Nkoroi v Muchina (Civil Appeal E099 of 2022) [2025] KECA 965 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 965 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E099 OF 2022

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

MAY 9, 2025

BETWEEN

HABEL MUCHEMI NKOROI ..... APPELLANT

AND

STEPHEN MUCHINA ..... RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Kerugoya (L.W Gitari, J) delivered on 12th November, 2020 in Civil Appeal No. 33 of 2018)

JUDGMENT

1. This second appeal arises from the decision of the Kerugoya High Court dubbed "ruling" dated 12th November 2020 in Civil Appeal No. 33 of 2018. That appeal arose from the decision of Kerugoya Principal Magistrate's Court in Civil Case No. 279 of 2015 which was instituted by way of a plaint dated 9th November 2015.

2. The appellant's case was: that he was the respondent's tenant in respect of premises situated at Kutus Mjini; that the respondent Civil Appeal No. NYR E099 of 2022 Page 1 of 16 locked the said house thus denying him not only access thereto but also prevented him from removing his items therefrom; that as a result, he filed a case against the respondent in Embu Rent Restriction Tribunal being Case No. 93 of 2014; that on 8th December 2014, the Tribunal ordered the respondent to release his goods in the presence of an officer from the Tribunal but found that his claim for the missing andor damaged items could only be dealt with in a civil court.

3. According to the appellant, when he went to collect his items, he found a number of items missing andor damaged. The said items, according to him, were stove stand, lamp, Sony radio, paper nylon and meter gauge, padlock, 2 blankets, 1 bedcover, 1 sheet, 1 mattress, 13kgs hashi gas, complete gas cooker, water pump machine (dyesin hydra high pressure), 1 mosquito net, money, 3 stools, 2 tablets and a sofa set. In his suit before the Magistrate's Court, he prayed for compensation of the missing andor

damaged items as well as reimbursement of accommodation expenses for 31 days he spent in lodging. He also prayed for bus fare for 10 days when he attended court as well as the costs of the suit.

4. In his defence dated 19th November 2015, the respondent confirmed that the appellant together with a tribunal officer collected the appellant's goods. He however, denied that any of the appellant's goods were damaged or missing. He challenged the appellant's contention that he incurred any expenses and further denied that the appellant was entitled to transport and lodging costs. According to the respondent, the claims by the appellant contradicted what he had claimed before the Tribunal and averred that the appellant's suit was defective, incompetent, had no basis and sought for its dismissal.

5. At the trial, both the appellant and the respondent adopted their respective witness statements. In his Judgement dated 15th March 2018, the learned trial Magistrate (Hon Soita) found that the appellant failed to prove his case on a balance of probabilities and dismissed his suit.

6. Aggrieved by the said decision, the appellant preferred an appeal to the High Court vide Kerugoya Civil Appeal No. 33 of 2018 from where this appeal arises. In that appeal, the appellant faulted the trial Magistrate on grounds that he erred in law and fact; by making a decision against the weight of evidence; and that he disregarded the appellant's evidence and documents and arrived at an erroneous decision. The respondent, in response to the appeal filed a preliminary objection dated 10th December 2019 challenging the appeal on ground that the record of appeal was defective hence rendered the appeal incompetent.

7. In the "ruling", the learned Judge noted that although the respondent had raised the issue of the competency of the appeal, that issue was not canvassed in the submissions. In her view, had the preliminary objection been argued, it would have had the effect of disposing of the appeal. The learned Judge, however, found that the trial Magistrate was right in finding that the appellant failed to prove his case on a balance of probabilities since the appellant did not produce receipts or valuation report to the nature of his damages. In the findings of the learned Judge, the respondent adduced evidence showing that the appellant collected the items from the house without raising any complaints regarding the damaged or missing goods. The appeal was dismissed for lack of merit.

8. Aggrieved, the appellant is before this Court challenging that decision on the grounds that the learned Judge erred in law and fact: by making a decision against the weight of the evidence adduced by the appellant; in disregarding the appellant's evidence and witnesses thus arriving at erroneous decision; and in disregarding the appellant's evidence and documents thus arriving at an erroneous decision. He prayed that the appeal be allowed, the judgment and order of the learned Judge be set aside and costs of the appeal be provided for.

9. We heard the appeal on 27th January 2025 during which the appellant appeared in person while the respondent was represented by learned counsel, Ms Wanjiru. The appellant relied entirely on his written submissions while Ms Wanjiru highlighted the respondent's written submissions briefly.

10. The appellant submitted: that the learned Judge erred in law and in fact by making a decision against the weight of the evidence adduced by the appellant without taking into consideration that, contrary to the decision in *Gusii Mwalimu Investment Ltd v Mwalimu Hotel Kisii Limited Appeal No.160 of 1995*, he was not given a proper notice to vacate the said premises; and that the learned Judge erred in law and in fact by disregarding the appellant's evidence and the report by the Rent Restriction Tribunal Officer which established that the appellant only recovered a few of his items and the respondent did not account for the missing items. In support of his submissions, the appellant cited the case of Richard Okuku Oloo v South Nyanza Sugar Limited (2013) eKLR, where this Court held that whereas special damages must be specifically pleaded and proved with a degree of certainty and particularity, the degree and certainty must depend on the circumstances and nature of the act complained of. It

was submitted that the appellant provided pictures of the damaged items, which included sofa set, bed sheets, blankets and other items and receipts to show ownership of the missing items as well as transport and accommodation receipts thus the learned Judge erred in disregarding the same whose cumulative value was Kshs. 115,157.

11. The respondent, on the other hand, submitted that the appeal was incompetent and without a basis, having been filed out of time since the judgment was delivered on 12th November 2020, but the undated Notice of Appeal was filed in May 2021. It was submitted that there was no evidence that the appellant applied for proceedings or even paid a deposit towards a request for the same. In the respondent's submissions, the memorandum of appeal was filed on 22nd August 2022, about 2 years thereafter, without the certificate of delay. It was therefore submitted that the High Court was right to dismiss the appeal for lack of merit for being incompetent.

12. According to the respondent, the burden of proving that the appellant's items were missing or damaged was on the appellant which he failed to discharge. It was reiterated that the goods claimed before the Tribunal and those claimed before the trial court differed and there was no quantification of goods in the plaint as required in a claim for special damages. The respondent urged this Court to dismiss the appeal with costs.

13. We have considered the appeal and the submissions made before us. The issues for determination before us are whether the appeal is competently before us and whether the learned Judge erred in law in dismissing the appeal on the ground that the appellant failed to prove his claim before the trial court.

14. Since in the first issue the competency of the appeal is challenged, we shall deal with the same before embarking on its merits, should that be necessary. The respondent's position is: that the appeal was filed out of time since the judgment was delivered on 12th November 2020 but Notice of Appeal was filed in May 2021; that there was no evidence that the appellant applied for proceedings or even paid a deposit towards a request for the same; and that the memorandum of appeal was filed on 22nd August 2022, about 2 years thereafter without a certificate of delay.

15. Rule 86 of this Court's Rules provides that:

> " A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."

16. Hence, the above is clear that this Court is empowered to strike out a notice of appeal or a record of appeal where an appeal does not lie (either due to want of leave, where one was required but not obtained or that the law bars this Court from entertaining such an appeal) or for failure to take a necessary step in the proceedings (such as failure to comply with the prescribed timelines). However, the Court is barred from exercising its power to strike out a notice or an appeal, under the said rule, where the application is brought:

> "...after the expiry of thirty days from the date of service of the notice of appeal or record of appeal..."

17. In the case before us, no such application was filed contrary to rule 44 of this Court's Rules which provides that:

> 1. Subject to sub-rule (3) and to any other rule allowing informal application, an application to the Court shall be by motion, which shall state the grounds of the application.
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> 2. A notice of motion shall be substantially in Form A as set out in the First Schedule and signed by or on behalf of the applicant.
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> 3. The provisions of this rule shall not apply—
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> a. to applications made in the course of a hearing, which may be made informally; or
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> b. to applications made by consent of all parties, which may be made informally by letter.

18. A preliminary objection is not one of the ways prescribed for making applications before this Court. Apart from the failure to comply with the procedure for making applications, the objection to the competency of the appeal, which could have been brough under rule 86 aforesaid, is taken way after the prescribed period for challenging the appeal. We find no merit in the objection.

19. On the merits of the appeal, it is important to reiterate that, pursuant to section 72 of the *Civil Procedure Act*, our mandate is limited to points of law. That provision provides that:

> 1. Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—
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> a. the decision being contrary to law or to some usage having the force of law;
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> b. the decision having failed to determine some material issue of law or usage having the force of law;
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> c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.
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> 2. An appeal may lie under this section from an appellate decree passed ex parte.

20. This Court, while appreciating the limits of its jurisdiction as a second appellate court, held in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR that:

> "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines 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 decision, it is perverse. In the case of Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:
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> 'We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (ta MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined

to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.'"

21. It is not in doubt that the appellant's claim was in the nature of special damages. In that kind of claim, the law is as set out in Central Bank of Kenya v Martin King'ori Civil Appeal No. 334 of 2002 that:

> " There can be no argument that the pleading particularised in the plaint was in the nature of special damages since these were damages relating to past pecuniary loss calculable at the date of the trial. The law on such pleading is now trite that the same must be pleaded with as much particularity as circumstances permit and it is not enough to simply aver in the plaint that the particulars of special damages are to be supplied at the time of trial. If at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of the trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars."

22. In his plaint, at paragraph *7*, the appellant set out the items which he claimed were damaged or missing. However, no value was assigned to any of those items. In his prayers for reliefs, he simply claimed "compensation of missing andor damaged items as set out in paragraph *7*". Neither in the body of the plaint nor in the reliefs were the values of the items, claimed to have been damaged or lost, set out.

23. In his evidence, he relied entirely on his witness statement dated 9th November 2015. That statement, apart from reproducing the same items, did not reveal their value. Even his submissions dated 10th November 2017 did not bring out the value of the items he was claiming. Whereas there are on record documents prepared by the appellant himself with the values indicated, and copies of receipts, the record of the proceedings does not indicate that the receipts were produced at the hearing. There was no valuation report produced, either. The mere attachment of the photographs was not sufficient to prove, first, that the items belonged to the appellant, and secondly, their respective values. Since the values of the items were not pleaded, they could not have been produced without an amendment to the plaint.

24. The respondent submitted that the copies of the receipts were filed together with the submissions. If that was the case, and we have no evidence to prove otherwise, they could not have been relied upon by the two courts below. Submissions is not a means through which evidence is adduced. The manner of production of evidence is provided in Order 14 rule 1(1) as read with Order 18 rule 2 of the Civil Procedure Rules. The former provides that:

> 1. Subject to subrule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars—
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> a. the number and title of the suit;
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> b. the party producing the document; the date on which it was produced; and
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> c. the endorsement shall be signed or initialled by an officer of the court.

25. Order 18 rule 2 of the Civil Procedure Rules follows:

Unless the court otherwise orders—

1. On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

2. The other party shall then state his case and produce his evidence, and may then address the court generally on the case.

3. The party beginning may then reply.

26. It is clear that the documents to be relied upon by a party are produced, either by consent of the parties or at the time the party is giving evidence. There is no avenue for production of evidence by way of submissions.

27. In the premises, we have no justification for interfering with the concurrent factual findings by the two courts below that the appellant failed to prove the value of the items claimed to have been damaged or lost.

28. We, accordingly, find no merit in this appeal which we hereby dismiss with costs.

It is so ordered.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MAY, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR