



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 215 OF 2015

GEOFFREY MWANYA KAMWAKI.....APPELLANT

VERSUS

FREDRICK MUTISO KAMWAKI.....RESPONDENT

(Being an Appeal from the Judgment in Kitui Senior Principal Magistrate's Court Civil Case No. 244 of 2012 by Hon. A. S. Lesootia Ag. S R M on 02/07/14)

J U D G M E N T

1. The Appellant filed a suit in the Lower Court against the Respondent seeking payment of **Kshs. 355,252/=**, General Damages for destruction of property and loss due to damaged reputation plus costs and interest. He averred that in the year **2010** the Respondent without any lawful excuse, reason and/or justification maliciously damaged his security wall standing on **Plot No. 7** located at **Kabati Market**. Following the incident the Respondent was arrested, charged and convicted in **Criminal Case No. 721 of 2010**.
2. In response, the Respondent denied all allegations set out in the Complaint and averred that the Appellant was a squatter in their father's property, **Plot No. 7 Kabati Market** therefore was the author of his financial losses and/or misfortunes consequently he cannot be compensated, allegations that were denied in the Appellant's rejoinder.
3. The learned trial Magistrate considered evidence adduced and reached a finding that **Dickson Kamwaki** had not given the Appellant the plot in question, it was therefore immaterial whether he constructed a security wall, whether he suffered damage or not as he was a stranger without interest on the plot. Regarding the Criminal Case where the Respondent was convicted for malicious damage to the property in issue he stated that it was the Appellant's duty and obligation to pursue the same. Consequently he dismissed the case with costs to the Respondent.
4. Aggrieved by the decision of the Court the Appellant appeals on grounds that: The learned Magistrate erred in law and fact by totally failing to take into account evidence of the Appellant's witnesses, hence holding that the Respondent was not liable and that he failed to consider submissions of the Appellant's Counsel together with the case law in support.
5. The Appeal was canvassed by written submissions. It was urged by the Appellant that the Respondent was found guilty of **Malicious Damage to Property** in the Criminal Case and he also admitted his guilt before the court. That regarding ownership he adduced evidence that he was given the property by his father in **1981** to develop as his son and produced evidence to show that he was paying rates for the property. Evidence that the wall cost him **Kshs. 83,900/=** and the degradation of the same was **Kshs. 234,920/=** was disregarded and that submissions by Counsel and case law cited were not taken into account.
6. It was urged for the Respondent that the Appellant having failed to establish on a balance of probability the ownership of the suit property known as **Plot No. 7** located at **Kabati Market, Kitui County**, the issue of damages occasioned and consequent compensation thereof could not arise. That a stranger or squatter who enters upon another person's private property and develops the same without consent of the owner does so at his/her own peril and any damages arising from it cannot be compensated.
7. It was urged further that the Appellant's father and owner of the property in issue was the one who demolished the wall as admitted by the Appellant.
8. This being a first Appellate Court, it is my duty to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility (**See Selle vs. Associated Motor Boat Company Limited (1968) EA 123**).
9. The case before the Court having been Civil, the Appellant had the duty of proving the case on a balance of probability. In the case of **Kinyungu Njogu vs. Daniel Kimani Maingi (2000) eKLR** it was stated that when the Court is faced with two probabilities, it can only

decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

10. The Respondent and three others were charged and convicted in **Criminal Case No. 721 of 2010** with the offence of damaging the subject wall maliciously. The Respondent was identified as the person who led the people who damaged the wall. Evidence adduced therefore pointed at him as one of the perpetrators of the act of the damage occasioned.

11. Ownership of the **Plot No. 7** located at **Kabati Market** was not in dispute. It was owned by **Dickson Kamwaki** the father of both the Appellant and Respondent. In his defence the Respondent averred that the Appellant was a squatter on their father's subject property. This was an insinuation that the Appellant deliberately entered the subject property without the permission of his father. However, it was proved on a balance of probability that the Appellant and his father entered into an arrangement. His father allowed him to construct a shop thereon that he leased out. And further permitted him to construct the security wall that was damaged. It was the evidence of PW2 **Archibad Kavindu** that he constructed the wall in **2006**. They entered into an agreement on **4th January, 2006**. The wall was in place for four (4) years prior to being damaged.

12. The owner of the property who retained the right to arbitrary exclusion of the Appellant was not present to supervise the damage that was occasioned. At the outset he had been charged but the Appellant withdrew the case against him on the ground that he was not one of the perpetrators of the act. He was however not called as a witness to confirm if he instructed the Respondent and his fellow culprits to remove/damage the security wall.

13. The value of the damaged wall was indicated at **Kshs. 80,000/=** in the Criminal Case. However, in the instant case **Kivuva Mulwa & Co. Financial and Tax Consultants** having verified receipts presented established the costs incurred as **Kshs. 83,900/=** therefore the material damage caused was **Kshs. 83,900/=** other alleged costs were expenses that should have been reimbursed by the State which I must disregard.

14. In the premises, I find the Appeal having succeeded partially and I allow it. In the result, Judgment of the Lower Court is set aside and substituted by an order entering Judgment for the Appellant in the sum of **Kshs. 83,900/=** being General Damages for the destruction of the wall plus costs of the suit both at the Lower Court and on Appeal.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 7th day of February, 2019.

L. N. MUTENDE

JUDGE