



Muthuri & another t/a Karibu Drapers v Kimathi & 3 others (Environment and Land Appeal E084 of 2022) [2024] KEELC 3254 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 3254 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E084 OF 2022**

CK YANO, J

MARCH 7, 2024

BETWEEN

**ARTHUR MATHEW RAPHAEL MUTHURI & JULIA GAITI MUTHURI T/A
KARIBU DRAPERS APPELLANT**

AND

**SAMSON KIMATHI 1ST RESPONDENT
JOSHUA MUTWIRI 2ND RESPONDENT
BERNARD KINYUA 3RD RESPONDENT
GEOFFREY KINOTI 4TH RESPONDENT**

JUDGMENT

1. The appellants in this appeal moved the trial court in Githongo SPMC Civil Case No. 20 of 2019 vide a plaint dated 27th June 2018 and filed on 28th June 2018 seeking orders of general damages for malicious damage to property, special damages of Kshs.2,356,958.40, mesne profits of Kshs. 60,000/= per month, costs of the suit and interest at court rates and any other or better relief.
2. The Appellants pleaded that at all material times relevant to the suit, they were and remain as the sole registered owners of plot No.47 Githongo market and have developed the same by building a petrol station and twelve (12) business premises. That on or about the 2nd day of November 2016 at Githongo market, Abothuguchi West Division in Imenti Central District within Meru County without any lawful cause or plausible excuse the respondents uttered words which indicated or implied that it was desirable to have destroyed the construction (works) buildings on plot No. 47 Githongo the property of Karibu Drapers at Githongo market.



3. The Appellants further pleaded that the respondents with their incited and excited supporters proceeded to plot No.47 Githongo and willfully and without reasonable cause destroyed the buildings being constructed thereon.
4. The Appellants averred that in carrying out the aforesaid acts, the respondents' actions were activated by malice and were without any reasonable and probable cause.
5. The Appellants enumerated particulars of malice by the respondents being making false allegations as to ownership of plot No.47 Githongo, influencing a mob through calculated statements and blinding them to destroy the Appellants' property, willfully scheming to have the Appellants' forcefully removed from within the said locality for claiming they were outsiders, publicly uttering statements of hatred and meant to instill fear directed towards the Appellants and proceeding to label the Appellants as land grabbers having failed and neglected to conduct investigations as to the ownership of the piece of land the records of which are in the public domain and proceeding actually to demolish the developments on the land.
6. The Appellants, stated that by participating in and inciting their cohorts to violence, the respondents caused the Appellants unjustifiable mental anguish, unprecedented loss, pain and suffering and as a result they have suffered loss and damage. The Appellants enumerated particulars of special damages as destroyed property valued at Kshs.2,356,958.40 and loss of anticipated business proceeds from the project at Kshs.5,000/=.
7. The respondents filed a joint statement of defence dated 21st August 2019 wherein they denied the Appellants claim and put them to strict proof. The respondents specifically denied uttering any malicious words against the Appellants.
8. The respondents also denied particulars of incitement and of special damages enumerated in the plaint. The respondents averred that the Appellants were not entitled to any relief claimed in the plaint.
9. Upon considering the matter, the trial court (Hon. S. Ndegwa – SPM) in a judgment delivered on 9th December, 2022) found that the Appellants did not prove their case against the respondents and as such dismissed the suit with costs.
10. The appellants were aggrieved by that judgment and filed this appeal on the following grounds:-
 1. The Learned Magistrate erred in law and fact in making a finding that the Appellants had not proved their claim on a balance of probabilities against the Respondents despite the Honourable Court in its assessment of the evidence before it making a positive finding in its judgement that: -
 - i. The respondents had entered the land forming the subject of the suit to wit: plot No.47 Githongo market.
 - ii. The land belonged to the Appellants herein.
 - iii. The entry was without the owners' consent.
 - iv. Damage was caused as a result of the entry by the Respondents themselves and others.
 2. The learned magistrate erred in law and fact in failing to find that the Respondents were jointly and severally liable for the demolition of the Appellants' property by inciting the mob by publicly making utterances that implied that it was desirable to demolish structures on the suit property-(plot no.47 Githongo Market) and actually participated in the demolition as led in



the testimony of an eye witness (PW2) whose evidence was uncontroverted at the hearing of the suit.

3. The Learned Magistrate erred in Law and fact in finding that the Appellants did not claim a specific amount in general damages when in law there is no mathematical or scientific formula in estimating general damages and that the guiding factors are the circumstances in each case and in the same judgement observing that nominal damages are awardable even where a party has not suffered any actual loss therefore arriving at a legally flawed decision.

In fact, general damages, unlike special damages, cannot be specifically claimed.

4. The Learned Magistrate erred in law by failing altogether to award the Appellants special damages claimed which amounts to the actual loss suffered despite the same being specifically pleaded and supported by evidence as observed in the same judgment and therefore arriving at an inconclusive and un-exhaustive judgement.
5. The Learned Magistrate erred in Law and fact in making a finding that the Appellants herein ought to have pleaded the actual benefit prevented from accruing by the Respondents from the suit property for the duration of the trespass when in fact the Appellants did not plead a continuing trespass at all against the Respondents.
6. The Learned trial Magistrate further erred in Law in failing to award the Appellants mesne profits despite there being a Specific pleadings and proof of the same by way of evidence.
7. The Learned trial Magistrate erred in wandering on a frolic of her own on issues relating to damages for trespass when the Appellants made no such claim. All was desired to cloud an otherwise straightforward claim of general damages for malicious damage to property, specific damages, mesne profits, costs and interest.
8. Having found that the Appellants were owners of plot No.47 Githongo market and that indeed they had proved that damage was inflicted thereon, the Learned Trial Magistrate erred in Law and fact, in refusing to award the same against the Respondents since there was sufficient direct and indirect evidence to link the Respondents to the damage.
9. The Learned Magistrate judgement is replete with contradictions on the evidence and findings of the court, the same is biased in favour of the 1st - 4th respondents against the Appellants, is full of errors, does not contain reasons for the decision, is against the provisions of law and a travesty of justice.
10. The judgement is against the weight of evidence on record.
11. The appellants pray that the appeal be allowed and the judgement of the trial court be set aside in its entirety, the court do allow the Appellants suit in the Magistrates court and grants the prayers therein and the costs of the appeal and costs in the lower court be awarded to the Appellants.
12. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 17th January 2023 through the firm of Kiautha Arithi & Co. Advocates while the respondents filed their submissions dated 5th December 2023 through the firm of Meenya & Kirima Advocates.



APPELLANT'S SUBMISSIONS.

13. The Appellants gave a detailed background of the appeal and proceeded to address grounds 1,2 and 9 of appeal.
14. The Appellants' counsel submitted that the subordinate court erred in Law and fact in holding that the Appellants had not proved their claims on balance of probabilities when indeed the Appellants had produced documentary evidence indicating that the Respondents had been in fact responsible for the malicious damage of the Appellant's property and that, that was further corroborated by PW3 where he gave a chronological testimony of how events transpired on that particular day. Learned counsel for the appellants' submitted further that PW2, who was a local preacher at Githongo market where the demolished plot, plot No.47 Githongo market was being constructed, testified that he was present and saw the four respondents whom he mentioned by names, agitate, incite and lead the incited and excited crowd in a pick-up to the site and the crowd not only demolished the Appellants' building under construction on the suit plot but actually actively participated in the demolition. That it was therefore wrong for the trial court in holding that PW3, an eye witness in broad daylight, could not have singled out the respondents from the crowd, yet there were meeting of incitement prior to the demolition which demolition itself took about forty (40) minutes and he also knew them before.
15. The Appellants counsel submitted that it was also a wrong finding for the learned magistrate to hold that the Appellant should have called more than one witness because there was a mob of over 200 people. The appellants counsel contended that it is not the number of witnesses who count in proof of Civil or indeed criminal cases, but the quality or probative value of the witnesses' evidence. It was submitted that one witness with cogent evidence, like PW3 would suffice to proof a case and his evidence sufficed. The Appellant counsel cited Section 107,108 and 109 of the Evidence Act and relied on the case of Kenya Power & Lightning Company Limited v Pamela Awino Ogunyo(2015)eKLR.
16. It is the appellants submission that the respondents did not deny holding the incitement meetings, but only changed to say that it was a security meeting where they evicted a troublesome bar owner. That they also did not deny being at the scene where the Appellants' plot was demolished nor did they deny that indeed the building under construction was demolished. It is the appellants submissions that the respondents remain accountable for all the events that transpired on that particular day as the Appellants were able to demonstrate in their list of documents as well as PW3 who was an eye witness on that day.
17. The Appellants submitted on grounds 3,4 and 8 in regard to special damages and argued that the law is clear on the head of damages called special damages. That special damages must be both pleaded and proved before they can be awarded by the court. The appellants counsel relied on the case of Hahn V. Singh, Civil Appeal No.42 of 183 (1985) KLR 716 and submitted that a natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury.
18. The Appellants counsel submitted that the appellants were able to produce a detailed valuation report from a certified valuer who was able to give a detailed report of the findings that had occurred at the Appellant's plot and argued that that was enough evidence relied on as special damages that the Appellants pleaded and proved and as such the trial court erred in Law and fact by failing to award the Appellants specific damages pleaded on their pleadings. That the trial court actually found that the loss through destruction was Kshs. 2,356,958.40/=.
19. On general damages, the appellants counsel submitted that the law is clear that general damages particularly the extent thereof would be unknown at the time of the trial and must await the conclusion



of the case so that they may be assessed. Further, that general damages are such as the law will presume to be direct natural or probable consequences of the action complained of. The Appellants counsel relied on the cases of Kenya Broadcasting Corporation Versus Geoffrey Wakio (2019) eKLR, Rook vs Rairre (1941) 1 All ER 297 and Butt Versus Khan (1981) KLR 349, Southern Engineering Company Ltd Versus Mutia (1985) eKLR and Kenfro Africa Ltd t/a Meru Express Services vs Lubia & Another (No.2) (1985) eKLR and Gicheru vs Morton & Another (2005) 2 KLR 333.

20. The Appellants counsel submitted that the learned magistrate erred in law and fact in finding that the Appellants did not claim a specific amount in general damages when in law there is no mathematical or scientific formula in estimating general damages and that the guiding factors are the circumstances in each case and in the same judgment observing that nominal damages are awardable even where a party has not suffered any actual loss therefore arriving at a legally flawed decision.
21. As regards grounds 6 and 7 of the appeal, the appellants counsel submitted that it is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. That in this case, the Appellants did not claim for continuing trespass as viewed by the Learned Magistrate but instead sought for mesne profits. That mesne profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves. The Appellants referred to the Black's Law Dictionary 9th edition.
22. The Appellants counsel submitted that mesne Profits must be pleaded and proved and relied on the case of Peter Mwangi Msuatia & Another Versus Samow Edin Osman (2014) eKLR Inverugie Investment v Hackett (Lord Lloyds (1995) 3 ALL ER 842, Kenya Hotel Proprietors Ltd v Willesden Investment Ltd (2009) KLR 126 and Park Towers Ltd v John Mithamo Njika & 7 others (2014) eKLR.
23. The appellants submitted that it is trite to state that the Appellants in this case deserved the award of mesne profits of Kshs.60,000 per month being the anticipated rental income for the twelve demolished rooms for a reasonable period as pleaded and proved. That the appeal is merited and the same should be allowed.

RESPONDENTS SUBMISSIONS

24. The respondents counsel gave the background of the matter and proceeded to submit on ground 1, 2, 7 and 8 of the appeal. The respondents counsel pointed out that the case is based on a claim that the 1st-4th respondents incited and excited supporters who proceeded to suit plot and willfully and without reasonable cause destroyed the buildings constructed thereon. It is their submission that the said claim is criminal in nature as demonstrated in the charge sheet in the record, and pointed out that none of the respondents have been convicted on the said charge. The respondents counsel pointed out that PW1 testified during cross examination that her husband was not at the property when the damage occurred and that he was informed by one Jamlick Mwangeli via phone and the said Jamlick was not a witness in the case.
25. The respondents counsel submitted that it is a principle of Law that whoever lays a claim before the court against another has the burden to prove it. They cited Section 107 and 108 of the [Evidence Act](#), and submitted that with the Appellant being not at the scene and Jamlick Mwangeli who was considered as instrumental to filing of the cause being not a witness, it leaves gaps as to who exactly caused the damage.
26. The respondents further submitted that there was inconsistencies demonstrated by PW2 and urged the court to find the Appellants did not prove on a balance of probabilities that the damage was caused by the 1st-4th Respondents to be held liable for the same. The respondents concurred with the trial court



judgement that what is disclosed in the pleadings was a tort of trespass to land and besides malicious damage to property is a criminal offence hence the criminal proceedings.

27. With regard to grounds 3 and 4 of the appeal, the respondents submitted that the Appellant's claim is on malicious damage to property. That malicious damage to property being a criminal matter its remedies/reliefs lies in criminal court. The respondents relied on section 339 (1) of the Penal Code.
28. The respondents further submitted that the Appellants sought for general and special damages for malicious damage to property but there was no evidence placed before the trial court to find the Respondents guilty for the offence of malicious damage to property or persuade court. That the damages sought herein are contemplated under the Section 339(1) of the Penal Code where remedy is imprisonment for five years thus the reliefs sought herein is not merited.
29. With regard to grounds 5, 6 and 7 of the appeal, the respondents' counsel submitted that the jurisdiction of the ELC Court is limited by Article 162(2) and (3) of *the Constitution* of Kenya and Section 13(2) of the ELC Act No. 19 of 2011. That Article 162(2)(b) states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land, while Section 13(2) of the ELC Act clearly gives power to ELC to hear and determine disputes relating to inter alia, environment, land use planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues. The respondents submitted that the the Appellants claim against the respondents jointly and severally was for general damages for malicious damage to property costs of the suit and interests.
30. It is the respondents' submission that Mesne profit is derived from continuous trespass and it is trite law that a party pleading mesne profit must conjunctively plead and prove and submitted that no evidence has been presented to the claim of mesne profit. It is the respondents' view that the Appellants claim is speculative and second guessing the outcome of the Criminal case. The respondents relied on the case of Karanja Mbugua & Another Versus Marybin Holding Co. Ltd (2014).
31. The respondents further submitted that whereas mesne profits is the profit received by a person or tenant in wrongful possession between the dates when s/he entered the suit property and when he leaves, there is no evidence or actual figure to support the profit obtained or warranting grant of Kshs. 60,000/= per month. It is submitted that it is unfathomable for the Appellants to place blame on trial court where they filed faulty pleadings of tort of malicious damage in ELC court and failure to provide evidence to support claim of mesne profit.
32. The respondents urged the court to find the appeal as lacking in merit and dismiss it with costs to the respondents.

ANALYSIS AND DETERMINATION

33. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities cited. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & another Vs Associated Motor Boat Co. Ltd* (1968) EA 123.
34. The issues I find for determination are whether the appellants had proved their claim on a balance of probabilities and whether the appeal should be allowed or not.
35. The appellants pleaded that they were the owners of Plot No. 47 Githongo Market where they had developed by putting up a petrol station and some business premises. Their case was that on or about 2nd November, 2016, the respondents, without any lawful cause or plausible excuse uttered words



which indicated or implied that it was desirable to destroy the construction works that were on the suit plot. The appellants further pleaded that the respondents with their incited supporters proceeded to the suit premises and willfully and without reasonable cause destroyed the buildings that were being constructed thereon.

