



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 24 OF 2015

KENNETH MWENDA.....APPELLANT

VERSUS

JULIUS RIMBERIA.....1ST RESPONDENT

DOUGLAS MUGAMBI NKANATA.....2ND RESPONDENT

(Being an appeal from the Judgment/Decree of the Senior Resident Magistrate

Githongo delivered at Githongo on the 24th (April, 2015 by Honourable C.A Mayamba in Githongo SN RMCC No. 35 of 2014)

JUDGMENT

1. This appeal arises from the judgment of C.A Mayamba S.R.M in Githongo RMCC No. 35 of 2014 delivered on 24.4.2015.
2. In that case appellant was the plaintiff while 1st Respondent was the 1st defendant. The 2nd Respondent was the 2nd defendant and is a person who had bought the suit property from 1st defendant. 1st Respondent is a grandfather of the Appellant. In the lower court case, plaintiff had averred that his grandfather had given him and his mother (deceased) land parcel No. L.R Nkuene/Ukuu/935. Plaintiff then extensively developed the property. He later learnt that 1st defendant had fraudulently transferred the land to 2nd defendant.
3. 2nd defendant had then filed a suit RMCC no. 10 of 2014 at Githongo against 1st defendant, seeking eviction of the latter. The two had then entered into a consent judgment which resulted in destruction of plaintiffs property valued at Shs.719,440.
4. Plaintiff hence filed the suit no 35 of 2014 at Githongo SRM'S Court seeking special and general damages as well as costs and interests. The suit proceeded as an undefended claim and judgment was finally delivered whereby plaintiff's claim was dismissed prompting this appeal.
5. The memorandum of appeal was filed on 8.5.2015 and the grounds set out thereon are:
 - (i) That the learned trial Senior Resident Magistrate erred in law and in fact in not considering that there was judgment on record which had not been set aside and he had no jurisdiction to dismiss the suit under the circumstances.
 - (ii) The learned trial Senior Resident Magistrate erred in law and fact in failing to understand what was before him and dealt with extraneous matters and therefore coming to a wrong decision.
 - (iii) The learned trial Senior Resident Magistrate erred in law and in fact in not pronouncing judgment in favour of the appellant after finding what damages he had proved.
 - (iv) The learned trial magistrate erred in law and in fact in not realizing that his duty was to assess damages and the value of the damaged property in terms of order 10 rule 6 of the civil procedure rules.
 - (v) The judgment of the trial magistrate is bad in law.
6. This appeal was canvassed by way of written submission and this time round, the defendant/respondents participated in the proceedings. Briefly, Appellant submitted that 1st respondent was father to appellant's mother, that during the lifetime of the appellant's mother, the 1st respondent sub-divided his land and set aside parcel no. L.R Nkuene/Ukuu/935 for the appellant and his mother. The two developed the land, then appellant's mother died.

7. Appellant remained on the land. The 1st respondent fraudulently transferred the land to 2nd respondent who then filed Githongo RMCC no. 10 of 2014 against 1st respondent. The two later entered into a consent which led to the eviction of the appellant.

8. Appellant contends that there was a judgment on liability and hence the duty of the magistrate was only to assess the damages and do no more. In particular, appellant relied on provisions of order 10 r 6 of the civil procedure rules. He also relied on the case of **Mukangu vs Mbui**.

9. On the part of respondent, it was submitted that 1st respondent was the registered owner of the land and there is no evidence that he ever gifted the land to appellant and his mother.

10. Respondent also states that the special damages were not specifically pleaded as alleged. The respondent proffered the following authorities in support of their arguments

- **Patrick Murime Gitau and 2 others vs Ngethe Gathuku & 4 others civil case no. 4259 of 1989.**

- **Gachira vs Gachira civil appeal no. 325 of 2003.**

11. This being a first – appeal, the court is enjoined to analyze and re-assess evidence afresh and reach its own conclusions, but always bearing in mind that it neither saw nor heard the witnesses testify. See **Selle vs Associated Motor Boat Co. (1968) E.A 123.**

12. I have carefully considered the evidence on record and the rival submissions. The issue for determination is whether the magistrate's duty was limited to assessment of damages in view of the fact that there was interlocutory judgment against the then defendants. In the circumstances, the grounds in the memorandum of appeal can be dealt with together.

13. **Order 10 rule 6 provides as follows:**

“Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant and the plaintiff shall set the suit for assessment by the court of the damages or the value of the goods and damages as the case may be”.

14. Pecuniary damages refers to quantifiable losses as submitted by the respondent for special damages to be awarded. They have to be specifically pleaded and then proved. In this case, appellant had made a general claim of special damages.

15. It is averred that the learned magistrate dealt with extraneous matters instead of dealing with the issue at hand, (Assessment of damages). **Was the magistrate right in dealing with the issue of ownership of the land?** I find that the magistrate had dealt with this issue in depth citing section 27 of the registered lands Act which accorded absolute ownership of land to a registered owner. On this issue, I will refer to the Latin maxim **“Quic Quid plantatur Solo, solo cedit”**, which means that **“Whatever is affixed to the soil belongs to the soil”**. Thus whoever owns a piece of land will also own the things attached thereon. It was therefore necessary for the appellant to establish the cause of action to lay a claim of damages. It was also right for the magistrate to deal with the issue of ownership of the land first and foremost before assessing the damages.

16. The authority cited by appellant, **Mukangu vs Mbui** can be distinguished from the present case in that in Mbui case, the court was dealing with the issue of overriding interests in respect of registered land. In the present suit, appellant's case before the lower court was anchored on fraud and the prayers sought were special and general damages.

17. I must state that a land matter cannot be equated to other matters like Running down cases where the issue of liability can be dealt with via Order 10 rule 6. Despite the entry of the interlocutory Judgment, Appellant was still required to formally prove his claim of ownership of the land.

18. All in all, I find this appeal is not merited. The same is dismissed with costs to respondents.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 7TH JANUARY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muchiri for appellant

HON. LUCY. N. MBUGUA

ELC JUDGE