



No 109

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 89 OF 2005
CONSOLIDATED WITH CIVIL APPEAL NO. 244 OF 2004

ELIAS ANYANGO ONDITI.....APPELLANT

-VERSUS-

WILSON O. NYABUNGE AND 7 OTHERS.....RESPONDENTS

JUDGMENT

(Being an appeal from Judgment and Decree of Honourable Lois Komingoi Senior Resident Magistrate Kisii CMCC NO. 155 OF 2000)

The appellant was the Plaintiff in the suit he filed in the Chief Magistrate's court at Kisii. He had filed the suit against the respondents by dint of the amended plaint dated 31st October, 2000. In the said plaint he described the respondents' in these terms; the first and third respondent's were brothers and sons to the late **Mathews Nyabonge**. The 2nd respondent was a former District Officer, Rongo Division. There was no description for the 4th and 5th respondents. However with regard to the 6th respondent he was described as the area assistant chief for Kameji sub-location. The 7th and 8th respondents were described as youths of the 6th respondent and therefore agents of the local administration and were deemed to be servants of the 5th respondent.

The appellant's claim against the respondent's jointly and severally arose out of torts committed by the respondents against him on various occasions between 4th, and 23rd February 2000 respectively. The torts involved were unlawful arrest, unlawful confinement, false imprisonment.

On or about 7th August, 1993 the appellant and the Estate of his late brother, **Ororia Onditi** agreed to sell to **Mathews Nyabonge** a portion of their land, Kameji/326 measuring 5 acres. However the deal fell through when the appellants brother passed on. **Mathews Nyabonge** was the father of the 1st and 3rd

respondent. Pursuant to the agreement aforesaid, **Mathews Nyabonge** paid to the appellant three (3) heads of cattle valued at Kshs. 13,000/= towards the purchase price of the parcel of land aforesaid. Apparently because of the death of the appellant's brother, Rongo Land Control Board could not give its consent to the transaction. Where upon **Mathews Nyabonge** opted to treat the agreement aforesaid as a lease agreement. By the time he passed on around 1993 he had planted sugarcane in the parcels of land and harvested four times at an agreed lease price of 5000/=.

Following the death of **Mathews Nyabonge**, the 3rd respondent in or about 1998 took away from the appellant 2 heads of cattle that had been paid as part of the purchase price aforesaid. The matter was apparently reported to the Chief of Kamagambo Location. In the chief's Baraza held on 7th January 2009, the dispute was arbitrated upon and decided in favour of the appellant and decision transmitted to the 2nd respondent who was then the District Officer, Rongo Division and Chairman of Rongo Land Control Board.

On 4th February 2000, the appellant was surprisingly arrested by his area assistant chief, the 6th respondent allegedly on the order of the 2nd respondent and taken to his office where he was placed in the cells until noon. He was thereafter removed from the cells at gun point and forced to thumb print some land documents transferring the land to either the 1st respondent or the estate of his father. The appellant being illiterate did not know what he was signing away. Later the 4th respondent together with the one **Juma** trespassed onto his land **Kameji/326** and carried out an illegal subdivision by planting a boundary which had the effect of giving a portion thereof to the 1st respondent. Subsequently, and in pursuit of compelling the appellant to thumb print the necessary document for the transfer, the 1st, 6th, 7th and 8th respondents went to the appellants homestead on the said parcel of land and assaulted him. He sustained injuries on the back, ribs and head as a result of the assault and being dragged on the ground. On 17th February 2000 the appellant was compelled to locate from his homestead and seek refuge elsewhere 4th April 2000. In between he lost properties to wit; 5 bags of maize, 7 chickens, 2 cocks, 2 Jembes and 4 weeding hoes all valued at Kshs. 7,300/=. The appellant maintained that the conduct of the 1st, 2nd, 3rd and 6th respondents in holding him hostage in the D.o's cells and forcing his signature or thumb print on land transfer documents relating to Kameji/326 was fraudulent. He proceeded to give particulars of fraud. On the basis of all the foregoing, the appellant prayed for a permanent injunction against the respondents from trespassing on or interfering with Kameji/326, declaration that the transfer in respect of Kameji/326 between the appellant and 1st respondent or estate of **Mathews Nyabonge** deceased if any was illegal and void *ab initio*; declaration that the 1st respondent or deceased's father's estate held Kameji/326 or part thereof in trust for him special damages for Kshs. 7,320/=:, general damages for unlawful arrest, confinement, assault, trespass, costs and interest.

Through **Messrs Oguttu Mboya & Company Advocates**, the 1st and 3rd respondents entered appearance and filed a defence and counter claim. In their joint defence, they denied the appellants claims and pointed out that the causes of action were misjoined and thus bad in law. They further contended that their late father, **Mathews Nyabonge** entered into a valid land sale agreement with the appellant in respect of land parcel **Kameji/326** and paid Kshs. 61,000/= being the full purchase price of two (2) acres out of the same. The plaint as drawn was ambiguous, vague and contrary to the provisions of order VI rule 7 of the **Civil Procedure rules**. Finally they averred that there being no blood relationship between them and the appellant, there can be no trust. The jurisdiction of the court was denied. By way of counterclaim the respondent's prayed for an order for specific performance directing the appellant to transfer 2 acres out of **Kameji/326** to the respondent. In the alternative amount of Kshs. 60,000/= refunded to them.

Through **Anthony Ombwayo**, litigation counsel, the 2nd, 5th, 6th, 7th and 8th respondents filed a joint defence. In the main they all denied the appellant's allegations and put him to the strictest proof thereof. On his part, the 8th respondent intimated that he would raise a preliminary objection to the effect that the appellant had not complied with the mandatory provisions of Section 13A of the Government Proceedings Act, hence the suit was nullity and ought to be dismissed with costs.

The hearing of the case then commenced before **L. Komingoi Rm** 4th June, 2002. The appellant testified that **Mathews Nyabonge**, the father of the 1st respondent bought land from him and gave out three heads of cattle as the purchase price. However, later he came and took away two heads of cattle leaving him with one. The agreed purchase price was equivalent to twelve heads of cattle. The subject parcel of land was **Kameji/326**. He was to sell him 2 acres out of the said suit premises. However they were unable to obtain the consent of the land control board as the suit premises were not registered in his name. It was then that **Mathews Nyabonge** took away the two heads of cattle. The remaining one was later taken away by the 3rd respondent. He denied that **Mathews Nyabonge** had paid him Kshs.60,000/= for the suit premises. Later the 6th respondent and his youth arrested and took him to Rongo D.O's office where he was held for 2 hours. He was then forced to thumb print some documents. Subsequently, Land Office personnel came whilst he was away, and surveyed the suit premises. After 4 days the 7th and 8th respondents came to his house at night and beat him up as they dragged him along saying they were taking him to the local chief to thumb print some documents. He was injured on the head, left eye and right leg in the process. He was treated at Miyoya Dispensary and Kisii District Hospital for the injuries. Dr. Owour examined him and prepared a report dated 20th April, 2004. He lost 5 bags of maize, 8 chicken, 3 jembes and 4 hoes all in the sum of Kshs. 7,200/= in the process. He could not transfer the suit premises because the purchase price had been recovered. On the day of his arrest there had been a land control board meeting and he was forced to thumb print the application form for consent to subdivision. He therefore prayed for damages for pain and suffering, unlawful arrest and confinement, assault and trespass.

The appellant then called **Jeremiah Opiyo Oludhe** as his witnesses. He merely corroborated the evidence of the appellant. He confirmed that there was a land transaction involving the appellant and **Mathews Nyabonge** deceased. He witnessed **Mathews Nyabonge** pay 3 heads of cattle for the suit premises. He also witnessed **Mathews Nyabonge** subsequently take away the 2 heads of cattle in 1993. He also saw the 3rd respondent take away the remaining 1 head of cattle in 1999. He confirmed that whatever **Mathews Nyabonge** paid for the suit premises was taken back. He had witnessed the appellant being taken to the DO's office and being forced to sign some documents pertaining to the suit premises. On 17th February, 2000 he heard screams emanating from the appellant's home and he went there. He found the appellant on the ground and the 6th, 7th and 8th respondents were at the scene with others. They had come to take the appellant to the D.O's office to sign some documents pertaining to the suit premises. The appellant appeared as though he had been beaten as he was bleeding. Later some people from the lands office came to fence off the suit premises whilst the appellant was away attending a funeral.

The final witness called by the appellant was **Dr. H.P Owour**. He had examined the appellant on 20th April, 2001. He had found on the appellant bruises on the cheeks, lateral chest and lower back. He classified the injuries as soft tissue injuries. He tendered into evidence the medical report.

That then marked the close of the appellant's case.

The 1st respondent testified that the appellant was a neighbour. He denied that he and his brother, 3rd respondent, had arrested and assaulted him. They could not have arrested him as they were not police officers. They had never been charged with the offence of assault nor had they been arrested over the same. They denied having trespassed on the suit premises if anything they had been given authority to work on the suit premises by the appellant through their deceased father. He had sold to their late father 2 acres out of the suit premises for Kshs. 60,000/= that was fully paid. They denied having forced the appellant between 17th February, 2000 and 4th April, 2000 out of his home. He never lost what he claimed as special damages. The appellant was paid in cash for the suit premises and not three heads of cattle. They never took away any cattle from him. Following the death of their father, they had obtained a grant of letters of administration. Together with the appellant they went to the Land control board at Rongo on 4th February, 2000 and a consent was issued. Following that consent, the appellant refused to transfer the 2 acres out of the suit premises to them . They thus prayed that the appellant be ordered to transfer to them the 2 acres or in the alternative refund Kshs. 60,000/=.

Dismas Okello Odenyoo, former chief of North Kamagambo testified on behalf of the 1st respondent. Its evidence was that on 25th November, 1995 the appellant and one, **Mathews Nyabonge** came to see him in his office as they wanted him to witness the agreement for sale of land. The appellant was selling a portion of the suit premises to **Mathews Nyabonge**. The purchase price was Kshs. 60,000/=. The same was paid and he witnessed the agreement. He was in the company of the assistant chief for Kameji sublocation, **Moses Ogutu Bando**, since deceased. He also witnessed the agreement. As far as he was concerned, the appellant had lied when he claimed in his evidence that he had not sold the suit premise to **Mathews Nyabonge** nor was the purchase price in the form of cattle. That as well marked the close of the defence.

From the proceedings it appears that the case proceeded only in the presence of the appellant, 1st and 3rd respondents respectively. Though the rest of the respondents were represented by the Attorney General, the record shows that the suit proceeded to hearing in their absence. There is no evidence on record that the said respondents had been made aware of the hearing and deliberately chose not to attend court.

Be that as it may, the learned magistrate having carefully evaluated the evidence on record both for the appellant, the 1st and 3rd respondents as well as their written submissions found in favour of the appellant holding thus:

“.....I have seen the sale agreement purportedly signed on 25th November 1995. The same does not contain either the seller or the buyers signatures. It only contains some identity card numbers but does not show who they belong to. This sale agreement cannot be relied upon for any purpose the purported (sic) sale was on 25th November 1995. The application for consent to the land control board was purportedly approved on 4th February 2000. This is six months after the alleged transaction. Even if the sale agreement was genuine then the transaction would have been null and void.

The plaintiff told the court that he sustained injuries as a result of assault. He did not however prove that it is the defendants who assaulted him on 17th February 2000. He did not tell the court whether he went to any hospital to seek medical (sic) until the year 2001. When he says he went to Kisii District Hospital, he did not report the assault to any police station nor was he issued with a P3 form. His medical report produced does not confirm the injuries complained of by the plaintiff. He said he had sustained injuries on the legs and eyes.

The particulars of the injuries were not set out in the plaint. The claim for special damages for assault therefore fails. The plaintiff also told the court that his house hold goods were stolen when he was away from home. He did not know who had taken them. He said he left his homestead on 17th February 2000. He therefore cannot talk (sic) the 1st and 3rd defendants to the theft. His prayers for special damages of Kshs. 7,300/= fails as well. Special damages must be specifically pleaded and specifically proved.

As for general damages for unlawful arrest and confinement; the plaintiff alleges that he was arrested and taken to the D.O's office where he was kept for 12 hours and bid (sic) to force him to sign the consent forms to the land control board. The plaintiff did not produce anything to show that he had been arrested and held at Rongo's D.O's office for the period. He is failed to prove the claim against the defendants on a balance of probabilities. The plaintiff has also not proved that the 1st and 3rd defendants are on his land. He is therefore not entitled to any general damages for trespass. The plaintiff's prayer for a declaration that the 3rd defendant's hold hand in his trust fails as he told the court that the land is still registered in his name.

After having decided that the sale agreement could not be relied upon. Having also decided that the transaction was null and void then the 1st defendant's claim cannot succeed. The 3rd defendant solely relied on the sale agreement. He was not present during the alleged transaction and does not know what transpired. DW2 who was called to testify told the court he witnessed the 1st defendant father and the plaintiff entering into a sale agreement. That the purchase prices was agreed at Kshs.

60,000/=. One therefore wonders why he did not ask the parties to append their signatures or thumb prints. He told the court lies. It could mean that the exhibit D1 was done after the deceased's death.

Consequently the 1st defendant counter claim is dismissed with costs. I enter judgment in favour of the plaintiff as follows:

- a) That a permanent injunction do issue against the defendant, their servants or agent from trespassing or interfering with land parcel number Kamagambo/Kameji/326 in part thereof by the estate of Mathews Nyabonge.**
- b) That the land transfer on parcel No. Kamagambo/Kameji/326 or part be between the plaintiff or 1st defendant on estate of the late Mathews Nyabonge is null and void.**
- c) Costs of the suit and interest.**
- d) Orders accordingly R.O.A 28days..”**

The appellant was not wholly satisfied with the judgment and decree aforesaid. He therefore preferred an appeal against part of the judgment that denied him damages both general and special. He advanced 14 grounds of appeal in his memorandum of appeal filed in court on 20th May 2005. In summary he blamed the learned magistrate for not entering judgment against the 2nd, 4th, 5th, 7th and 8th respondents who did not appear for the hearing though having been served through the Attorney General. That the appellant's evidence on the above issue had not been rebutted. The magistrate had erred in not holding the 1st and 3rd respondents liable for the special and general damages for unlawful arrest, confinement, assault and trespass when they were the ones who had set the ball rolling. They had invited the administration authorities to effect the culpable offences against the appellant. The magistrate erred in not holding that the appellant had proved his case against the respondents on balance probabilities. She erred in holding that the appellant's claim for damages on the basis of assault had not been proved for want of production of P3 form and treatment card. She also erred in not holding that on 7th January, 17th February and 4th April 2000 respectively when the appellant was arrested and confined, the 1st and 3rd respondents lacked capacity to make a claim in law over their late father's estate for want of grant of letters of administration nor when the consent was purportedly given. Finally, it was the view of the appellant that the learned magistrate had erred in law and fact in failing to hold that the appellant had proved that he had been assaulted, arrested and confined by the respondents and that the 1st, 3rd and 4th respondents had trespassed on his suit premises.

The 1st and 3rd respondents too were appalled by the decision. They also lodged an appeal being civil appeal number 244 of 2004 against the same judgment and decree. However in their written submissions dated 9th April, 2010 and filed in court on 12th April, 2010 the said respondent indicated that they had reconsidered their said appeal and now wished to withdraw the same entirely. In view of the foregoing **Kisii HCCA No. 244 of 2004** is hereby marked as withdrawn. I will deal with the question of costs towards the end of judgment. The appeal having been so withdrawn, I do not think it will be worthwhile to set out the grounds of the said appeal. This judgment is therefore in respect of **Kisii HCCA number 89 of 2005** only although the two appeals had been consolidated on 8th March 2010.

At the hearing of the appeal, parties agreed to canvass the same by the way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them together with cited authorities.

While an appellate court has jurisdiction to review the evidence tendered in the trial court to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the court had failed to appreciate the weight or bearing of the circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate too so decide. See **Peters V Sunday post Ltd (1958) E.A 424 and Watt V**

Thomas (1974), ALL ER 582.

The issue is this appeal and indeed in the trial court is whether the appellant marshaled sufficient evidence to entitle him to damages both special and general damages for assault, unlawful arrest, confinement and trespass. Just as the trial court, I am satisfied that the evidence led in that regard fell far to short of the threshold of proof on balance of probabilities.

The appellant has stated that since the 2nd, 4th, 5th, 6th, 7th and 8th respondent did not attend the hearing and offered no evidence in rebuttal, his evidence remained unchallenged and therefore the learned magistrate was duty bound to act on the same and enter judgment in his favour. That may well be true. However nothing on record suggests that the said respondents were aware of the hearing of the case nor were they made aware of the same by the appellant. The record shows that the hearing date was agreed upon between the counsel for the appellant and counsel of the 1st and 3rd respondents. This was in the absence of the Attorney General who appeared for all the remaining respondents. There is no evidence on record that the Attorney General was subsequently served with the hearing notice for the day when the case first came up for hearing and or on subsequent dates. The record also shows that on 4th June, 2002 when the case came up for hearing, **Mr. Nyakongo** appeared for the appellant whereas **Mr Oguttu** appeared for the 1st and 3rd respondents. There is no mention of the Attorney General and or the remaining respondents. Yet the learned magistrate proceeded with the hearing of the case. Neither counsel for the appellant nor 1st and 3rd respondents alerted the learned magistrate of the absence of the Attorney General and the other respondents. The learned magistrate herself too did not consider the issue and made a ruling therein whether or not to proceed with the case the absence of the Attorney General and or the other respondents notwithstanding. It was upon the appellant to alert the court of such absence in the event that the court on its own motion did not raise the issue. It seems to me that the court proceeded with the case perhaps on the wrong assumption that the case was merely between the appellant and 1st and 3rd respondents only. Even the judgment attests to this fact. The proceedings thus with regard to the other respondents were erroneous and irregular. Had the learned magistrate found against them, they would have been condemned unheard for omissions that were not of their making. Perhaps it was out of this realization belatedly that the learned magistrate made a note after the appellant had testified that **“.....The Attorney General having been served through litigation counsel Kisumu Ps duly filed did not attend the hearing..”**. This note came late in the day and was self-serving. It did not change the situation or ameliorate it either. In subsequent hearings, there is no indication of service again. To grant the appellant what he has sought against those respondents therefore will be tantamount to condemning them unheard. Indeed this court will be endorsing the mischief perpetrated upon those respondents by the appellant. He was bound to notify them of the hearing date. He did not. He cannot therefore be allowed to benefit from his mischief.

Turning to the 1st and 3rd respondents and dealing with the issue of special damages, I do not think that the same was specifically proved. It was the appellant's evidence that 7th & 8th respondents herein went to his house in the dead of night and assaulted him. He screamed and attracted the attention of his neighbours, who came to his rescue. He further testified that as a result of the actions of 7th & 8th respondents, coupled with the fear of being arrested, he abandoned his homestead and properties therein and relocated elsewhere. However, upon return, he had lost 8 chicken, 3 jembes, 4 hoes and 5 bags of maize all valued at Kshs. 7,200/= and not kshs. 7,300/= as pleaded in the plaint. On cross-examination, the appellant stated that he did not know who took and/or stole his alleged properties. In view of the evidence on record, the Appellant's contention that the court ought to have awarded special damages against the 1st & 3rd respondents is clearly misconceived and legally untenable as he did not prove any link between the loss of the properties and the 1st & 3rd respondents, to warrant a finding against them on that score. Further there was no hard and credible evidence that at any given time he was in possession of those items. It is elementary learning that special damages must be specifically pleaded and strictly proved. In the circumstances of this case, it was lacking. As concerns claim for General damages for unlawful arrest, confinement and assault, again no evidence was tendered to show that these respondents were involved in the arrest of the Appellant, if any. Besides, no evidence was tendered to show that the respondents were police officers, seized with the authority and/or power to effect arrest

whatsoever. Further there was no evidence at all that the appellant had been arrested, either by the respondents at all. In this regard, no complaint was ever made to any Police Station or any other relevant authority to vindicate the allegations of unlawful arrest and confinement by the appellant. There was no evidence led that these respondents had control and or command over the persons who arrested and confined the appellant. On the other hand it would appear that the arrest if any was effected by the Government Officers, who have mandate by law to carry out such tasks following a complaint lodged. Consequently, any arrest carried out by the relevant security agents, cannot be blamed on the respondents, insofar as the said security agents, were not employees and or servants of the respondents or acted at their behest.

The appellant did not testify that the said respondents had indeed assaulted him. If anything he was assaulted by the 6th, 7th & 8th respondents. In this regard therefore any claim for damages for assault against the 1st & 3rd respondents, lacks any factual basis.

The appellant contended that the 1st & 3rd respondents had trespassed upon the suit land. Consequently, he sought general damages for trespass. However, the appellant did not tender any evidence concerning damages, if any, that suffered to warrant such an award. He did not say what he was using the land for and whether he had been evicted from the suit premises. If anything the evidence suggests that he has been in continuous occupation of the suit premises safe for a period of about 2 or so months when he allegedly relocated elsewhere.

In view of the foregoing this appeal is unmerited and consequently dismissed with costs to the 1st and 3rd respondents. However, the appellant shall have the costs of the withdrawn appeal by the 1st and 3rd respondents.

Judgment dated, signed and delivered at Kisii this 30th day of June 2010.

ASIKE-MAKHANDIA

JUDGE