REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 258 OF 2011

SAMWEL MANDERE OGETO ……………...…………. APPELLANT

VERSUS

THE COUNTY CLERK, COUNTY COUNCIL OF GUSII

COUNTY COUNCIL OF GUSII …………………….. RESPONDENTS

JUDGMENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Kisii, Hon. E. Mainain CMCC No. 265 of 2010 dated 3rd November, 2011)

1. **Background**

This is an appeal from the judgment and decree of E. Maina, CM delivered on 3rd November 2011 in Kisii CMCC No. 265 of 2010 (hereinafter referred to only as "**the lower court**"). By an amended plaint dated 9th November 2010 that was filed by the appellant herein in the lower court, the appellant averred that he was the owner of all that parcel of land known as **LR No. West Kitutu/Bogeka/3082** (hereinafter referred to only as "**Plot No. 3082**") on which he intended to construct commercial premises. He averred that in order to actualize this intention, he caused building plans to be prepared and approved by all relevant authorities including the defendants. Following this approval, he engaged a contractor to put up the said commercial premises on Plot No. 3082 which is situated at Nyakoe Market. The said contractor commenced the construction work and had completed the construction of the said commercial building save for the doors and windows when the respondents through their agents and employees without any lawful cause entered Plot No. 3082 and demolished the entire building that the appellant had put up thereon as aforesaid. In the process of carrying out the said demolition exercise, the respondents' said agents or employees also seized and/or confiscated various items belonging to the appellant that were being used at the construction site. The appellant averred that the respondents never gave him any notice prior to the demolition of the said building which demolition had deprived him of expected rental income and exposed him to loss and damage. The appellant averred that the actions of the respondents in demolishing the building that the appellant had put up on Plot No. 3082 and the confiscation or seizure of the items referred to hereinabove were unlawful and amounted to abuse of the due process.

2. The appellant sought judgment against the defendants jointly and severally for; kshs. 314,000/= being compensation for the demolished building, general damages for trespass, an order for unconditional return of the items that had been seized by the respondents or in the alternative payment of the monetary value thereof and a permanent injunction to restrain the respondents from re-entering, trespassing onto, demolishing any buildings, interfering with and/or in any other manner dealing with Plot No. 3082.

3. The appellant's suit in the lower court was defended by the respondents. The respondents denied the appellant's claim in its entirety in their amended defence that was filed in court on 17th December 2010. The respondents averred that the appellant was duly given a notice to demolish the structure that he was putting up or erecting at Nyakoe open air market because he had failed to meet the conditions that had been put in place by the respondents concerning such developments. The respondents denied that they had seized and/or confiscated any items belonging to the appellant. The respondents averred that the appellant was not entitled to the reliefs that he had sought in the amended plaint.
4. **<u>The decision of the lower court:</u>**

The appellant's case was heard by E. Maina, CM (as she then was). The appellant gave evidence and called two witnesses. On their part, the respondents called two (2) witnesses. In the course of cross-examination of the respondent's 1st witness, the court visited the 2ndrespondent's stores where it was said that the confiscated items had been kept. The court also visited the location where the appellant's building had been brought down. On each occasion, the court made notes of what had transpired. After the close of the respondents' case, the advocates for the parties made closing submissions in writing. The lower court considered the appellant's case as had been pleaded, the defence that was put forward, the evidence that was tendered by both parties, the closing submissions by the advocates for the parties and reached a conclusion that the appellant's case had not been proved in a judgment that was delivered on 3rd November 2011. The lower court framed the issues for determination as follows; whether the demolition of the appellant's building or structure that had been put up on Plot No. 3082 was lawful and whether the appellant was entitled to the reliefs that he had sought in his amended plaint. In its judgment, the lower court made a finding that the structure or building that the appellant had put up on Plot No. 3082 was unlawful because, its construction had not been approved by the respondents as required by law and also for the reason that the respondents had not confirmed to the appellant the site where it was to be put up.

