REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 66 OF 2013

JAMES MWANGI NJUKI …….. APPELLANT

VERSUS

KERUGOYA/KUTUS MUNICIPAL COUNCIL ……..… RESPONDENT

(AN APPEAL FROM THE JUDGMENT DELIVERED ON 28TH JUNE 2011 BY HON. E.M. NYAGA – R.M. AT KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 16 OF 2010)

JUDGMENT

This appeal arises out of the judgment of E.M. NYAGA RESIDENT MAGISTRATE delivered on 28th June 2011 in KERUGOYA CHIEF MAGISTRAT'S COURT CIVIL SUIT NO. 16 of 2010 wherein the trial Court dismissed the appellant's suit against the respondent with costs.

The appellant's suit in the subordinate Court sought a permanent injunction prohibiting the respondent from entering, cutting or constructing an access road through his plot No. 41 at Kutus old town as well as damages for appellant's demolished buildings. It was the appellant's case that there is no road of access between his plot No. 41 and plot No. 40 at Kutus old town yet on 20th January, 2010, the respondent's askaris demolished his property on the basis that they were on a road of access. His evidence was that when he bought the property from one SAMUEL MUCHIRI KAMUNGU, there were two developments on the property. He said the access road is between plot No. 41 and 62 and not plot No. 40 and 41. His witness JOHN MWANGI MWANIKI a surveyor with the Ministry of Lands produced a map showing that the access road is between plots No. 41 and 62 and not between plots No. 40 and 41.

On its part, the respondent called as witnesses the Deputy District Physical Planning Officer ERNEST KINUTHIA (DW1), the District Surveyor Kirinyaga County MICHAEL KINUTHIA (DW2) and the Engineer Kerugoya-Kutus Municipal Council ELIJAH THIWA (DW3). The totality of their evidence was that according to the Kerugoya-Kutus development plan of 10th May 1971, there was an access road between plots No. 40 and 41 and under the Physical Planning Act, the Kerugoya-Kutus Municipal Council may destroy any building that interferes with its development plans. They said there was no road between plots No. 40 and 41 as it had been blocked by structures and so on 20th November 2008, the defendant's liaison Committee met following complaints from members of the public and decided to demolish the structures that were destroying the road. The appellate was notified accordingly by a notice dated 17th April 2007 and thereafter, the respondent demolished the timber structure that was on the road.

Having considered the above evidence, the trial magistrate was of the view that the appellant had

not proved his case which he proceeded to dismiss with costs thus giving rise to this appeal.

The following grounds have been raised in the appeal:

1. ***That the trial magistrate did not indicate in his judgment the issues for determination***
2. ***That the trial magistrate erred in law and fact by failing to rule on whether there was an access road between plot No. 41 and 62 and only ruled on the issue of the road between plot No. 41 and 40***
3. ***That the trial magistrate erred in law and fact by giving a judgment based on the respondent's evidence and totally ignoring the appellant's case.***
4. ***That the trial magistrate erred in law and fact by finding that it was proper and just for the appellant to have been condemned by the respondent un-heard (to have an access road cut through his plot) which is against the rules of natural justice***
5. ***That the trial magistrate erred in law and fact by taking the evidence of unqualified respondent's witnesses and totally relying on it to give judgment in favour of the respondent.***

It is therefore prayed that the appeal be allowed and the entire judgment of the lower Court be set aside and judgment be entered as per the plaint or alternatively, this Court do come up with its own judgment and costs of this appeal be granted to the appellant.

Counsels for the parties have filed their submissions which I have considered together with the record herein.

Being a first appeal, this Court has a duty to re-evaluate the evidence, assess it and reach its own conclusions remembering that it neither saw nor heard the witnesses and therefore it must give due allowance for that. Further, I should not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or a mis-apprehension of the evidence or it is shown that the trial Court acted on wrong principles in arriving at the decision appealed from – see ***SELLE AND ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD 1968 E.A. 123,*** and ***PETERS VS SUNDAY POST LTD 1958 E.A 424.***

I have considered this appeal in light of the principles set out in the above cases.

The trial magistrate did not specifically set out the issues for determination as per order ***21 Rule 4 of the Civil Procedure Rules***. The said judgment is quite short (three typed pages). It is however clear even from that short judgment that the trial magistrate addressed the issues that were in controversy. These issues were whether to accept the evidence of the appellant and the map produced by his witness or whether to agree with the respondent that the law empowers it to prepare development plans and also to demolish illegal structures. I do not consider it fatal that the trial Court did not frame the issues because it is clear from the judgment that those issues were considered. Having considered the two sides, the trial magistrate addresses himself as follows:-

> "***It follows that when the Physical Planning Liaison Committee sat on 20th November 2008 and ruled that the clerk to the Municipal Counsel (sic) remove the destructing (sic) development, they were already carrying out their mandate and this was following complains by members of the public who could not gain access to their premises"***

What the trial magistrate was saying really is that under the law the respondent was the body mandated to prepare development plans and therefore designate roads of access and pull down structures that are on such roads. That is provided for under the ***Physical Planning Act*** (***Cap 286 Laws of Kenya***) and under ***Section 26*** of the same, a party has the right to file objections regarding any development plans. From the evidence during the trial, a notice dated 17th April 2007 had been served by the respondent upon the appellant before his structures were removed.

The other complaint is that the trial magistrate only ruled on the issue of an access road between plot No.

41 and 40 but did not rule on whether there was an access road between plot No. 41 and 62. From the pleadings herein, the subject matter was the road of access through the appellant's plot No. 41 at Kutus town and also damages for his structures that had been destroyed. In his own testimony, the appellant said there was no road between his plot No. 41 and plot No. 40. That was the main issue before the trial magistrate and he addressed it in his judgment.Indeed the appellant's own evidence was that when he bought the plot, those structures were there. Therefore, what the trial magistrate was required to determine was whether those structures were on a road access and he made a finding that they were on the road access even by the time the appellant bought the plot.

It is also the appellant's case that the trial magistrate ignored his case. That complaint is not borne out of the proceedings herein. At the commencement of his judgment, the trial magistrate has outlined the case for both parties before arriving at the decision which he did. It is also complained that the trial Court considered evidence of the respondent's un-qualified witnesses which he relied on in making his finding in favour of the respondent. As I have indicated above, the respondent's witnesses were a Surveyor, a Planning officer and an Engineer. Their qualifications were never an issue at the trial and going by their designations, they can hardly be described as "***un-qualified***" witnesses.

The appellant has also raised the ground that he was condemned un-heard against the rules of natural justice. This is in relation to the respondent's action of demolishing the structures on the road through his plot. As stated above, a notice dated 17th April 2007 was issued as required by law. That is not disputed because having received the said notice, he instructed his lawyer who wrote to the respondent that the appellant would not comply with the said notice and that any demolition would be at the respondent's detriment. The appellant cannot therefore be heard to say that he was condemned un-heard.

Ultimately therefore, having considered all the above, I find that this appeal lacks merit and is hereby dismissed with costs to the respondent.

B.N. OLAO

JUDGE

31ST JULY, 2014

31/7/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Mugambi for Appellant – present

Mr. Kahiga for Wambugu for Respondent – present

COURT: Judgment delivered this 31st July 2014 in open Court.

Mr. Mugambi for Appellant present

Mr. Kahiga for Wambugu for Respondent present

Right of appeal explained.

B.N. OLAO

JUDGE

31ST JULY, 2014