Case Number:	Civil Appeal 240 of 2011
Date Delivered:	09 May 2014
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	John Wycliffe Mwera, Daniel Kiio Musinga, William Ouko
Citation:	Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR
Advocates:	Mr Oduol for the Appellant Mr Mwangi for the 1st Respondent Mr Kurgat for the 2nd Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Petition No. 625 of 2009
Case Outcome:	Appeal allowed in part
History County:	Nairobi
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MUSINGA & OUKO JJA)

CIVIL APPEAL NO. 240 OF 2011

HON. DANIEL TOROITICH ARAP MOI, CGH……...……APPELLANT

AND

MWANGI STEPHEN MURIITHI ……...……...……1ST RESPONDENT

RAYMARK LIMITED ……2ND RESPONDENT

(Being an Appeal against the decree of the High Court of Kenya at Nairobi (Gacheche, J.) dated 6th April, 2011 at Nairobi

in

Petition No. 625 of 2009)

****

JUDGMENT OF THE COURT

The appeal we are about to determine followed the judgment of the High Court (***Gacheche J)*** delivered on 6th April, 2011.

On 23.10.2009 ***Mwangi Stephen Muriithi***, the 1st respondent, filed a petition in the High Court invoking the powers donated by Section 84 (1) of the Constitution in force then but since repealed, together with the Constitution of Kenya (***Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice Rules 2006***. The reliefs sought were as provided for under Sections 72 and 75 of the said Constitution. In the whole matter reference will merely be made to the **Constitution** and the **Rules**. The 1st respondent filed his petition against the appellant, ***Hon. Daniel Toroitich Arap Moi***, the President of Kenya since retired, hereinafter to be referred to simply as the appellant.

During the proceedings, the 2nd respondent, ***Raymark Ltd*** was joined as the interested party in connection with a certain piece of land the 1st respondent had laid claim on.

The 1st respondent pleaded that he was a joint property owner in three limited liability companies together with the appellant and others, stating the percentage share ownership in each as follows:

a. ***Fourways Investments Limited –***

Mwangi Stephen Muriithi – 40%

James Kanyotu – 40%

Sadru Alibhai – 1%

Daniel Arap Moi – 19%

b. ***Sheraton Holdings Limited***

Mwangi Stephen Muriithi – 40%

James Kanyotu – 40%

Sadru Alibhai – 1%

Daniel Arap Moi – 19%

c. ***Mokamu Limited***

Mwangi Stephen Muriithi – 33%

James Kanyotu – 33%

Daniel Arap Moi – 33%

It was further pleaded that the three companies, which we shall refer to only by their first names, owned the following properties:-

1. ***Fourways – LR No. 209/4383 Muindi Mbingu Stree, NRI***

LR No. 209/2464 Kimathi Street NRI

LR. No. 209/2385 Moi Avenue NRI

2. ***Sheraton – LR No. 209/1846 Mama Ngina Sreet NRI***

3. ***Mokamu – LR. No.11793 Solai, Nakuru***

The 1st respondent then claimed that in 1982 the appellant using his powers of President of the Republic of Kenya ordered his unlawful detention without trial, thereby getting an opportunity to deprive him of his property rights, by causing the properties aforementioned to be sold off. That the appellant did not and had not accounted to the 1st respondent as regards the proceeds of the sales thereof. He had thus suffered loss, violations of fundamental rights under Sections 72 and 75 of the former Constitution and therefore prayed for:

a. ***A declaration that the said detention was illegal and unconstitutional, under Section 72;***

b. ***a declaration that the sale of properties belonging to the three companies aforesaid was illegal under Section 75;***

c. ***an order against the appellant to pay compensation to the 1st respondent for the deprivation of rights; and***

d. ***costs.***

In the affidavit in support of the petition the 1st respondent repeated the contents of the petition. In another affidavit sworn on 22nd February, 2010 the 1st respondent said as against the appellant, among other things:

"21. That the Respondent has however refused to restore to me the property he took away from me."

In yet another affidavit sworn by the 1st respondent on 14th May 2010, it was deponed that the annexed documents (MSM 1) indicated that Rupani House and Kenwood House, belonging to Fourways were sold for a sum of sh.36million. However, the annexed documents only indicated that plot LR 209/4383 was transferred to Fourways on 24th September, 1968. There was no document to evidence the sale price of the two plots for sh.36 million.

Further in the latest affidavit, the 1st respondent averred that a building, Corner House belonging to ***Sheraton*** was sold for sh.28 million whereby only sh.6 million was paid leaving a balance of sh.20,354,300/= (figure not arithmetically correct). The registration number of this property was not given and the bundle (MSM II) said to have been annexed, was not readily available in the record.

It was the 1st respondent's further deposition that another building called Atlas House for which he had no documents, but which belonged to ***Fourways*** had attracted an offer of sh.13million.

And lastly, that the land belonging to ***Mokamu***, measuring 1020 acres carried a valuation of sh.100,000/= per acre. The farm had 800 head of cattle, each valued at sh.65,000/= plus other miscellaneous assets worth sh.20million. All the above claimed values were ascertained as follows:

"9. That these are the estimates I have for the properties in question which I arrive at – conscientiously and to the best of my personal knowledge and experience."

The 1st respondent concluded his affidavit by acknowledging to have been paid sh.5 million from ***Sheraton*** which he desired the court to deduct from his dues.

On 14th April, 2010 ***M/s Kiplenge & Kurgat Advocates,*** filed a replying affidavit to the petition, sworn by one ***Joseph Tole Maganga***, on behalf of the 2nd respondent (***Raymark***) which was then an interested party. Therein it was stated, among other things:

"10. That the piece of land stated as LR No. 11793 in Solai Nakuru District belongs to the Interested Party and has never been the property of M/s Mokamu Ltd."

We quote this part of the 2nd respondent's affidavit to be referred to later when we address its notice of cross-appeal.

The appellant did not file a reply to the petition – a factor that assumed great significance in the proceedings. **Mr. Oduol**, learned counsel for the appellant told us that his client opted to file a preliminary objection based on jurisdiction and not grounds of opposition or a replying affidavit.

The hearing of the petition proceeded by way of affidavit evidence and the submissions by the parties' advocates. At the end of it all the learned judge analysed the material placed before her and decided, in paraphrase, as follows using the parties descriptions in this appeal:

i. The High Court had jurisdiction conferred on it under Section 60(1) of the Constitution to determine the subject petition, claiming violations of rights under Sections 72 and 75.

ii. Non-disclosure of material particulars in respect of the case of **Muriithi Vs Director of Criminal Investigations & Another** [1988] KLR 629: It was a case concerning orders of *habeas corpus*, not related to the petition and so its disclosure was not necessary.

iii. Breach of Fundamental Rights: The new and progressive approach is that it is no longer tenable to consider that these rights are only against the State. Even individuals and non-state bodies can breach others' fundamental rights, and the appellant accordingly violated the fundamental rights of the 1st respondent.

iv. Limitation Period: There is no time limit within which one could litigate a breach of fundamental rights via Section 84 of the Constitution, but not for a claimant who sleeps on his rights only to sue when he elects to do so without a satisfactory explanation.

v. Whether the claim was constitutional or commercial:

a. the 1st respondent had deponed on oath and the appellant had not rebutted the claim that the latter unlawfully detained the former.

b. the detention of the 1st respondent was not for the purpose of preservation of public security but to secure personal and ulterior commercial advantage and to interfere with the former's liberties and rights.

c. the claim was a constitutional matter warranting the 1st respondent to seek compensation for the illegal detention.

d. the action of the appellant led to a denial of fundamental rights leading to loss, economic and such

financial loss that warranted an award of sh.50 million in punitive damages.

vi. Loss of properties: The sale/disposal of properties once owned by the 3 companies had not been denied and the 1st respondent's share was calculated at sh.80,161,720/= which was awarded.

vii. Interest: Awarded at court rates of 12% p.a. on a compound basis with effect from 1st July 1982 on both sums contained in (v) and (vi) above.

viii. No order was made in favour of the 2nd respondent (Raymark)

ix. Costs: To be borne and paid to the 1st respondent by both the appellant and the 2nd respondent.

The above decision was distilled in the decree given on 6th April, 2011 with the reproduction of the sums awarded plus interest levied at 12% p.a. on compound basis and specifically:

"1. That a declaration be and is hereby made that the detention of the Petitioner was caused by the Respondent for the achievement of ulterior commercial advantages for the Respondent and was illegal and unconstitutional and contravened the Petitioner's right under Section 72 of the Constitution.

2. That a declaration be and is hereby made that the sale of the property belonging to Fourways Investments Limited, Sheraton Holdings Limited and Mokamu Limited during the detention of the Petitioner by the Respondent was illegal and an infringement of his constitutional right to property under section 75 of the Constitution."

The above decree gave rise to the filing of the present appeal based on 75 grounds. These were condensed into six (6) grounds argued over one hundred and one (101) paragraphs and making reference to many authorities. The 1st respondent's submissions had some twelve (12) heads with subheads and also made reference to authorities. The 2nd respondent, supported the position of the appellant. Both the 1st and 2nd respondents, filed notices of cross-appeal which were argued.

The main grounds of the appeal, and which the 1st respondent stoutly answered, including any other along the way, covered the areas of:

i. Jurisdiction.

ii. Non-disclosure of material facts.

iii. Legality of detention.

iv. Failure to plead particulars of breach.

v. Limitation of actions and *Res Judicata.*

vi. Assumption of facts.

Beginning with the jurisdiction of the High Court in entertaining the claim that the 1st respondent had been unlawfully detained, ***Mr. Oduol***, learned counsel for the appellant, submitted that detention under the former Constitution was lawful and that to challenge detention effected under Section 83(1) of the former Constitution could only be by presenting a case before a special Tribunal provided for under Section 83(2)(c) of that Constitution and not in the High Court. And further that the ***Muriithi*** case (supra) had confirmed that the 1st respondent had been legally detained and so the High Court did not have jurisdiction to determine the legality of that detention afresh.

Counsel continued that the claim of the 1st respondent's property in the three companies, was governed by the Companies Act, a complete legal regime regulating the relationships of share-holders in a limited liability company, including where a minority shareholder feels that the majority are oppressing him, or his shares are being diminished or there was failure to account. That the petition before court was misconceived since a shareholder cannot petition the court as the 1st respondent did. He was an individual different from the separate and distinct entities of the three limited liability companies. Thus he had no capacity to sue on their behalf, because the properties allegedly sold belonged to the three companies and not the 1st respondent.

We heard that the 1st respondent had been detained lawfully as was found in the ***Muriithi*** case which was heard by the High Court earlier (***Chesoni, J.*** as he then was***)***. But he did not disclose that fact to court. He knew well that such detention was in the docket of the Minister in charge of Home Affairs yet the 1st respondent did not join that party or the Attorney General in that regard. That the appellant did not personally owe the 1st respondent protection of his individual rights. It was the State that ought to have been sued. That was the position under the former Constitution which position has since changed with Articles 2(1), 10(1) 20(1), 21(1), 22 and 258 of the present Constitution.

Citing the case of ***Anarita Karimi Njeru v R [1970] KLR 154***, ***Mr. Oduol***, stressed that a petition seeking relief for breaches of one's fundamental rights as the 1st respondent alleged here should set out, with a reasonable degree of precision, not only the provisions breached but also the manner in which the rights were infringed. The particulars of infringement are essential in this regard, not mere claims, to enable the respondent to know the exact nature of the case to answer. We were urged to find that the particulars of infringement under sections 72 and 74 were lacking.

Turning to the grounds of *res judicata* and limitation we were told that the ***Muriithi*** case decided and settled the issue of the 1st respondent's detention, which his petition brought up to be litigated afresh. That the detention was executed by the Minister and therefore amounted to an act of the State not attributable to the appellant. That the decision by ***Chesoni, J*** was not appealed and consequently, ***Gacheche, J*** did not have power to re-open and rule on the same issue, and that the 1st respondent did so after 28 years. His claim was thus time-barred.

The next point ***Mr. Oduol*** addressed related to proof of the claims laid. We heard that no evidence was placed before the learned judge to show that the three companies the 1st respondent claimed to have held shares in were ever incorporated and if so by who and what the respective share holdings were. Only a percentage of shares was pleaded. That share-holding did not entitle a person to a portion of the companies' assets and yet that is what the High Court awarded the 1st respondent because the court assumed that since the appellant did not file a replying affidavit to rebut the facts deponed to by the 1st

respondent, it had to be presumed that he had proved his claim under Order 6 rule 9 of the repealed Civil Procedure Rules, even without tendering any evidence. That, that was in error. Then we heard that the 1st respondent had not claimed or pleaded special damages which were awarded. Similarly, interest was not pleaded yet it, too, was awarded. It was argued that the learned judge took the figures stated in the 1st respondents' submissions and based her award on them. This was in error since submissions do not substitute evidence.

Mr. Kurgat, learned counsel for the 2nd respondent, supported ***Mr. Oduol's*** position and added that his client came into the proceedings to state by affidavit that parcel no. LR 11793 Solai, Nakuru, was never owned by ***Mokamu Ltd*** as the 1st respondent claimed in his petition. It was always the property of the 2nd respondent. That the 1st respondent did not deny this fact and did not prove it by evidence that indeed ***Mokamu*** owned this land. Proof fell on the 1st respondent and not the 2nd respondent. Yet the High Court found that the 1st respondent's shares in the Solai property were sold and he should be compensated.

Mr. Kurgat submitted that in the circumstances his client was wrongly and unfairly condemned to pay costs.

It was now the turn of ***Mr. Mwangi***, to reply to the appeal, the 2nd respondent's notice of cross-appeal and argue his own cross-appeal.

Beginning with the position taken by ***Mr. Oduol*** that Section 83 of the former Constitution governed the 1st respondent's detention, ***Mr. Mwangi*** submitted that that was only when Kenya was at war and detention was ordered. At the time of his client's detention Kenya was not at war and so his detention was illegal. And that the independent tribunal envisaged to handle detention could only review the same and make recommendations concerning the necessity or expediency of continuing the detention. It was not a venue to challenge the legality of one's detention. That lay only with the High Court, in the manner the 1st respondent moved.

Moving to jurisdiction, ***Mr. Mwangi*** argued that generally a court ought to determine its jurisdiction to handle a given matter. But a court can determine that during the trial of the whole case, for instance where that challenge is on some aspects of the case only as opposed to the whole case. Counsel told us that jurisdiction as defined in ***The Owners of Motor Vessel 'Lillian "S" " vs Caltex Oil (Kenya) Ltd [1989] KLR 1*** was a condition precedent to the whole case as set out and mandated by statute – the ***Supreme Court Act 1981*** (U.K) dealing with admiralty causes. This was a peculiar and specific area of litigation and not a general one. So the learned judge addressed the preliminary objection on jurisdiction along with the merits of the case, holding that she had jurisdiction to entertain the petition. It concerned breaches of Sections 72 and 75 of the former Constitution while the ***Muriithi*** case only focused on *habeas corpus* in which the detention order was accordingly placed before ***Chesoni, J***. That was all, while ***Gacheche, J*** properly determined the validity of that detention.

Mr. Mwangi maintained that the 1st respondent claimed that the appellant detained him, both in the petition and the supporting affidavit. The appellant did not deny that by filing a replying affidavit and so the claim was proved. The detention was with the intention by the appellant to appropriate the 1st respondent's interest in the three companies; the court was bound to find for the 1st respondent on the balance of probabilities; that since appellant did not deny the claims laid against him, by dint of Order 2 rule11 and Order 6 rule 9 of the old Civil Procedure Rules he was deemed to have admitted those claims; that the 1st respondent did not need to produce documents in evidence to support his claims since that evidence is only required when a claim is denied. And in any case extracts of titles of the properties sold had been exhibited in the third affidavit. It should be noted that when we looked at the

annexture to the affidavit sworn on 14.5.2010 “MSM 1” was in respect of LR 209/4383 only, being transferred to ***Fourways***.

Mr. Mwangi continued to state that breach of fundamental rights was not the responsibility of the State only – even individuals could be liable. Accordingly, the 1st respondent sued the appellant claiming that the latter had breached his rights and he proved it. That the Companies Act was not applicable in dealing with the complaint that the appellant detained the 1st respondent in order to appropriate his property rights contrary to Section 75 of the former Constitution. That was a matter for a constitutional and not a commercial court.

Counsel further submitted that the 2nd respondent came into the proceedings as a stranger and was busybody for which it was rightly condemned to pay costs. The Solai property no. LR 11793 was never an issue and so the 1st respondent did not have to file a reply to the affidavit of the 2nd respondent on this matter.

Coming to the issue of interest, ***Mr. Mwangi*** posited that the learned judge awarded interest at court rates. That rate should have been on a commercial basis because the 1st respondent’s financial interests were prejudiced by the appellant’s acts. The 1st respondent lost commercial opportunities and so we should order interest to be paid at commercial rate of 35% per annum prevailing at the time.

In response, ***Mr. Oduol***, reiterated that the ***Muriithi case*** sealed the 1st respondent’s fate of detention. The order was not appealed against. In the circumstances of this case the operation of the Companies Act was not suspended and so the claim for compensation ought not to have been through a constitutional petition but by way of commercial litigation. We were told that ***Section 107 of the Evidence Act*** still required that the 1st respondent proved his claim by laying evidence before court, even when the appellant had not filed a replying affidavit to dispute the claims. The trial court failed to insist on that and so the claims remained unproved. There was no evidence of the titles of the properties allegedly sold and no evidence of their sale either. Similarly, there were no share certificates exhibited to prove the shareholding by the 1st respondent. He merely claimed that he suffered loss but without proof.

Interest was not pleaded but was inserted in the submissions. So it was with the award of damages. And there was no evidence that the 1st respondent engaged in commercial activities.

As for ***Mr. Kurgat***, he reiterated that the 2nd respondent has always held the position that its property be returned to it.

At the close of it all we now move to determine the appeals herein. Being the first appellate court, we are enjoined to follow the case of ***Selle vs Associated Motor Boat Co. Ltd [1968] EA 123*** where it was stated that:

“An appeal from the High Court is by way of a re-trial and the Court of Appeal is not bound to follow the trial judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.”

As we noted earlier, the petition herein was determined on affidavit evidence only plus submissions. No witnesses were heard. Not to follow strictly the course the parties presented this appeal we begin with the issue of jurisdiction.

The 1st respondent claimed that his rights under Sections 72 and 75 of the former Constitution had been violated and moved under Section 84 of the Constitution to seek redress. That section reads:

"84(1) Subject to subsection (6) if any person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction:

(a) to hear and determine an application made by a person in pursuance of subsections 1;

(b) ----

(3) -----

(4) ------"

The High Court has original jurisdiction to hear applications alleging breaches of fundamental rights contained in Sections 70 to 83 all inclusive. The 1st respondent's petition alleged that his rights under Sections 72 and 75 had been breached, namely, the right of protection to personal liberty and protection from deprivation of property. Even without having recourse to the provisions of Section 60 of the former Constitution conferring on the High Court unlimited jurisdiction in civil and criminal matters, Section 84 confers original jurisdiction on the High Court to hear and determine claims of violations of fundamental rights. Accordingly, we have no doubt that the learned judge had the jurisdiction to hear the petition before her.

The next question is then how she went about the two alleged breaches – illegal detention and deprivation of property.

On the issue whether the 1st respondent was lawfully detained, it was settled in the *habeas corpus* application that was heard and disposed of by ***Chesoni, J.*** in the ***Muriithi*** case (above).

The learned judge said:

"The order produced by the Deputy Public Prosecution was shown to Mr. Khaminwa. I examined and satisfied myself and I made a specific finding that it is a Detention Order signed by the Minister of State in the President's Office in charge of Internal Security matters ----

The Director of CID has answered to the court summons and he has satisfactorily shown that he is unable to produce Mwangi Stephen Muriithi and that the subject cannot be forthwith released because he is detained under the Preservation of Public Security Act and Regulations. He has shown that the subject is deemed to be in lawful custody."

In the same ruling it appears at holding no. 4 that if the 1st respondent intended to challenge the validity of the Public Security and the Regulations thereunder, that could have been done by an appropriate application for such a declaration. The court was not seized of such application. The application would be to challenge the validity of the statute under which the 1st respondent was detained and not the detention itself. There was no such challenge to the Act. The ruling by ***Chesoni, J.*** was not

appealed against or reviewed. Accordingly, it is correct in law and procedure to say that the 1st respondent's detention was and it remained lawful all the time. That detention order was issued by the Minister in Charge of Internal Affairs in the Office of the President – not the President himself. It was an act of the State. So all in all it was not the appellant as the President who detained the 1st respondent as the learned judge found. The validity of the detention the 1st respondent had since been established by ***Chesoni, J.*** a judge of the High Court, and so the same matter, namely the illegality of the 1st respondent's detention could not be reopened before another judge of the High Court. In sum, the legality of the 1st respondent's detention was *res judicata* and the later finding by ***Gacheche, J.*** was of no moment. The essence of *res judicata* is to close litigation so that that same issues and parties do not keep on coming before court again and again for determination. ***Chesoni, J.*** settled the issue of the legality of the 1st respondent's detention and with that we set aside the declaration that the appellant violated the 1st respondent's rights under Section 72 of the Constitution. To that extent we find that the learned judge had no jurisdiction to make such a declaration.

On whether she had jurisdiction to consider the alleged breach under Section 75, deprivation of property, we answer that in the affirmative. The 1st respondent had claimed that the appellant sold properties of the three companies he was a co-shareholder in. We have no doubt that the Companies Act provides that a shareholder has property in the shares that entitles him/her to vote at meetings, elect officers/directors and the rest. But a shareholder has no ownership or right to the properties held by the company – a legal entity, separate and distinct from its shareholders. (see ***Salmon vs Salmon [1895-9] All ER 33***). The 1st respondent fell in such a category. He could thus not sue or petition about loss of properties of limited liability companies where he allegedly held shares. But he could sue claiming that his property in the form of shares had been put to risk. Therefore in our view, the 1st respondent could invoke the powers donated by ***Section 75 "---without prejudice to any other action with respect to the same matter which is lawfully available."*** (Section 84 above). The 1st respondent could have filed a derivative action under the Companies Act but he chose the petition way. We do not fault him for this and the High Court was in order to consider that claim.

The question was raised as to the time limit applicable when one applies for redress for breach of fundamental rights. We agree with the general principle that no law or past case has set such a time limit. To that extent we agree with the holding of ***Gacheche, J.*** that:

"--- where it is alleged petitioner has taken his sweet time in preferring a claim, the burden of convincing the court that he had a good reason for moving late, lies with him; and he must explain the delay and time taken with a view to convincing the court that he could not have moved earlier."

The learned judge accepted the delay of six years from 2003 to 2009 when the 1st respondent filed the petition as reasonably explained. We do not say more, particularly in the light of our finding that he petitioned against the wrong person, the appellant, instead of the Minister who issued the order of his detention on behalf of the State.

The next issue for determination is whether even if the appellant ought not have been sued in court by way of petition, and judgment delivered against him, the claims were proved. Proof in claims of a civil nature is by way of evidence. Section 3 of the ***Evidence Act (Cap 80)*** defines evidence as denoting:

"--- the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved, and without prejudice to the foregoing generally, includes statements by accused persons, admissions and observations by the court in its judicial capacity."

In that regard, to prove or disprove a matter of fact, a claimant bears the burden of proof as stated in sections 107, 108 and 109 of the Evidence Act, as follows;

"107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either said.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall be on any particular person."

In these proceedings and particularly the claim that the appellant sold off properties of three companies to the detriment of the 1st respondent, the three provisions reproduced above require that the 1st respondent who laid the claim that certain facts existed had the burden to prove existence of those facts. It is no matter that the appellant did not refute the claim by way of a replying affidavit. The 1st respondent was still bound to lay evidence on a balance of probability of the alleged facts before the learned judge. The 1st respondent claimed that there were three companies in which he, the appellant and others held shares. Each of those companies owned the properties stated in the petition. That the appellant sold off those properties and had them accordingly transferred and as a result the 1st respondent suffered loss and damage.

In our view we think that the facts to be proved required documentary evidence. The 1st respondent ought to have produced the certificates of incorporation of the three companies together with their respective Articles and Memoranda of Association, the names and addresses of the shareholders, the shareholding of each, and documents of title to show that each of those companies owned parcels of land as pleaded. Evidence that the properties were sold, to who, at what consideration and when the sales took place, ought to have been adduced. By that or such evidence as the learned judge should have required, the 1st respondent would have been on his way to prove existence of facts to satisfy the court that indeed those facts existed. That was his burden. He did not discharge it.

On perusing the judgment and hearing ***Mr. Mwangi,*** what comes through clearly and was repeated several times over, was the position that since the appellant did not deny the facts stated in the affidavits of the 1st respondent then he was deemed to have admitted those facts. With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence , when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1st respondent that:

"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred was also not proved.

Accordingly, the learned judge fell in error to assume that those facts indeed existed.

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

Regarding the 2nd respondent, its General Manager, ***Joseph Tole Maganga***, swore an affidavit where he clearly stated that LR. No. 11793 – Solai, Nakuru, belonged to that party and never to ***M/s Mokamu*** Ltd, as it had been claimed by the 1st respondent. There was no denial of this and there were no documents produced before court to the effect that that parcel of land belonged to ***Mokamu***. Again it was the 1st respondent's duty to bring that evidence, not the 2nd respondent. The trial court should have insisted on this but it did not and ***Mr. Mwangi*** told us that the 2nd respondent was a busybody, that LR No. 11793 was not an issue in the proceedings. We disagree. It was indeed an issue and the 2nd respondent was not a busybody. The 1st respondent had claimed in his petition that LR No. 11793 Solai, was the property of ***Mokamu Ltd***. a company in which, he, the appellant and others held shares. That while the 1st respondent was in detention, the appellant sold that land and did not account for the proceeds to him. The 2nd respondent reacted by stating on oath that that Solai land was its property and at no time did it belong to ***Mokamu***. The 2nd respondent came to court to protect its interest but it was ignored, judgment was delivered against it and also condemned in costs. That is why we do not accept the position that the 2nd respondent was a busybody and the land in question was not an issue. The 2nd respondent was a party to be affected, as it was, when the learned judge delivered her decision. Its Solai land was a real issue. Therefore on this ground of proof regarding the fate of the properties of the three limited liability companies, the 1st respondent failed to discharge his burden and the trial court was in error to conclude in his favour.

On the question of damages, costs and interest rate which the appellant and the 2nd respondent raised, we were told that there was no pleading for and no proof of punitive damages (sh. 50 million), and an award of what was termed as a share of proceeds of the property sales (sh. 80,161,720/=). Then how did the trial court award compounded rates on the court interest rate of 12% p.a"

To find the source of these awards we went through the submissions of the parties, including supplementary ones, plus commentaries. We noted that on 14th May, 2010 ***Mr. Mwangi*** for the 1st respondent tabulated under the heading "MEASURE OF DAMAGES" a total of Shs.80,161,720/= called "*Financial Losses*". Then he proposed a sum of shs.1billion as punitive damages.

We have already found that the 1st respondent failed to discharge his burden of proof of the existence of facts claimed of the companies, what they owned and whether property sales indeed took place, followed by transfers. So what we conclude is that the learned trial judge simply lifted the figure of sh.80,161,720/= from the 1st respondent's submissions and awarded it against the appellant. This was wholly in error. Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "***marketing language***", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of

the companies. And even that he did not do.

Regarding the punitive damages sum of shs.50 million awarded, the learned judge again found and lifted the proposal in the submissions of the 1st respondent. We were unable to come by any pleading or evidence to warrant this award and therefore it cannot be sustained.

On interest, the trial court was not inclined to award 35% p.a. rate as proposed by the 1st respondent. It gave 12% p.a. court rate **on a compound basis**. We were in agreement that where one gets a monetary award, an interest rate may attach to it. But we are unable to fathom where the award of interest on a **compound basis** came from or what purpose it was to serve.

In the result, we allow this appeal and set aside the High Court decision in the following terms:

a. ***The two declarations made in favour of the 1st respondent under Sections 72 and 75 of the Constitution are set aside.***

b. ***The two sums awarded representing financial loss and punitive damages are set aside.***

c. ***The orders on costs and interest are set aside.***

d. ***Costs of this appeal and the court below to be paid by the 1st respondent to the appellant.***

e. ***The 2nd respondent's cross appeal is allowed with costs here and in the court below.***

f. ***The 1st respondent's cross appeal is dismissed with costs.***

Dated and delivered at Nairobi this 9th day of May, 2014

J.W. MWERA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

/jkc