5. Having made a finding that the demolished building was an illegal structure, the lower court concluded that the appellant was not entitled to be compensated therefor. On the appellant's claim for confiscated items or tools, the lower court held that the claim was in the nature of special damages and as such had to be pleaded and strictly proved. The court declined to award the appellant the monetary value of the said items on the ground of want of proof of the items that were confiscated and the monetary value thereof. On the appellant's claim for a permanent injunction, the court noted that the appellant had failed to identify the boundaries of the Plot No. 3082 when the court visited the scene. The court wondered on which land the injunction was to attach if it was to be granted. The court also observed that the appellant could not use as a basis for injunction his unlawful conduct. In conclusion, the lower court found that the appellant had not proved its case on a balance of probability and dismissed the same.
6. **<u>Appeal to this court;</u>**

The appellant was not satisfied with the decision of the lower court and filed this appeal on 5th December 2011. In his memorandum of appeal dated 3rd December 2011, the appellant challenged the lower court's decision on the following grounds;

i. **The learned trial magistrate having found and held that the respondents herein, had neither issued nor served the requisite notice for demolition, same erred in law in finding and holding that the offensive demolition, levied by and/or at the instance of the respondents, was lawful and/or legal.**
ii. **The learned trial magistrate erred in fact and in law, in finding and holding that the appellant had not supplied and/or tendered credible evidence to show that same was the lawful proprietor of the suit premises upon which the demolished structures stood and/or were constructed, contrary to the oral and documentary evidence obtaining in the court records.**
iii. **The learned trial magistrate erred in fact and in law in finding and holding that the appellant had not proved and/or established that the respondents had seized and/or**

confiscated assorted paraphernalia, notwithstanding the evidence and the fact that the appellant identified and/or indeed pointed out some of his tools, which were (sic) seized and/or confiscated by the respondents.

iv. **The learned trial magistrate erred in fact and in law in refusing and/or failing to grant the orders of permanent injunction sought, over and in respect of the premises and thereby violated and/or contravened the appellant's rights and/or interests over the suit premises.**

v. **In failing and/or refusing to grant the orders of permanent injunction as sought, the learned trial magistrate abdicated her judicial responsibilities and thereby impeached and/or negated the sanctity of the appellant's title over and in respect of the suit premises.**

vi. **The learned trial magistrate failed to properly construe and/or appreciate the crux of the appellant's case and thereby failed to address the salient and pertinent issues, raised thereunder. Consequently, the judgment and/or decree of the learned trial magistrate, is at variance with the evidence and hence erroneous.**

vii. **The learned trial magistrate erred in fact and in law in failing to grant and/or award the appellant the liquidated and/or special damages pleaded, notwithstanding that same were sufficiently and/or specifically proved, as by law required.**

viii. **The learned trial magistrate failed to properly evaluate and/or analyze the evidence and submissions tendered by the appellant. Consequently, the learned trial magistrate arrived at and/or reached a conclusion contrary to the weight evidence on record.**

ix. **The learned trial magistrate took into account erroneous and/or extraneous issues, whilst on the other hand failing to take into account relevant issues. Consequently, the learned trial magistrate failed to discern the material discrepancies in the respondent's evidence.**

x. **The judgment of the learned trial magistrate is deficient and devoid of reasons for such determination. Consequently, the judgment sought to be impeached is contrary to Order 21 Rules 4 and 6 of the Civil Procedure Rules, 2010.**

In his plea to this court, the appellant urged the court to set aside, review, vary and/or quash the decision of the lower court and to substitute in place thereof an order granting the reliefs the appellant had sought in the lower court. The appellant also prayed for the costs both in the lower and before this court.

7. **Consideration of the grounds of appeal;-**

When the appeal came up for directions on 24th June 2014, the parties agreed to argue the same by way of written submissions. Whereas the appellant filed his written submissions on 21st August 2014, the respondents had not filed their submissions by 16th December 2014 when the date for judgment herein was given. I have considered the record of the lower court, the grounds of appeal put forward by the appellant, the submissions by the appellants' advocates and the authorities cited in support thereof. In the case of **Makube –vs- Nyamuro (1983) KLR 403**, it was held that;-

> **"A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."**

Under section 78 of the Civil Procedure Act, Cap. 21 Laws of Kenya, this court while sitting as a court of appeal has the same powers as the trial court. It has the power therefore to re-examine and evaluate the evidence on record to satisfy itself that the trial court had arrived at a decision that was supported by evidence before it. I will consider the appellant's grounds (i) and (ii)of appeal together, grounds (iii) and (vii)of appeal together, grounds (iv) and (v)of appeal together and grounds (vi),(viii),(ix) and (x)of appeal together.

8. **Grounds (i) and (ii) of appeal;-**

In his ground one (i) of appeal the appellant has challenged the lower court's finding that the building and/or structure that he had put up on Plot No. 3082 was unlawful. I am of the opinion that this finding by the lower court was based on the evidence on record and as such cannot be faulted. On the material

that was before the lower court, it was not disputed that the structure that was put up by the appellant was not the same as the one whose plans were approved by the respondents. In his evidence in cross-examination by the respondents' advocate, the appellant stated that the building or structure that was demolished by the respondents was not a permanent structure. It was a store that was built using timber and iron sheets. He stated further that the plan that had been approved by the respondents was for a permanent building. In his evidence in cross-examination by the respondents' advocate, PW2 Abel Ogeto Momanyi corroborated the appellant's testimony that what was demolished was a temporary structure with walls made of off-cuts and roof made of iron sheets. The witness stated that the structure was a store measuring approximately 9 feet by 25 feet. The witness stated further that in constructing the said temporary structure they did not use the plan that was approved by the respondents which was for a permanent house. From the foregoing, it is clear that there was overwhelming evidence before the lower court to the effect that the structure that was put up by the appellant and which was demolished by the respondents had no approved plans.

9. The lower court did not therefore fall into any error in its finding that the structure was illegal. Even if it is assumed for argument sake that the structure was approved as contended by the appellant which is not the case, the approval that was granted to the appellant was subject to the respondents confirming to the appellant the site on which to put up the structure. This did not happen and as such the structure was put up contrary to the terms on which it was approved. Again, the lower court cannot be faulted for holding that the structure was illegal for having been put up contrary to the conditions upon which the same was approved. The onus of proof was upon the appellant. He placed no evidence before the lower court in proof of the fact that the structure that was demolished was put up at the site or at a location that was pointed out to him or approved by the respondents. I am not in agreement with the submission by the appellant that the approval of the plan by the 2nd respondent was an indication that the condition upon which the plan had been approved by the District Physical Planning officer had been met. It was up to the appellant to prove that, that was the position. This he failed to do.
10. The appellant has contended in his submissions that one other ground on which the lower court declared the appellant's structure aforesaid to have been illegal was that the appellant had been served with a notice by the respondents prohibiting construction of illegal buildings/ structures without approval. The appellant has submitted that the lower court was wrong in this finding. As I have stated at the beginning of this judgment, the lower court had reached a finding that the appellant's structure was unlawful for two (2) reasons, first for want of approval by the respondents and secondly, because the site on which the structure had been put up had not been confirmed by the respondents. The court expressed itself as follows (see page 36 of the record of appeal); **"Here too I find that the erection of the structure was unlawful because firstly it was not the one approved and secondly because the council had not confirmed the site."**
11. It is not correct therefore to say that one of the grounds upon which the appellant's structure was held to be illegal was because the appellant had been served with a notice not to put up unapproved structures which notice he ignored. I find the appellant's submissions before this court inconsistent with the submissions that he made before the lower court on this issue of notice. In the lower court, the appellant had urged the court to ignore this issue of notice. In fact it is the court that said that the issue cannot just be wished away. The appellant had submitted as follows (see page 45 of the record of appeal);

> **"The issue before the court was not whether there was a notice or not and even if there was such notice, the method applied by the defendants' agents was primitive…"**

I find it strange that the appellant who had not treated the issuance of notice as an issue for determination by the lower court would want now to fault the lower court for saying that such notice was in fact issued. As I have stated above, the court nevertheless did not find the appellant's structure as illegal on the basis of the finding that it had reached on the issue of service of notice.

12. On his ground two (ii) of appeal, the appellant faulted the lower court for allegedly holding that the appellant did not prove that he is the lawful proprietor of the parcel of land on which the structure that had been demolished was constructed. I have found no merit at all in this ground of

appeal. The lower court did not make a finding at all on the issue of the ownership of the parcel of land on which the demolished building was situated. In fact, the lower court agreed with the appellant that the ownership of that parcel of land was not an issue for determination by the court. The court stated as follows (see page 34 and 35 of the record of appeal);-

> **"As was correctly submitted by counsel for the plaintiff the issue here is not the ownership of the plot but whether that demolition was lawful and whether the plaintiff is entitled to the prayers sought."**

It is clear from the foregoing that the issue of ownership of the parcel of land on which the building that was demolished was situated was not before the lower court for determination and the court did not make finding or holding in relation thereto. It cannot therefore be a basis for an appeal to this court.

13.**Grounds (iii) and (vii) of appeal;**

The lower court stated that it would have awarded some compensation to the appellant for the items that were said to have been seized or confiscated by the respondents but could not do so because the claim was in the nature of special damages and had not been strictly proved. The appellant had prayed that its items that were said to have been seized by the respondents be returned unconditionally and in the alternative, he be paid the monetary value of the said items. The court had at the request of the appellant visited the respondents' stores to find out if the items the appellant had claimed to have been seized or confiscated by the respondents were lying there. The only things that the appellant identified as belonging to him after visiting four (4) stores was a hand saw and a spade the total value of which according to the appellant was kshs. 650/=. The onus was upon the appellant to prove that; he was the owner of the items that were listed in the amended plaint as having been confiscated/seized by the respondents, that the same were actually seized or confiscated by the respondents and the value of the said items. Apart from stating in his evidence in chief that the respondents took away the tools that his workers were using the particulars of which he also gave, there was no evidence of the value of the said items. The appellant did not tell the court how he arrived at the amounts that he claimed in the amended plaint. The appellant did not also place any evidence before the court that he owned the items. No receipts were produced for the acquisition of the same. Even for the two (2) items that he said to have identified in one of the stores stated above, there was nothing to prove that the same belonged to him apart from his claim to that effect.

14.The lower court could not therefore order items that had not been proved to belong to the appellant and which the appellant had not proved to have been taken from him to be returned to him. Even if the appellant had proved that the said items were indeed his and that the same had been seized or confiscated by the respondents, the court could not order the same to be returned to the appellant because physical search at the respondents' premises did not find the bulk of them in the respondents' custody. The most appropriate order that the court would have made in the circumstances was for the appellant to be paid the monetary value of the items which was the appellant's alternative prayer. But for the court to do this, the court had to have some evidence on the values to put on the items. What the court had before it were figures pleaded in the plaint without any evidence of how they were arrived at. In the Court of Appeal case of **William Kiplangat Maritim& Another –vs- United Millers Ltd, Nairobi Civil Appeal No. 180 of 1993 (unreported),** the court cited with approval its decision in the case of **Charles Sande –vs- Kenya Co-operative Creameries Ltd. Civil Appeal NO. 154/1992 (unreported**) in which it had stated among others that;

> **"…It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think that we need to cite any authority for this simple and hackneyed proposition of law."**

For the foregoing reasons, I am unable to fault the lower court's refusal to award the appellant the value of the items that were said to have been seized or confiscated by the respondents for want of proof.

15. In ground seven (vii) of appeal, the appellant has faulted the lower court for failing to grant and/or award the appellant the liquidated and/or special damages that the appellant had claimed. The appellant had claimed a sum of kshs. 89,250/= being the value of the items that were said to have been confiscated by the respondents and a sum of kshs. 314,000/= being the cost of the building that was demolished by the respondents. These were the only liquidated and/or special damages sought by the appellant. As I have stated above, the lower court found the appellant's claim for the value of the items said to have been confiscated by the respondents as not having been proved. For reasons that I have given above, I am unable to fault that finding. With regard to the claim for the cost of the demolished building, I am in agreement with the lower court that having found that the appellant's building had been erected illegally no compensation could be awarded to the appellant for the demolition thereof. It is a principle of public policy that no court should lend its aid to a man who founds his cause of action upon an immoral or an illegal act. This policy is captured in the latin phrase " ***exdolomalo non oritur actio***". In the Court of Appeal case of **Nabro Properties Ltd. vs. Sky Structures Ltd. & 2 others [2002] 2 KLR 299**, Gicheru JA. at page 312 cited page 191 of **Brooms Legal Maxims** where it is stated that "**It is a maxim of law, recognized and well established, that no man shall take advantage of his own wrongs and this maxim which is based on elementary principles, is fully recognized in courts of law and equity, and indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest………,we may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law**." The appellant could not therefore benefit from his own wrong. The lower court did not therefore fall into any error in declining to award the appellant the cost of the building that was demolished by the respondent that the appellant had put at kshs. 314,000/=.
16. **<u>Grounds (iv) and (v) of appeal;</u>**

The appellant had sought a permanent injunction to restrain the defendant from re-entering, trespassing onto, demolishing any building, interfering with and/or in any other manner dealing with Plot No. 3082. I am of the view that the lower court cannot be faulted for declining to grant this order. There was completely no basis for granting the same. The evidence before the court was to the effect that the respondents entered Plot No. 3082 and demolished a structure that had been put up thereon by the appellant. The lower court having held that the structure was illegally put up and that its destruction was justified there was no basis upon which the injunction sought could issue. Injunction could only issue to restrain an illegality. The respondents had not committed an illegality and there was no evidence that they intended to do so. I would like also to observe that the respondents had a statutory mandate to control developments in their area of jurisdiction which included Plot No. 3082. In discharge of such mandate they had a right of entry into premises. A permanent injunction that the appellant sought would have restricted the exercise of this mandate in relation to Plot No. 3082. A court cannot restrain the exercise of a statutory power unless it is demonstrated that the power is being exercised wrongfully. There was no evidence before the lower court to this effect. It is my finding therefore that the injunction was rightfully declined.

17. **<u>Grounds (vi),(viii),(ix) and (x) of appeal;</u>**

These grounds of appeal have no merit. In its judgment, the lower court set out the appellant's claim, the evidence that was adduced in proof thereof, the evidence that was adduced by the respondents in opposition to the claim, the issues that arose for determination and, its determination of those issues. The lower court judgment complied with the provisions of order 21 rules 4 and 5 of the Civil Procedure Rules contrary to the appellant's contention. In my view, the lower court properly analyzed and evaluated the evidence that was placed before it before arriving at the decision appealed herein. The appellant has not pointed out the extraneous matters that the court is said to have taken into account or the relevant matters that it failed to consider.

18. **<u>Conclusion;</u>**

In conclusion, I am unable to fault the decision of the lower court that is the subject of this appeal. The appellant's appeal therefore lacks merit and the same is dismissed with costs to the respondents.

Delivered, signed and **dated** at **KISII** this**13th day**of **February, 2015.**

S. OKONG'O

JUDGE

In the presence of:-

Mr. Mose L. h/b for Oguttu for the appellant

N/A for the respondents

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE