REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 509 of 2003

HARRISON MWANGI NYOTA …….……..…….. APPELLANT

VERSUS

NAIVASHA MUNICIPAL COUNCIL …… RESPONDENT

(An Appeal from the Judgment of Hon. M. M. Muya, SRM in

Naivasha SRMCC No. 97 of 1995 delivered on 11th July, 2003).

JUDGMENT

The Appellant is the owner of a parcel of land known as Naivasha Municipality Block 5/235 (hereinafter "the suit land") located in Naivasha. Sometimes in February, 1999, he constructed a barbed wire fence on the perimeter of the suit land, admittedly without approval of the Naivasha Municipal Council ("the Council"). The Council demolished the same, causing the Appellant damages of Kshs.131,700/= which was the amount of the Appellant's claim before the lower court.

In its Judgment delivered on 11th July, 2003, the lower court (Hon. M. M. Muya) dismissed the claim based on the finding that the demolition was lawful. It is against that Judgment that this appeal has been filed, on the following four grounds of appeal:

"***1. The learned Magistrate erred in law and fact by finding that the Appellant had been served with a demolition notice by the Respondent on 10/2/1995 without evidence to support such finding.***

2. The learned Magistrate erred in law and fact by failing to find that the Respondent had given evidence contradicting its pleadings/defence.

3. The learned Magistrate erred in law and fact by failing to find that the Respondent had given evidence contradicting its pleadings/defence.

4. The learned Magistrate erred in law and fact by finding that the Appellant had not proved his case on a balance of probabilities."

Although duly served, the Respondent did not appear in Court on the date of the hearing. The Appellant's argument centered mainly on the issue of "notice" of demolition. The Appellant says that notice was not issued, while the Respondent says it was. The lower Court found as a fact that it was. The Appellant's contention is that the notice could not have been served because the fence was erected on 25th

February, 1999, after the issue of the alleged notice on 10th February, 1999. Indeed, the Appellant is correct in his submission that there was a contradiction between the Appellant's four witnesses, and the Respondent's one witness on this issue. However, the Magistrate chose to believe the Respondent's witness, as he was fully entitled to, and I cannot interfere with that discretion.

This being a first appeal, it is my duty to assess and re evaluate the evidence before the lower court, bearing in mind that this court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him and that he has not acted on wrong principles in reaching his conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

The evidence before the lower Court was that the fence was erected without approval of the Respondent. There is no dispute about this fact. Both in his examination in chief, and in cross-examination (see pages 42 – 43 of the Record) the Appellant admitted that he had indeed applied for approval to erect the structure, but did not get the same. This is what he said in cross-examination:

"***I had applied for permission to build. I did not get an approval. I did not get if for a full year. I was not given any reason why fencing was being discouraged".***

In its Judgment, the lower Court observed that Section 145 (m) of the Local Government Act, provides that:

"***A local authority may require, enforce and regulate the fencing of plots and prohibit or control the use of barbed wire for fencing".***

and that the Respondent had adopted, vide gazette notice No. 2849 of 7th June, 1991 the local government (Building code) (Adoptive by laws) order 1968 which makes it an offence under Section 252 to erect a building without obtaining first an approval of the Council.

The Court also noted that under Section 258, "if a person shall fail to comply with any or all the requirements of a notice served under these by laws the council may do or cause the work or thing required by such notice to be done and may recover the cost incurred from the person in default as a civil debt".

And, accordingly, the Magistrate held that the demolition was lawful. In my view, the lower Court came to the correct conclusion based on the evidence before it. Even if the Appellant was right in his argument that notice of demolition had not been given, the relevant and important issue is whether the demolition was lawful. The fact is that the fence was erected without lawful authority. That was sufficient reason to demolish it. It should not have been there in the first place. The Appellant cannot, and should not be allowed to profit from his illegal act. With or without notice, the demolition in my view, was proper and lawfully carried out.

Accordingly, I find that there is no basis to this appeal and dismiss the same. However, as the Respondent was not present, I will make no order as to costs.

Dated and delivered at Nairobi this 28th day of November, 2006.

ALNASHIR VISRAM

JUDGE