



Mugo v Wanjau (Civil Appeal 178 of 2017) [2023] KECA 1636 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 1636 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 178 OF 2017
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
MAY 26, 2023**

BETWEEN

JOSEPH MUIRURI MUGO APPELLANT

AND

MARGARET MWIHAKI WANJAU RESPONDENT

*(An Appeal from the judgment and decree of the High Court at Nyeri
(L.N. Waitbaka, J.) dated 16th August 2017 in ELC No. 136 of 2014)*

JUDGMENT

1. There is no dispute that the deceased Joseph Wanjau Kuria owned land parcel LR Ndarugu/Gathaite/728 (the suit land). He leased out 2 ½ acres of the land to Paul Kabecha for a period of 8 years following a tenancy agreement signed on 9th October 1995. Paul Kabecha owed the appellant Joseph Muiruri Mugo Kshs 334,181. Following Nyeri CMCC No 310 of 1991 filed to recover the debt, the appellant obtained an order to attach the lease. The order was that for 8 years he would take over and harvest the pineapples that had been planted on the 2 ½ acres. The order was registered against the title. The appellant constructed a five roomed timber house and a toilet on the land to be used in the course of managing the parcel and the crops. His evidence was that it cost him Kshs 522,800 to construct the items.
2. The respondent Margaret Mwihaki Wanjau was the widow of the deceased. The deceased died on 2nd August 1998. The respondent became the owner of LR Ndarugu/Gathaite/728 following succession proceedings. She filed HCCC No 638 of 2002 at Nairobi seeking that the appellant delivers to her vacant possession of the attached land, saying the appellant was a trespasser. She obtained an ex parte order of eviction against the appellant. Using the order dated 28th January 2003, she moved onto the land, cut down the pineapples and pulled down the timber house and toilet. The appellant applied before the High Court to have the ex parte orders set aside on the basis that the orders had been obtained without reference to him. The orders were set aside on 9th May 2005.



3. Following complaint to the police, the respondent was arrested and charged with malicious damage to property contrary to section 339(1) of the [Penal Code](#). The particulars were that on 2nd February 2003 at Gathaite Village in Thika District of the Central Province, jointly with others not before the court, illegally and willfully damaged two and a half acres of pineapple fruits valued at Kshs 181,489 the property of the appellant. The respondent was tried, found guilty, convicted and sentenced to one year on probation.
4. In Thika CMCC No 419 of 2012, the appellant sued the respondent claiming that, before the expiry of the lease over the 2 ½ acres on the suit land, she had invaded the parcel and damaged his pineapples and removed the five roomed timber house and toilet, and that these acts had caused him loss and damage. The appellant sought an order compelling the respondent to put him back into occupation of the parcel for the unexpired period or alternatively for her to pay him Kshs 250,000 per year for the unexpired three years; an order that she replants the pineapples or pays Kshs 181,489 being the value of the damaged crop; and she rebuilds the five roomed house and latrine or pays their value of Kshs 522,800. The appellant claimed that during the criminal case he had retained a lawyer to hold brief and paid him Kshs 169,000. He sought to recover that. He also sought to recover Kshs 122,000 which he and his witnesses had used during the trial. Lastly, he asked for general, aggravated and exemplary damages, costs of the case and interest.
5. The respondent opposed the suit, and denied the averments of the appellant. Her case was that the said lease agreement was illegal as it had not received the blessings of the Land Control Board under section 6 of the [Land Control Act](#) (Cap. 302), the lease was null and void *ab initio* as the consent of the registered owner had not been granted under section 54(b) of the [Registered Land Act](#) (Cap. 300); that she had taken possession of that pursuant to a lawful order in HCCC No 638 of 2002; that criminal proceedings were conducted against her by the state, and therefore the appellant's decision to hire a lawyer to watch his brief was voluntary; the criminal proceedings and conviction were admitted, but she stated that no civil liability could be imputed against her; and she claimed that the sums claimed were highly exaggerated, and would, if granted, amount to unjust enrichment. Based on these material, she counterclaimed seeking an order that the tenancy be found to be null and void, and sought a declaration that no benefit could be derived from the same.
6. On 17th March 2014 the subordinate court entered judgment for the appellant and dismissed the counterclaim. In the trial the respondent had admitted knowledge of the lease of 8 years over the 2 ½ acres that her late husband had granted to Paul Kabecha, and agreed that the lease had not expired. She agreed that she had taken over the land, and said she was not aware of the attachment of the lease by the appellant. The trial court received the evidence of the parties, and found that when the appellant was evicted he had planted pineapples whose damage was valued by an agricultural officer to be worth Kshs 181,489; that the damage was the subject of the criminal charge which had been proved beyond doubt and therefore was payable as special damages. The court found as a fact that the appellant had put up a five roomed house and toilet, and had proved that they had cost him Kshs 522,800 which was ordered to be paid as special damages. The appellant had sought to be allowed to complete his 3 years or be paid Kshs 250,000 for each year in the alternative. He was allowed the prayer. The Kshs 169,000 legal fees was allowed, but the Kshs 122,000 was not allowed. The plea for general or exemplary damages was found not proved. Costs and interest were awarded.
7. The respondent was aggrieved by the decision. She appealed to the Environment and Land Court at Nyeri. She blamed the trial court for:-
 - i. failing to apply the law and principles relating to pleadings and proving special damages;
 - ii. allowing damages that were not otherwise recoverable from the defendant in law, or at all;



- iii. failing to consider the effects of section 6 of the *Land Control Act*, Cap. 302 Laws of Kenya on the transaction which formed the basis of the respondent's claims;
 - iv. failing to find and hold that the transaction forming the basis of the respondent's claim was null and void ab initio for want of consent of the Land Control Board;
 - v. failing to find and hold that the acts complained of by the respondent and which formed the basis of the claim for special damages were lawfully and regularly undertaken (that is to say were taken pursuant to a valid court order granting her vacant possession of the suit property); and
 - vi. failing to consider the evidence and submissions before it and instead proceeded to consider extraneous and irrelevant factors in arriving at the judgment.
8. The learned Judge, (L.N. Waithaka.J) heard the appeal and delivered her judgment on 16th August 2017. It was found that the appellant's possession of the land was lawful and that his eviction was illegal and unlawful. The learned Judge found that the appellant had suffered loss and damage on account of the illegal and unlawful eviction. It was held as follows:-

- “97. On whether the respondent suffered any loss and damage on account of the illegal action, upon review of the evidence adduced in this matter, I find and hold that the respondent;
- i. Lost his crops of pineapples which was valued at Kshs 181,489/ = by the Agricultural Officer;
 - ii. Lost the house and toilet which he had constructed on the suit property;
 - iii. Incurred legal costs in hiring an advocate to watch his brief in the criminal case that was preferred by the state against the respondent;
 - iv. The respondent also lost the right to be on the suit property for the remaining term of the lease granted him by court.”

9. Subsequently, however, the learned Judge went on to hold as follows:-

- “(ii) That although the evidence adduced in this matter sufficed to prove that the appellant destroyed the house and the toilet he had constructed thereon, the evidence adduced in support of that loss, which by law ought to have been specifically pleaded and strictly proved, was insufficient to enable the court to make a fair determination of the size of the house (was it one bedroomed as contended by the appellant or 5 bedroomed as contended by the respondent); Issues abound concerning the size and the materials used in the construction of the house. One wonders why, if the respondent had lost a property of that value, it hardly featured in the criminal proceedings! For the foregoing reasons, I find and hold that the claim was not sufficiently proved.
- (iii)
- (iv) That despite being germane, the claim for loss of user was a claim in the nature of special damages that ought to have been specifically pleaded and strictly proved. In the circumstances of this case, that claim was neither specifically



pleaded nor strictly proved of by law required. There was, in the circumstances, no legal basis and/or justification for the award of Kshs 250,000/= per annum for three years.

100. Whilst the respondent did not meet the legal threshold for award of special damages in respect of the loss and damage he sustained owing to the appellant's illegal activities, unlike the lower court, I find and hold that the trial magistrate should have proceeded to award general damages in favour of the respondent for trespass. However, since that issue does not form part of the issues presented before this court for determination, I will say no more about it.
 101. The import of this determination is that the appeal has merit and is allowed to the extent that the award of Kshs 522,000/= and Kshs 750,000/= in respect of the destroyed house and toilet and loss of user respectively is set aside.
 102. As the appellant has partially succeeded in his appeal, he shall have ½ the costs of the appeal.”
10. The appellant was aggrieved by this decision, and appealed to this court. The grounds of his appeal were as follows:-
- “(1) The learned Judge erred in Law in failing to assess damages for trespass having found that the learned Magistrate ought to have awarded general damages for trespass.
 2. The learned Judge erred in Law in disallowing the award of Kshs 522,000/= without considering the pleadings and all the documentary and oral evidence adduced.
 3. The learned Judge erred in law in finding that the 5 bedroomed house did not feature in the criminal proceedings.
 4. The learned Judge erred in law in disallowing the award of Kshs 740,000/= without considering the appellant had pleaded to be allowed to complete his unexpired term of three years or alternatively Kshs 250,000/= per year.
 5. The learned Judge erred in law in failing to evaluate the evidence and adequately consider all the issues raised which consequently came to the wrong decision.
 6. Reasons wherefore the appellant prays that this appeal be allowed with costs.”
11. The appellant's and respondent's counsel each filed written submissions in respect of the appeal. Mr. Mwangi for the appellant attended the hearing, and indicated he would rely on the submissions he had filed. We have considered what each had to say.
12. The mandate of this Court on a second appeal is limited to issues of law only, unless it is shown that the 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 (*Maina v Mugiria* [1983] KLR 78, *Kenya Breweries Ltd v Godfrey Odoyo* [2010]eKLR). The decisions of this Court have variously approved what was held in *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 in which it was held that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept 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 that the decision is bad in law.

13. The first issue for determination is whether the superior court erred in failing to award general damages for trespass. Counsel for the appellant argued that it was erroneous for the superior court to find that general damages were not payable, having found that there was trespass on the part of the respondent. The respondent's counsel submitted that trespass was not pleaded or proved either at the subordinate court or the superior court level, and therefore that general damages were not payable.
14. From the record, the appellant in his plaint dated 4th June 2012 in Thika CMCC No 419 of 2012 sought judgment against the respondent in general damages for the unlawful eviction from the suit property by the respondent.

There were criminal proceedings in which there was a finding that the respondent had willfully and unlawfully entered the 2 ½ acres and damaged property of the appellant thereon. In the appellant's plea for general damages, his case was that he had suffered loss and damage owing to the trespass on, and damage of, his property. In dealing with the issue, the learned Judge found that the respondent had unlawfully ejected the applicant from the land, and that the appellant had suffered loss and damage as a result of the unlawful ejection. The subordinate court had declined to award general damages in the following terms:-

“(f) On the general damages and exemplary damages, the plaintiff stated he suffered psychological trauma as his children were kept out of school when the pineapples were destroyed. This prayer was not produced. He did not lay any connection between the children and damaged pineapples. I will therefore not grant this prayer to the plaintiff.”

15. It was the respondent who appealed to the superior court. There was no cross appeal by the appellant against the finding of the subordinate court on the question of general damages. The superior court could not therefore deal with that question, there being no appeal by the appellant. What the respondent had complained on appeal to the superior court was that the subordinate court had allowed damages, that were not otherwise recoverable. What damages had the court allowed? They were in the nature of special damages: Kshs 522,000 being the value of the damaged five-bedroomed house and toilet; Kshs 169,000 being legal fees; and Kshs 750,000 being the alternative prayer to being put back on the land for the three unexpired years. That being the case, we determine that the issue of general damages was not subject of the appeal before the superior court and therefore the question of it falling into error by not allowing the same cannot arise. It matters not that the court noted that, given the evidence, the subordinate court ought to have awarded general damages.
16. The next complaint was that he learned Judge erred in law in disallowing the award of Kshs 522,800/ = considering the pleadings and all the documentary evidence. The learned Judge found that although the evidence adduced proved that the appellant destroyed the house and the toilet, he had not adduced sufficient evidence to support the loss; that it was not shown what the size of the house it was, and what the materials had been used to construct the same.



17. The common evidence, both in the subordinate and in the superior court, was that the appellant had constructed a house and toilet on the 2 ½ acres, and that they had been demolished by the respondent during the unlawful eviction. In the plaint it was pleaded that:

“7. The plaintiff pursuant to the court order had put up a five roomed timber house and one latrine on the said land to facilitate good farm management at a cost of Kshs 522,800/=.”

18. The subordinate court found for the appellant that indeed his five roomed timber house and latrine were damaged. The appellant produced receipts leading to Kshs 522,800 being the value of the damage. At paragraph 97 of the judgment, the learned Judge found that the appellant –

“ (ii) Lost the house and toilet which he constructed on the suit property.”

However, later in the judgment the learned Judge observed that the size of the house was not proved and that there was no proof of the value of the materials used. This was the reason she allowed the appeal in regard to the Kshs 522,800. It was further noted that the house and latrine had not featured in the criminal case.

19. In the judgment delivered on 20th June 2008 in the criminal proceedings, the learned magistrate stated as follows:-

“By her own admission the accused person stated that she took the land, on 2nd February 2003 employed some people to clear away the land of the pineapples that were growing together with the house and latrine that were also on the land.”

20. When the respondent gave sworn evidence in the criminal case, she stated as follows:-

“On 2nd February 2003, I went and took back my land. I employed some people to clear the land as some seedlings (coffee) had been uprooted, a house built there and even a latrine.”

It was incorrect for the learned Judge to state that the issue of the house and the latrine did not feature in the criminal proceedings. It is a question of law where the superior court made a finding that was at variance with the evidence.

21. The question of the five bedroomed house and toilet was not in contention at the subordinate court, and receipts were produced that showed that Kshs 522,800 had been used on the materials and so on. It is trite that special damages are supposed to be pleaded and specifically proved. During the evidence at the subordinate court, the respondent’s counsel objected to the production of the receipts amounting to Kshs 522,800. The basis of the objection was that there was no evidence that stamp duty had been paid on the receipts. The learned magistrate allowed the production of the receipts and reserved a ruling on their admissibility. By the time of the judgment the ruling had not been delivered, and no reference was made on the issue in the judgment. The learned Judge did not deal with the issue in the judgment. During this appeal, the respondent’s case was that the lower courts ought not to have accepted the receipts, in view of sections 5 and 9 of the *Stamp Duty Act* (Cap. 480) and the decision in *Leonard Nyongesa v Derick Ngula Right*, Civil Appeal No 168 of 2008 at Mombasa. We find that, although the appellant erected a five bedroomed house and latrine on the land which the respondent demolished, there was no specific proof of the value of the house and the latrine, which made their compensation not payable. This is because the subordinate court failed to make a finding on the contested admissibility of the receipts.



22. The last question relates to the award of the Kshs 750,000 that was declined by the learned Judge.
23. We consider that the suit was for the court to order the appellant to complete the three years unexpired period or in the alternative there be compensation of Kshs 250,000 for each year. The respondent had acknowledged that three (3) years had not expired when she evicted the appellant. It was common ground that the parcel was being used to grow pineapples for business. The judgment in the subordinate court and the one of the learned Judge did not order the appellant to resume being on the land and utilise the three remaining years. The learned Judge found that –

“(iv) The respondent also lost the right to be on the suit property for the remaining term of the lease.”

It is trite that equity will not suffer a wrong to be without a remedy. We find that it was wrong for the learned Judge to interfere with the lower court’s award of Kshs 750,000. We allow the appeal and set aside the learned Judge’s order disallowing the Kshs 750,000 and in its place shall be an order reinstating the lower court’s order for the respondent to pay the appellant Kshs 750,000 together with interest. It is clarified that the award of Kshs 181,489/= for the damaged pineapple crop and Kshs 169,000/= being legal fees paid in the criminal case before the subordinate court shall remain to be paid.

24. The appellant shall get half of the costs of appeal.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF MAY 2023.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

