Ongoma v Board of Management St. Catherine Primary & Technical/ Vocational Institute for Mentally Handicapped (Environment and Land Appeal E011 of 2024) [2025] KEELC 7165 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7165 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL E011 OF 2024

BN OLAO, J

OCTOBER 23, 2025

BETWEEN

PETER LUNANI ONGOMA ..... APPELLANT

AND

BOARD OF MANAGEMENT ST. CATHERINE PRIMARY & TECHNICAL/VOCATIONAL INSTITUTE FOR MENTALLY HANDICAPPED ..... RESPONDENT

(Being an appeal from Judgment and Decree of HON E. A. NYALOTI CHIEF MAGISTRATE delivered on 23rd May 2024 in Busia CM ELC Case NO E243 of 2021)

JUDGMENT

1. Peter Lunani Ongoma (the Appellant) was the Plaintiff in Busia Chief Magistrate's Court Elc Case No E243 of 2021 in which he impleaded the Board Of Management St. Catherine Primary And Technical/ vocational Institute For Mentally Handicapped (herein the Respondent) seeking various remedies arising out of a breach of lease over the land parcel No Marachi/Elukhari/2251 (the suit property). It was the Appellant's case that at all material times, he was the registered proprietor of the suit property and vide a lease agreement executed on 28th May 2011, he leased it to the Respondent at Kshs.150,000 for a period of six (6) years payable before 30th June 2011 and thereafter 20% of the net proceeds of the harvested trees planted thereon. It was also an express term of the lease agreement that the suit property shall be fenced. The six (6) year period lapsed on or about 31st May 2017 but the Respondent failed to abide by the terms of the lease and has continuously breached them. Particulars of the breach were pleaded in paragraph 7(a) to (f) of the plaint.

2. The Appellant therefore sought judgment against the Respondent in the following terms:

1. A declaration that the lease agreement executed between the Appellant and the Respondent on 28th May 2011 had lapsed and/or expired by effluxion of time on or about 31st May 2017 and the Respondents stay on the suit land constitutes trespass.

2. An order directing and commanding the Respondent through it's authorized officers to execute a surrender of lease to discharge the lease registered against the Appellant's title to the suit land and in default, the Executive Officer of this Court to execute the said surrender of lease.

3. A Court directing commanding the Respondent to fence the suit land and remove the first stands (destump) of all felled trees and in default pay to the Appellant the costs of fencing and destumping the suit property (paragraph 13).

4. An order directing and commanding the Respondent to disclose with documentary proof the value of all trees already and sold from the suit property and thereafter pay to the Appellant 25% of the net proceeds from the sale (paragraph 14).

5. A permanent injunction restraining the Respondent acting through its' servants, employees, agents and or Board Members from entering upon, cutting down or harvesting trees on the suit property without prior valuation concurrence and consent from the Appellant.

6. General damages for trespass.

7. Costs of this suit.

8. Interest on (6) and (7) above.

3. The Respondent filed a statement of defence admitting that there was a lease agreement for a consideration of Kshs.150,000 which was paid and it fenced the suit property. The Respondent however denied having breached the lease agreement and put the Appellant to strict proof thereof adding that it was the Appellant who frustrated the Respondent from harvesting the trees by preventing any entry to the suit property by using goons despite the lease agreement expressly providing that the trees shall remain the property of the leasee even in the event of a delayed harvest. The Appellant was invited to a strict proof of any loss and damage suffered. The Respondent averred further that it had not trespassed onto the suit property and the Appellant was not entitled to any of the prayers sought and this Court should compel the Appellant to allow the Respondent to harvest the remaining trees and his suit be dismissed with costs.

4. The Appellant filed a reply to defence joining issues with the Respondent and repeating the averments of his plaint.

5. The suit was heard by Hon. E. A. Nyaloti Chief Magistrate with the Appellant being the only witness who testified in support of his case while Wilberforce Kundu the PTA Chair testified on behalf of the Respondent.

6. In a reserved judgment delivered on 23rd May 2024, the trial magistrate made the following disposal orders:

   a. Judgment in favour of the Appellant for Kshs.100,000 as general damages for trespass on the Appellant's land.

   b. The Appellant was granted a permanent injunction against the Respondent.

   c. The Respondent to fence the suit property.

d. On the issue of 25% proceeds of sale of trees, the Appellant did not prove how much the Respondent sold from the harvest of the trees.

e. The Appellant was also awarded the costs of the suit and interest at Court rate from the date of judgment.

The Appellant was aggrieved by that judgment and lodged this appeal which he raised the following grounds:

1. The learned trial magistrate erred in law and in fact in misapprehending the pleadings and evidence adduced before her on the Appellant's claim for payment of 25% of the net proceeds from the sale of trees harvested from the suit property.

2. The learned trial magistrate erred in law and in fact in failing to consider and determining all issues raised before her.

3. The learned trial magistrate erred in law and in fact in failing to properly frame all the issues that fell for determination.

4. The learned trial magistrate erred in law and in fact in the exercise of her judicial discretion on assessment of damages for trespass thereby awarding damages that were inordinately low as to amount to abuse and wrong application of principles on award/ assessment of damages.

5. The learned trial magistrate erred in law and in fact in arriving at a decision that was contrary to the weight of the evidence before her.

The Appellant therefore prays that this appeal be allowed with costs and;

a. An order be issued by this Court for judgment in favour of the Appellant in terms of paragraphs 13 and 14 of the plaint.

b. The Court do re-assess the damages due and payable to the Appellant for trespass.

7. Directions having been taken that the appeal be canvassed by way of written submissions, only Mr Omondi instructed by the firm of Omondi & Company Advocates filed submissions on behalf of the Appellant. The Hon Attorney General did not attend Court nor file any submissions on behalf of the Respondent.

8. I have considered the record of appeal and the submissions by Mr Omondi.

9. This being a first appeal, my duty is to re-consider and re-evaluate the evidence on record and draw my own conclusions. In so doing, I must remember that unlike the trial Court, I neither saw nor heard the witnesses as they testified. I should therefore give due allowance in that regard and give my reasons for the decisions which I make either in up-holding or up-setting the trial magistrate's decision. In the case of Peters -v- Sunday Post Ltd 1958 E.A. 424, it was stated thus:

> " Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate so to decide."

See also Selle & Another -v- Associated Motor Boat Company Ltd 1968 E.A. 123 at page 126 where the Court said this of an appellate Court's duty:

> " ... 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 it's 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 judge's 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 demeanour of a witness is inconsistent with the evidence in the case generally."

The same route was taken in the case of Mwanasokoni -v- Kenya Bus Services Ltd 1985 KLR 931 [1985 eKLR]. I shall be guided by those precedents among others including the relevant law.

10. From the impugned judgment, the trial Court awarded the Appellant the orders of a permanent injunction, an order directing the Respondent to fence the suit property plus costs and interest. What this Court needs to reconsider is whether the trial magistrate erred in declining to award the Appellant 25% being the proceeds of the sale of trees and if the assessment of general damages of Kshs.100,000 was insufficient.

11. With regard to failure to award the Appellant 25% of the proceeds of sale of the trees harvested from the suit property, this is how the trial Court addressed that claim in paragraph 30 of the impugned judgment:

> 30: "On the issue of the 25% proceeds of the sale of the trees, I am satisfied that the Plaintiff did not prove how much the Defendant sold from the harvest of the trees."
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> On that issue, the Appellant had pleaded in paragraph eight (8) of his plaint that:
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> 8: "The Plaintiff further states that by a letter dated 17th March 2020, the Defendant through its secretary undertook to fence, destump, vacate from the suit land on or before 1st July 2020 and pay the Plaintiff 25% of the sale proceeds. The Defendant failed to honour the undertaking."
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> The letter dated 17th March 2020 and addressed to the Appellant's counsel was among the Appellant's documentary evidence produced during the trial on 6th November 2023. Paragraphs 2, 3 and 4 which are relevant read as follows:
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> 2: "The 1st harvest was generally used internally in the construction of the school building. These was valued at Ksh.79,100 for 362 poles. Therefore 20% will be paid after we have sold the trees. The former Board of Management skipped and we are sorry for the inconvenience to your client.
>
> Referring to (1) above, we undertake to dispose off the trees by 1st July and pay Mr Peter Lunani 25% of the proceeds as an appreciation for his patience and understanding.
>
> That we shall undertake to repair the fence and destump the land as soon as possible but not later than 1st July 2020."

During the plenary hearing, the Respondents witness Wilberforce Kundu confirmed that indeed the Appellant was owed money for the trees harvested from the suit property. This is what he said when cross-examined by Mr OmondI on 16th November 2023.

