



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 4 OF 2009

COUNTY COUNCIL OF MURANG'AAPPELLANT

VERSUS

MORRISON MBUTHIA MAINARESPONDENT

JUDGMENT

This judgment is the result of the appeal against the judgment of **Hon. G. Nzioka**, the then learned Senior Principal Magistrate vide **Murang'a S.P.M.C.C. No. 440 of 2007**. **Morrison Mbuthia Maina**, the Respondent herein had sued the **County Council of Murang'a** the Appellant, seeking for *inter alia* a declaratory order the Appellant's action of impounding and detaining the Respondent's motor vehicle registration **No. KAT 606Y** was unlawful and unjustifiable. That the Appellant had no power to act the way it did. The Respondent sought for also an order of injunction to compel the Appellant to release the motor vehicle and to restrain it from further seizing the Respondent's motor vehicle nor preferring any charges against the Respondent. The Respondent also sought for damages plus costs. In the end, the learned trial magistrate gave judgment in favour of the Respondent in the following terms:

- i. The detention of the Plaintiff's motor vehicle was unlawful.**
- ii. The Plaintiff awarded Kshs. 29,500/= as damages.**
- iii. Each party to bear its own costs.**

The Appellant was dissatisfied hence it preferred this appeal. In its Memorandum of Appeal, the Appellant put forward the following grounds:

- 1. The learned magistrate grossly erred in law and fact when she purported to award damages which were neither specifically pleaded nor strictly proved.**
- 2. The learned magistrate erred in law when she based her judgment on the fact that the by-laws were not produced as an exhibit when she was enjoined to take judicial notice because the by-laws had been duly gazetted.**
- 3. The judgment was against the weight of evidence.**

I have re-evaluated the case which was before the trial court. I have further taken into account the submissions filed herein. In the **first ground**, it is argued that the trial court erred when it awarded special damages whereas the same was not pleaded nor proved. I have looked at the **Plaint** and I am convinced that the Respondent actually pleaded for special damages in paragraph 7 of the **Plaint** hence he cannot be faulted. The learned trial magistrate analyzed the evidence in detail and appreciated the principle that

special damages must be pleaded and strictly proved. The Respondent had pleaded to be paid Kshs. 3,800/= per day. The trial magistrate was not bound by the figure but was to examine the evidence. After a critical analysis of the evidence presented to her, the learned magistrate came to the conclusion that the Respondent was entitled to be paid Kshs. 2,950 per day for 10 days. In my view, the learned Senior Principal Magistrate did not fall into error but correctly applied the principle. I dismiss this ground.

In **ground 2**, the trial court is faulted for basing its judgment on the fact that the by-laws were not produced as an exhibit. It is the Appellant's argument that the court should have taken judicial notice that such laws had been duly gazetted. It is clear from a portion of the trial court's judgment that the trial magistrate found that the Appellant had failed to cite the law or by-law the Respondent is alleged to have breached. It is said the same came up by way of submissions. The Appellant argues that the submissions sufficiently brought out the relevant law which was breached. I have looked at the defence filed by the Appellant and it is clear that the Defendant generally pleaded that the Respondent breached the Defendant's by-laws. That law was never cited. The Appellant's witness i.e D.W.1 did not also cite the by-law breached. The by-law was cited by the Defendant's learned counsel as the **County of Murang'a (Omnibus/bus/Matatu/Taxis) by-laws 2004**.

With great respect, I think the trial magistrate fell into error when she concluded that the by-law was not supplied to her. It would appear that by-law allowed the Appellant to arrest, tow and detain any motor vehicle which was driven or parked in breach of the aforesaid by-laws. I agree with the Appellant that courts are enjoined to take judicial notice of the existence of the by-laws pursuant to **Section 60(1)(a)** of the **Evidence Act**. The appeal succeeds on this ground. No damages can be awarded where there is no fault. Consequently, the award on damages must be set aside.

In the end, the appeal is allowed. The judgment of the trial court is set aside and is substituted with an order dismissing the suit. The Appellant is awarded costs both before the subordinate court and on appeal.

Dated, signed and delivered this 23rd day of August, 2013

J.K. SERGON

JUDGE

In open court in the presence of Mr. Ndirangu holding brief for

Gichuki for Respondent

N/A Mwaniki for Applicant