REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 760 of 2001

LUCY M. KARANJA…...……..…….. APPELLANT

VERSUS

KENYA WOOLS & SKINS INDUSTRIES
TRADERS & CONTRACTORS CO. LTD..…...RESPONDENT

(Appeal from the judgment of the Chief Magistrate's Court at Nairobi by Hon. J.W. Lesiit, in CMCC No.8552 of 1999 dated 3rd October. 2001)

J U D G M E N T

1 This is an appeal arising from a judgment delivered by J.W. Lesiit, Chief Magistrate (as she then was), on 3rd October, 2001. By a plaint dated 13th September, 1999 and amended on 9th August, 2000, Lucy Nyakio Karanja, (hereinafter referred to as the appellant), sued Kenya Wools & Skins Industries Traders & Contractors Company Ltd, (hereinafter referred to as the respondent). The appellant sought judgment for a permanent injunction against the respondent or its servants or agents restraining them from entering plot No.201, or demolishing the fence or house. The appellant also sought a permanent injunction restraining the respondent, its servants or agents from excising any part of plot No.201. In the alternative the appellant sought compensation for the value of the house and a portion of the plot. The appellant further sought damages, costs and interest.

2. In its defence filed on 21st September 1999, the respondent admitted that the appellant was a shareholder of the company, but denied that the appellant was allocated plot No.201. The respondent maintained that the appellant was one of 430 members residing on an un surveyed plot on the respondent's land and that the respondent had legally served a notice on the appellant requiring her to remove her house, fence and tank to enable the respondent create an access road. That decision followed a resolution which was arrived at by members of the respondent. The members of the respondent further resolved that the plot be excised to create an access road without any compensation.

3. During the hearing of the suit in the lower court, the appellant and one Beuya Geoffrey Muiruri testified in support of the appellant's claim. The appellant explained that she is a member of the respondent. She produced a share certificate and maintained that she was allocated the plot in issue in the year 1972. The plot was surveyed and she was shown where to build. She constructed a house of timber with an iron sheet roof. She also constructed a kitchen. She had two water tanks which she installed outside. She further fenced the plot with barbed wire and off-cuts wood.

4. Sometimes later, some officials of the respondent complained that the access road which was allocated was too narrow and that they needed to expand it. The respondent's officials later demolished the appellant's house, fence and water tanks. The appellant identified David Thangei, the vice chairman of the respondent and the Chairman one Mahera as having been involved in the demolition exercise. The appellant explained that she was not compensated for the damage caused in her home. She hired a valuer to assess her damage. She paid the valuer Kshs.7,000/= for a report, and Kshs.4,000/= for court attendance.

5. Beuya Geoffrey Muiruri testified that he visited the appellant's home on 24th January, 2000. He noted that the demolition included part of the fence, piping, two water tanks, pit latrine and washroom block. He prepared a report, valuing the portion of the plot which was excised to be covered by the road, at Kshs.70,000/=. Muiruri noted that the appellant's house could no longer fit on

the remaining plot. He valued the house at Kshs.325,000/=, the pit latrine and bathroom block at Kshs.30,000/=, water tank Kshs.35,000/=, demolished fence Kshs.25,000/= and the piping at Kshs.20,000/=. He prepared a report which he produced in evidence.

6. The respondent's witnesses were Dr. James Makara Chege, (Chege) Peter Muteti (Muteti), and Zaberio Kinyua Gitonga (Gitonga). Chege testified that he was a director of the respondent. He explained that the respondent company bought a 24 acre farm in Limuru in the year 1978. Members were required to pay a sum of Kshs.352.50, and upon joining members who requested were shown a temporary portion on the plot to build. There were many members who settled on the land but they were to wait until the land was demarcated and proper allocation done. Later the land was to be surveyed but some people had built on the area identified as the road and they were asked to move to create room for the roads.

7. The appellant who was one of those who had built on the area identified for the road, refused to move. She had built a wooden house with iron sheet roof and cemented floor. She also had two tanks, one built of cement and the other iron sheets. Chege explained that it was only the iron sheet tank which was moved to pave way for the road. He maintained that neither the house nor the cemented tank was touched or damaged.

8. Muteti was a senior assistant Chief, Marurungi Sub-location. He attended a meeting of the respondent wherein it was resolved that the land be surveyed and that all plots found to be on the road be removed. After the survey was done and the affected plots identified, most of the affected members demolished their structures from the identified plot. However, the appellant did not demolish her structures. Members of the company went to the appellant's plot and demolished her water tank. He explained that neither the house nor the water tank built of stone, was touched.

9. Gitonga, who was the District Land Surveyor, testified that he did survey work on the land following instructions from the directors of the respondent. At the time Gitonga was assigned to carry out the survey and sub-division, and create some roads, members had put up structures in a haphazard manner on the respondent's plot. Gitonga was requested to create the roads in a manner that would create minimal disturbance. Members of the company met and agreed voluntarily to remove any structures on the area identified as the road reserve. Gitonga maintained that they demarcated the plot and finished the survey work. Counsel for each party filed written submissions urging the trial magistrate to find in favour of his client.

10. In her judgment, the trial magistrate found that the evidence of the defence witnesses that the appellant together with some other members were shown by the company where to put temporary structures, on the understanding that the members would later be shown proper sites after the land was surveyed, was not disputed. The trial magistrate found that the area where the appellant built her structures was a temporary site. She noted that the identification of that site to the appellant and the appellant's subsequent construction on the plot, did not constitute ownership.

11. The trial magistrate further noted that although the appellant produced a share certificate, the share certificate did not show the area of the land allocated or owned. It could not therefore be used as a title to the land where the appellant constructed. The trial magistrate found that the plot on which the appellant had built and the entire land belonged to the respondent and had neither been surveyed nor were any titles issued. She noted that the appellant having failed to prove ownership of the suit land an injunction could not issue.

12. With regard to appellant's prayer for compensation, the trial magistrate found that the appellant having been given a plot for temporary occupation, she had no business constructing a permanent house. The trial magistrate further found that the appellant's evidence that her fence, tank and house were partly demolished was contradicted by her witness. This was the valuer, who stated that only part of the fence was uprooted and one tank moved.

13. The trial magistrate finally concluded that the demolition was carried out by members of the respondent company pursuant to a meeting attended by the appellant wherein it was agreed that the respondent's land be surveyed, demarcated and access road created. The trial magistrate was of the opinion that the appellant had failed to prove that the respondent was responsible for the acts of demolition carried out at her plot. She noted that the appellant failed to prove her alleged damage and therefore dismissed the appellant's suit with costs.

14. Being aggrieved by that judgment, the appellant has lodged this appeal raising 10 grounds as follows:

(i) The learned trial magistrate erred in law and fact in holding that the appellant's properties were not demolished by the respondent while there was sufficient evidence and admission to that effect.

(ii) The learned magistrate erred in law and in fact in failing to make a finding as to whether there was a necessity of excising the appellant's portion of land.

(iii) The learned Chief Magistrate erred in law and in fact in holding that Plot No.201 did not belong to the appellant and that it belonged to the respondent yet no document of title was produced by the respondent in proof of ownership.

(iv) The learned Chief Magistrate erred in fact and in law in failing to consider that the appellant had lived on plot No.201 since 1972 without any disturbance.

(v) The learned Chief Magistrate erred in fact and in law in holding that the purported sub-division and creation of access road was legal while no consent or authority to subdivide from the Director of Survey was produced.

(vi) The learned Chief Magistrate's findings were against the weight of evidence.

(vii) The learned Chief Magistrate erred in fact in holding that the appellant was unable to prove damage of her property.

(viii) The learned Chief Magistrate erred in law in applying the doctrine of volenti non fit injuria while the same was neither applicable nor raised by the respondent.

(ix) The learned Chief Magistrate erred in fact in holding that a resolution to demolish structures had been passed in the respondents company without sufficient evidence to that effect.

(x) The learned Chief Magistrate erred in law and in fact in finding that there was no malice in demolishing the appellant properties.

15. During the hearing of the appeal, there was no appearance for the respondent, although the respondent's counsel was duly served. Mrs. Madahana who appeared for the appellant, submitted that there was sufficient evidence on record showing that the appellant's house was demolished and damage caused to her premises, pursuant to a notice issued by the respondent. She maintained that it was clear from the evidence that the property was demolished with the express consent of the respondent. She submitted that the trial magistrate was wrong in finding that there was no proof of damage. She noted that the appellant was told to move from the whole land even though the excision of the plot only was necessary.

16. Mrs. Madahana submitted that the trial magistrate having found that the land belonged to the members of the respondent, and the appellant having proved that she was a member of the respondent holding a share certificate, the trial magistrate ought to have found that the plot belonged to the appellant, and she was therefore entitled to compensation. Mrs. Madahana maintained that the findings of the trial magistrate were against the weight of the evidence, as the trial magistrate should not have found that the appellant was not entitled to any compensation. Mrs. Madahana pointed out that the defence did not raise the plea of *volenti non fit injuria*. Moreover, the appellant testified that she did not know that any excision would take place.

17. Finally Mrs. Madahana submitted that there was malice in demolition of the property as there was no justification for the excision since only 4 metres was required. She therefore urged the court to allow the appeal.

18. I have carefully reconsidered and evaluated the evidence which was adduced in the lower court, the submissions made and the judgment of the lower court. I have also considered the submissions made before me and the authorities cited. The appellant sought an order of permanent injunction restraining the respondent or his agents or shareholders from entering Plot No.201 or demolishing any structures on the said plot. In order for the court to grant the order sought, the appellant had to establish that he was the owner of the said plot or at least that he had a better right to the plot than the respondent. The appellant was not able to prove that there was any plot registered or delineated as plot No.201. The only document produced by the appellant in support of her alleged ownership of the plot was a share certificate numbered 201. That share certificate only confirmed that the appellant was the registered holder of fully paid up ordinary shares in the respondent company. It did not establish that the appellant was the owner of Plot No.201.

19. Indeed, it was not denied that the respondent was the owner of a big parcel of land which included what the appellant referred to as plot No.201. That land was bought by the respondent for the purpose of allocation to its members. It is also clear that as at the time the appellant occupied the plot referred to as No.201, no survey had been done or the plots numbered or formally allocated. Possession of the land was therefore given temporarily.

20. It is true that the survey done to create access road was not meant to relocate the residents. The members of the respondent company having resolved that all who were on the area identified for the access road had to move without any compensation for the structures they had put up, the appellant was bound by that resolution of the company. Further, the appellant having been given only temporary occupation of the plot, pending the survey and formal allocation, she put up permanent structures on the plot at her own risk and cannot therefore seek compensation for any loss for removal of the structures from the respondent.

21. Further, although the appellant demonstrated that the respondent had threatened to demolish her structures she did not prove that the actual demolition was done by the respondent or the respondent's agents. The appellant merely acted on an assumption that the demolition was done on the respondent's instructions.

22. For the above reasons, I find that the trial magistrate was right in dismissing the appellant's suit and do therefore dismiss this appeal. The respondent not having attended court, to defend this appeal, I make no orders as to costs.

Dated and delivered this 26th day of January, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ms. Chelangat H/B for Mrs. Madahana for the appellant

Advocate for the respondent absent

Eric - Court clerk