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Macharia & another v Gatuna (Environment and Land Appeal 35 of 2023) [2024] KEELC 1152 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1152 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT AND LAND APPEAL 35 OF 2023

YM ANGIMA, J

FEBRUARY 29, 2024

BETWEEN

WAINAINA MACHARIA .... 1ST APPELLANT

WILLIAM NJIHIA KIMANI .... 2ND APPELLANT

AND

JAMES NGURU GATUNA .... RESPONDENT

(An appeal against the judgment and decree of Hon. J.H.S. Wanyanga (SRM) dated 19/11/2021 in Nyahururu CM ELC No. 212 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. J.H.S. Wanyanga (SRM) dated 19.11.2021 in Nyahururu CM ELC No. 212 of 2018 – James Nguru Gatuna -vs- Wainaina Macharia & William Njihia Kimani. By the said judgment, the trial court found the Appellants liable for trespass and causing damage to the Respondent's property and entered judgment against them jointly and severally. The trial court also awarded the Respondent costs of the suit.

B. Background

2. The material on record shows that vide a plaint dated 05.04.2016 and amended on 01.02.2018 the Respondent sued the 1st Appellant seeking the following reliefs against him:

   a. Special damages of Kshs.201,500/= aforesaid.

   b. General damages.

   c. Mesne profits from 04.03.2016 until the final determination of this case.

d. Costs of this suit.

e. Interest on a, b and c above at court rates.

f. Any other further and better reliefs as this honourable court may deem fit and expedient to grant.

3. The Respondent pleaded that at all material times he was the registered proprietor of Title No. Nyandarua/Ol-Aragwai/7867 (the suit property). He pleaded that on diverse dates between 2016 and 2018 the 1st Appellant had entered the suit property and, inter alia, and wrongfully uprooted the beacons marking its boundaries, removed the fencing posts and barbed wire, and destroyed his crops growing thereon. It was pleaded that in 2018 the 1st Appellant had wrongfully sprayed the 1st Respondent's maize crop with an agrochemical substance causing it to dry and thereafter planted hay grass on the suit property.

4. The Respondent pleaded that the 1st Appellant had destroyed his fence at least twice and on each occasion he incurred financial expenses in re-instating the fence and also reinstating the beacons. He pleaded various particulars of special damage in his amended plaint and contended that the Respondent was liable for the loss incurred.

5. The Respondent pleaded that in spite of issuance of a demand and notice of intention to sue, the 1st Appellant had failed to make good his claim hence rendering the suit necessary.

6. The record shows that the 1st Appellant filed a written statement of defence dated 14.10.2019 denying liability for the Respondent's claim. He simply made a general denial denying all the allegations contained in the amended plaint. He denied that the Respondent was the owner of the suit property and denied having entered the same and caused damage thereon. He consequently prayed for dismissal of the Respondent's suit with costs.

7. It would appear that vide a notice of motion dated 27.09.2018 the 2nd Appellant sought to be joined as an interested party in the suit on the basis that he was the rightful owner of the suit property. He contended that the suit property was merely a sub-division of his Title No. Nyandarua/Ol Aragwai/1693 which he had bought from one, Francis Waweru Mbochi in 1986. The record shows that the said application was allowed by the trial court hence the 2nd Appellant was joined as an interested party.

C. Trial Court's Decision

8. The record shows that upon a full hearing of the suit the trial court found and held that the Respondent had proved most of his claims to the required standard. The trial court found that there was no evidence to demonstrate that the 2nd Appellant was the owner of the suit property or of Parcel 1693. The court also found that the Interested Party's title for parcel 1693 had, in fact, been canceled by the High Court in previous proceedings.

9. As a result, the trial court awarded the Respondent general damages of Kshs.400,000/= and special damages of Kshs.59,500/= out of the sum of Kshs.201,500/= claimed in the suit. The Respondent was also awarded costs of the suit. It is evident from the judgement that the same was rendered against the 1st and 2nd Respondents jointly and severally.

D. Grounds of Appeal

10. Being aggrieved by the said judgment the Appellants filed a memorandum of appeal dated 02.12.2021 raising the following six (6) grounds of appeal:

a. The learned magistrate erred in law and fact in finding that the Respondent had proved his case that properties were damaged and it is the 1st Appellant who damaged the properties on L.R. No. Nyandarua/Ol Aragwai/7867.

b. The learned magistrate erred in law and fact in finding that the Respondent had pleaded and proved special damages totaling to Kshs.59,500/=.

c. The learned magistrate erred in law and fact in finding that the Respondent was entitled to general damages of Kshs.400,000/= which award was vague and uncalled for and it was not specified under which head the general damages were awarded.

d. The learned magistrate erred in law and fact in applying the wrong principles and the law in awarding special damages of Kshs.59,500/= and general damages of Kshs.400,000/= to the Respondent whereas the pleadings, facts and evidence did not support such award.

e. The learned magistrate erred in law and fact in granting orders that were not pleaded, or sought for in evidence by the Respondent and in dwelling in extraneous matters not factored in evidence while determining the suit.

f. The learned magistrate erred in law and fact in making final orders on payment of special damages, general damages and surrender of a title deed against the 2nd Respondent whose role in the suit was that of an interested party and where no such orders were sought against him in the pleadings and evidence by the Respondent.

11. As a result, the Appellant sought the following reliefs in the appeal:

a. That the appeal be allowed.

b. That the judgment of the trial court dated 19.11.2021 be set aside and the Respondent's suit be dismissed with costs.

c. That the Appellants be awarded costs of the appeal.

E. Directions on Submissions

12. When the appeal was listed for directions it was directed that the appeal shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Respondent's submissions were filed on 23.01.2024 whereas the Appellants' submissions were filed on 14.02.2024.

F. Issues for Determination

13. Although the Appellants raised 6 grounds in their memorandum of appeal, the court is of the opinion that the same may be summarized into the following 3 grounds:

a. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim against the 1st Appellant.

b. Whether the trial court erred in law in holding the 2nd Appellant jointly liable with the 1st Appellant.

c. Who shall bear costs of the appeal.

G. Applicable legal principles

14. As a first appellate court, this court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at P.126 as follows:

> " …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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. Similarly, in the case of Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> " …it is 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 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 the 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…"

16. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt –vs- Thomas [1947] A.C. 424 at page 429 – 430 as follows:

> "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

17. In the case of Kapsiran Clan -vs- Kasagur Clan [2018] eKLR Obwayo J summarized the applicable principles as follows:

    a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

a. Whether the trial court erred in law and fact in holding that the Respondent had proved his claim against the 1st Appellant

18. The court has considered the material and submissions on record on this issue. The 1st Appellant contended that the Respondent did not prove his case on a balance of probabilities since there was no sufficient evidence to connect him to the alleged damage and destruction on the suit property. It was further contended that the special damages of Kshs.59,500/= awarded by the trial court were not strictly proved as the award of general damages was vague and erroneous.

19. The court has noted that the 1st Appellant's evidence at the trial was entirely evasive. He did not specifically respond to the allegations that on the specified dates (as per the amended plaint) he wrongfully entered the suit property and caused the damage alleged. He did not respond to the issue of uprooting beacons twice, and the issue of spraying the Respondent's maize crop with chemicals. His entire evidence dwelt on the alleged ownership dispute between the Respondent and the 2nd Appellant.

20. The court has further noted that the 1st Appellant's defence to the suit before the trial court was a mere denial which did not address the very specific incidences of trespass and destruction of crops and other property. His witness statement filed with his defence was a terse 4-line statement claiming that he was merely a caretaker of the 2nd Appellant and that the suit was merely designed to divert attention from the ownership dispute between the Respondent and the 2nd Appellant. It is also noteworthy that at the trial he did not inform the court of his whereabouts and activities on the 5 days he was said to have committed the damage, that is 04.03.2016, 17.03.217, 03.11.2017, 06.09.2018 and 08.09.2018.

21. The court is thus satisfied that the trial court was entitled to rely upon the evidence of the Respondent who testified as PW1 and his witness who testified as PW2. It is noteworthy that it was PW2 and her husband who had sold the suit property to the Respondent and she was residing nearby. The court is of the view that the identification of the 1st Appellant as the tortfeasor could not have been a case of mistaken identity since he claimed to have resided in the locality since 1990.

22. The mere fact that the 1st Appellant was a caretaker employed by the 2nd Appellant could not absolve him from tortious liability for his wrongful actions. He could be personally sued and found liable for his wrongful actions regardless of who had employed him. It was not the 1st Appellant's defence that whatever he did was on the instructions of the 2nd Appellant. His defence was just a bare denial of liability. The Respondent could, of course, have chosen to sue the 2nd Appellant on account of vicarious liability but he did take that option. In the event, tortious liability would rest entirely with the actual tortfeasor.

23. The court has considered the 1st Appellant's submissions that the special damages awarded of Kshs.59,505/= were not properly proved at the trial. The court has noted that although the Respondent had sought special damages in the sum of Kshs.201,500/= he was awarded Kshs.59,500/= only since that is the amount the trial court considered to have been proved by documentary evidence. The court has further noted that the receipts for that amount were not contested by the 1st Appellant at the trial. He did not object to the production of the receipts and he did not challenge their authenticity.

24. The court has noted that in their written submissions the Appellants have contested the receipts and cast doubt on their genuiness. They have even raised the issue of payment of stamp duty which was neither raised at the trial or even in the memorandum of appeal. The court is of the opinion that these belated objections are a mere afterthought being raised by the 1st Appellant after losing the case. The court is satisfied that the trial court was properly guided in holding that the Respondent had proved the sum of Kshs.59,500/=.

25. Finally, the court has considered the 1st Appellant's objection to the award of general damages of Kshs.400,000/=. It was contended that the award was erroneous and vague since the Respondent had not proved a violation of any of his constitutional rights. The court is of the opinion that the trial court did not err in law in awarding the Respondent general damages of Kshs.400,000/= for violation of his rights. There is abundant evidence on record to demonstrate that the Respondent was the registered proprietor of the suit property and that the 1st Appellant had wrongfully entered thereon and destroyed his crops and other property without any lawful justification or excuse.

26. The Respondent's amended plaint before the trial court shows that after narrating his grievances therein he pleaded for general damages. It is obvious that he was seeking general damages for the violation of his property rights. The technical term for such violation is trespass to land. It is not reasonable to expect a layman acting in person to use technical terms in drafting their pleadings. As a result, the court finds no fault on the part of the trial court in awarding the Respondent general damages for trespass to land since all the material facts to support the prayer were pleaded in the amended plaint.

b. Whether the trial court erred in law in holding the 2nd Appellant jointly liable with the 1st Appellant

27. The court has considered the material and submissions on record on this issue. It is evident that the Respondent had only sued the 1st Appellant in the amended plaint. His allegations were directed solely at him. The reliefs sought were similarly directed solely at him. The Respondent's evidence at the trial was directed to the 1st Appellant as there was no allegation that the 2nd Appellant was involved in the wrongful entry into the suit property and destruction of property even though he was said to be the 1st Appellant's employer. The 2nd Appellant was merely joined in the suit as an Interested Party on his own application.

28. In the circumstances, the court readily agrees with the 2nd Appellant that the trial court erred in law in holding the 1st and 2nd Appellants jointly and severally liable whereas the latter was not a defendant in the proceedings but merely an Interested Party. The Respondent's amended plaint did not make any allegations against him. His evidence at the trial attributed wrong doing only on the part of the 1st Appellant. In the premises, the court finds and holds that judgment was wrongfully entered against the 2nd Appellant. It should have been entered solely against the 1st Appellant.

c. Who shall bear costs of the appeal

29. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. Since the 1st Appellant's appeal has failed, he shall bear the Respondent's cost of the appeal. In so far as the 2nd Appellant is concerned, he shall bear his own costs of the appeal since he was the one who waded into the litigation seeking to be joined as an Interested Party before the trial court. He was not sued in the proceedings by the Respondent. He shall also bear his own costs of the proceedings before the trial court.

I. Conclusion and Disposal Orders

30. The upshot of the foregoing is that the court finds no merit in the 1st Appellant's appeal. However, the court finds merit in the 2nd Appellant's appeal since judgment was wrongly entered against him by the trial court. As a result, the court makes the following orders for disposal of the appeal:

    a. The 1st Appellant's appeal be and is hereby dismissed.

    b. The 2nd Appellant's appeal be and is hereby allowed to the extent of excluding him from the judgment.

    c. The judgment and decree of the trial court against the 1st Appellant is hereby affirmed.

    d. The 1st Appellant shall bear the Respondent's costs of the appeal whereas the 2nd Appellant shall bear his own costs of the appeal and of the suit before the trial court.

    It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 29TH DAY OF FEBRUARY, 2024.

In the presence of:

Mr. Waichungo for the 1st and 2nd Appellants

James Gatuna – Respondent present in person

C/A - Nyaga

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Y. M. ANGIMA

JUDGE