REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCA. NO. 117 OF 2012

RICHARD NYONGA ALUVALE.....APPELLANT

-VERSUS-

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY AND ANOR.....RESPONDENTS

(Formerly CMCCC 7188 of 2008 Milimani Commercial Courts, Nairobi)

JUDGEMENT

INTRODUCTION

1. The Appellant was arrested by 1st Respondent on account of engaging in the constructing a building without an Environment Impact Assessment License (EIAL), and subsequently charged in Kibera Law courts.

2. It turned that same license was unnecessary as the building was not of the character of the zone of the area that required EIA License.

3. Subsequently Appellant sued the Respondents seeking the reliefs; Kshs.37,000/= being expenses incurred for the fees on Environment Assessment Report, Court Fine and Legal fees.

4. He also sought general damages for trespass to person and property, malicious arrest and prosecution, loss of building materials and two weeks of man hours lost, cost and interest.

5. The first Defendant/Respondent filed defense and denied the claim.

6. The 2nd Defendant/Respondent also filed defence and denied claim.

7. The matter was heard fully and the trial court dismissed the claim for want of prove.

8. The Appellant being aggrieved lodged instant appeal and set the following grounds of appeal.

> *1. The Learned Magistrate erred in Law and in fact in finding that the Appellant required an Environmental Impact assessment Report contrary to the express provisions of the Law and the testimony of the 1st respondent's witness.*
>
> *2. The Learned Magistrate erred in Law and fact in disregarding the documentary evidence of the 1st Respondent's officer and witness who categorically stated that the Appellant did not require the Environmental Impact Assessment Report.*
>
> *3. The Learned Magistrate failed to appreciate the binding legal authorities quoted before him by counsel on behalf of the Appellant.*
>
> *4. The Learned Magistrate failed to appreciate that the 2nd Defendant was liable for the harassment and incarceration of the Appellant.*
>
> *5. The Learned Magistrate erred in Law and in fact in failing to appreciate that the 2nd Respondent did not call any witness in evidence and hence the Appellant's allegations against the 2nd Respondent stood uncontroverted.*

6. The Learned Magistrate erred in dismissing the Appellant's suit.

9. The parties were to file and exchange written submissions as directed by the court but only the Appellant complied.

APPELLANT'S SUBMISSION

10. The Appellant submits that, he was led to believe that an Environmental Impact Assessment Report was not necessary when he was constructing his massionette home in Denholm before he was wrongfully arrested.

11. He contends that he had complied with the Estate Development Plans as approved by the City Council of Nairobi and Registered under No. ED 416 thus he had the go ahead to carry on with the construction of his house.

12. Further he contends that, he was not required to carry out an environmental Impact Assessment for the proposed project given that the project will have minimum/insignificant environmental impacts. However the 1st Respondent went ahead to claim that the environment and Impact assessment was only required as an enforcement order.

13. According to **Section 58 of the environment Management and Co-ordination act of 1999**; an Environmental Impact Assessment License is necessary for any proponent undertaking a project unless it is provided that the proponent forego the submission of the environmental impact assessment study report in certain cases.

14. The components of the Letter dated 21st of august 2008 given by the Director General of the EIA division, is one of the cases when an EIA is not needed which was to the effect that the construction had minimal/insignificant environmental impacts.

15. The 2nd schedule of the EMCA Act of 1999 specifies the projects requiring an environmental Impact Assessment. This include:-

a) Major changes in land.

b) Large settlement schemes.

c) Urban development that include:- establishment of industrial estates, establishment of new housing developments exceeding 30 housing units and shopping centers and complexes.

16. Thus the Appellant did not need an EIA as the construction he was undertaking was only for a massionette of a single storey and thus in essence it was wrong for the 1st Respondent to cause his arrest and require him to take an EIA license.

17. The fact that the Appellant had complied with all the relevant by-laws from the city Council, resident association and paid all required fees is a clear indication that he was following due process and a further confirmation by the director General of the EIA division only goes to support this case.

18. The Appellant discharged his burden of proof on a balance of preponderances before the subordinate court.

19. The Learned Magistrate erred in law and in fact in failing to appreciate that the 2nd Defendant was liable for harassment and incarceration of the Appellant.

20. The NEMA and police officers arrested Appellant took him to two police stations; one at the NEMA offices and the other at Lang'ata Police Station. He was incarcerated for over 8 hours in the police cells before he was finally released at around 7.00 p.m.

21. The actions by government agents subjected the petitioner to mental and physical torture. This was a case of pure harassment by government agents.

22. The Respondents did not controvert this fact and the court ought to have allowed the prayer for damages in respect to harassment and subsequent incarceration.

23. In **Simon Njaaga Mbote -Vs- Attorney General (2012) eKLR**, the court adopted the finding of the court in **Oduor Ongw'en & 20 Others -Vs- Attorney General, Nairobi Constitutional Petition No. 777 of 2008** (unreported) where Hon. Justice Musinga stated in regard to similar contentions.

> ***"……..The state has the power, machinery and ability to obtain information from each and every police station or court and in absence of an appropriate affidavit supported by such documentary evidence as would be sufficient to counter the petitioner's averments, the Respondent cannot simply argue that the Petitioner's claims have no proof …. The basis of each of the Petitioner's claim is well documented and if the respondent intended to challenge the claim he ought to have filed an appropriate affidavit in response thereto. That was not done. All in all, each of petitioners have properly demonstrated that their constitutional rights and freedoms were violated and what now remains is for his court to assess the quantum damages payable."***

24. In this case similarly, no evidence was produced to controvert the fact that the Appellant was harassed by government agents.

25. The Learned Magistrate erred in law and in fact by not appreciating that the Appellant's allegations against the 2nd Respondent were uncontroverted since the 2nd Respondent did not call any witnesses.

26. The 2nd Respondent did not call any evidence to controvert the facts or evidence on record. The case against him was uncontroverted. The fact that the 2nd Respondent did not call any witness or produce any evidence shows that the evidence adduced by the Appellant against it is uncontroverted and hence need to be upheld.

27. The Appellant claimed and alleged that he had suffered bad treatment in the hands of the police and this was ideally not rebutted by the 2nd Respondent as it did not adduce any evidence to try and revoke this.

28. They re-emphasize the decision in **Oduor Ongw'en & 20 others -Vs- Attorney General, Nairobi Constitutional petition No. 777 of 2008** (unreported) where Hon. Justice Musinga stated in regard to similar contentions.

> ***"…. The state has the power, machinery and ability to obtain information from each and every police station or court and in absence of an appropriate affidavit supported by such documentary evidence as would be sufficient to counter the petitioner's averments, the respondent cannot simply argue that the petitioner's claim have no proof …. The basis of each of the Petitioner's claim is well documented and if the respondent intended to challenge the claim he ought to have filed an appropriate affidavit in response thereto that was not done. All in all, each of petitioners have properly demonstrated that their constitutional rights and freedoms were violated and what now remains is for this court to assess the quantum damages payable."***

29. The learned magistrate erred in not appreciating this fact and should have instead allowed the Appellant's allegations as they were uncontroverted. The rule obliges counsel to give witnesses the chance to respond to evidence and by then not doing this, goes to infer that they accept the allegations.

DUTY OF FIRST APPELLATE COURT

30. The duty of the court in a first appeal such as this one was stated in **Selle & Anor –Vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123** in the following terms:-

> ***"I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif -Vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)"***

31. This same position had been taken by the Court of Appeal for **East Africa in Peters -Vs- Sunday Post Limited [1958] EA 424** where Sir Kenneth O'Connor stated as follows:-

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."***

EVIDENCE TENDERED

32. In his evidence the Plaintiff told the court that on 01/08/2008, he was lawfully constructing on land Ref: No.82/6292/235. Two motor vehicles arrived carrying one Wangare Kirumba and about 5 police officers. They went to a neighboring plot.

33. Workers there fled. The foreman in that plot was arrested. They approached the Plaintiff's plot and introduced themselves as NEMA officials and police officers.

34. The Plaintiff told them that he had all the approvals. The Plaintiff called his lawyer. He was escorted away from the site. The motor vehicles were speeding.

35. He showed the officials all the necessary approvals. These are the documents No.1 to No. 8. He was asked to record a statement. He was then told that he did not have an EIAR. He was held in cells.

36. He referred to a letter dated 04/08/2008. It indicates that an inspection had been conducted at his site. He states this is not so as on 04/08/2008, he was attending court over lack of a NEMA license.

37. He exhibited a letter for Area Residents association showing he had complied with all the conditions.

38. His construction was stopped. He was advised to get an assessor to do an EIA Report. This was done. He added that his plea of guilty in court was because he did not have the license.

39. He had not been made aware that he needed it. He sought compensation for loss of material at site and for his reputation for the manner in which he was arrested.

40. On cross examination, he said he saw one police officer with a pistol. He was not handcuffed. He was not beaten. They did not put him in the police vehicle. He was put in his car.

41. There was no police officer in his car. The police officers were driving at a high speed. The Plaintiff drove fast to keep up with the pace.

42. He said he was not harassed at NEMA offices. He was taken to Makadara Court, charged, pleaded guilty and was fined Kshs.20,000/=.

43. On cross examination by Mr. Nguyo for the Attorney-General, he said he was demanding Kshs.37,000/=.

44. He referred to a receipt dated 13/08/2008 for Kshs.2,000/= being payment for project report. He said the police mishandled him. They dragged him to his car.

45. DW1 called by the 1st Defendant testified that she was the then district environment officer. A report was made that 2 constructions at Donholm were going on without EIARS.

46. She visited the site in company of police officers and found construction going on in the two sites. It was her finding that EARS were required in the area.

47. During the arrest the Plaintiff was not physically abused. He was not handcuffed. He was not put in a police motor vehicle. He drove in his own motor vehicle to NEMA offices.

48. On cross examination DW1 acknowledged there was a letter dated 21/08/2008 by Zephania Ouma of NEMA. He was head of EIA had been taken.

49. The letter of 21/08/2008 was in error. On re-examination, she said that letter dated 21/08/2008 was nullified by letter dated 22/08/2008.

50. The letter of 22/08/2008 states that the prescription to undertake an EIAR was as a result of an enforcement action. The inspectorate section was compiling the evidence to determine security of the notation of appropriate enforcement action.

51. It is stated that this letter nullified earlier letter of 21/08/2008. The 2nd Defendant called no evidence.

ISSUES, ANALYSIS AND DETERMINATION

52. After going through the evidence on record and the submissions, I find the issues are;

i. Whether the Appellant proved his case beyond reasonable doubt?

ii. If above in affirmative, what are the damages awardable?

iii. What are the orders as to costs?

53. It is common ground that the Plaintiff was arrested ostensibly for breach of the EMCA Laws of Kenya. He was charged and fined Kshs.20,000/= for erecting a building without Environmental Impact Assessment License as required by law.

54. The Plaintiff was then required to submit an EIAR which he did on 13/08/2008. Of determination is whether the arrest was actuated by malice/recklessness and if in the affirmative what damages, if any, were suffered by the Plaintiff.

55. Looking at the evidence I note the Plaintiff was arrested by DW1 and police officers for what was in their finding a cognizable offence.

56. The arrest even as described by the Plaintiff himself shows no concrete evidence of the Plaintiff being mishandled by the police officers at the time. He was not beaten. He was not hand-cuffed; he was indeed allowed to drive in his motor vehicle to the offices of NEMA.

57. He recorded a statement and was then charged. In court he was convicted on his own plea of guilty.

58. This conviction has not been set aside or otherwise varied. It still stands. It validates the action by the district environment Officer and the police officers and confirms an offence had been committed.

59. How can a prosecution that leads to a conviction be held to be a malicious one? In a suit for malicious prosecution the Plaintiff must show;

1) That the prosecution was instituted by the Defendant or by someone for whose acts he is responsible.

2) That the prosecution terminated in the Plaintiff's favor.

3) That the prosecution was instituted without reasonable and probable cause and

4) That the prosecution was actuated by malicious (see <u>Murunga -Vs- attorney –General (1976 - 890) KLR 1251).</u>

60. In the suit the Appellant/Plaintiff failed to prove any of the ingredients above. For the Appellant/Plaintiff to succeed before the Trial Court in the suit as framed the conviction in the criminal court ought to have been appealed against or sought review successfully which was not the case here.

61. The Appellant/Plaintiff further sought special damages which were not specifically pleaded and proved as required by law.

62. In the end, I find must and hold that the Appellant/Plaintiff failed to prove his case against either of the Respondents/Defendants to the required decree with the unpleasant result that his appeal is dismissed with no orders as to costs as Respondents never appeared herein to defend the appeal nor fie submissions.

SIGNED, DATED AND DELIVERED THIS 14TH DAY OF DECEMBER 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE