Ndungu & another v Ndegwa & another (Civil Appeal E120 of 2022)
[2025] KECA 33 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 33 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E120 OF 2022

W KARANJA, J MOHAMMED & LK KIMARU, JJA

JANUARY 17, 2025

BETWEEN

CHARLES MATHENGE NDUNGU ..... 1ST APPELLANT

KENNETH IRERI NDWIGA ..... 2ND APPELLANT

AND

JOHN NGUGI NDEGWA ..... 1ST RESPONDENT

ROSE MUTHONI NDEGWA ..... 2ND RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Nyeri (M. T. Matheka, J.) dated 14th June, 2021 delivered by (F. Muchemi, J.) on 24th June 2021 in Nyeri HCCA No. 21 of 2018)

JUDGMENT

Background

1. This is a second appeal against the decision of the High Court (M.T. Matheka J.), which set aside judgment of the trial court that had awarded Charles Mathenge Ndungu and Kenneth Ireri Ndwiga (the 1st and 2nd appellants) special damages of Kshs.2,017,245 and substituted therefor with an order dismissing the appellants' suit with costs.

2. Putting the matter in context, the appellants sued John Ngugi Ndegwa and Rose Muthoni Ndegwa, (the 1st and 2nd respondents) in Nyeri CMCC No.47 of 2012 via plaint dated 20th February, 2012 seeking special damages of Kshs.2,017,245 for causing damage to their property on L.R No. Mweiga Block 5/Muthuini/11 (the suit land). It was stated that the 2nd appellant was the registered owner of the suit land who bought the said land through a public action and sold it to the 1st appellant as well as handed over a power of attorney to the 1st appellant for purposes of effecting the transfer. It was the

appellants' case that the respondents trespassed on the suit land and maliciously damaged a bungalow that was under construction.

3. From the record, Rose Muthoni Ndegwa, the 2nd respondent was the initial registered owner of the suit land and was sued by one Mwaura Babu for Kshs.27,000 and upon failing to pay the said amount, the suit property was sold by public auction through a court order. The suit land was bought by the 2nd appellant who had it registered in his name. That the 2nd appellant partially developed the suit land and handed a power of attorney to the 1stappellant to deal with it while he relocated abroad.

4. The 2nd respondent moved the Environment and Land Court (ELC) and sought nullification of the auction. She also obtained a temporary injunction restraining the 2nd appellant from developing the suit land pending determination of the case.

5. Turning back to the pleadings relating to this matter, the respondents denied the appellants' allegation before the trial court and maintained that the registered owner of the suit land was the 2nd respondent who was a sister to the 1st respondent. That the 1st respondent had every right to visit the suit land. It should be noted that the 2nd respondent was also living abroad and her brother and agent; the 1st respondent herein handled the matter.

6. After considering the claim on merit, the trial court's finding was that the appellants proved their case on a balance of probability on the basis of the documents produced, to wit, title deed, green card, search certificate, agreement for construction, tabulation of the work done and receipts of payments. Consequently, on 14th March, 2018 judgment was entered for the appellants against the respondents and awarded the appellants special damages of Kshs.2,017,245 plus costs of the suit.

7. The decision of the trial court did not go well with the respondents who filed an appeal against the said decision being Nyeri HCCA No. 21 of 2018. In their Memorandum of Appeal dated 11th April, 2018, the respondents sought for the trial court's judgment to be set aside and the suit be dismissed with costs on grounds that the trial court erred in law and fact by: holding that the appellants had made out a proper case on a balance of probabilities to warrant a judgment while the same was way below the required standard of proof; shifting the burden of proof to the respondents; involving itself in the extraneous issues; disregarding the points of law on flimsy grounds; disregarding the weighty defence raised; and entering judgment which was not supported by any iota of evidence.

8. The appeal before the High Court was heard by way of written submissions and after considering the arguments of both parties, the High Court framed 4 issues for determination to wit, whether the suit should be struck out for being time barred; whether the suit was sub judice; whether the appellants proved their case to the required standard and in particular the claim for special damages to the required threshold; and who should bear costs.

9. As the first appellate court, the High Court cautioned itself of its mandate in reliance on the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 129 and Peters vs Sunday Post Limited [1958] EA 424.

10. In determining the said issues, the High Court found that it was not stated why the suit was time barred and that the lower court was right in stating that the other suits alleged were merely mentioned without any evidence to substantiate the claim of sub judice. As regards the issue of proving the claim of special damage to the required standard, the High Court found that there was no single evidence showing that the respondents damaged the buildings as alleged. The High Court further held that the receipts relied upon by the appellants in proof of the special damage of Kshs.2,017,245 were merely thrown to the court as the appellants failed to match the tabulation of materials with the receipts. Further, that some of the receipts were rejected hence casting doubt on all the receipts filed. Further, it was a finding of the

High Court that the valuation report relied upon by the appellants was prepared after seven years of the alleged incidents when the case had already been filed in court and the property had changed hands hence failed to support the appellants' claim. Consequently, the High Court found that the appeal was merited and dismissed the appellants' case with costs.

11. The High Court thus ordered that:

> " The appeal is allowed. The judgment of the subordinate court be and is hereby set aside and substituted with dismissal of the respondents' suit with costs to the appellants here and below.
>
> Each party should bear their own costs."

12. It is this finding that provoked the second appeal herein. The appellants filed their Notice of Appeal. The appellants in their Memorandum of Appeal sought for the High Court judgment to be set aside/ reviewed and substituted with a judgment in favour of the appellants to the tune of Kshs.2,007,229 excluding only the impugned receipts denied and that the respondents bear the costs.

13. The appellants' grounds of appeal are that the learned Judge of the High Court erred in law and in fact by:-

    i. Failing to review the evidence as a whole so as to arrive at its own conclusion while making due allowance for the fact that it never saw nor heard the witnesses and as a result arrived at the wrong decision and which decision was bad in law.

    ii. Rejecting the expert opinion of the valuer from Yard valuers without giving cogent reasons save for the fact that the property had changed hands and that the same was done seven years later and which issues were extraneous to the accuracy of the report.

    iii. Finding that the appellants had not proven causation by placing the respondents therein at the scene yet the respondents never denied trespassing on the said parcel but only contended that the same was owned by the 2nd respondent

    iv. Disregarding the exhibits produced in the trial court as a whole on the basis that their credibility had been tainted by three receipts denied by the 1st appellants worth Kshs.10,016 only out of a total claim of Kshs.2,107,245 despite the fact that two had nothing to do with building materials but agrochemicals and the other was not visible.

Submissions by Counsel

14. The appeal was disposed of by way of written submissions, which were highlighted by counsel for the parties during the hearing. The appellants, were represented by Messers Charles G. Mbau & Co. Advocates who had filed their written submissions while the respondents were represented by Messers Gor, Ombongi & Co. Advocates who had also filed their written submissions.

15. The appellants' counsel, Mr. Mbau submitted that this being a second appeal, only matters of law should be considered, that the failure by the first appellate court to properly evaluate the evidence produced during trial was a matter of law citing this Court's decision in Stanley N. Muriithi & another vs Bernard Munene Ithiga [2016] eKLR that:

> " We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law ... If we find out that some evidence was indeed disregarded then

the next issue for our determination will be whether the evidence in question would have affected the outcome of the appeal."

16. The appellants' counsel submitted that the High Court disregarded the exhibits produced in the trial court as a whole for reasons that their credibility had been tainted by three receipts worth Kshs.10, 016 which were rejected out of a total of Kshs.2,107,245. That the High Court found that the respondents did not place the respondents at the scene to prove the claim of trespass yet the respondents themselves never denied trespassing on the suit land. The appellants' counsel further submitted that the High Court wrongly rejected the expert opinion on the basis of its age contrary to the principle established in the High Court case of Stephen Kinini Wang'ondu v The Ark Limited (2016) eKLR that:

> " ... a judge may give little weight to an expert expert's testimony where he finds the expert reasoning speculative or manifestly illogical...."
>
> According to the appellants' counsel, the High Court failed to balance the scales of justice properly hence prayed that the appeal be allowed and the decision of the trial court awarding them Kshs.2,106,229 less the Kshs.10,016 which was rejected be reinstated.

17. The appeal was opposed. The submissions by the respondents' counsel, Mr. Makora, in reply to the appellants' submissions were that the appellants failed to discharge their burden of proof in particular that they are entitled to an award of special damages of Kshs.2,107,245. That the evidence of the valuation report relied upon by the appellants was prepared six years after the alleged incident while the case was already in court hence not cogent and strong enough to meet the threshold of proof on a balance of probability required in law. Further, that the special damages were not specifically/particularly pleaded as no particulars were set out as required by law. That some of the receipts produced by the appellants did not belong to the appellants therefore could not support the claim. The respondents'counsel cited this Court's case of Hahn vs Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716 at 717 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 inferred from the act ..."

18. The respondents' counsel also picked issue with the High Court's orders on costs at paragraphs 65 and 66 of the impugned judgment and as highlighted at paragraph *7* above, to wit, "... costs to the appellants here and below and each party to bear their own costs" are contradictory. To sum it all, in view of the foregoing, the respondents sought for the appeal to be dismissed and costs in this Court and the two courts below be awarded to the respondents.

Determination

19. As a second appeal, this Court reminds itself of its mandate to delve on matters of law only. Reliance is put in this Court's case of Kenya Breweries Limited vs Godfrey Oboyo [2010] eKLR as cited by the appellants in support of the proposition that:

> "In a second appeal however, such as this one before us, we have to resist the temptation delving into matters of facts. This Court, on second appeal, confides itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decisions, it is perverse."

20. We have considered the record of appeal, the submissions by both parties, the authorities cited and the law and discern that the only issue for determination before this Court is whether the appellant's claim for special damages of Kshs.2,107,245 was proved as required by law.

21. The threshold for proving a claim of special damages is settled that the claim must not only be pleaded but strictly proved with a degree of particularity and certainty. However, the degree and certainty depends on the circumstances of each case as stated by this Court in Hahn vs Singh (supra). See also Jiwanji vs Sanyo Electrical Company Limited [2003] EA and Richard Okuku Oloo vs South Nyazna Sugar Co Ltd [2013] eKLR.

22. The appellant's case is that the High Court failed to properly evaluate the evidence before the trial court and arrived at a wrong decision making it a matter of law to be considered by this Court. One of the appellants' grounds of appeal faulted the High Court's finding that the appellants failed to place the respondents at the scene yet the respondent never denied trespassing on the suit land. A closer look at the respondents' statement of defence dated 2nd March, 2012 at paragraph *6* stated:

> " 6. The defendants deny that on or about 1st December, 2006 or trespassed onto the parcel of land known as LR. Mweiga Block 5/Muthuini/II without any colour of right or license or maliciously caused damage to a bungalow ... and the plaintiffs are put to strict proof thereof.

23. From the foregoing, we find that the 1st appellate court did not err in finding that the allegation of trespass was denied and that the appellants had the burden proving the same. We have perused the proceedings of the trial court

and agree with the High Court's finding that there was no single evidence by the appellants that placed the respondents on the scene or evidence that it was the respondents who caused the alleged damage.

24. As to proof of special damages, the appellants' (plaintiffs) plaint at paragraphs *8*, *9* and *10* provides that:

> "8. Upon the said trespass the 1st defendant proceeded to maliciously cause damage to a bungalow which was undergoing construction by forcefully bringing down the wall thereby causing damage to the said premise;
>
> 9. As a result of the said damage the plaintiff suffered damages amounting to Kshs. 2,017,745;
>
> 10. The Plaintiff's claim against the defendants' is for the said sum of Kshs. 2,017,245."

25. The above extract of the plaint shows that there were no particulars given on how the Kshs.2,017,245 was arrived at. There was neither tabulation of the payment receipts nor matching the receipts with the expenses given. The appellants sought to rely on a valuation report produced in court dated 8th February, 2013. The case was filed in the year 2012 and the alleged damage occurred on 1st December 2006. The valuation was for the incomplete building and not the alleged damage caused. Furthermore, from the proceedings, the 1st appellant testified that he transferred the suit land to his wife, Mary Wangari Mathenge (Mary) and it was she who instructed the valuer to carry out the valuation. The High Court dismissed the said report for reasons that it was prepared 6 years after the alleged incident and when the case was already in court and further that the suit land had changed hands.

26. The appellants' submissions are that these were not valid grounds for dismissing the valuation report. Going by the 1st appellant's own testimony that he had transferred the suit land to Mary as at the time

of hearing before the trial court, we find that the appellants had no valid claim over the suit land before the trial court to warrant the award of special damages.

Moreover, the valuation report did not give an assessment of the damage caused but the value of the incomplete building as it was. As such, the valuation report did not support the alleged special damage suffered by the appellants. The payments receipts, as stated by the High Court, were merely thrown at the court; they were not matched with the tabulated expenses allegedly incurred. As held by the High Court in the impugned judgment:

> "It was expected that the respondents would have led evidence, receipt by receipt to demonstrate that they had spent the specific amount claimed. ... The respondents bore the singular duty to prove, to the last cent that they had spent that money."
>
> We need not say more.

27. We are guided by the case of David Bagine V. Martin Bundi [1997] eKLR where this Court stated:-

> "It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:
>
> "...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177 thus;
>
> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages,' They have to prove it."

28. A claim for special damages must be specifically pleaded and proved with a degree of certainty and particularity.

Further as stated by Chesoni, J. (as he then was) in the case of Ouma v Nairobi City Council [1976] KLR 304:

> "Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damages, Ratcliffe v Evans (1892) 2 QB 524 where Bowen L J said at pages 532, 533;-
>
> The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

29. In the instant appeal there was a claim and a list of the appellants' items demolished or carted away by the respondent's agents. This was in the pleading, but certainty and particularity of proof were lacking. In the circumstances, the claim for special damages fails.

30. By parity of reasoning, we find that the claim for special damages was not strictly proved with certainty and particularity as required by the law. Conclusively, after careful consideration of the matter, we find that the appeal is not merited. We find no reason to disturb the High Court's findings.

31. The upshot is that the appeal is hereby dismissed with costs to the respondents. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF JANUARY, 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR