REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 50 OF 2012

COUNTY COUNCIL OF NYAMIRA …… APPELLANT

VERSUS

MAGEKA OSEKO

J. NYANKURU ……..……RESPONDENTS

JUDGMENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court at Nyamira, Hon. J. Wanjala (SPM)in SRMCC No. 131 of 2009 dated 9th March 2012)

1. On 14th July 2009, the respondents herein filed a suit against the appellant at the Senior Resident Magistrate's court at Nyamira in Nyamira SRMCC No. 131 of 2009, Mageka Oseko & Another –vs- County Council of Nyamira (hereinafter referred to only as the "**lower court case** or **the lower court**"). In the lower court case, the respondents sought the following reliefs:

a. **Compensation for the damages occasioned to the building on the suit plot in the sum of kshs. 700,000/=.**
b. **General damages for trespass.**
c. **Permanent injunction restraining the defendant by himself, its agents, servants and anyone claiming under the defendant from re-entering, trespassing onto, demolishing any building, interfering with and or in any manner whatsoever dealing with the suit plot that is Plot No. 72 Manga Township.**
d. **Cost of the suit.**

The respondents' case against the appellant in the lower court was that at all material times the respondents were the registered allottees of a parcel of land known as Plot No. 72 Manga Township (hereinafter referred to only as "**the suit property**") and that the suit property was allocated to the respondents by the County Council of Gusii on 14th June 1968. The respondents averred that following that allocation they took possession of the suit property and constructed a permanent commercial building on the same using burned bricks and corrugated iron sheets which premises they used for business purposes. The respondents averred further that they have over the years been paying plot rates and rents initially to the County Council of Gusii and subsequently to the appellant for the suit property.

2. The respondents averred further that on or about 19th December 2006 the appellant through its agents and/or servants, and/ or employees without any lawful cause or basis trespassed upon the suit property and while thereon damaged and demolished the entire building that had been put up thereon by the

respondents, thereby subjecting the respondents to loss and damages. The respondents contended further that the appellant did not give to the respondents any prior notice before the said demolition and that as at the date of the said demolition no rents and/or rates were due and outstanding by the respondents to the appellant. In their particulars of loss, the respondents put the cost of the damaged building at kshs. 700,000/=. They also set out loss of rental income the particulars of which they indicated would be supplied at a later date. In addition, the respondent claimed general damages against the appellant. The appellant filed its statement of defence in the lower court on 18th August 2009 denying the respondents' claim in its entirety. The appellant denied that the respondents were the allottees of the suit property and that they had put up on the suit property any building as claimed. The appellant denied further that the respondents had been paying any plot rates or rent to the appellant for the suit property and that they had entered the suit property on 19th December 2006 and caused damage and demolition to any building on the suit property.

3. In the alternative, the appellant contended that if the respondents had put up any commercial building on the suit property, the same was put up unlawfully. The appellant claimed further in the alternative that if the respondents were allottees of the suit property and if the building standing thereon was destroyed or demolished by the appellant the said demolition was lawful and accordance with the provisions of the Local Governments Act, Cap 265 of the Laws of Kenya and the Physical Planning Act and the bylaws made thereunder. The appellant contended further that if any buildings and/or structures had been erected by the respondents on the suit property, the same was illegal, unlawful and as such cannot form a basis for any claim for compensation. The appellant claimed that the respondents had put up the said building without the grant of permission by the appellant, that the respondents had failed to submit building plans for approval by the appellant's physical planning office and town planning committee, that the respondents had failed to adhere to the requirements of Local Government Act Cap 265 Laws of Kenya and Physical Planning Act, and that the respondents had failed to heed an enforcement notice that had been issued to them to demolish the said building.

4. Finally, the appellant had contended that the respondents' suit in the lower court was bad in law as the same had been filed out of time. When the respondents' case in the lower court came up for hearing, the 1st respondent gave evidence and called two (2) witnesses. The 1st respondent told the lower court that the suit property is registered in his name and in the name of the 2nd respondent and that the same was allocated to them by Gusii County Council in the year 1968. He produced as an exhibit a copy of plot card. The 1st respondent testified further that following the allotment of the suit property to them, they have been paying land rent initially to Gusii County Council and thereafter to the appellant for the suit property. The 1st respondent produced in evidence a bundle of receipts as evidence of the said payments. He testified further that he had constructed a building on the suit property which he used to use as a retail shop which building was made of bricks and had four shops in total. He told the court that the said building was approved by the appellant and he produced as an exhibit a receipt issued by the appellant for the payment that he had made for development permission for the suit property.

5. The 1st respondent testified further that on 19th December 2006, the appellant demolished the building that he had put up on the suit property and that prior to that demolition he had not been given any notice. The 1st respondent told the court that the only notice that he received from the appellant was given two (2) years after the said demolition on 25th June 2008 and that it was addressed to one, Onuong'a Oseko c/o Mboga Oseko and it related to building on Plot No. 127. He told the court that he is a stranger to Plot No. 127 and the owner is not known to him. He produced a copy of the said notice as an exhibit. He testified that after the said demolition, he engaged a valuer to value the damage and that according to the valuer the damaged building was worth kshs. 700,000/=. He urged the court to compensate him for the damaged building and also to award him compensation for the lost rent claiming that he used to earn kshs. 1,000/= per month from the building as rent. The respondent's first witness was one Francis Mageto Omayio (PW1). He told the court that he was present when the respondents' building on the suit property was demolished by the appellant's employees who were accompanied by administration police from Manga Administration Police Post. He told the court that he is the one who notified the 1st respondent of the demolition. He told the court that the demolition was carried out on 19th December 1996 between

12.00 noon and 1.00pm. The respondent's 2nd witness in the lower court was one, Dominic Odondi Ouma (PW2). PW2 told the court that he is a practicing property valuer and that he had been engaged by the respondents to value a building on the suit property which had been damaged. He told the court that in his assessment, the value of the damaged building was kshs. 700,000/=, while the value of the plot he put at kshs. 300,000/=.

6. After the close of the respondents' case in the lower court, the appellant called one witness, one Evans Mibunche Masese (DW1). DW1 told the court that he is a works inspector with the appellant and that his duties include implementation, and supervision of the appellant's projects. He told the court that he also recommends and forwards building plans for approval by the appellant. DW1 confirmed that the respondents are the owners of the suit property which they own jointly at Manga Market. He told the court that the suit property had rent arrears of upto kshs. 8,695/= as at 13th December 2005 and that he was not aware of any payment made by the respondents after that date. He took the court through the procedure of approving building plans. He told the court that the respondents had made payment for building plan approval but they never presented the actual plan for approval, and as such according to the appellant, the respondents did not have an approved building plan for the development on the suit property.

7. DW1 told the court that the building that was demolished by the appellant was on Plot No. 127 at Manga Market and not on the respondents Plot No. 72. He testified that Plot No. 72 (the suit property) has not been developed and that the plot which has been developed which is Plot No. 127 is owned by Samuel Asanya, Zachariah Ongendi and Ezekiel Ongeri. DW1 testified further that the appellant had learnt that the respondents had put up an illegal structure on Plot No. 127 and on learning of this incident the appellant issued an enforcement notice to the respondents to remove the said illegal structure at their own cost. He stated that the said structure was illegal because it had not been approved by the appellant and furthermore the same had encroached on a road reserve and had extended beyond the normal council plot which measure 50feet by 100 feet. He confirmed that the enforcement notice that had been produced by the respondents as Plaintiff's exhibit 6 was the notice that the appellant had served upon the respondents. He confirmed that the notice was given with respect to Plot No. 127 and not with respect to the suit property. He confirmed further that Plot No. 127 and the suit property are 500metres apart.

8. After the close of the defence case, the advocates for the respondents herein and the appellant filed written submissions. The lower court (J. Wanjala, SPM) in a judgment delivered on the 9th March 2012 entered judgment for the respondents against the appellant for kshs. 700,000/= being compensation to the respondents for loss of their building, kshs. 200,000/= being general damages together with the costs of the suit. The lower court found that the respondents were the owners of the suit property and that the appellant had demolished their building that had been constructed on the suit property. The court also found that the appellant had failed to prove that the building that they demolished was on Plot No. 127 and not on the suit property. The lower court was also not convinced that the building that had been put up by the respondents on the suit property was not approved more particularly after the appellant witness confirmed that the respondents did pay fees for the approval of a building plan for development on the suit property. The court also found that the appellant had not given to the respondents any notice prior to the demolition of their building on the suit property and that the purported notice that was issued on 25th June 2008 after the demolition related to Plot No. 127 and not to the suit property. The court was not convinced that the appellant was justified in demolishing the respondents building as they had failed to prove that the said building was an illegal structure. The court found the respondents' case as proved and awarded judgment accordingly on terms that I have set out hereinabove.

9. It is against that judgment of the lower court that this appeal has been preferred. The appellant has put forward eight (8) grounds of appeal against the said judgment as follows:

1. **That the learned trial magistrate erred in law in allowing the respondents claim which was obviously time bad.**
2. **That the learned trial magistrate erred in law in allowing the respondent claim which had not been sufficiently proved or proved at all.**
3. **That the learned trial magistrate erred in law in allowing the respondents claim for**

compensation for illegal developments.

4. **That the learned trial magistrate erred in law in failing to identify the issues for determination from the totality of the evidence adduced and submission made.**
5. **That the learned trial magistrate erred in law in failing to evaluate and consider all the evidence tendered and hence arrived at a wrong decision.**
6. **That the learned trial magistrate erred in law in failing to give the reasons for the decisions arrived at.**
7. **That the judgment of the trial magistrate contravened the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules 2010.**
8. **That the learned trial magistrate erred in law and in fact in failing to take into account the appellant's evidence and submissions in arriving at her decision.**

10. When the appeal came up for directions on 24th June 2013, the advocates for the parties agreed that the appeal be argued by way of written submissions. By consent of the parties, I directed that the appellant do file and serve its written submissions within thirty (30) days from that date and that the respondent do file and serve their written submissions in reply within 30 days from the date of service of the appellant's written submissions. When the matter came up for mention on 23rd October 2013, the parties had not put in their written submissions. On that day, I ordered the appellant to file its submissions within 21 days from that date and the respondents to file their submissions in reply within 21 days from the date of service of the appellant's written submissions. The matter was fixed for mention on 3rd December 2013 for a judgment date. Following that order, the appellant filed its written submissions on 2nd December 2013. When the matter came up for mention on 3rd December 2013 for a judgment date, the respondents' advocate informed the court that they were in the process of filing their submissions and urged the court to proceed and give a judgment date. The appellant's advocate on the other hand confirmed that they had filed their submissions and also urged the court to give a judgment date. I ordered that a judgment on the matter will be delivered on notice.

11. The respondents have to date not filed their written submissions. It is therefore only the submissions by the appellant which are on record. I have considered the pleadings, the proceedings and the judgment of the lower court. I have also considered the grounds of appeal and the written submissions by the appellant's advocates. As was rightly submitted by the appellant's advocate, this court being the first appellate court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified in the lower court. See, the case of **Verani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269**on this duty of the first appellate court.

12. I will consider the appellant's first ground of appeal alone; I will then consider grounds 2, 3 and 5 of appeal together, grounds 4 and 8 of appeal together and lastly grounds 6 and 7 of appeal together.

Ground 1 of appeal

> In this ground of appeal, the appellant has contended that the lower court made an error in allowing the respondents' claim while the same was time barred. The appellant had pleaded time bar in its statement of defence in the lower court. The appellant also raised the same issue of time bar in its submissions before the lower court. The appellant's contention is that the respondents suit was time barred by dint of the provisions of section 3(1) of the Public Authorities Limitation Act Cap 39 of the Laws of Kenya, which provides that:**"No proceedings founded on tort shall be brought against the Government or a local authority after the end of 12 months from the date on which the cause of action accrued."**

13. I am in agreement with the submissions by the appellant that the respondents' case in the lower court was time barred. It is not in dispute that the respondents' claim in the lower court was based on the tort of trespass. It is also not in dispute that the alleged trespass took place on 19th December 2006. It is not in dispute that the respondents' did not bring their claim against the appellant until 14th July 2009 which was more than 2 years and 7 months from the date of the alleged trespass. In the circumstances, the

respondents' claim against the appellant was statute barred and was not maintainable. I have noted that although the appellant had pleaded time bar and submitted at length on the issue before the lower court, the lower court did not at all in its judgment refer to the issue and as such made no determination thereon. The appellants first ground of appeal therefore succeeds.

The 2nd, 3rd and 5th grounds of appeal

14. These grounds concern proof of the respondents claim before the lower court. I am satisfied on the material on record that the respondents did prove their claim against the appellants in the lower court to the required standard. As was found by the lower court, the respondents proved that they are the owners of the suit property on which they had put up a building. They also proved that the said building was demolished and that it was demolished by the appellant. The respondents also proved that the value of the building on the suit property that was demolished by the appellant was kshs. 700,000/=. I cannot fault the lower court for overruling the appellant's contention that the building that they had demolished was constructed on Plot No. 127 and not on the suit property. I agree with the lower court that there was no evidence before the court in proof of that fact. I therefore find no merit on the appellants grounds 2, 3 and 5 of appeal.

Grounds 4 and 8 of appeal

15. These grounds of appeal concern the alleged failure by the lower court to identify issues from the evidence and submission made before it for determination. In my view, the only issue that the lower court failed to identity and determine was that which related to time bar. The issue was raised in the defence and in the submissions by the appellant before the lower court and the lower court had a duty to determine the same. To that extent, appellant's contention that the lower court failed to identify issues for determination is partly correct.

Grounds 6 and 7 of appeal

16. These two grounds revolve around the lower courts alleged failure to give reasons for its decision. I find no merit on these two grounds of appeal. The decision of the lower court speaks for itself. The lower court set out the respective parties' cases as pleaded, the evidence adduced on behalf of each party, the issues for determination and its decision on the said issues and the reasons for the decision. Contrary to the submission by the appellant, the judgment of the lower court complied with the provisions of Order 21 Rule 4 of the Civil Procedure Rules 2010.

Conclusion

17. The appellant's appeal succeeds on grounds 1, 4 and 8. As I have stated hereinabove, the respondents claim in the lower court was time barred and was not maintainable. The judgment entered in favour of the respondents in the lower court was therefore improper. I therefore allow the appellant's appeal and set aside the judgment of the lower court dated 9th March 2012 in Nyamira SRMCC No. 131 of 2009. In substitution thereof, I hereby strike out Nyamira SRMCC No. 131 of 2009 for being time barred. The appellant shall have the costs in the lower court and before this court.

Delivered, dated and signed at Kisii this 29th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Onsongo h/b for Mrs. Asati for the Appellant

Mr. Ogutu for the Respondents

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE