Case Number:	Civil Appeal 55 of 2012
Date Delivered:	23 Mar 2018
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Alnashir Ramazanali Magan Visram, Erastus Mwaniki Githinji, Jamila Mohammed
Citation:	Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal Dismissed with Costs to the Respondents.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, VISRAM & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 55 OF 2012

BETWEEN

CAPT. GODFREY JULIUS NDUMBA MBOGORI.....1ST APPELLANT

KARIMI BUSINESS ASSOCIATES LTD.....2ND APPELLANT

AND

NAIROBI CITY COUNTY.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, (Khamoni, J.) dated 13th December, 2007

in

HCCC NO. 2901 OF 1995)

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JUDGMENT OF THE COURT

Background

1. This is an appeal against the decision of **J.M. Khamoni, J.** wherein the learned Judge dismissed the appellant's case with costs to the respondent. Dissatisfied with that judgment, the appellant has preferred this appeal.

2. A brief background to this matter as can be gleaned from the amended plaint dated 4th September, 2006 is that **Cap. Godfrey Julius Ndumba Mbogori**, (the 1st appellant), averred that he was the equitable owner of a portion of land parcel Nairobi/Kasarani/12499 belonging to one **Robert James Kigunda, (Kigunda)**; that the 1st appellant is the Chairman and Managing Director of the 2nd appellant, **Karimi Business Associates Ltd** which is a company through which the 1st appellant and his wife carry out their business activities; that by an agreement made in April 1989 between the 1st appellant and the said **Kigunda**, the 1st respondent purchased 2 acres portion being Land parcel No. Nairobi/Kasarani/14969 (the suit premises) and commenced the business of rearing chicken thereon after constructing structures for the efficient conduct of the said business and that he commenced business with the financial assistance of various banks and financial institutions which advanced loans to the appellants who charged various properties as security for the loans and other financial assistance.

3. The 1st appellant further averred that on various dates including 20th June, 1994, employees from the City Inspectorate Department of the Nairobi City Council (now the **NAIROBI CITY COUNTY**) (the Respondent herein), trespassed into the 1st appellant's suit premises and caused damage therein by demolishing structures, lawfully erected on the suit property and illegally carried away materials and stores as a result of which the appellants suffered loss and damage. The appellants contended that the respondent is vicariously liable for the acts of its officers and agents. It was the appellants further contention that as a result of the trespass and other unlawful and malicious acts by the respondents or their officers and agents while in the normal course of their duties, the appellants were unable to repay their loans from the various banks and financial institutions resulting in the sale of various properties in exercise of the banks' and financial institutions' statutory power of sale respectively.

4. The appellants claimed Kshs.180,655,000 computed as follows;-

"a) Buildings and structures demolished

illegally and materials taken ……. Shs. 2,500,000.00

b) Chicken feeds, stores, equipment and other

Materials illegally carried away ... Shs. 1,500,000.00

d) Loss of profits from 1993 until August, 1995

As per schedule …….....Shs.25,800,000.00

TOTAL CLAIM Shs.29,800,000.00

Principal Claim As of 30th Aug., 1995= Kshs.29,800,000.00

+1996:10 Crops @ Shs.980,000 = Shs. 9,800,000.00

+1997:10 Crops @ Shs.980,000 = Shs. 9,800,000,00

+1998:10 Crops @ Shs.980,000 = Shs. 9,800,000.00

+1999:10 Crops @ Shs.980,000 = Shs. 9,800,000,00

+2000:10 Crops @ Shs.980,000 = Shs. 9,800,000.00

+2001:10 Crops @ Shs.980,000 = Shs. 9,800,000.00

+2002:10 Crops @ Shs.980,000 = Shs. 9,800,000.00

+2003:10 Crops @ Shs.980,000 = Shs. 9,800,000.00

+2004:10 Crops @ Shs.980,000 = Shs. 9,800,000.00

+2005:10 Crops @ Shs.980,000 = Shs. 9,800,000.00

+2006:10 Crops @ Shs.980,000 = Shs. 9,800,000.00

NB: Demolished Poultry Houses included unused

Structures in which new crop was expected.

Auctioned properties worth Shs.73,655,000.00

Total Crops: 110 @ Shs.980,000.00 Shs.107,800,000.00

Therefore Total ClaimShs.180,655,000.00."

5. The appellants prayed for:

a) Kshs.180,655,000.00.

b) Interest thereon at the rate of Twenty five per centum (25% p.a.) per annum from the date of filing suit until payment in full.

c) Exemplary and/or punitive and/or general damages.

d) Costs of the suit with interest at court rates.

e) Such further or other relief as to this Honourable court may be just.

6. The respondent filed its amended defence dated 29th September, 2006 in response to the amended plaint wherein it denied that any of its employees entered the appellant's premises on diverse dates and proceeded to demolish various structures, including chicken enclosures, stores and workers premises or that any equipment was carted away from the suit premises.

7. The respondent further denied that the 1st appellant lost any business due to any alleged acts on the part of the respondent or its employees; that it was a party to the various transactions between the appellants and the various banks and financial institutions and it could therefore not be held liable for any default by the appellants to honour their obligations with the banks and financial institutions and that there is no justification to claim special damages of Kshs.180,655,000/= or interest thereon as the respondent was not privy to the various contracts between the appellants and other parties or the default by the appellants to perform the same.

8. It was the respondent's further contention that the premises on which the business was situated was not designated for business purposes and if at all the business was being conducted in a residential area, it was in contravention of the bye-laws as no application for change of user was ever filed and the necessary consent granted; that further and/or in the alternative the respondent averred that if the respondent's employees did carry out the said destruction, this was done without the knowledge and approval of the respondent and the said employees acted beyond the scope of their duties and the respondent is therefore not liable for any loss and damage.

9. In its Reply to Amended Defence, the appellants averred that the suit premises were both commercial and residential user and there was therefore no need to apply for change of user; that the business of chicken rearing undertaken by the appellants on the suit premises did not require licensing and the respondent was obligated to notify the appellants of their intention to move into the suit premises before entering the suit premises.

10. The matter proceeded for hearing, during which the 1st appellant was the appellants' sole witness. **Mr John Koyier Barreh, (John),** the Ag.Assistant Director in charge of Development Control, an employee of the respondent was the sole defence witness. At the hearing, the 1st appellant conceded that he was not the registered owner of the suit premises and did not have a title to the suit premises.

11. **John** testified that the suit premises were registered in the name of **Kigunda**; that it came to the attention of the respondent that the 1st appellant had constructed unauthorized structures with no building plans from the respondent as required under the respondent's building by-laws and that prior to the issuance of the demolition notice, the respondent had charged the registered owner of the suit premises, **Kigunda** in the City Court in CRC No.1190/1992 for failing to remove the unauthorized structures; that the District Magistrate ordered that the structures erected on the suit premises be destroyed.

12. The learned Judge in his judgment held that the appellants had failed to prove that they were the registered proprietors of the suit premises, and the respondent therefore was not liable to pay the appellant the amounts claimed. The learned Judge dismissed the appellants' claim with costs and stated as follows:-

"… the plaintiffs have not satisfied this court on the basis of the evidence on record, even on the balance of probabilities, that the defendant is liable to pay the plaintiffs what the plaintiffs are claiming in this suit.

Having failed to prove that they are the registered owners of the suit premises and that the lawful user of the suit premises is the

type of business for which they seek damages against the defendant the plaintiffs come out (to use a mild language) as unauthorized occupiers whose stay on the suit premises should not be secured by the defendant whatever the magnitude of the developments the plaintiffs may have effected on the suit premises."

13. Aggrieved by that decision, the appellants preferred this appeal on the grounds *inter alia* that the learned Judge erred in both law and fact;

i. in holding that the appellants had not proved their claim against the respondent.

ii. in holding that the appellants were unauthorized occupiers of the suit premises.

iii. in holding that the developments effected by the appellants on the suit premises were unlawful.

iv. in holding that the appellants were not the registered owners of the suit premises and thus the suit lacked merit.

v. That the learned Judge failed to properly evaluate the evidence in its entirety and arrived at conclusions not supported by evidence or law.

14. The appellants sought the following orders:

(a). "That the appeal be allowed and the decree dismissing the Appellants case be set aside and substituted with the following:

(i). That judgment be entered for the plaintiffs for loss of business as claimed which as of today stands Ksh. 1, 344,724, 720/=.

(ii). That judgment be entered for the plaintiff for loss occasioned by their demolished poultry houses and the current value of the several properties that were auctioned at Kshs. 344, 4000,000/=.

(iii). That judgment be entered for the plaintiffs for exemplary and punitive damages to be assessed by the court.

(b). The costs of this Appeal be awarded to the Appellant.

(c). Any other or further order that would be just and reasonable to serve the ends of justice."

Submissions by Counsel:

15. Learned counsel, **Mr Mogikoyo,** appeared for the appellants and submitted that the learned Judge erred in holding that the appellants had not satisfied the court that the respondent was liable to pay the appellants the claims made while there was sufficient evidence to support their claim; that the learned Judge erred in holding that the appellants were unauthorized occupiers in the suit premises whereas the evidence on record proved that the appellants had a legal right to the suit premises and were therefore entitled to payment of the claims made.

16. In developing the argument further, counsel submitted that the learned Judge erred in holding that the developments effected by the appellants on the suit premises were unlawful and that the appellants were not the registered owners of a portion of the suit premises and that their claim therefore lacked merit. It was counsel's further contention that the learned Judge erred in failing to hold that the appellants had suffered loss and damage as a result of the actions of the respondent's agents and were therefore entitled to an award of general, special, exemplary and punitive damages. Counsel urged us to allow the appeal with costs.

17. Learned counsel **Ms. Matunda** appeared for the respondent and submitted that from the pleadings, the 1st appellant did not prove that he was the registered owner of the suit premises and therefore have no right to pray for the orders sought in the amended plaint; that the respondent sent the eviction notice to the registered proprietor, **(Kigunda),** and the demolition of the structures on the suit premises therefore was lawful as the registered proprietor was given due notice. On the issue of the damages sought by the appellant, counsel submitted that special damages must be specifically proved which the appellants failed to do, that the appellants

failed to prove the damage suffered; and that there was no irregularity carried out by the respondent as the structures that were demolished on the suit property were erected illegally as no approvals were issued by the respondent to carry out the business that the appellants were engaged in. Counsel concluded by submitting that the appellants were not entitled to the award of exemplary damages, which are punitive in nature, as the respondent was carrying out its lawful mandate of keeping the City of Nairobi planned and orderly. Counsel urged us to dismiss the appeal with costs.

Determination:

18. This being a first appeal, we are entitled to reconsider the evidence, evaluate it and draw our own conclusions but making allowance for the fact that we have not seen or heard the witnesses. (See **Selle V. Associated Motor Boat Company Limited (1968) EA 123, 126** where the court considered the principles upon which it acts in a first appeal noting as follows:-

"Briefly put they [the principles] 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 witness 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 based on the demeanour of a witness is inconsistent with the evidence in the case generally."

19. We have carefully considered the judgment of the High Court, the grounds of appeal, the record, the submissions of respective counsel, the authorities cited and the law.

It is the 1st appellants' contention that the basis of his claim is that the respondent's employees trespassed on the suit property occasioning loss and damage; that the respondent was vicariously liable for the actions of its employees and was therefore liable to pay general, special and exemplary damages to the appellants.

20. It was the appellants' further claim that in 1989 he purchased the suit premises from **Kigunda;** that he constructed structures for chicken rearing on the suit premises; that he paid water and electricity bills in respect of the suit premises and that a dispute arose between the 1st appellant and the said **Kigunda** resulting in the institution of a suit by the 1st appellant against the said **Kigunda** namely Nairobi High Court Civil Case No. 6195 of 1991 wherein an order of injunction was issued on 4th December, 1991 restraining **Kigunda** from interfering with possession and occupation by the 1st appellant.

21. The 1st appellant in cross examination testified as follows:-

"The business was situated in plot No. 14969 Kasarani area …. I do not have title to that plot. It is in the name of the seller Robert James Kigunda."

The respondents' witness, **John,** fortified this position when he testified as follows:-

"Nairobi Kasarani/12499 belonged to one Robert James Kigunda according to our record and documentation….We refer to such person as the registered legal owner in accordance with the law under which that particular land is registered."

22. It is therefore not in dispute that the suit property was registered in the name of **Kigunda**. The question for our consideration is therefore whether a claim for trespass can flow in favour of the appellants when they are not the registered proprietors of the suit premises.

Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition at page 428 states as follows:-

"Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land. *(Emphasis added).*

23. We are further guided by the case of **Jones vs Chapman 1847] 2 Exch 821** by Lord Maule, J. who stated:-

"…as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession…"

Accordingly, in the circumstances of this case, in the absence of title, the appellants cannot claim trespass against the respondent herein.

24. It is not disputed that the respondent gave the registered proprietor of the suit property, **Kigunda**, due notice to remove the structures erected on the suit premises as they were not authorized and did not conform to the City by-laws. It was the respondent's contention, which the 1st appellant conceded in his testimony in cross examination, that the respondent duly gave notice to the registered owner to remove the unauthorized structures. It was the respondent's claim that under the law it was only obliged to serve the registered owner with the notice requiring him to remove the offending structures which it did.

The 1st appellant testified as follows:-

"The notice was issued to Mr Kigunda and myself. The box number is Mr Kigunda's … I was not party to the case in the City Council and I was not charged there nor was I served with any notice."

25. **John** testified that the suit premises were in Zone 18 which was designated as a residential area and that the appellants were not authorized to carry out the business of rearing chicken on the suit premises. It was his further testimony that a notice was served on the registered owner of the suit property **Kigunda** to remove the unauthorized structures on the suit premises; that this matter was referred to the City Magistrate's Court and a Demolition Order was issued.

26. The 1st appellant testified that he applied for relevant licences from the respondent but he was unable to prove the relevant permits and licences as the respondent's agents had carried them away at the time they demolished the structures on the suit premises. The 1st appellant testified that he did not apply for change of user and neither did he use an architect to draw his development nor did he have a building plan. It was **John's** evidence in rebuttal that even if the respondent had carried away the documents as alleged, it would be possible to obtain copies from other offices such as the Lands Office and from the respondent which the appellants had failed to do. **John** testified as follows:-

"the land is only 2 acres. It is residential. For what the plaintiff (appellants) were doing therefore, approval was required as that development would be different from the planned use of the land. To keep 14,000 chicken on a plot you need to apply for change of use and you will also require a single business licence".

27. In the circumstances, we find that as the suit premises were registered in the name of **Kigunda** who was given due notice to remove the unauthorized structures, the appellants cannot claim against the respondent. The structures erected on the suit premises were unauthorized and the activities carried on by the appellants were unauthorized and did not conform to the city by- laws.

28. On the appellants' claim for general damages, we find that there was no breach by the respondent to the appellants as there was no wrongful act on the part of the respondent as it was complying with its duty to ensure that the City of Nairobi is planned and orderly and that any developments carried out comply with the City by-laws. This claim therefore fails.

29. It was the appellants' further claim that the respondent was liable for special damages for *inter alia* loss of business, loss occasioned by the demolished poultry houses, and the current value of the several properties that were sold in exercise of the chargees' statutory power of sale and also for exemplary and punitive damages. The respondent denied liability on the ground that the appellants were not the registered owners of the suit premises, which premises were in Zone 18 which was designated as a residential area and not for the business carried out by the appellants; that the appellants' use of the suit was therefore unlawful, that due notice was issued to the registered owner to demolish the structures on the suit premises as they were not in conformity with the by-laws for that particular area resulting in demolition of the unauthorized structures.

30. 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."

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

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."

In the instant case there was an allegation 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.

32. The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of **Rookes V Barnard [1964] AC 1129** where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.

Lord Devlin also gave expression to 3 considerations which must be borne in mind in any case in which an award of exemplary damages is being claimed. The first category is that the plaintiff himself must be the victim of the punishable behaviour; the second category is that the power to award exemplary damages must be used with restraint for it constitutes a weapon and can be used either in defence of liberty or against liberty and thirdly, the means of the defendant, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages.

33. In the circumstances of this case, the appellants did not demonstrate that their claim fell within any of the categories contemplated above to justify an award of exemplary damages as against the respondent. Accordingly, the claim for an award of exemplary damages fails.

34. The upshot is that this appeal has no merit and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 23rd day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR