time they were locked (sic).***

***(ii) The appellant was the author of his own misfortune in that he sub-leased the premises to Patrick Githinju Kihohia and Wilfred Ndungu Ndirangu without the knowledge and/or consent of the Respondent, thus it was not possible for the loss to be placed squarely on the foot of the respondent.***

***(iii) It was not true that the Defendant conceded in the replying affidavit that the plaintiff's property had been secured in the premises. The reasons behind this was because the plaintiff had no knowledge or rather he had not seen those properties when he locked the said premises.***

***(iv) The learned Magistrate did not err in law and facts in not holding that the defendant had delayed in issuing the appellant with a licence for the premises until February, 1993. This ground (by the appellant) is baseless as the delay was not one which was maliciously premeditated. It is incorrect to say that the issue of delay in issuing the appellant with a licence was the result of that loss of income. The appellant therefore cannot blame the county council for his loss. It is for this reason that the appellant is not entitled to damages for loss of income.***

***(v) The respondent's prayer was for the appeal to be dismissed with costs.***

6. On 9th July, 2015 Mr. Gori undertook to avail a copy of the authority he had cited in his written submission. At the time of writing this judgment he had not done so.

7. After going through the record of appeal, the issues for determination by this court are as follows;-

***1. Was the respondent liable for the loss of the appellant's goods in the closed premises?***

***2. Had the appellant sub-leased the said premises to third parties without the respondent's knowledge***

***3. Is there proof that the appellant's properties had been secured in the said premises by the respondent***

***4. Did the appellant incur loss of income by the respondent's delay in issuing him with a licence for the premises, and if so, is the appellant entitled to damages?***

***5. Who will bear the costs of the suit and the appeal herein?***

8. In order to determine the above issues canvassed in the record of appeal, this court in its appellate jurisdiction is bound to evaluate the evidence in the lower court and arrive at its own independent decision. In the case of **Selle –V-Associated Motor boat (1968) EA 123,** the Court of Appeal stated as follows;-.

***"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. In particular, this court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence of the case generally."***

9. The appellant in his evidence in the lower court stated that in the year 1988 he had rented a house at Nanyuki Municipal Council Plot Nos. 3 and 4 in Nanyuki Old Market. He had a welding workshop which contained various assets as outlined in paragraph 6 of the amended plaint.

10. The appellant also adduced evidence that there was an electric generator, a hydraulic pump machine and a customer's car registration No. KLB 569 Peugeot 504. He also had windows for sale. He stated that the vehicle belonged to Wamugunda who died in either 2006 or 2007.

11. He further testified that on 17.4.1988 Nanyuki Municipal Council workers went and chased (sic) his workers and closed the factory. The appellant obtained orders on 23.9.91 in Meru HC Civil Case No. 252 of 1990 for the Nanyuki Municipal Council to reopen his workshop but they declined to open. The appellant sought orders for auctioneers to open it, which they did on 23.1.92.

An inventory was recorded by the auctioneers of the goods that were found in the workshop and he produced a copy of the inventory in the lower court.

12. The appellant adduced evidence that many of his goods were stolen when his workshop was closed and guards belonging to the said Municipal Council stationed there.

13. The appellant further stated that he applied for a licence on 6.5.1992 and paid for it but he was issued with a licence on 19.2.93. He stated that he had already installed a posho mill but was not able to embark on the business since the premises were locked up by the respondent. Although he had not done the work of a posho mill before, he expected to make Kshs.2, 700 per day, which he lost from the date of Justice Oguk's Judgment in Meru H.C.C. Case No. 252 of 1990, until 19.2.1993. He testified that he was doing welding business before the closure of his workshop.

14. In cross examination, he stated that he had hired his machine to one Githinji and Wilfred and had entered into an agreement with them dated 28.9.1987. He further said there was a dispute with his subtenants and they went to court over their failure to pay the appellant.

15. On the other hand, the respondent adduced evidence through DW1 Eston Nyaga Mukara, who testified that according to the policy of the Municipal Council of Nanyuki, a tenant is not supposed to sub-let. In October, 1987, the appellant had sub-let the premises to two other people as shown by an agreement between Ndirangu, Githinji and the appellant dated 28.9.1987. The sub-letting was illegal as the said Council was not consulted. The appellant's premises were locked when the council realized that there was a dispute.

When the Municipal Council of Nanyuki locked up the premises, the appellant had sub-let and the said premises were in other people's hands. The premises were locked on 17.4.1988.

16. After re-evaluating the proceedings of the lower court, it is the finding of this court that the appellant while operating his workshop business, entered into an agreement, dated 28.9.1987 with one Wilfred Ndungu Ndirangu and Patrick Githinji Kihohia, whereby he leased his machine to the duo. This evidence came out during the cross-examination of the appellant. Further evidence emerged that there was a dispute with the subtenants over failure to pay the appellant and they went to court.

17. When the respondent got wind of the sub-tenancy agreement, they locked up the premises on 17.4.1988. The respondent produced a copy of the sub-tenancy agreement. The decision to lock up the appellant's premises was further informed by the policy of the Municipal Council of Nanyuki against sub-leasing. It is apparent from the evidence adduced that at the time the respondent locked up the premises on 17.4.1988, the appellant's sub-tenants are the ones who were operating a business from the said premises.

18. It is therefore the finding of this court that the Hon learned Magistrate made the correct finding in law and facts when she found that no inventory was made at the time the premises were locked up. The appellant's claim on the goods that were in the workshop at the time of the closure can therefore not be ascertained. It is also clear that at the time of the closure of the premises Ndirangu & Githinji were operating there from. The learned Magistrate was therefore right in finding that there were many parties operating from the premises and the loss of the appellant's goods could not be attributed to fall under the respondent. This court therefore upholds the learned Magistrate's finding in that the appellant failed to prove his case on a balance of probability.

19. The burden of proof in civil cases was well defined in the case of **KANYUNGU NJOGU –VRS- DANIEL KIMANI MDINGI (2000) eKLR** that when the court is faced with two probabilities, it can only decide the case on a balance of probability.

It is the finding of this court that the appellant did not discharge his burden of proof to the required standard.

20. On the 2nd claim for loiss of income, I find the appellant's claim to be res-judicata as a similar issue was addressed by Hon. Justice Oguk in Meru HCC Case No. 252 of 1990.

21. The said judgment on page 16 reads as follows;-

> ***"As regards the plaintiff's claim for damages against the Council for the loss of the anticipated income from the said businesses of posho milling, I consider that he is not entitled to any such damages from the council. He was the author of his own misfortune when he decided to allow Githinji Kihohia (DW3) to set foot on the premises. In so doing, he had not consulted the Council and the Council cannot be held responsible for the losses incurred due to his vow (sic) with Githinji Kihohia over Council property. The steps taken by the council in locking the premises and keeping it under guard until the dispute is resolved is therefore commendable."***

22. In the above case in the High Court in Meru, one of the orders the appellant had sought was for general damages for loss of business and income during the period that the Council had kept the premises closed and locked up.

23. Since the above matter had been heard and determined by Hon Justice Oguk, the appellant was barred from bringing a similar claim to court. Section 7 of the Civil Procedure Act Cap 21 provides that;-

> ***"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit of the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court"***

24. The test in determining whether a matter is res - judicata was summarized in the case of **Bernard Mugo Ndegwa – vrs – James Nderitu Githae and 2 others (2010) eKLR** as follows;

> ***i) That the matter in issue is identical in both suits;***
>
> ***ii) The parties in the suit are the same;***
>
> ***iii) The similarity of the claim;***
>
> ***iv) Concurrence of jurisdiction; and***
>
> ***v) Finality of the previous decision***

Having made the foregoing findings, the appeal by the appellant is dismissed with costs to the respondent.

Dated and signed at Kakamega on this 24th day of September 2015.

**NJOKI MWANGI**

**JUDGE**

Delivered, dated and Countersigned, at Nyeri this 13th day of October 2015

**JOHN MATIVO**

**JUDGE**

In the presence of;

.....Appellant

.....Respondent

.....Court Assistant