



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT KISII
APPEAL NO. 179 OF 2015

COUNTY GOVERNMENT OF HOMABAY.....APPELLANT

VERSUS

JENNIPHER ANYANGO.....RESPONDENT

(Being an appeal from the judgment of Hon. T. Gichohi, CM delivered on 9th July 2015 in Homa Bay CMC Civil Case No. 53 of 2014)

JUDGMENT

1. This is an appeal by the appellant against the judgment of Hon. T. Gichohi, Chief Magistrate, delivered on 9th July 2015 in Homa Bay CMCC No. 53 of 2014. The magistrate in the case before her found and held that the plaintiff had proved her case and entered judgment for the plaintiff awarding her a sum of kshs. 3,400,000/= on account of the value of the residential house and general damages.

2. The appellant being dissatisfied by the decision of the learned Chief Magistrate has appealed the decision/judgment to this court vide a memorandum of appeal dated 15th July 2015. The appellant has set out the following grounds of appeal:-

1. THAT the court below was biased against the appellant from the word go and therefore ended up with a judgment that only reflected personal feelings and not based on law at all.

2. THAT the conduct of the court below in refusing to allow the appellant's application that was already filled and paid for to be placed in the court file for consideration spoke volumes about the direction the court below was taking with regard to biasness mentioned under paragraph 1 above.

3. The honourable subordinate court did not exercise her discretion judiciously in this matter and made no records at all of her refusal to admit the application filed in court on 7th May 2015.

4. The learned magistrate failed to appreciate the fact that the building she was now compelling the appellant to pay for was never approved to be constructed and therefore such building in itself was illegal as there was nothing completely tabled before the court in terms of building approval or approval plan.

5. The learned trial magistrate did not appreciate that under the law, a developer has to meet all the required conditions to commence constructions of a building without which, and there was no basis at all to make a finding that the appellant was liable to the respondent for any

damages.

6. The learned trial magistrate willfully declined to allow the appellant to canvass its case due to perceived personal differences between the said presiding magistrate and the counsel that represented the appellant.

7. The honourable learned trial magistrate relied on evidence that was contradictory and unreliable.

The appellant prays for the appeal to be allowed and the respondent's case in the court below to be ordered dismissed with costs to the appellant and that the costs of the instant appeal be awarded to the appellant.

3. The parties agreed to argue the appeal by way of written submissions and the court on 31st May 2016 gave directions that the appellant files its submission within 30 days of that date and the respondent within 30 days of being served with the appellant's submissions. When the matter was mentioned on 20th September 2016 to take a date for judgment the appellant did not attend court and had not filed any submissions as directed. The respondent had not been served with any submissions by the appellant and had on 2nd August 2016 filed her submissions. The court in the premises reserved judgment for delivery on 25th November 2016.

4. The court takes cognizance of the fact that this being a first appeal it will be obligated to reevaluate the evidence adduced before the lower court to ascertain whether the trial magistrate arrived at the correct findings on the facts and on the law in reaching the decision that she did. The court however will not interfere in the magistrate's exercise of discretion unless it is demonstrable that in the exercise of the discretion the magistrate applied the wrong principles and that a miscarriage of justice was occasioned.

5. The brief facts of the case before the Chief Magistrate's Court was that the respondent was in 1990 allocated by the then Homa Bay Municipal Council an unsurveyed Residential Plot No. 16 in Homa Bay Municipality where she intended to construct a residential house. The respondent stated that following allocation of the plot she had the same surveyed and beacons after paying all the requisite fees. The respondent stated she constructed a residential house on the plot but averred that in the course of construction, her contractor discovered there was a water pipe passing through the plot and that she informed the appellant of the fact who advised her to proceed with the construction of the house as they would reroute or relocate the water pipe. The respondent continued and completed the house and moved in but stated that the appellant never rerouted or diverted the water pipe as promised such that the water pipe underneath the house burst and the house was flooded prompting the respondent to vacate from the house.

6. Upon reporting to the water engineer of the appellant about the burst water pipe, the engineer informed the respondent nothing could be done since the water pipe was inside the house. The respondent stated that the appellant agreed to allocate her an alternative plot and eventually allocated to her what she stated was a very small plot but she had no money to develop as she had used all her money to build the house that was condemned. The respondent's position was that the appellant allocated to her a plot that was on top of a water pipe when it was their duty and obligation to allocate her a plot which had no issues. The respondent sought compensation or damages of kshs. 3.1 Million represented by the amount expended in constructing the house. The plaintiff called as a witness one Philip Odongo Kabita a registered and practicing and licensed valuation surveyor who certified the cost of construction of the condemned house to be kshs. 3.1 Million.

7. The appellant did not cross examine the respondent or the respondent's witness and neither did the appellant tender any evidence at the trial with the result that the plaintiff's evidence was not challenged or controverted in any manner.

8. The appellant's grounds of appeal 1, 2 and 3 relate to alleged bias on the part of the trial magistrate. The bias alleged by the appellant unfortunately is not borne out by the record of the proceedings. The

record shows that the hearing of the suit was adjourned on 8th January 2015 on the application of the appellant's counsel and similarly on 5th February 2015. On 19th March 2015 the suit was part heard in the presence of the appellant's counsel when the respondent testified partially and was by consent of the parties adjourned to 23rd April 2015 for further hearing. On 23rd April 2015 the trial magistrate declined to grant an adjournment to the appellant's counsel on the ground there were no justifiable grounds and that the appellant had previously failed to honour the terms under which the appellant was granted an adjournment. An adjournment is granted at the court's discretion having regard to the attendant circumstances and the grounds upon which the application for adjournment is grounded. Having regard to the circumstances of the matter I cannot fault the trial magistrate's exercise of her discretion to deny the appellant the adjournment.

9. The appellant has further by its grounds 2 and 3 of appeal faulted the trial magistrate for failing to consider and allow the appellant's application stated to have been filed on 7th May 2015 which sought stay of further proceedings and/or judgment in the matter. I have perused the original lower court record and there is no such application on record. In the premises one cannot tell whether such an application was brought to the attention of the trial magistrate. On 23rd April 2015 after completing taking the evidence of the plaintiff the trial magistrate reserved judgment for delivery on 4th June 2015 as the defendant was absent. It is the usual practice that where judgment is reserved the court file is taken by the judicial officer to his/her chambers for purposes of preparing the judgment and is not available in the court registry for any purpose. Essentially the application by the appellant sought to "arrest" the preparation and delivery of the judgment. Under Order 21 of the Civil Procedure Rules no such power is donated and my own view is that once a judgment is reserved the judicial officer is obliged to render the judgment and any party who has any issue with the judgment has to await its pronouncement to take any necessary action but cannot as it were injunct the judicial officer from rendering the judgment.

10. In the instant matter the appellant had the option of awaiting the delivery of the judgment upon which the appellant could if they had valid reasons for non attendance during the hearing apply for the judgment to be set aside and/or reviewed as the case may be and/or they could appeal against the judgment as the appellant did in the instant case. I therefore do not find that the appellant's grounds 1, 2 and 3 are substantiated and I hold that no bias on the part of the learned trial magistrate has been demonstrated and I accordingly reject the grounds as lacking any basis.

11. Grounds 4 and 5 of the memorandum of appeal challenge the learned trial magistrate's evaluation and appreciation of the evidence adduced and presented by the respondent. The appellant contend that the respondent did not produce any proof that she had obtained approval for the house she constructed on the plot allocated to her from the appellant. The appellant argues that unless there was approval for the building plans given by the appellant then the construction was illegal for want of approval and hence no compensation whatsoever would be warranted. It is worthwhile to note that in the statement of defence filed on behalf of the defendant/ appellant no issue was taken and/or raised by the appellant that the respondent had not obtained approval for the building that she erected on the plot. Besides even though from the evidence adduced by the respondent at the trial it was evident that the appellant was constructing a house on the plot the appellant did not stop the construction as they would have been entitled to do if the building plans had not been approved. The appellant under the Physical Planning Act, Cap 286 Laws of Kenya have powers to approve any building plans under sections 29 and 30 and to enforce compliance with the Act under Section 38 by serving a defaulting party with an enforcement notice requiring compliance with the Act.

12. The respondent in her evidence stated she had sought approval for the building plans and produced in evidence receipts for application and approval fees. The trial magistrate considered this issue and in her judgment stated as follows:

"The plaintiff produced receipts to show that she paid for the survey, map and approval of building plan (Exh. 4, 5, 6 and 7 respectively). She explained that most of the letters she relied on were not written to her directly and that she was given copies of correspondence in the offices she went so that they could confirm to her that action was being taken. I am

satisfied that approval was granted for her to construct the building.

The evidence by the respondent as observed earlier in this judgment was not rebutted. On the basis of the evidence adduced by the respondent the trial magistrate made a finding that “the defendant’s officers failed to exercise due diligence to ensure that the plot they allocated the plaintiff was safe for development and more so construction of a residential house. That was pure negligence on their part. The defendant is liable for the loss suffered by the plaintiff.”

13. I am satisfied that the trial magistrate was entitled to come to the conclusion that she did on the basis of the evidence and material placed before her by the plaintiff. The trial magistrate in my view properly awarded the respondent the sum of kshs. 3.1 Million being the value of the cost of the development. The plaintiff/respondent was however allocated an alternative plot although she stated it was smaller than the one where she had constructed the house that had become inhabitable. The plaintiff in fact stated her problem was that she was not able to develop the alternative plot as she had no money presumably because she had already used all her money in constructing the house that had become inhabitable. Having awarded compensation for the cost of the house and the appellant having allocated the respondent an alternative plot as compensation for the plot that she could not utilize, the trial magistrate ought not to have awarded any general damages to the respondent. The general damages in the sum of kshs. 300,000/= were not merited and I accordingly set aside that aspect of the award.

14. In the result, I set aside the award by the trial magistrate of general damages of Kshs. 300,000/= but I uphold the compensation awarded by the trial magistrate of kshs. 3,100,000/= being the value of the residential house together with interest thereon at court rates from the date of judgment in the lower court. The respondent will have the costs of the appeal before this court and costs of the suit in the court below.

Judgment dated, signed and delivered at Kisii this 25th day of November, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the Appellant

Respondent in person

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE