REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Civil Appeal 168 of 2010

MACHARIA WAIGURU….…….....…….……..….APPELLANT

Versus

MURANG'A MUNICIPAL COUNCIL……....…….1ST RESPONDENT

MURANG'A MOTOR SPARES……...……..2ND RESPONDENT

(Appeal arising from the judgment of Principal Magistrate 's court Murang'a in civil case no. 415 of 2009)

JUDGMENT

This is an appeal against the judgment of I.K. Orenge the Resident Magistrate delivered on 8/9/2010.

By a plaint filed in court on 24th December 2009 the appellant sued the respondents claiming general damages for the loss of use of the appellants motor vehicle registration No. KSZ 892 Nissan – Datsun and damages for any loss that might have occurred while this car was in the defendant's possession.

The appellant on 30th December 2009 took out a notice of motion application for order that the applicant be granted orders to inspect the subject motor vehicle which was then lying in the 1st Respondents premises in Murang'a town after being taken there by the 2nd Respondent to recover Ksh. 300,000/- hidden in the car and further order that the defendant to give reasons why the car should not be released and the 1st respondent filed memorandum of appearance on 31st December 2009.

From the record the said application was certified urgent and fixed for interpartes hearing on 31st December 2009 when prayer one of the said application was allowed.

On 5th January 2010 once again under certificate of urgency the appellant took out a notice of motion under order XXXIX rule 7B and section 63(1) of CPA for an order that the applicant be authorized to enter the 1st respondents premises and take away car registration No. KSZ 892 Nissan Datsun which application was certified urgent and fixed for hearing interpartes on 8th January 2010 and on the said date the second respondent had not been served so the application was stood over to 20th January 2010.

In the mean time on 6th January 2010 the second respondent through the firm of Macharia Kimotho & Associates entered appearance and filed a replying affidavit to the said application and on 8th January

2010 filed a defence wherein the same stated that it was a stranger to the matters pleaded by the plaintiff and that the plaintiff has no cause of action against the same and shall raise a preliminary objections to the suit to have it struck out with costs.

It should also be pointed out that the 1st defendant on 7/1/2010 filed its defense where the same stated that the motor vehicle the subject matter of this appeal was towed after the plaintiff had been given sufficient notice which cannot lead to a compensation of general damages. That the said motor vehicle was towed for being abandoned in a public street in contravention of section 17(1) of the 1st Respondent's by laws which notice was duly and as consented by the appellant served upon the plaintiff through the motor vehicle to remove the said obstruction. The 1st respondent further stated that the appellant was always at liberty to access the subject matter and required no court order to access the same and that the respondent only pursued a lawful act and will therefore raise a preliminary objection at the hearing that the said suit is a sham and an abuse of this process of court.

On 14th January 2010 the appellant filed an amended plaint and pleaded at paragraph 5, 6 and 8 as follows:

5. ***the plaintiff also claims damages from the defendant for any loss that might have occurred while the car was in the defendant's possession and recovery of Ksh. 300,000 that was in the said car***.

6. ***The plaintiff avers that on 19th December 2009 in Murang'a town the 2nd defendant at the express authority of the 1st defendant's servants/agents/employees towed away the plaintiff's motor vehicle above mentioned and tow to the compound of the 1st defendant and there detained the said motor vehicle for reasons best known to themselves.***

8. (a) By the letter above mentioned the plaintiff wished to be given access to the car to find out whether money hidden by the plaintiff in the car was still safe but no answer has been received so far.

(b) The above actions complained of were unlawful, deliberate and/or negligent.

He therefore prayed for judgment against the defendant jointly and severally for:

a. General damages for loss of use of the motor vehicle.

b. Costs of his suit plus interest.

c. Such further orders or relief this honourable court deems fit and just to compensate the plaintiff for any loss or damage that might have occurred during the towing away process or while the car was in the defendants' possession and any other loss monetary or otherwise that might have been occasioned by the defendants servants/agents actions.

On 1st March 2010 the appellant was allowed to withdraw all the pending applications and case fixed for hearing on 14th April 2010.

When the appellant testified that on 19th December 2009 the 2nd respondent on the instructions of the 1st Respondent towed the appellant's car registration no. KAZ 892 Nissan Dutsun for non payment of parking fee he had argument with the defendant whether the area was a designated area or whether the respondent would charge fee on Saturday. That he wrote a letter to the town clerk and did not get a reply up to 31st December 2009. He therefore obtained a court order to allow him inspect the motor vehicle and 1st Respondent wrote to him charging him Ksh.9500/=. He was not charged on obstructions. On 10th December 2009 he was served with notice that KRG 442 Honda civic was obstructing and that he had the authority to park the motor vehicle at the said building. On 16th February 2009 the car was towed away by one Mr. Waweru and that he had Ksh. 340,000/- in the motor vehicle belonging to one of his clients when he inspected the motor vehicle he only found the envelope.

Under cross examination he stated that only one of the cars was towed away and that it was towed on 19th February 2009 while the money was paid to him on 18th February and that the 2nd respondent had one duty of care.

P.W.2 James Kimani testified that on 10th February 2009 he saw a notice brought by Githinji and brother and placed on Motor vehicle KRG 442 and that motor vehicle KAZ 892 was towed by Murang'a motor under instruction of council and that he had brought Kimani and Chege to the appellant who paid Ksh. 300,000/- for the agreement. That KAZ was parked under the dumping site.

Under cross examination he stated that it had obstructed the shop. The motor vehicle had been chained at 12 pm. And was towed around 5 pm.

P.W.3 Mr. Enosh Wachera also testified on behalf of the appellant that the motor vehicle was found on 16th December 2009 from near the building having been given notice to be towed. Under cross examination by Mr. Karweru he stated that the notice was for motor vehicle registration No. KAZ 892 and that the motor vehicle was being repaired on the said date and that the appellant gave him Ksh. 500 to go and buy fuel for it.

The defendant chose not to call any witnesses and at the close of the proceedings the trial magistrate delivered a judgment after the plaintiff filed written submission in which he submitted that Ksh. 309,000/- was lost at the 1st Respondent's premise and by their employee. He further claimed Ksh. 118,000/- for taxi services on the cost of Ksh. 900/- per day. And the court found that the plaintiff did not plead for loss of Ksh. 300,000/- and that the plaintiff did not call the alleged purchasers or seller to give evidence as to whether there was transaction in which the plaintiff was acting for them. The court therefore found that the said omission makes it hold that the claim was an afterthought and in any event it should have been specifically pleaded and proved.

The court further found that there was no evidence for loss of user which should also have been pleaded. The court found that the appellant had not pleaded any irregularity in towing the motor vehicle nor asked the court for order for the release of the said motor vehicle and therefore dismissed this suit.

It is this ruling that triggered the appeal herein as the appellant being dissatisfied with the same filed the following grounds of appeal.

1. ***The magistrate side stepped the main issue in the application dated 30th December 2009 which was the illegality of the defendant's actions.***

2. In the absence of any evidence from the defendants the court had no alternative but to enter judgment against them.

3. The question of the Kshs. 300,000/- did not arise at the hearing as by this time the defendants premises and ascertain whether the Kshs. 300,000/- was still there and having ascertained that it was not the court allowed the plaintiff to amend the plaint to include the claim for Kshs. 300,000/- as special damages.

4. The court failed to take into account that there being no conditions limiting the inspection as provided for by the law the owner of the money Stephen Mwangi Kimani accompanied the plaintiff during inspection and ascertained that the money was missing. It was therefore unnecessary to call him as a witness as he has stated in his affidavit attached herewith.

5. The magistrate completely disregarded the law in that

a. The defendants did not produce any law or regulation either to back their claim for obstruction or payment of parking fees.

b. The court is condoning illegalities by shielding the defendant to avoid being questioned on the disappearance of the Kshs. 300,000/- did not give evidence and also to avoid being questioned as to how the notice relating to car registration No. KSZ 892 was back dated.

c. The magistrate failed to follow his own orders or to appreciate the significance of his own order of inspection and subsequent events.

d. The magistrate failed to follow the sequence of event brought about by his own orders and giving half baked remedies regarding the 2nd defendant.

I must point out that the appellant on 17th May 2011 filed a notice of motion application which was dismissed by this court on 10th February 2012 and therefore what is before the court is the determination of the main appeal. The same having been admitted on 4th March 2011.

On 14th May 2012 directions were given that the appeal be disposed off by way of written submissions which have now been filed before me by the appellant and the1st respondent.

I must at this point state that I do not understand the basis of this appeal but shall try as much as I can to rule on the same.

It should be pointed out that parties are bound by the pleading. At paragraph 8(b) the appellant stated that the above action complained of were unlawful deliberate and or negligent but during the trial no evidence was ever tendered by the plaintiff before the trial court to support this said allegations. In his submission the appellant has stated that the respondent has not shown under what law they acted in towing away the appellant's motor vehicle and has relied on the authority of County Council of Murang'a vs Douglas Kariuki Muchoki Nyeri High Court Civil appeal No. 13 of 2008 in what the court ruled that the said council did not have a valid by laws to impound the respondent's motor vehicle.

I must point out at this stage that this case is not relevant to the present appeal as the case before the trial court was not the irregularity of the respondents' action to tow away the appellants motor vehicle but a claim for loss of money which was in the said motor vehicle.

I have had a look at the submissions by this advocates for the 2nd respondent and the submissions by the appellant and must state here without any contradiction that the appellant did not understand the issues which he placed before the trial court.

As stated herein above all the pending applications before the trial court were withdrawn and the main suit fixed for hearing. This being a civil matter it was upon the appellant to prove his case on a balance of probability and I find no fault with the trial court's judgment herein.

It was upon this appellant to plead and prove loss of user. I have analysed the evidence tendered before the trial herein above and must confess that the appellant did not tender in any evidence for the claim in respect of loss of user which as rightly pointed by the trial court is special damages which needed to be specifically pleaded and proved. The appellant having failed to do so can not at this stage fault the trial court for dismissing his claim.

I therefore find no merit in the appellants' appeal herein save that the clerical error in the number of the motion section is something which could have been corrected without going on appeal since that is an error which is apparent on the face of the record.

I note that the appellant appeal seems to be hinged on the basis that the 1st Respondent did not have by laws to enable it tow the motor vehicle the subject matter of the appeal and in as much as the appellant might be right in this I am sorry to state that was not the issue before the trial court and therefore cannot be the subject matter of this appeal.

The appeal herein therefore fail and is dismissed with no order as to cost.

Dated and delivered at Nyeri this 27th day of September 2012.

J. WAKIAGA
JUDGE

Read in open court in the absence of the parties and the advocate.

J. WAKIAGA
JUDGE