



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO.71 OF 2003

KARATINA MUNICIPAL COUNCIL.....PLAINTIFF

VERSUS

SIMON MAINA WAITHAKA.....DEFENDANT

(Appeal from the judgment and orders of the Chief Magistrate dated Nyeri

CMCC No. 746 of 2002 by Mr. Kaburu Bauni Esq. (CM)

J U D G M E N T

Karatina Municipal Council (hereinafter referred to as the Appellant) is dissatisfied with part of the judgment and orders made by the Chief Magistrate Nyeri in Nyeri CMCC 746 of 2002 dated 28th May 2003, in which the trial Magistrate found the claim of Simon Maina Waitthaka (*hereinafter referred to as the Respondent*) partly proved and entered judgment for Kshs.40,340/- being special damages claimed by the Respondent from the Appellant. The Appellant has raised 4 grounds in his memorandum of appeal.

In effect the Appellant contends that the trial Magistrate erred in giving judgment for the Defendant for the special damage of Kshs.40,340/- which damage was not specifically proved, and that the trial Magistrate further erred in giving a judgment which was contradictory as the trial Magistrate had found that the Respondent had erected an illegal structure and had been served with notice to remove the same and could not therefore be compensated by the Appellant for the removal of the same.

The Respondent filed a cross appeal against part of the judgment in which the trial Magistrate dismissed his claim for general damages. Four grounds were preferred in which the Respondent maintained that the Appellant had unlawfully encroached onto the Respondent's land and the trial Magistrate therefore erred in holding that the Respondent suffered no loss and that the trial Magistrate erred in holding that a claim for general damages for trespass was a special loss which ought to have been pleaded in monetary terms and also in failing to appreciate that the evidence adduced on the value of the suit land was aimed to assist the court in assessing general damages.

It is apparent from the plaint that the Respondent's claim for special damages was for a demolished iron sheet fence. He particularised the special damages as:-

(a) Iron sheets Kshs.16,640/-

(b) Timber frames Kshs. 6,000/-

(c) Posts Kshs. 4,400/-

(d) Others Kshs.13,300/-

It is an established principle of law that special damages must be specifically pleaded and proved. In his evidence however the Respondent stated:-

“I had fenced using iron sheets and posts. I cannot remember how many iron sheets and posts. The value of the fence removed was more that Kshs.40,000/-. I cannot recall the exact value.”

No other evidence was given in support of the alleged special damages nor was any effort made to explain what were “**others**” valued at Kshs.13,300/-. I concur with the advocate for the Appellant that the evidence adduced fell short of proving the special damages and the trial Magistrate therefore ought not to have awarded any special damages.

As regards the claim for general damages the Respondent in paragraph 7 and 8 of the plaint pleaded as follows:-

7. “The Plaintiff’s plot No. Karatina Block B – 179 has been greatly reduced in acreage and its market value has been immensely reduced.

8. “The Plaintiff’s claim against the Defendant is for special and general damages for trespass to land arising from the loss of market value of plot No. Karatina Block B1 – 179 as a direct result of the Defendant’s unlawful acts aforesaid.”

To succeed in his claim the Respondent had to prove that the market value of his plot had immensely reduced as a direct result of the Appellant’s actions. In his evidence however the Respondent testified that He sold the plot at a price of Ksh.3.4 million which was way above its stated market price of Kshs.2.9 million Although the Respondent claimed He had initially received an offer of Kshs.4.5 million, there was no evidence adduced to this effect nor is there any evidence that if indeed the offer fell from Kshs.4.5 million to Kshs.3.4 million it was due to the actions of the Appellant. I find that the Respondent failed to prove his claim for general damages as pleaded and the trial Magistrate was therefore right in rejecting the same.

The upshot of the above is that this appeal succeeds. Accordingly I dismiss the Respondent’s cross appeal and allow the Appeal. I set aside part of the judgment of the trial Magistrate giving judgment in favour of the Respondent for Kshs.40,340/- and substitute it thereof with an order dismissing the Respondent’s claim against the Appellant in its entirety

The Respondent shall pay costs of this appeal and that of the lower court to the Appellant.

Orders accordingly.

Dated, signed and delivered this 8th day of February 2005.

H. M. OKWENGU

JUDGE