REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CIVIL APPEAL NO.8 OF 2018

THE COUNTY LANDS REGISTRAR, KIAMBU.............................1ST APPELLANT

THE DEPUTY COUNTY COMMISSIONER...................................2ND APPELLANT

THE HON. ATTORNEY GENERAL..3RD APPELLANT

-VERSUS-

REUBEN WAMBORA KAROBA...RESPONDENT

(Being an Appeal from the Judgment and Decree of the Principal Magistrates Court

at Githunguri by Hon. C. Kutwa, delivered on 22nd March 2018

in Githunguri PMCC No.3 of 2016)

REUBEN WAMBORA KAROBA...PLAINTIFF

AND

THE COUNTY LANDS REGISTRAR, KIAMBU.............................1ST DEFENDANT

THE DEPUTY COUNTY COMMISSIONER...................................2ND DEFENDANT

THE HON. ATTORNEY GENERAL..3RD DEFENDANT

JUDGMENT

The Respondent herein ***Reuben Wambora Karoba*** filed ***Civil Suit No.3 of 2016*** at the ***Chief Magistrates Court Githunguri*** on ***10th February 2016***. The claim was against the Appellants herein and he sought for:-

a) Special damages of Kshs.953,430/=.

b) Cost of the suit.

c) Interest on (a) & (b) above.

d) Any other or further orders that the court may deem fit to grant.

In the said claim, the Respondent had averred that on the 4th august 2014,

on the instructions of the 2nd Defendant, the 1st Defendant unlawfully and without justifiable cause placed a restriction on the Respondent's property known as ***LR.No.Githunguri/Githiga/T.408***. He further alleged that sometimes in ***July 2014***, he instructed ***Development Valuers*** to conduct a ***Development Valuation*** on the suit property and consequently a Search was conducted on the suit property at ***Kiambu Land***

Registry on or about ***5th November 2014***. After the Search, the results showed there was a restriction placed on the suit property. He contended that prior to the placing of the restrictions, the 1st Defendant (now Appellant) never informed him about the said restriction. Further that the Respondent (Plaintiff in ***CMCC No.3 of 2016***) filed a Judicial Review application for the removal of the said illegal restriction and the said Judicial Review application was successful and the decision to place such restriction was revoked.

It was his further contention that he instructed the ***Development Valuer*** to carry another Valuation on the suit property after the removal of the restriction. However, the Bill of Quantities brought a variation of ***Kshs.953,430/=.*** He therefore contended that the variation was solely as a result of delay caused by the restriction which had been placed on the suit property hence making it impossible for him to transact. That though the Respondent (Plaintiff thereon) had made demand to the Appellants (Defendants thereon) to indemnify him for the loss incurred, the Appellants (Defendants thereon) negligently ignored and refused to compensate him. The Respondent had urged the trial Court to enter Judgment in his favour.

The Appellants herein through the office of the Attorney General had filed their Defence on ***September 19th 2016*** and denied all the allegations made in the Plaint. The Appellants had denied that the Respondent did incur any loss or at all and did put him to strict proof. They however admitted institution of ***HCC.JR.Misc.Civil Application No.31 of 2015,*** as alleged by the Respondent. It was the Appellants' contention that the Respondent's suit did not disclose any reasonable cause of action against them and they prayed for the dismissal of the Respondent's (Plaintiff) suit. After the Pre-trial Directions, the matter was fixed for hearing on ***3rd August 2019*** before ***Hon. C. Kutwa, Principal Magistrate*** wherein the Plaintiff gave evidence for himself and called one witness.

The Respondent herein who was the Plaintiff before the trial court gave evidence and adopted his witness statement fully. He also produced ***exhibits No.1, 2, 5 & 6***. However, documents **No.3, 4, & 7** were to be produced by an expert. In cross-examination, the Respondent confirmed that the suit property was initially filed by his father ***John Karoba***. He also admitted that one ***Mburu Karoba,*** is his step-brother and the said **Mburu Karoba** wrote a letter to the Deputy County Commissioner requesting him to place a restriction on the suit property ***Githunguri/Githiga/T.408***. He confirmed in cross-examination that the ***Land Registrar Kiambu*** placed a caution or restriction on the suit property on ***4th August 2014,*** and that he had become the registered owner of the suit property on ***28th July 2014***. It was also his admission that the ***Deputy County Commissioner*** is responsible for security and was entitled to put a caution on the suit property. He also acknowledged that the said ***Mburu Karoba,*** withdrew the complaint on ***2nd February 2015*** and the said caution was removed on ***6th March 2015***. He however obtained the ***Court Order*** on ***19th March 2015,*** and was issued on ***20th March 2015***. He testified that the restriction was removed before the Court Order was issued and that it had been placed via a complaint made by his brother. However due to the said restriction, he suffered loss but he did not sue his brother. It was his evidence that the 2nd Defendant (Appellant) summoned him but by then he had already gone to court. He further stated that it was the 2nd Defendant(Appellant) who placed the caution on ***4th August 2014,*** at the instigation of his brother ***Mburu Karoba*** who was the Chairman of CDF Githunguri.

On ***11th January 2018, PW2 David Muchemi Mathenge*** testified and averred that he is a ***Quantity Surveyor***. He confirmed that he prepared the ***Bill of Quantities*** attached to the further list of documents and stated that the ***two Bill of Quantities*** gave estimates of costing the construction. He however did not produce the said Bill of Quantities as exhibits.

On the part of the Defendants, two witnesses were called. ***DW1 – Edward Ndegwa,*** the ***Deputy County Commissioner*** who testified that in ***2014***, the Plaintiff's brother requested for placing of a restriction on the suit property vide a letter dated ***1st August 2014*** marked as ***exhibit 1***. That their office responded to ***Mburu Karoba's*** letter vide a letter to the ***Land Registrar - D.Exhibit No.2***. That on the basis of the said complaint, he invited the two brothers vide a letter dated ***28th January 2018,*** as he wanted to hear from the two brothers. The said letter was produced as ***exhibit No.3***. However via a letter dated ***2nd February 2015***, the said ***Mburu Karoba*** stated that he had no interest on the land and on ***12th February 2015,*** the office of DW1 wrote to ***Land Registrar Kiambu***, to remove the restriction. The said letter was produced as ***exhibit 5***. He confirmed that the restriction was eventually removed in the ***year 2015,*** and his office had no interest in the matter. That their intention was to ensure there was no conflict between the two brothers and that they did not stop the Plaintiff from developing the land. He confirmed in cross-examination that the complaint by ***Mburu Karoba*** was that the land was a family land and the search showed the land was registered in the name of the Plaintiff (Respondent herein). It was his testimony that they did not investigate the complaint and he did not know for what purpose the Plaintiff (Respondent herein) was to use the land for.

DW2 – Robert Muthuki the ***Land Registrar Kiambu*** confirmed that

his office received a letter from the ***County Commissioner,*** which requested them to act. He confirmed that he acted on the letter and placed a caution on the said land. He however removed the caution on ***6th March 2015*** and later received a ***Decree*** dated ***19th March 2015,*** but by then the restriction had already been removed. He testified that he was not aware if a restriction can stop development. In cross-examination he confirmed that he was aware of the procedure for placing a restriction on a parcel of land. He further confirmed that his action of placing a caution was quashed by the court. He also confirmed that he did not invite the parties for the removal of the restriction and that with restriction, the Plaintiff (Respondent) could not obtain any loan.

After the *viva voce* evidence, parties filed their respective written submission and on ***22nd March 2018***, the trial court entered ***Judgment*** in favour of the Plaintiff (Respondent herein) for ***Kshs.933,430/=*** plus costs and interest. A ***Decree*** to that effect was drawn on ***10th May 2018*** and the total decretal sum was quantified at ***Kshs.1,201,322/=*** plus costs of ***Kshs.139,756.50/=.***

The Appellants were aggrieved by the above determination of the court and the Decree thereon and they have sought to challenge the said Decree through the ***Memorandum of Appeal*** filed on ***19th April 2018***. The Appellants sought for setting aside of the Judgment delivered on ***22nd March 2018*** by ***Hon. C. Kutwa***, ***Principal Magistrate Githunguri*** and that the same be substituted with an Order for dismissal of the suit with costs.

The grounds upon which the Appellants sought for the Appeal to be allowed are:-

1) That the learned Magistrate erred in law and in fact in finding that the Respondent's claim for special damages was proved on a balance of probabilities despite the failure by the Respondent to adduce evidence to support such claim.

2) That the learned Magistrate erred in law and in fact for relying on Bill of Quantities which were neither marked for identification nor produced as exhibits as required by law.

3) That the learned Magistrate erred in law and in fact in awarding the Plaintiff a sum of Kshs.953,430/= as special damages on the basis of Bill of Quantities not produced as exhibits hence not specifically proved.

4) That the learned Magistrate erred in law and in fact on relying on a Bill of Quantities dated July 2014 and filed in court on 10th November 2017 when the pleadings had closed and without leave of court to file the same out of time and which Bill of Quantities was not produced as exhibit.

5) That the learned Magistrate erred in law and in fact in awarding costs and interest to the Respondent.

6) That consequently the learned Magistrate's decision occasioned a miscarriage of justice.

The Appeal is opposed by the Respondent who though did not file any ***Grounds of Opposition*** had alleged in a ***Replying Affidavit*** to the initial interlocutory application for Stay of Execution of the Judgment that the Memorandum of Appeal did not raise any triable issues.

Vide a Consent filed in court on ***29th October 2018***, the parties consented to have the ***Notice of Motion*** dated ***15th May 2018,*** allowed in terms of prayer No.2 with no orders as to costs. They also consented to have the Appeal admitted and the same be canvassed by way of written submissions.

In compliance thereof, the Appellants through the Litigation Counsel for the Attorney General, ***Rose Nyawira*** filed the written submissions on ***31st October 2018,*** and urged the court to allow the Appeal with costs to the Appellants. It was their contention that the Bill of Quantities (BQs) were not produced by the Respondent. Though the same were to be produced by an expert who was called as PW2, the said PW2 only testified on how he prepared all the three Bill of Quantities but did not produce them as exhibits. However, the trial Magistrate in his Judgment alluded that the Respondent did produce all the three Bill of Quantities and used the said exhibits to award special damaged of ***Kshs.935,430/=.*** The Appellant relied on the case of ***Delta Haulage Services Ltd…Vs…***

Complast Industries Ltd & Another (2015)eKLR, where the Court held that:-

> ***"It is clear that for a document to be said to form part of evidence at a trial, the same must be availed at the trial, a witness should testify on it by identifying the same and thereupon produce the same as evidence. A witness produce a document by stating that he wishes to produce it as evidence or exhibit or rely on it as is evidence. Upon such production, it is then marked as exhibit. It is only then that a document can be said to have been produced at trial".***

The Appellants further submitted that the Respondent did not specifically prove the damages awarded. It was submitted that though the Respondent (Plaintiff therein) identified the two ***Valuation Reports*** in his report, he did not make any reference or produce any Valuation Report. It was further submitted that though the trial court found that PW2 was able to proof that the valuation in the two Bills of Quantities was ***Kshs.935,430/=*** which was a result of the restriction placed on the suit land by the 1st Appellant, the said Bill of Quantities that the trial court relied on were never produced and therefore the special damages were not strictly proved. The Appellants still relied on the case ***of Delta Haulage Services Ltd (supra)*** where the Court held that:-

> ***"In this regard, a claim for special damages must not only be pleaded but must be strictly proved".***

Upon the above submissions and the cited authorities, the Court was urged to uphold the Appeal and dismiss the Respondent's case as determined by the trial court.

On the part of the Respondents, the ***Law Firm of Ojienda & Co. Advocates*** filed their written submissions on ***13th November 2018*** and urged the Court to dismiss the Appellant's Appeal.

It was submitted that the trial Magistrate's decision was sound and should not be disturbed. It was further submitted that the issues raised by the Appellants' herein ought to have been raised during the trial. That the Appellants fully participated in the trial and no objection was raised when the documents were served upon the Appellants and the Appellants cannot raise objection to the said documents at this juncture. Further the Respondent submitted that the Bill of Quantities were produced as part of the Respondent's evidence during the trial when the court recorded that ***'list of documents is adopted as evidence and the documents were produced as exhibit No.1 to 5 respectively***.' It was the Respondent's submission that the Appellants did not object to the said production and the court did comply with ***Order 3 Rule 2*** of the ***Civil Procedure Rules***. The Respondent relied on ***Section 144*** of the ***Evidence Act*** and the decision in the case of ***Chairman, Secretary & Treasurer suing as the officials on behalf of House of Hope…Vs…Wotta-House Ltd (2018) eKLR***, where the Court held that:-

> ***"An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."***

The Respondent also relied on the case of ***<u>Kenneth Nyaga Mwige..Vs</u>***

<u>Vs…Austin Kiguta & 2 Others (2015) eKLR</u>, where the Court held that:-

> ***"The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disapproved. <u>First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case</u> (emphasis added). When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disapproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record."***

It was the Respondent's submissions that all the stages of production of documents or exhibits and in our case Bill of Quantities were well followed and the trial court was right to consider the said exhibits. It was also submitted that though the Appellants were given an opportunity to cross-examine on the said documents, they declined to do so and therefore the documents were produced at the hearing.

On whether the award of ***Kshs.953,430/=*** was based on the Bill of Quantities, it was submitted that the two Bill of Quantities produced by the Respondent had a variance of ***Kshs.953,430/=*** and the increase in costs was caused by the delay caused by the restriction placed on the suit property. The said aspect was not denied by the Appellant on whether the Respondent was entitled to costs. It was submitted that as provided by ***Section 26*** of the ***Civil Procedure Act***, costs follow the event and is granted at the discretion of the court. The Respondent was the successful litigant who had suffered as a result of placing of the restriction. Therefore the Respondent was entitled to costs of the suit.

The above are therefore the pleadings, evidence and the determination of the trial court. Further the Court has summarized the submissions of the parties before this court. This court is now called upon to make a determination of the Appeal filed by the Appellants as provided by ***Section 78*** of the ***Civil Procedure Act***. The court is called upon to analyse the whole evidence, evaluate, assess, weigh, interrogate and scrutinize the said evidence and arrive at its own independent conclusion.

Further, the Court will caution itself that it neither saw nor heard the witnesses and must therefore give allowance for that. Again the findings of the trial court must be given due deference unless, it falls foul of proper evaluation of the evidence on record or the trial Magistrate acted on wrong principles in arriving at his findings. See the case of ***<u>Selle….Vs….</u>***

<u>Associated Mobi Boat Co.(1968) EA 123</u>, where the Court held that:-

> ***"An Appeal to this Court from a trial by the High 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 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 the demeanour of a witness is inconsistent with the evidence in the case generally". <u>(See Abdul Hameed Saif…Vs…Ali Mohamed Sholah [1955] 22 EACA 270).</u>***

Further as the court determined this Appeal, it takes into account that the court will only interfere with the discretion of the trial court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as are known the decision is plainly wrong. (See the case of ***<u>Ocean Freight Shipping Co. Ltd…Vs…Oakdale Commodities Ltd, Civil App.No.198 of 1995).</u>***

After a thorough consideration of the available evidence, it is not in doubt that a restriction had been placed on the suit property ***Githunguri/Githiga/T.403***. There is also no doubt that the Respondent did file ***Civil Suit No.3 of 2016*** at ***Githunguri Chief Magistrates Court***. Further, it is evident that Judgment was entered in favour of the Respondent wherein the Appellants were condemned to pay the Respondent ***Kshs.935,430/=*** plus costs and interest. A Decree has been drawn to that effect. It is also evident that in arriving at the figure of ***Kshs.935,430/=*** the trial Magistrate relied on the Bill of Quantities that were referred to by the Respondent and his witness.

The Appellants have alleged that the trial Magistrate erred in law and in fact in relying on Bill of Quantities which were neither marked for identification nor produced as exhibits as required by law.

The Court has seen the court records as filed by the Appellants. The Respondent filed the list of documents on ***10th February 2016.*** On ***29th June 2017***, the matter was placed before the trial Magistrate for Pre-trial directions and it was indicated that the parties had complied and therefore the suit was marked as ready for trial. For that reason, the matter was placed for hearing on ***3rd August 2017,*** wherein the Plaintiff (Respondent herein) adopted his witness statement and produced ***exhibits No.1 to 5*** in the list of documents filed in court on ***10th February 2018***. However, the court further recorded that ***exhibits No.3, 4 & 7*** were to be proved by the expert.

From the court record, it is also evident that on ***11th January 2018***, PW2 who is allegedly the expert referred to by the trial court gave evidence and stated that he prepared the Bill of Quantities attached to the further list of documents and the initial list of documents. He did not produce the Bill of Quantities on the further list of documents as exhibit in court. Further the Plaintiff's further list of documents was filed in court on ***10th November 2017,*** after the closure of Pre-trial directions. There was no evidence that the said filing of further list of

documents was done with the Leave of the court. The said list of further documents therefore did not form part of the documents to be produced in court. Even after the trial Magistrate alluded to the fact that ***exhibits No.3, 4 & 7*** on the initial list of documents were to be proved by the expert, the said expert PW2 did not produce them. These documents were ***Specifications and Bill of Quantities*** dated ***July 2015***, ***Construction Plan*** and ***Specification and Bill of Quantities*** dated ***April 2015***.

From the court records, it is not clear whether the ***exhibits No.3, 4 & 7*** which the trial Magistrate relied on to arrive at a figure of ***Kshs.935,430/=*** were produced. This is because on record, he stated that the said exhibits would be proved by an expert witness and when the expert witness appeared in court, he did not produce them.

The court will be guided by the findings in Court of Appeal in the case of ***Kenneth Nyaga Mwige..Vs…Austin Kiguta & 2 Others, Nairobi Civil Appeal NO.140 of 2008***, where the Court held that:-

> ***"The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disapproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disapproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.***
>
> ***The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.***
>
> ***Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account".***

From the trial Magistrate's record, ***exhibits No.3, 4 & 7*** were to be proved by the expert witness who was to testify on them and tender them as exhibits in court. PW2 did not do so and though the said exhibits were identified by PW1, they were not properly produced as exhibits by PW2. The said ***exhibits No.3, 4 & 7*** were not formerly produced by the expert and it was therefore wrong for the trial Magistrate to rely on them.

On the further list of documents though ***Order 18 Rule 10*** of the ***Civil Procedure Rules*** and ***Section 146*** of the ***Evidence Act*** allows for parties to call further evidence or produce further documents, the said provisions of law do not exist in vacuum. The Court must give Leave to a party who wishes to introduce new evidence after the closure of the time lines. The Respondent herein introduced a further list of documents without Leave of the court.

Having found that the Bill of Quantities were not formally produced by the expert, then the Court finds that since the Respondent had sought for special damages of ***Kshs.935,430/=*** that prayer was not specifically proved. It is trite that special damages must be specifically proved as was held in the case of ***Hahn …Vs…Singh, Civil Appeal No.42 of 1983 (1985) KLR 716,*** where the Court held that:-

> ***"Special damages must not only be specifically claimed (pleaded) but also strictly proved…. for they are not the direct natural or probable consequence of the act complained of and may not be interred from the act. The decree of certainty and particularly of proof required depends on the circumstances and nature of the acts themselves".***

On the issue of costs, it is trite law that costs are awarded at the discretion of the court. However, costs do follow the event. Having found that the trial Magistrate erred in awarding special damages based on Bill of Quantities that were nor formally produced, then this Court finds that the Respondent cannot be said to have been a successful litigant and was not entitled to costs of the suit and interest thereon.

Having now carefully considered the available evidence, and having evaluated it and having come to its own independent decision, the Court finds and holds that the trial Magistrate erred in law and in fact by relying on documents that were not properly or formally produced and also awarded special damages that were not specifically proved.

The upshot of the foregoing is that the Court finds the Appellants' Appeal is merited and the same is allowed entirely by setting aside the Judgment dated and delivered on ***22nd March 2018*** by ***Hon C. Kutwa*** and instead substitute it with an Order of dismissal of the entire suit as filed by the Respondent (Plaintiff thereon) with costs to the Appellants (Defendants therein).

On this Appeal, each of the party to bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 4th day of October 2019

L. GACHERU

JUDGE

4/10/2019

In the presence of

No appearance for the Appellants though served with Judgment Notice

No appearance for the Respondent though served with Judgment Notice

Lucy - Court Assistant

L. GACHERU

JUDGE

4/10/2019