REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL 44 OF 2010

PETER GEORGE WAITHAKA....…….…………………...………...……APPELLANT

VERSUS

FREDRICK GATERI MACHANGA………………………………………… RESPONDENT

(Being an appeal from the Judgment of P.T. NDITIKA Senior Resident Magistrate delivered on 11th March 2009 in Kerugoya SRM Civil Case No. 95 of 2004)

J U D G M E N T

PETER GEORGE WAITHAKA the Appellant herein was the Defendant while FREDRICK GATERI MACHANGA was the Plaintiff in Kerugoya Senior Principal Magistrate's Civil Case No. 95/2004. In his amended Plaint dated 25th August 2004 the Respondent asked for the following prayers:

(a) A permanent injunction barring and restraining the defendant by himself, his servants, employees and/or agent from tampering with plot 1A Wanguru in any manner whatsoever thereon, including the 2 bathrooms, 2 toilets and septic tank and the drainage system aforementioned.

IN THE ALTERNATIVE

(b) The defendant be ordered to pay KShs.500,000/= to the Plaintiff so that the 2 toilets, 2 bathrooms, 1 septic tank and drainage system can be apportioned to him or

(c The defendant names as co-proprietor of Plot 1 Wanguru in the records of Kirinyaga County Council be cancelled forthwith and that the plaintiff do refund KShs.210,000/= paid to him

(d) Costs to the Application

(e) Any other further and/or alternative relief as this Court may deem fit to grant.

The Appellant/Defendant filed a defence denying all the Respondent/Plaintiff's claims save that he paid

Shs.210,000/= for the portion he bought which consisted of one complete room, septic tank, 2 toilets, 2 bathroom. He further filed a counter claim for the following prayers.

(a) A declaration that he is the legal owner of all the developments embedded on Plot 1B Wanguru Market comprising of one Septic tank, 2 bathrooms, 2 toilets and one complete room.

(b) A permanent injunction barring the Plaintiff, his agents, servants, assigns or anyone claiming under him from tampering or interfering in any manner whatsoever with the Defendant's quite possession and user or infringement of his property rights on Plot 1B Wanguru Market inclusive of facilities constructed thereon.

(c) Costs

(d) Any other relief as the Court may deem fit and just to meet ends of justice.

The matter was fully heard and the learned trial Magistrate entered Judgment for the Respondent in terms of the alternative prayer. The main prayer for injunction was dismissed. This Judgment grieved the Appellant who has filed this Appeal citing the following grounds

1. That the learned Magistrate erred in law and fact by holding that the Respondent had proved his case on a balance of probability which fact was not supported by evidence on record.

2. That the learned Magistrate erred in law and fact by holding that the Appellant should pay the Respondent KShs.500,000/= as compensation for developments on suit Plot No. 1 Wanguru market whereas no tangible and admissible evidence was tendered to make that finding.

3. That the learned Magistrate erred in law and fact by holding that the Respondent had failed to prove his claim for permanent injunction yet proceeded to grant the Respondent the alternative prayed in his plaint against the established principles of law.

4. That the learned Magistrate erred in law and fact by failing to determine the Applicant's counter claim without giving good reasons and against the rules of delivering a considered judgment between parties to a suit.

5. That the learned Magistrate erred in law and fact by failing to consider and determine all the issues pleaded by the parties to the suit despite evidence having been tendered before him without giving food reasons.

6. That the learned Magistrate erred in law and fact by not delivering a considered Judgment against the weight of evidence adduced by the Appellant.

As a first appellate court, I am enjoined to re-evaluate and re-consider the evidence that was adduced before the Court below and arrive at my own independent conclusion. I am guided by the case ***of SUMARIA & ANOTHER VS ALLIED INDUSTRIES LTD [2007] 2 KLR 1.***

The Respondent had given evidence to the effect that he sold to the Appellant the undeveloped part of Plot No. 1 Wanguru plus one room and paid:

(a) Shs.130,000/= for the undeveloped part and

(b) Shs.80,000/= for the room.

There was no written agreement. The rest of the plot which comprised of development and 2 bathrooms, water closet and drainage rental rooms, shop, 1 storey septic tank remained his.

He admits having been paid money (Shs.210,000/=) for the sold property. He was worried when he

saw the Appellant depositing building materials and so he ran to Court for orders. An officer from Kirinyaga County Council (PW2) produced minutes from the Council concerning this plot. He said the Appellant was added as a party to the plot on the Respondent's application. The Council could not subdivide the plot since it had developments. The parties were left to agree.

The Appellant stated that he paid the Respondent Shs.210,000/= comprising of Shis.1500,000/= for the land and Shs.60,000/= for the developments or physical facilities i.e. 2 latrines and 2 rooms. In 1997 his name was added as an owner of the plot (DEXB2a & b). They got authority from the Council to subdivide the plot into Plot 1a and 1b which meant it was half by half. He applied for a building plan which was approved.

He denied interfering with plot 1(a) if anything it was the Respondent who had interfered with his plot. He said they had not agreed on any value for the toilets and bathrooms as this was part of what he had bought.   His witness (DW2) who is his wife said they bought from the Respondent half of Plot 1 comprising of 1 room, 2 bathrooms, 2 toilets and 1 septic tank.

After considering this evidence and the submissions by counsels, the learned trial Magistrate found that the Respondent had proved his case and that the Appellant had to pay Shs.500,000/= to be given the 2 toilets, bathrooms and septic tank and drainage system.

Though the learned trial Magistrate was silent on the prayers in the counter claim, it's clear his granting of prayer 2 of the Plaint gave a death blow to the prayers in the counter claim. From the evidence before the Court it is clear there was an agreement which was never reduced into writing. A sum of Shs.210,000/= was paid and received. The Appellant maintains that he bought half the plot which included 2 toilets, 2 bathrooms, a septic tank and drainage system. And the Respondent maintained that he only sold the Appellant a room plus the undeveloped part of the plot.

And that if the Appellant wanted the facilities mentioned he had to pay Shs.500,000/= for them as agreed. Again there was no written agreement about payment of the Shs.500,000/= for the said facilities.

PW2 told the Court that the Council was aware that the Appellant owned part of the plot but it was not clear how much of it belonged to who because of the developments on it. So it was for the parties to agree which they didn't hence the case. Therefore PW2 did not assist in determining the issue of whether the two parties co-owned the property in equal shares. The Court visited the scene. It noted that there was Plot A & Plot B. He did not however, indicate (page 37) what Plot A comprised of and what plot B comprised of. That is what he had gone to do I believe.

I will consolidate all the grounds and reduce them into;

1. That the learned trial Magistrate erred by granting the alternative prayer against the weight of the evidence.

2. That the learned trial Magistrate erred by failing to dismiss the Respondent's case and grant the prayers in the Counterclaim.

It has clearly come out from the evidence on record that the parties herein were very good friends who trusted each so much such that they did not see the need of reducing their agreement into writing. Therefore there is no document save for the Council minutes which confirm that the Appellant's name was added as co-owner with the Respondent in plot No.1. The same is silent on what each party was to own. The Appellant submits that the silence means the ownership to be was in equal proportions. What the Respondent says is that he sold to his friend the undeveloped part with one room. And if he sold him the undeveloped part why was he throwing tantrums when the Appellant brought building materials to develop his undeveloped portion? The Court indeed did not find any material deposited on Plot 1A which belongs to the Respondent. And it was for this reason that the prayer for injunction was not granted.

However the Court found for the Respondent that he had proved that the Appellant had to pay shs.500,000/= for him to own the facilities mentioned. This was an error because;

i) There was no proof of any such agreement between the parties.

ii) The value of shs.500,000/= was not established by the evidence on record. How was it arrived at?

No valuation report of those facilities was presented to the Court. The Respondent did not even attempt to give his own assessment of the facilities. Since this was not in any form of agreement the Respondent had a duty to prove the existence of any such oral agreement or arrangement.

The learned trial Magistrate ought to have found the whole of the Respondent's case lacking in merit and dismiss it.

Coming to the Counter-claim, the Appellant's case was also grounded on an oral agreement. He wanted the Court to find that he owned Plot B which comprised of the one room and the facilities complained of. He was telling the Court that he bought from the Respondent the one room and facilities at shs.60,000/=. This was based on their own valuation. There was no evidence of any valuation.

There were minutes produced DEXB 2(a) indicating that the Appellant's name had been added and approved. While DEXB 2(b) indicated that the application for subdivision had been considered and approved by the Council, these minutes do not talk of sizes.

It would have assisted the Court if the original application had been called for and produced in order for the Court to be certain of what was exactly approved. Was it divided into two equal portions or what did the Respondent exactly apply for? PW2 had said where there was no development the subdivision was to be into two equal parts, but where there was development subdivision had to be determined by the parties. In this case there was development.

From the shaky evidence it would not be possible to tell what the agreement was. And considering that there are no beacons in place one cannot tell where Plot A ends and where Plot B starts.

He who pleads a fact must prove it. It was incumbent on the Appellant to prove that indeed when he bought the plot it was clear that he was buying half of the plot, and the half he bought had thereon 2 toilets, 2 bathrooms, 1 room, septic tank and drainage system. And that these facilities were all worth shs.60,000/=. Besides his word of mouth and that of his wife there is no other evidence to prove these facts. Without documentary evidence, it would require real convincing for one to believe that the facilities above plus one room would go for shs.60,000/=. The Appellant herein failed to convince the Court that what he told the Court is what was the real position.

After re-evaluating and considering the evidence on record, I do find that both the Appellant and Respondent did not prove their claims in the Court below. The upshot is that the Appeal is allowed. I set aside the Judgment of the Court below. I under the same breath find no merits in the Appellant's Counterclaim which I dismiss with costs.

The Appellant gets the costs of the Appeal.

DATED, SIGNED AND DELIVERED AT EMBU THIS 4TH DAY OF JULY, 2012.

H.I. ONG'UDI
J U D G E
In the presence of:-

Mr. Kahiga for Appellant

Ms. Mureithi for Mr. Magee for Respondent

Njue CC