



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 32 OF 2008**

**ROSE NJAGI ALIAS MARGARET NJERI NGANGA.....APPELLANT**

***VERSUS***

**KIRINYAGA COUNTY COUNCIL.....RESPONDENT**

**RULING**

1. This is an appeal against the judgment of Lucy W. Gitari, Senior Principal Magistrate, Embu delivered on 20/9/2007. The appellant's claim against the respondent was for a permanent injunction restraining the defendant from ever interfering with enjoyment of her proprietary rights on Plot No. 257 Wang'uru Market and for compensation of the value of a commercial building allegedly demolished by the respondent. The claim was dismissed with costs for failure to discharge the burden of proof.
2. The grounds of appeal are that the magistrate erred in finding that the appellant had constructed the structure on a road reserve without supporting evidence, that the building plans produced in court did not tally with what was on the ground and that the building was constructed on a different site. The magistrate also failed in finding that the claim of KShs.500,000/= was not proved even after the expert reports demonstrated the same.
3. The appellant in the written submissions stated that the evidence produced in court was sufficient to prove a prima facie case against the respondent and that the magistrate was wrong in her finding that the plaintiff did not prove any proprietary rights over Plot No. 257 Wang'uru Market yet the appellant produced minutes of the respondent allocating the plot and payment receipts for the same. The appellant argues that the evidence was not controverted.
4. It was further argued that paragraph 5 of the defence is an admission that the respondent allocated the plot to the plaintiff and granted her authority and approval for developments. Further that the respondent did not produce town maps to show the site that was demolished. The respondent did not adduce any evidence to show that the appellant had constructed on a road reserve. The building plans produced as an exhibit by the appellant and which was approved by the respondent captures the correct site plan for it would otherwise not have been approved by the respondent.
5. On the finding that the claim for compensation was not proved, the appellant stated that her witness PW2 produced a valuation report which was not controverted by the respondent. The respondent did not controvert the appellant's testimony that the building was constructed at a cost of Kshs.500,000/=.
6. The respondent submitted that it was its defence that the appellant's building encroached a road reserve and violated the provisions of the physical Planning Act. The appellant did not produce anything to prove ownership like a title or allotment letter. The appellant did not avail any beacon certificates demarcating the size of her property. No documents were produced to prove the loss the appellant claimed to have

suffered after the demolition.

7. The officials of the respondent in-charge of enforcing the Physical Planning Act duly issued notices that the illegally constructed buildings would be pulled down but the same was ignored. The respondent cited the case of **KARATINA MUNICIPAL COUNCIL VS WAITHAKA [2005] eKLR** where the court held that special damages must be specifically pleaded and proved.

8. The duty of the first appellate court was explained in the case of **JABANE – VS- OLENJA [1986] KLR 661**.

*More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.*

9. PW1 testified that she was allocated Plot No. 257 by Kirinyaga County Council in 1997 as per the minutes produced in court. She said that she paid some money to the respondent and was shown the plot by the council surveyor. In 1999 she also got a plan from the respondent which had been approved. It was on 20/6/2001 when the respondent demolished the house without any notice. The building was valued at KShs.500,000/=. She called two witnesses to support her case.

10. PW2's evidence was that he was a registered valuer and that on 11/10/2005, he valued the property belonging to PW1 and made a valuation report. He valued the plot by its size and the materials he found at the site after the demolition. He further testified that after the demolition, part of the plot was allocated to someone else. He said he relied on the information he got from PW1 regarding the construction and how far it had gone.

11. PW3 said that he was a building contractor and was given construction work by the appellant. PW1 gave him approved and stamped plans from Kirinyaga County Council. He constructed and even put the roof after plastering.

12. The respondent's witness DW1 testified that he was an enforcement officer at all material times. His duties included enforcement of the Councils By Laws and the Physical Planning Act, 2006. He told the court that he received a letter from the defendant's respondent's administration officer that Plot No. 257 was being constructed on a road reserve. The owner was served with a notice to stop construction and was warned that the same would be demolished at her cost.

13. DW1 visited the site on 24/1/2000 and found the construction going on. Two other notices were given to the owner to stop the construction. The witness was later to oversee the demolition of the building. The plan that the owner had was not tallying with what was on the ground. She was supposed to visit the council offices and be given the right plot. The demolition was justified as the owner was building on the road reserve.

14. The most important issue to consider is whether the appellant proved ownership of Lock Up/Shop No. 257 Wang'uru market and magistrate erred in finding that the building was on a road reserve.

15. The appellant produced minutes of a council meeting held on 1/10/1997 indicating that the conversion of various shelters, kiosks, bandas and village plots into commercial plots, lock ups and general kiosks were considered and approved subject to the availability of the sites. The minutes do not specifically refer to plot number Lock –Up 257 Wang'uru Market. The minutes refer to conversion and not allocation of the plot.

16. The appellant did not produce any document of ownership not even an allotment letter to prove that Plot No. 257 was allocated to her by the respondent. It is not clear how the appellant was able to identify

the plot on the ground for her to start the construction. In cross examination she said that she was never shown the beacons nor issued with a beacon certificate.

17. The appellant required documents of ownership to prove the said plot belonged to her. For her to be granted the injunction, she sought in the plaint, she had to prove that she had proprietary rights on the area she had constructed a structure. Among the documents produced, there was none to show that the respondent had allocated her any plot. Some of the correspondences she produced referred to Plot No. 257 Wang'uru but none of them was an ownership document.

18. It was argued by the appellant that her evidence was not controverted by that of the respondent. However, the duty to prove the case on the balance of probability has to be discharged whether there was any evidence to the contrary. Her further argument that the respondent did not produce a map to show that she had constructed on a road reserve was not of any assistance to her claim. It was the appellant who ought to have produced the map to even show where her plot was situated in relation to the road.

19. PW2 who was the appellant's witness said that the ground where the appellant took her was owned by the respondent which evidence was adverse to the appellant's case. PW2 said he did not find any structure there but only building materials upon which he based his valuation report.

20. The two receipts produced by the appellant to show that she paid some money to the respondent could not be substituted for ownership documents. I find that the learned magistrate was correct to find that no proprietary rights had been established by the appellant.

21. As to whether there was encroachment on the road reserve, the evidence of Dw1 was uncontroverted. He stated that his duties entailed enforcement of the Councils By Laws and the Physical Planning Act, 2006.

22. On the prayer for damages, the appellant did not strictly prove that the value of the demolished building was Kshs.500,000/=. She produced no receipts of purchase of any building materials or for transport.

23. In the case of ***DOUGLAS ODHIAMBO APEL & ANOTHER VS TELKOM KENYA LIMITED*** the court held that *“the law on special damages is that they must be specifically pleaded and strictly proved”*. In absence of strict proof, the court was right in declining to grant an award on special damages.

24. In addition to lack of proof of special damages, the appellant's claim as a whole was founded on proof of proprietary rights which she failed to prove. The appellant failed to explain how she took her building materials to the site and started construction on land which did not belong to her.

25. It is my finding that the appellant has failed to prove that the learned magistrate erred on both law and facts. I dismiss the appeal with costs and uphold the decision of the court below.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 11<sup>TH</sup> DAY OF JULY, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Ithiga for Kahiga for Appellant**

**Appellant present in person**