



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 239 OF 2007

JOSEPH WATHANGA WAHOMEAPPELLANT

VERSUS

THE REV. FATHER IN CHARGE for the time being

GITHURAI- KIMBO CATHOLIC1ST RESPONDENT

GITHURAI TING'ANG'A CO LTD2ND RESPONDENT

(An appeal arising from the Judgment delivered on the 5th March, 2007 by Honourable, J.O. Were Resident Magistrate)

JUDGMENT

The appellant first sued the 1st respondent in a plaint dated 26th May, 1998 alleging that he was the rightful owner of a parcel of land known as LR NO. Ruiru/Kiu Block 6/199. That sometimes in the year 1995 negotiations started whereby he was to surrender the suit premises to the 1st respondent for the benefit of the Catholic Church Githurai Kimbo and the amount of compensation was to be agreed upon.

It was also agreed that the 1st respondent would pay the appellant all the expenses he would incur in moving out of the suit premises. It was his case that the 1st respondent dishonored the agreement and chose to involve the administration. In the process, the appellant incurred expenses amounting to Kshs. 46,540/=. He demanded this from the 1st respondent who refused to pay the same. His claim was therefore the sum of Kshs. 46,540 plus interest at 24% from the date of filing the suit plus costs.

The said plaint was subsequently amended to include the 2nd respondent. The appellant pleaded that he bought the said parcel of land from the 2nd respondent who then fraudulently transferred the same to the 1st respondent. Particulars of fraud against both the 1st and 2nd respondent have been set out in the amended plaint. It is also pleaded that the 1st respondent without any justification and with the knowledge of the 2nd respondent demolished the appellant's house and crops.

In addition to the sum of Kshs. 46,530/= the appellant pleaded for an order of injunction against the 1st respondent to restrain him from constructing or developing the suit premises or plot No. 85. He also sought damages.

The two respondents denied the claim and after a full hearing the plaintiff's suit was dismissed but the court found he was entitled to compensation amounting to Kshs. 10,000/= nominal damages to be paid by

the 1st respondent. His case against the 2nd respondent was dismissed in its entirety with costs.

Aggrieved by the said judgment, he lodged this appeal. In the memorandum of appeal dated 4th April and filed on 5th April 2007 the appellant faulted the learned trial magistrate in finding that he did not prove ownership of the suit premises. He also faulted the learned trial magistrate for failing to find that plot No. 85 and plot No. LR Ruiru/Kiu 6/199 is one and the same. That the definition of land is stipulated in the Registered Land Act Cap 300 Laws of Kenya.

Additionally, he stated that the trial court failed to appreciate his house was on the suit premises. It was also his case that the 1st and 2nd respondents did not provide any evidence of ownership of the suit premises and finally that he failed to appreciate the valuation report which quantified his loss. He therefore prays that his appeal be allowed with costs.

Written submissions have been filed by both parties. In a long and winding judgment the learned trial magistrate addressed the material before him, observing that the plaint filed by the appellant showed complete disconnect between his case and plot 85 and wondered why he was seeking injunction orders against the 1st respondent, yet he had not established the relationship between plot 85 and the one cited in the plaint as Ruiru/Kiu Block 6/199.

The trial magistrate also observed that the appellant did not demonstrate how plot 85 changed to become Ruiru/Kiu Block 6/1999 and most importantly he did not produce any documentary evidence showing his claim to the suit property. He emphatically concluded that there is no proof the appellant was and or is the registered owner of the suit property as pleaded in the amended plaint, nor was there any evidence that he bought the same from the 2nd respondent.

It is trite law that any transaction relating to land must be in writing signed by both parties and witnessed accordingly. No such evidence was tendered by the appellant. His claim on that parcel of land must therefore fail. In any case, his pleadings fell short of any claim to title. It is surprising that he sought injunction orders against the 1st respondent. His claim for Kshs. 46,540/= was in the form of special damages. Special damages must be specifically pleaded and strictly proved.

In his evidence in the lower court he said as follows,

“The sums of Kshs. 46,540/= was for loss I suffered because of taking me to Kahawa West. The Kshs. 46,540 can only be alluded to the loss I have suffered.”

That evidence is hardly any proof of the claim pleaded and amounts to a mere statement. The learned trial magistrate was right to conclude he was unable to find any justification for that claim because no proof was provided by the appellant.

The two respondents did not offer any defence but proof of any case is not based on the weakness of a defendant's case but on the strength of the plaintiff's case. The appellant failed to establish the claim set out in the plaint. That notwithstanding, the learned trial magistrate awarded Kshs. 10,000/= nominal damages in favour of the appellant against the 1st respondent. As the 1st respondent has not raised any concern about that award I have no reason to disturb the same.

In the record of appeal filed by the appellant, there is included a certificate of search of the parcel of land Ruiru/Kiu Block 6/199 which confirms the leasehold interest in favour of Githurai Kimbo Catholic Church. In effect he is confirming that the 1st respondent's title thereon cannot be challenged by any party including himself. The provisions of Sections 27 and 28 of

the Registered Land Act Cap 300 are clear in that regard. The allegations of fraud against the 1st and 2nd respondents were not proved.

Taking into consideration all the material before me, I have come to the conclusion that the appeal must fail and is accordingly dismissed. The circumstances of this case call for an order that each party shall bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 9th Day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE