



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 5 OF 2017

JULLOW JULIUS KALUME.....APPELLANT

VERSUS

KENGA KAZUNGU KAMBAO.....1ST RESPONDENT

KATANA SHILINGI KAMBAO.....2ND RESPONDENT

(An Appeal from the Judgement/Decree of the Chief Magistrate's Court at Malindi by the Resident Magistrate Hon. J.N. Wandia dated 3rd February, 2017 in CMCC No. 306 of 2010)

JUDGEMENT

1. The Appellant, Jullow Julius Kalume, was the plaintiff in Malindi CMCC No. 306 of 2010 whereas the 1st Respondent, Kenga Kazungu, and the 2nd Respondent, Katana Shilingi Kambao were respectively the 1st and 2nd defendants in that matter. The Appellant's claim was for:

“a. Principal sum of Kshs. 83,108/=.

b. General Damages.

c. Costs and Interest.

Any other relief the honourable Court shall deem fit to grant.”

2. In a judgement delivered on 3rd February, 2017, the trial magistrate, J.N. Wandia, RM entered judgement in favour of the Appellant and against the 1st Respondent in the sum of Kshs. 37,500 and directed that costs would be in the cause. The claim against the 2nd Respondent was dismissed.

3. The Appellant challenges the judgement of the trial court on four grounds which in summary are to the effect that the decision was against the weight of the evidence adduced at the trial.

4. This being a first appeal, the evidence adduced at the trial should be subjected to a fresh analysis in order for this court to reach its own independent decision.

5. The Appellant testified as DW1 and told the court that between 9th December, 2005 and 31st August, 2007 he paid Kshs. 35,500 to the 1st Respondent towards the purchase of a piece of land. He also paid Kshs. 2,000 to two persons who witnessed the agreements thus making the total amount Kshs. 37,500. When he completed making the payments the 2nd Respondent who is a chief and a brother to 1st Respondent went and took over the land he had bought and started developing it. It was his evidence that he had prepared over 5000 tree seedlings which he intended to plant on the land and as a consequence of the 2nd Respondent's action he suffered loss to the tune of Kshs. 45,608.

6. Cross-examined, the Appellant stated that the piece of land he bought was a quarter acre or half an acre and he could only have planted 1000 trees on the land. He also testified that he used to sell each seedling for ten shillings.

7. PW2 Joseph Karisa Chai who identified himself as the chairman of Malindi Jua Kali Woodworks and Conservation Association told the court that the Appellant was a member of their group. His evidence was that the members of the group used to grow tree seedlings with a

view of selling or planting the same. He further testified that the Appellant intended to plant his seedlings. After they divided the seedlings the Appellant received 5,876 seedlings valued at Kshs. 70,008. The Appellant's seedlings later dried up as there were issues over his land.

8. Answering questions put to him during cross-examination, PW2 stated that the tree nursery was in Ngala. Further, that they started planting the seedlings on 14th April, 2009 and the same were mature by 30th September, 2011. He stated that he did not know the size of the land the Appellant had bought. The witness also testified that the Appellant refused to sell the trees even though there were interested buyers.

9. PW3 Robert Kazungu told the court that he worked for the Appellant for three years. On 27th September, 2009 he was sent to clear land at Kibao Cha Ngombe in Mamburi by the Appellant. He cleared a quarter of an acre. An issue arose over the ownership of the land and they could not plant the tree seedlings that they had prepared for planting on the land.

10. The defendants did not call any evidence.

11. The evidence that was adduced established on a balance of probabilities that the Appellant bought land from the 1st Respondent but the same was later occupied by the 2nd Respondent. The trial magistrate therefore rightly found against the 1st Respondent in respect of Kshs. 37,500 being the purchase price and money paid to the witnesses. There is no cross-appeal against the decision.

12. As for the claim for Kshs. 45,608 against the 2nd Respondent, the trial magistrate tersely held that:

“As for the 2nd defendant, I feel that the plaintiff has not satisfactorily proven his claim of Kshs. 45,608, as his own witness PW2 and PW3 were able to demonstrate that he (the plaintiff) was the author of his own loss. The claim against the 2nd defendant fails with no costs to either party.”

13. With respect to the trial magistrate, I find that this conclusion was erroneous. The evidence adduced by the Appellant showed that he had grown over 5,000 seedlings which he intended to plant on the parcel of land he had bought from the 1st Respondent. The value of each seedling was, according to the evidence of the Appellant and PW2, ten shillings.

14. The evidence also showed that the Appellant had specifically prepared the seedlings for the purpose of planting the same on the parcel of land he had bought from the 1st Respondent. He lost the land when the 2nd Respondent took over the same claiming it was his. There was therefore a connection between his loss and the actions of the 2nd Respondent. He was therefore entitled to an award of Kshs. 45,608 for the lost seedlings as pleaded in the plaint.

15. I concur with the trial magistrate that there was no basis laid for award of general damages.

16. In summary, this appeal is found to have merit and is allowed. The judgement and orders of the trial court are set aside and substituted with orders as follows:

a) Judgement is entered against the 1st Respondent for Kshs. 37,500.

b) Judgement is entered against the 2nd Respondent for Kshs. 45,608;

c) The Appellant will have costs from the respondents in regard to this appeal and the proceedings in the trial court. The costs shall be shared on prorata basis as per the award against each respondent; and

d) The decretal amount shall attract interest at court rates from 3rd February, 2017 being the date of delivery of the judgement by the trial court.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT