REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 24 OF 2017

RECHA SAYIA.....APPELLANT

VERSUS

JULIUS SHISERO.....RESPONDENT

JUDGEMENT

The appellant dissatisfied with the whole judgment of Honourable Eshitubi delivered in Kakamega CMCC No. 337 of 2010 wishes to appeal from the same on the following grounds:-

1. That the learned magistrate applied the wrong standard of proof in civil cases and placed a higher burden of proof than required in civil cases.

2. That the learned magistrate erred in law to hold that the appellant's property had not been destroyed and failed to take into account of the evidence before her.

3. That the evidence of the defendant differed with his pleadings significantly.

4. The learned magistrate erred to dismiss the claim on account that a land registrar's evidence was needed to prove the wrongful acts of the respondent when the court had previously found that the respondent had carried his execution on a non-existent land.

5. The learned magistrate's judgment left the appellant with no remedy when it was proved that the actions of the respondent led to loss of his property.

6. The learned magistrate wrongly applied the doctrine of judicial privilege and erroneously extended it to cover the respondent who was not a judicial officer.

7. The learned magistrate failed to take into account of the fact that the actions of the respondent were deliberate and malicious and were not only meant to deceive the court but did deceive the court to the detriment of the appellant.

8. The learned magistrate failed to analyse the evidence rendered by the respondent which evidence didn't answer to the claim against the respondent to the required standards.

The appellant prays for the following orders:-

(a) That this appeal be allowed.

(b) That the lower court's judgment be set aside.

(c) That the court do grant the appellant's prayers in the lower court.

(d) Costs of this appeal be provided.

The appellant submitted that, the appeal is mainly depends on the standard of proof and the doctrine which states that whoever who alleges something has the burden of proof in giving evidence to proof the allegations.The main issue which was the burden of proof for the plaintiff in the lower court, now the appellant herein was: We submit that he discharged the burden of proof.

The Appellant discharged that burden by producing the following evidence. That the quantum of damages was not challenged by the

Respondent in the lower court by evidence or otherwise. In the defendant's evidence nothing is said about quantum. That he is aware that he was evicted from land parcel number 403. The eviction order was for land 402 which did not exist. It turns out that the defendant was misusing an eviction order to evict the plaintiff from his land number 403. He was able to proof to the court that the order for eviction was being misused by the Respondent. If there is anything which proved that the Respondent was evicting the Respondent from land parcel number 403 and not 402 is the order stopping the Respondent from evicting the plaintiff from 403.

Exhibit 5 shows that the court had found out that the defendant was evicting the plaintiff from his land number 403. That is why the eviction was specifically stopped, and orders of eviction set aside.There was no doubt therefore that the eviction orders were executed on land parcel 403.A brother to both the plaintiff and defendant testified that the houses were destroyed on plot number 403.The witness knows what he was testifying about. He is the one who had shared land parcel 402 with the defendant and he surely testified that the eviction was done on plot 403. PW4 was very categorical that the demolition took place on land 403.After all, the witness for the Appellant said that the execution was done on plot 403,on a balance of probability, the Appellant discharged his duty.

The Respondent on page 14 testified on cross- examination that by the time execution was done land parcel 402 was not existing. He did not have the survey report which he says gave him part of the Appellant's land. He did not have the order adopting the surveyor's report.He was not with the surveyor when demolitions were done.That the Appellant had constructed on the same land as this case progressed in court. Land parcel 403 belongs to the Appellant.

This testimony on cross- examination supports the Appellant's case in material particulars. It asserts the Appellant's case as follows:That by the time of execution there was no number 402. Making it impossible for the execution to take place as ordered by the court. Respondent ought to have sought an amendment of the order for its execution. He did not.The Respondent is the one who made the allegation that he carried out the execution on land parcel number 1539 and not 403.Given that land parcel number 402 was not in existence then, it was incumbent upon the Respondent to proof that the actual execution was done on land 402, as per his allegations.The burden of proof shifted to the Respondent as he is the one who alleged. Because by the order of the court dated 6th August 2010, the court had found out that the Respondent was using the order of 30th October 2010 to evict the Appellant from his land. Number SOUTH KABRAS/ CHEMUCHE/403. It therefore became imperative to stop him from misusing the order.

Given that a court of competent jurisdiction had found out that the order the Respondent was using was being used to evict the Appellant from SOUTH KABRAS/ CHEMUCHE/403, and that order of the court was not appealed from, the trial court could not have demanded more evidence from the Appellant.They rely on the cases of; PI (suing as a next of kin of CM (deceased) vs Zera Roses- Eldoret Civil Appeal No.126 OF 2009 and Civil Appeal 7 of 2014. Evans Otieno vs Cleophas Mbwana.

The respondents submitted that land parcel S. KAKAMEGA/ CHEMUCHE/402 was at the time of the judgement subdivide to land parcels S.KAKAMEGA/ CHEMUCHE/1538 and S.KAKAMEGA/ CHEMUCHE/1539. The land parcel S. KAKAMEGA/ CHEMUCHE/403 was in the name of Jared Recha Saiya. The eviction order against the appellant was on land parcels S.KAKAMEGA/ CHEMUCHE/1538 and S.KAKAMEGA/ CHEMUCHE/1539 formerly S. KAKAMEGA/ CHEMUCHE/402. The appellant’s contention is that the eviction was done on S. KAKAMEGA/ CHEMUCHE/403 and it was upto him to prove his case.

This court has considered the appeal and the submissions herein. I have carefully perused the record of appeal and the lower court file. The plaintiff’s case in the trial court is that he was evicted from his land causing damages in which he claims compensation. No report was produced to show exactly where the boundaries are in these plots or where the eviction was done. It would have been useful for a surveyors report to be produced to establish his case. This was not done. The defendant’s orders were from court. It is on record that S. KAKAMEGA/ CHEMUCHE/402 was at the time of the judgement subdivide to land parcels S.KAKAMEGA/ CHEMUCHE/1538 and S.KAKAMEGA/ CHEMUCHE/1539. The respondent maintained that the eviction order against the appellant was on land parcels S.KAKAMEGA/ CHEMUCHE/1538 and S. KAKAMEGA/CHEMUCHE/1539 formerly S. KAKAMEGA/ CHEMUCHE/402. I agree with the trial magistrate in his judgement on page 61 of the record of appeal when she states that;

> “The court is left still wondering what exact sites- parcel of land the eviction was conducted on. Had a land officer been involved from the point eviction the Land registrar, the plaintiff could have pointed out precisely on what parcel this property was demolished”.

In Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the award as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE