



REPUBLIC OF KENYA



KENYA LAW
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**Manyara v Muracha (Environment and Land Appeal E092 of 2021)
[2024] KEELC 96 (KLR) (15 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 96 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E092 OF 2021
EK WABWOTO, J
JANUARY 15, 2024**

BETWEEN

FRANCIS G MANYARA APPELLANT

AND

RICHARD MURACHA RESPONDENT

(Being an Appeal from the Judgement and Decree of the Chief Magistrate Court of Kenya at Nairobi (the Honourable G. Mmasi Senior Principal Magistrate dated and delivered at Nairobi on the 2nd day of October 2019 in Milimani Chief Magistrate Court Civil Suit No. 3111 of 2018)

JUDGMENT

1. This appeal is against at the judgement of Hon. G. Mmasi SPM in respect to Milimani Commercial Court Civil Case No. 3111 of 2018 which judgement was delivered on 2nd October 2019. The Learned Magistrate in her judgment delivered on 2nd October 2019 declined to grant any general and special damages to the appellant for the reasons that the same had not been proved.
2. Aggrieved by the said judgement and decree the Appellant filed a Memorandum of Appeal dated 1st December 2021. The singular ground raised in the memorandum of Appeal was that be learned trial magistrate erred in law by declining to grant any general damages on the ground that the same had not been proved to be satisfaction of the Court contrary to the well settled principle of law that assessment of general damages must be undertaken by the said Court even if the suit is dismissed.
3. The Appellant thus prayed that the Appeal be allowed and part of the judgment be set aside and substituted with a judgment.



- a) Allowing prayer (c) of the Appellant Plaint dated 11th December 2017 and filed in Court on 13th December 2017 and filed in court on 13th December 2017 at the rate that will be assessed by court upon assessment of general damages as envisaged by law.
 - b) Assessing the General Damages payable to the Appellant in Nairobi Chief Magistrates Court, Civil Suit No. 3111 of 2018.
 - c) Directing that the Respondent pays the costs and interest of the proceedings before this Honourable Court as well as the client Magistrates Court in Nairobi where this Appeal enacted from.
4. The parties canvassed the Appeal by way of written submissions. The appellant filed written submissions and authorities in support of the appeal. The appellant's written submissions were dated 18th January 2023 and were filed by F.A. Badia & Co. Advocates. The Respondent filed his written submissions and authorities in opposition to the appeal through the firm of Wafula Washika & Associates. The submissions were dated 20th February 2023.

The Appellant's written Submissions

5. The Appellant outlined four issues for determination by this Court. These were: -
 - i) Whether the learned trial magistrate erred in law and in fact in so far as she failed to undertake an assessment of general damages despite the appellant having proved his case at lower court on a balance of probabilities as envisaged by law.
 - ii) Whether this Court sitting as an appellant Court by virtue of Section 78 of the *Civil Procedure Act* has jurisdiction to undertake assessment of general damages.
 - iii) What is quantum of general damages payable by the Respondent as direct consequences of his illegal activities on the Appellant's suit property.
 - iv) Whether the Appellant is entitled to costs and interest of the suit at the lower Court as well as this Appeal.
6. Replying on Section 78 of the *Civil Procedure Act* and the cases of Nairobi Civil Appeal 29 of 2010 Masinga Ndonga Ndongye -vs- Kualam Limited, Nyeri Civil Appeal 181 of 2011 Andrew Mwori Kasaya -vs- Kenya Bus Service and Gladys Wanjiru Njaramba -vs- Globe Pharmacy and Another [2014]KLR, it was submitted that the learned magistrate misdirected herself in law by failing to undertake an assessment of general damages that would have been awarded to the Appellant as against the Respondent more so when the Appellant was successful in his suit against the Respondent in the lower Court at the rate of 100%.
7. It was further submitted that pursuant to Section 78 of the *Civil Procedure Act* this Court has jurisdiction to undertake an assessment of general damages where the same was not done by the lower Court. The Court was urged to proceed and undertake the exercise of assessment of general damages.
8. The Appellant argued that having succeeded 100% in his suit as against the Respondent in the lower Court also based on the Engineer's Assessment Report on Mr. Francis G. Manyora's property on plot No. L.R. 105/587, prayed for a sum of Kshs. 3,000,000/= as fair and just compensation to the Appellant for the wanton and illegal activities of the Respondent upon his property.



9. On costs and interest, it was submitted that the Appellant is entitled to the same including costs of the Lower Court and Court of Appeal. Reliance was made to the case of Nairobi Civil Appeal No. 29 of 2010, Masinga Ndonga Ndonge -vs- Kualam Limited.

The Respondent's submissions

10. The respondent submitted as that an award of general damages was not tenable since the evidence presented before the court did not support the it. The respondent also argued that the appellant's own expert report having stated that the appellant had not presently suffered damages but that a continuation of the ingress of water may lead to damage, the subordinate court could not as at that point make a lawful award for damages. The respondent submitted that damages would have been suffered in the event that the flow of water was not addressed which in this case was. Reliance was placed to the case of Hurligham Park Limited vs Kings Developers Limited & Another [2020] eKLR where the court found that an ward of general damages for nuisance was established where NEMA had stopped the defendant's development for failure to install appropriate protective barriers as well as issued an improvement notice.
11. It was also submitted that the plaint did not also state the damages suffered by the appellant herein.
12. It was further submitted that the plaint did not specifically sought for general damages save for prayers sought and further that the expert report did not confirm any damages at all. The Court was urged to dismiss the appeal with costs.

Analysis and determination

13. The Court has considered the entire record of appeal, the written submissions and authorities filed by the parties. This being a first Appeal, this court is required to re-evaluate the evidence tendered before the Tribunal and make its own findings and conclusions as was held in the case of China Zhingxing Construction Company Ltd vs Ann Akuru Sophia [2020] eKLR and also Selle vs Associated Motor Boat Company Ltd [1968] EA 123. The High Court in the China Zhongxing Construction Company Ltd case (supra) cited the Court of Appeal for East Africa in Peters vs Sunday Post Limited [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484.”

From the foregoing, I just wish to reiterate that the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.

14. The Court is of the view that the following issues stand out as key issues for determination which can dispose of the appeal. These are:-
 - i. Whether the Trial Magistrate erred in failing to undertake an assessment of general damages.



- ii. What are the appropriate reliefs to grant herein.
15. It was the appellant's contention that the trial magistrate misdirected herself in law in failing to undertake an assessment of general damages that would have been awarded to the Appellant. It was argued that the learned trial magistrate had concluded that the appellant had proved his case on a balance of probabilities and hence ought to have assessed and awarded damages. The respondent faulted the appellant's position and argued that the plaint as filed in the subordinate court save for a prayer on general damages does not state the damages suffered by the appellant and further that the expert report did not confirm any damages at all.
 16. The learned trial magistrate in her judgment declined to grant any general damages as the same have not been proved to the satisfaction of this Court
 17. Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove his case Section 107 of the *Evidence Act* stipulates that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Section 109 stipulates that the burden of proof of any particular fact lies on the person who wishes the court to believe in its existence. On the other hand, Section 108 of the *Evidence Act* stipulates that the burden lies on the person who would fail if no evidence at all were given on either side.
 18. Damages are sums of money awarded in order to put the injured party in the same position as he would have been had he not sustained the wrong for which he is now getting his compensation or reparation, see case of Livingstone -vs- Rawyard's Coal Co. (1880) 5 App Case 25 (United Kingdom House of Lord's).
 19. In exercise of its jurisdiction, the ELC has powers to make an Order for the award of damages as stipulated under Section 13(7) (c) of the ELC Act.
 20. Order 2 Rule 11(4) of the Civil Procedure Rules provides that allegations that a party has suffered damage and any allegations as to the quantum of damage are deemed to have been traversed unless the same is specifically admitted.
 21. Further in the case of Strom's Bruks Akhe Bolag vs Hutchisen (1905) AC 515 Lord MacNauhten held that; "General damages are such as the law will pressure to be direct natural and probable consequences of the action complained of".
 22. In the case of Kenya Bus Services & Another -vs- Fredrick Mayard (1997) 2 KAR 232, the Court of Appeal held that;

"The principles on which an appellate Court will interfere with the trial judge's assessment of damages are well settled in the Court of Appeal. The Court will only interfere where an error of principle by the Trial Judge is shown, or so high or so low that they must be wholly erroneous estimate and an error of principle must be interred."
 23. In the instant case, the learned trial magistrate having held and found that the appellant had proved his case to the required standard fell into error by not assessing the award of general damages he would have awarded to the appellant.
 24. In view of the before this Court shall now proceed and assess damages for the appellant. The appellant in his submissions urged the Court to award a sum of Kshs. 3,000,000/= as fair and just compensation for damages. The Respondent on the other hand did not submit on any figure save for his retaliation



that the Appellant was not entitled to general damages on the basis that the expert report did not confirm any damages.

25. Considering all the circumstances of this case, this Court is of the view that an award of general damages in the sum of Kshs.500,000/= would be adequate compensation to the appellant owing to the Respondent's actions. The appellant will also have costs of the Appeal. This court further directs that the award of interest shall be from the date of the judgment of the lower court until payment in full.

Final orders

26. In conclusion the appeal by the Appellant succeeds and part of the judgment before the lower court is set aside and substituted with the following orders: -
- i. General damages of Kshs.500,000/=.
 - ii. Costs of the judgment of the lower court and the Appeal to be paid by the respondent.
 - iii. Interest at court rate and the same to accrue from the date of judgment of the lower court until payment in full.

Judgement Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF JANUARY 2024.

E.K. WABWOTO

JUDGE

In the presence of:-

N/A for Appellant.

Mr. Washika for the Respondent.

