



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 181 OF 2012

ROBERT MUTHAWA.....APPELLANT

VERSUS

KITUKU MULWA.....RESPONDENT

[Being an Appeal from the judgment of civil suit no. 614 of 2008 in the Principal Magistrates Court

at Kitui delivered on the 16th day of October, 2012 by Hon. A.G. Kibiru SPM]

RULING

1. Being aggrieved by the Judgment of the Trial Court, the Appellant filed a Memorandum of Appeal on 30th October, 2012. The Appellant had sued the Respondent in the Trial Court for a sum of Ksh.11,000/=, for the reason that on or about the 23/3/2007, the Respondent had entered the Appellant's land and destroyed sisal plantation terraces and sweet potatoes. The suit was dismissed and hence this Appeal. The Appellant filed a Supplementary Memorandum of Appeal dated 19/2/2014.

2. The Appellant sets forth the following grounds:

1. The learned Magistrate erred in law when he failed to note that the Appellant has proved his case.
2. That learned Trial Magistrate erred in law in failing to consider what the Plaintiff has told the Court together with his witness.
3. The learned Senior Principal Magistrate erred in law failing to hear or write what the Appellant had told the Court.
4. The learned Senior Principal Magistrate erred in failing to consider the case of the Appellant which was weighty.

3. The Defendant had entered appearance and filed a defence denying the allegations made by the Plaintiff.

Evidence

4. The Plaintiff/Appellant availed two witnesses whereas the Defendant Respondent availed one witness. The matter proceeded to Trial. PW1 the Appellant/Plaintiff had testified that the Defendant on 23/3/2007 entered on the land at Kyangwithya Mbusyani 143. He produced a title deed copy as Pex no 1 and a search certificate as pex no 2. The Defendant cut grams, sisal and sweet potatoes. The agriculture office carried out an assessment. In cross-examination he testified that the defendant had been cleared his sweet potatoes. PW2 Peter Muli Muchama testified that the Defendant had uprooted boundary sisal plant, cut some cassava trees, uprooted grams and sweet potatoes. He witnesses the Defendant leaving the shamba. On cross-examination he confirmed he saw the Defendant on the land and he knew the Plaintiff had dug terraces in his land. PW3 Samuel Wambua Musyoki a divisional agriculture extension officer central division testified he said he had visited the Plaintiffs farm on 31/7/2007 and assessed the destruction of sisal plants, sweet potatoes and terraces. He produced an assessment report on pex no 2. The damaged totalled to Ksh.11,000/=.

5. DW1 (Respondent/Defendant) testified and stated that Kyangwithya Mbusyani 142 was registered in the name of the father Mulwa Kituku and he produced an official search (Dex no 1). He denied destroying the boundary marks or destroying any terraces or crops. On cross-examination he testified that land parcel no 142 was in his father's name. He testified sisal plants were on the boundary. The Plaintiff had planted maize on cross-examination he testified that he used the land with his siblings he was not called when the agricultural officer visited the land.

6. DW2 Eliud Muniya James testified and said he was a neighbour to both the Plaintiff and the Defendant. The parties had been involved in the land dispute and parties planted sisal plants along the boundaries. The sisal plant had been uprooted in 2007 by the Plaintiff. On cross-examination, he testified that his land shared a boundary with the Plaintiff and the Defendant's, and he had been jailed for two years for the alleged assault.

Submissions

7. Parties agreed to canvas the Appeal by filing written submissions.

Appellant's Submission

8. He urged the Court to set aside the judgment of the lower Court and allow the Appeal with costs. He urged that he had produced a title deed as proof of ownership to the land parcel no Kyangunthya/Mbusyani 143. He had crops growing and he had dug terraces. However, the Respondent/defendant had entered into the land and caused damage. He was confirmed by PW2 that the Respondent had entered into his land and has caused destruction on the land. The assessment on the damage plants was done by PW3 yet the Magistrate erred when he ruled that the Appellant did not inform the Court what the police took after assessment by the Agriculture Officer.

9. He submitted that he had proved his case on a balance of probabilities since the respondents evidence was only a denial.

Respondent's Submission

10. The Counsel for the defendant opposed the Appeal as set out in the Memorandum of Appeal and in the Supplementary Memorandum which violates Order 42 of the Civil Procedure Rules. Leave was not sought and given to file the same and thus urged the Court to dismiss or strike it out.

11. The Trial Magistrate conclusion that the Appellant had not proved his case, was not an error as alleged by the Appellant. The assessment report did not specify the parcel number where he had carried out the report and it was not dismissed by anybody. The Court had considered all the evidence on record before it made its Judgment. He urged that the Appeal be dismissed.

Issues for determination

12. The issues for determination that arise that:

- a. Whether the Respondent/defendant was liable for the destruction of the land.
- b. If, so how much was adequate compensation.
- c. Whether the court will interfere with the finding of facts by the trial court.

Determination

13. Section 107 of the Evidence Act provides for the burden of proof as follows:

"1. Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which asserts must prove that those facts exists.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

14. The Appellant sued the Respondent for cutting or destroying sisal plant terraces and sweet potatoes. The Appellant availed two witnesses. His brother PW2 saw the destruction and an agricultural officer (PW3) as stated above. The burden was on him to prove to the Court the destruction on his crops. This is the Court of first Appeal and the Court is under a duty to re-evaluate the evidence on record and reach its own conclusion as was held in the Court of Appeal in **Selle & Anor v. Associated Motur Boit & Co. Ltd & Anor.** [1968] EA 123.

15. The Appellant produced a copy of the title deed as Pex no. 1 had been registered as Kyangunthya/Mbusyani 143 as proof of the land where the Appellant had gone to destroy the crops. The Appellant testified that the respondent had entered into his land and cut down crops he had planted. PW3 had assessed the value of the destruction. The respondent had, however, disputed destroying the Appellant's crops and he he produced a copy of a search for the parcel no. Kyangunthya/Mbusyani 142 registered in the name of Mulwa Kituku his father. DW1 the Respondent further testified that their land borders Kyangunthya/Mbusyani 143 and the boundary was marked with sisal plants. The Respondent's witness DW2 evidence was on a previous dispute that the Appellant and respondent had. His evidence is not of help in this case. The respondent though had denied destruction of the crops. The evidence by PW3 was an expert witness and the Court erred in law in not relying on the evidence. This Court shall adopt the Divisional Agricultural Assessment Report and award the Appellant a sum of Ksh.11,000/= being the cost of damage cost.

Conclusion

16. This Court is guided by Law JA Kneller & Hannox A.G JJA in **Mijube v. Nyanuro** [1983] KLR 403-415, that "this Court does not have to interfere with the lower Court's decision on a finding of fact unless the same is founded on wrong principles of fact and or law and or it

was based on no evidence.” This Court is, however, not bound to follow the Trial Court’s finding if it appears the Court failed to take into account particular circumstances or probabilities. In this case, the witnesses agreed that the plaintiff and the defendant had a long land dispute between them. The agricultural officer who assessed the damage was a witness of the destruction. The trial court failed to consider that the circumstance of the raging boundary dispute and the testimony of the plaintiff’s witness PW2 supported by the evidence and assessment report of the agricultural officer PW3 weighted against the defence’s only evidence agreeing to an earlier manifestation of the dispute with no response to the present suit, made the fact of encroachment alleged by the plaintiff more probable than not, and, therefore, the plaintiff had, on the civil standard of proof on a balance of probabilities, proved the encroachment and damages pleaded in the suit. The appellate court is in these circumstances entitled to interfere with the trial court’s finding on the facts.

Orders

17. Accordingly, for the reasons set out above, the Court makes the following specific orders.

1. The Appeal is allowed.
2. Judgment is entered for the Appellant against the respondent in sum of **Ksh.11,000/=** being the value of the damaged crops, together with interest at court rate of 14 % from the date of the filing of the suit until full payment.
3. The appellant shall have the costs in this Appeal and in the proceedings in Trial Court.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 22ND DAY OF JANUARY 2019

G.V. ODUNGA

JUDGE

Appearances:-

M/S Robert Muthamwa Acting in person applicant.

M/S Kinywa Musyoki & Co. Advocates for the Respondent.