> " The head teacher of the school read the letter. The letter indicates that the school have no trees. The school harvested the trees three times. I do not know the value of the 2nd and 3rd harvest. I do not have the number of the principal of the school. The school was supposed to fence the land. The school did not repair the fence. The school has not paid the Plaintiff any money. I was not present when the harvesting of the trees was done. I do not have a letter from the management to appear in Court. There was a meeting last month that authorized me to appear in Court and testify. The Plaintiff was entitled to 20% after every harvest."
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> Annexed to the letter dated 17th March 2020 was the following tabulation:
>
> > " Sales Of The Trees
> >
> > 1st Harvest - 198 poles - 49,500
> >
> > 2nd Harvest - 64 poles - 9,600
> >
> > 3rd Harvest - 100 poles - 20,000
> >
> > Total - 79,100"
>
> This claim of 25% of being the value of the sale proceeds from the trees was therefore in the nature of a special damages claim. The law is that the same must be specifically pleaded and proved with a degree of certainty and particularly – Richard Okuku Oloo -v- South Nyanza Sugar Company Ltd 2013 eKLR. In his submissions on this issue counsel for the Appellant has stated at paragraph 11 on page 3 that:
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> > " In her judgment the trial magistrate rendered herself thus:
> >
> > > 'I am satisfied that the Plaintiff did not prove how much the Defendant sold from the harvest of trees.' This was an obvious misdirection. The claim as pleaded did not require the Appellant to prove how much the Respondent had fetched from the sale of harvested trees. The Appellant was required to prove 1st that he was entitled to the said 25% of the proceeds from the harvested trees and show that the Respondent had harvested trees but failed to account for the proceeds and pay the Appellant as agreed."
>
> Counsel cannot be correct when he submits that "the claim as pleaded did not require the Appellant to prove how much the Respondent had fetched from the sale of trees". The Appellant's own documentary evidence cited above has tabulated what the Respondent fetched from the three (3) harvests of trees to Kshs.79,100. Similarly, in the letter dated 17th March 2020 that figure was mentioned. This was not a case where the Appellant had no clue of what the Respondent fetched from the trees. This was not really a case where the trial Court could invoke Section 112 of the *Evidence Act* as submitted. Besides, the letter dated 17th March 2020 was produced by the Appellant himself so it is not proper for the Appellant's counsel to submit, as he has done, that "by writing the value of trees and the number in ink while the letter

was typed the Respondent created a doubt on the truthfulness of the information" and that "it is inconceivable that the Respondent could only have harvested only 326 poles on 3.27Ha of land on 3 occasions". Cleary the Appellant should have tabulated the special damages because he had the information which he filed and thereafter he should have specifically pleaded and roved the special damages. The trial Court did not err in law or in fact in declining that prayer. That finding must be up-held.

12. With regard to the claim that the award of Kshs.100,000 as general damages was inordinately low, such damages are the discretion of the trial Court. In the case of Butt -v- Khan C.a. Civil Appeal No 40 of 1977, it was held 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."

In the circumstances of this appeal, the trial magistrate did not give any reasons why she thought the award of Kshs.100,000 was sufficient. Further, she did not consider the undisputed fact that the lease had lapsed or expired by effluxion of time on or about 31st May 2017 and so by the time this suit was filed on 11th May 2021, the Respondent had trespassed on the suit properly for four (4) years. Counsel for the Appellant has submitted that an award of between Kshs.500,000 to Kshs.1,000,000 would have sufficed as fair compensation. I think if the trial magistrate had taken that period into account and also the fact that the Respondent had earned an income from the suit property by harvesting tree therefrom, she would not have awarded the sum of Kshs.100,000 in general damages which sum was clearly inordinately low and this Court must interfere with the same. An award at Kshs.600,000 will serve the ends of justice in the circumstances of this case.

13. The up-shot of all the above is that having considered the appeal, this Court makes the following disposal orders:

    1. The judgment delivered on 23rd May 2024 is up-held save that the award of general damages is enhanced to Kshs.600,000.

    2. The Appellant shall have half the costs of the appeal and in the Court below together with interest.

BOAZ N. OLAO

JUDGE

23RD OCTOBER 2025

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 23RD DAY OF OCTOBER 2025.

Right of Appeal.

BOAZ N. OLAO

JUDGE

23RD OCTOBER 2025