36. At the trial, the appellants called three witnesses. PW1 was Julia Gaitu, one of the appellants herein. She however was not present at the premises on the material day and therefore did not witness any of the allegations that were levelled against the respondents.
37. PW2 was Samuel M’Itire who testified that on the material day he was preaching at Githongo Market when he saw a vehicle with people calling for a meeting at Githongo Stadium. That he went there and found a crowd of about 200 people led by the 1st and 2nd respondents herein. His evidence was that the crowd went to the suit premises with stones and carrying placards and started demolishing the structures thereon.
38. PW3 was a valuer who prepared and produced the Valuation Report in respect of the loss that was occasioned by the demolition.
39. The respondents also testified and basically denied having taken part in the demolition of the suit premises.
40. The question for determination is whether the appellants proved that the respondents were liable for the destruction on their property. For liability to attach, and has rightly found by the trial court, the appellants ought to have proved that the respondents were the ones who entered the suit property and caused the damage.
41. In this case, it is clear that PW1 never witnessed the respondents enter the suit premises. On his part, PW2 testified that the demolition was carried out by a crowd of about 200 people. PW2 did not tell the court how he concluded that the said crowd was being led by the respondents herein. Indeed, there was no evidence to confirm that the vehicle that was allegedly calling people for a meeting belonged to the respondents. The type of vehicle nor registration numbers were not disclosed to the trial court. PW2 did not also state what the inciting words that were uttered were. Moreover, PW2 was categorical that he did not know the person who was driving the said vehicle. Further in his evidence, PW2 never mentioned that the 3rd and 4th respondents participated in the demolition.
42. It is a principle of law that whoever lays a claim before court against another has the burden to prove it. This is provided for under Section 107 and 108 of the *Evidence Act*. This was a case that amounted to malicious damage to property. The whole case depends on onus of proof. The only evidence in this case that directly links the 1st and 2nd respondents is that they were seen driving a car at Githongo market and allegedly calling out people to attend a meeting. The make, registration number and colour of the said vehicle were not disclosed. Even the person who was driving was not given. Certainly, the two of them could not have been driving one vehicle.
43. As I have stated the claim was for structures that were demolished. Demolition of property could amount to a charge of malicious damage to property. In the case of *Henry H. Itanga Versus M. Manyonka* [1961]EA 705 it was held that:

“A high standard of proof – comparable to that required in a Civil fraud was required to substantiate an allegation of removal, in circumstances which could amount to theft, of a large sum from a house within the respondent’s close. The learned Judge did not apparently,



appreciate that there were gradations of the standard of proof in Civil cases and applied a standard which was inappropriate to the circumstances of this case”.

44. Further, in the case of Hornal Versus Neuberger Products Limited (2) (1956) 3 All ER 970, Denning L. J said at page 973:- “ The more serious the allegations the higher the degree of probability that is required, but it need not in a civil case reach the very high standard required by the Criminal law”.

45. In the case of Henry H. Itanya Versus M. Manyoka (Supra), it was held further as follows:

“ ...While the standard of proof required in a civil case is not so high as that required in a criminal case, it is not correct to say or imply that the standard of proof is the same in all civil cases – namely a mere balance of probabilities; the standard varies according to the gravity of the matter to be proved as the allegation on the present case was an allegations of breaking and forcibly taking possibly amounting to theft, the standard of proof was very high – at least as is required in cases of civil fraud...”

46. Applying the above standard of proof to the present case which was a case of demolition of property which amounted to malicious damage to property, it is my conclusion that the trial magistrate applied the appropriate standard of proof on the matter. After considering the evidence in the trial court and this court; I have hesitatingly arrived at the conclusion that the appellants failed to prove their case against the respondents to the appropriate standard of proof. On the facts so far as they were established, I would not be prepared to say that the appellants had established their claim and to upset the learned trial magistrate order dismissing the suit with costs. Having considered the evidence on record, I am satisfied that the findings and holdings of the learned trial magistrate were justified and well founded and I find no reason to interfere with the same.

47. Consequently, I find no merit in this appeal and the same is dismissed with costs to the respondents.

Dated, signed and delivered at MERU this 7th day of March, 2024

Hon. C. Yano

ELC – Judge

In the presence of:-

Court Assistant: Tupet

Nyaga for appellant

Ms. Murugi for respondent

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JUDGMENT

