



## **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA AT KITUI**

#### **CIVIL APPEAL NO. 217 OF 2015**

**ZIPORAH NAIPANOI NDUNDA.....APPELLANT**

**VERSUS**

**PETER MWANIA MAUNDU.....RESPONDENT**

*(Being an Appeal from the Judgment and Order in **Mutomo Principal Magistrate's Court Civil Suit No.131 of 2013** by **Hon. S. Ogot (RM)** on 05/03/15)*

#### **RULING**

1. **Ziporah Naipanoi Ndunda**, the Appellant, by way of Complaint sued the Respondent claiming for recovery of **Kshs. 120,655.75/=** being the assessed value of pasture and trees that were alleged to have been damaged by the Respondent's livestock. She pleaded that the Respondent's livestock entered her land without her consent and caused the damage and the Respondent also encroached on the stated land and cut trees then burnt charcoal.
2. The allegations were denied by the Respondent who averred that it was the Appellant who had encroached on his land.
3. The trial Court considered evidence adduced and was of the view that the question of ownership of land should have been determined first to ascertain who owned the crops that were allegedly damaged. In the result, the claim was dismissed.
4. Aggrieved, the Appellant appeals on grounds that:
  - The learned Resident Magistrate erred in law and misdirected herself on the facts when she made a finding that the Appellant had not proved her claim even when there was overwhelming evidence placed before her.
  - The learned Resident Magistrate erred in law and misdirected herself on the law and the facts when she relied on contradictory evidence of the Respondent and his witnesses which did not corroborate one another on the land where this damage had been occasioned.
  - The learned Resident Magistrate erred in law and misdirected herself on the facts when she disregarded the overwhelming evidence that the Appellant owned the land in question through her husband who had successfully litigated over the same.
  - The learned Resident Magistrate erred in law and misdirected herself on the facts when she based her Judgment on the issue of land ownership instead of the crop damage which was before her.
5. The Appeal was canvassed by way of written submissions. It was the Appellant's submissions that the learned Resident Magistrate digressed from the issues raised and based her determination and final Judgment on issues that were never pleaded by parties in their pleadings. That she concentrated on the issue of ownership of land which had not been pleaded and avoided the claim of damages resulting from destroyed crops and trees. In this regard he relied on the case of **Nairobi Civil Appeal No. 219 of 2013 Independent Electoral and Boundaries Commission**.
6. That the Appellant was in possession of the land at the time, had planted crops and trees having been left on the land by her husband.
7. The Respondent on the other hand urged that the issue of ownership was raised and consequently pleaded by the Appellant, allegations that were denied by the Respondent who claimed that the land belonged to him. That ownership of land was traced to the husband of the Appellant. The dispute between them and the Respondent was heard by the Land Disputes Tribunal (Now repealed following the enactment of the **Environment and Land Act, 2012**), the decision had not been adopted as Judgment of the Court therefore the issue of ownership remained undetermined and none of the disputing parties had more rights over the land than the other. That having been awarded the land by the clan the pasture and trees belonged to him.

8. Further, it was contended that to benefit from what naturally grew on the land there was the obligation to prove ownership and that there was no issue of crop damage.

9. This being a first Appellate Court, it is my duty to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility (**See Selle vs. Associated Motor Boat Company Limited (1968) EA 123**).

10. It is trite as correctly submitted that parties are bound by their pleadings and any evidence led by way of the parties which does not support the averments in the pleadings, which is at variance with the averments of the pleadings goes to no issue and must be disregarded (**See Adetoun Oladeji (NIG) Ltd vs. Nigeria Breweries PLC SC 91)2002**).

11. The Plaintiff was drawn by the Appellant herself. She averred that the Respondent had encroached onto her parcel of land, cut trees and burnt charcoal and he also let loose his livestock that caused damage on her farm. This was a claim of damage having been occasioned on what she envisaged to be on her land. Since she was making the allegation by virtue of claiming ownership, this was an issue that was pleaded therefore the learned trial Magistrate did not digress from what was pleaded.

12. In reaching its finding the trial Court was of the view that the issue of ownership had to be determined in order for it to resolve the question of the damage alleged.

13. Following the report made by the Appellant, PW6, **Samuel Muriuki Gachagua** visited the farm and found trees burnt. Some of them were for charcoal while others were converted into posts. He assessed the damage at **Kshs. 81,323,40cts**. Vegetation was destroyed which he assessed at **Kshs. 8,132.30cts**. The assessment was done in the absence of the Respondent.

14. The Respondent admitted having cut the trees but claimed ownership of the disputed portion of land.

15. What was proved was the fact that the Appellant and her husband, PW2 had a land dispute over the portion of land in issue with the Respondent. The matter was heard by their clan but ultimately escalated to the Land Dispute Tribunal which however did not conclude the matter following enactment of the **Environment and Land Court Act, 2012** which disbanded the Land Dispute Tribunal. Parties do not seem to have taken directions when the Act came into operation. DW2 **Peter Mulu**, Board Member of the defunct **Land Tribunal, Mutomo** stated that they were stopped from continuing with the work by statute before they determined the issue. Therefore, the issue of ownership of the land remained unresolved as correctly found by the trial Court. Both parties claimed ownership of the trees and vegetation.

16. The Appellant herein desired to have the case determined in her favour; having asserted facts as presented she was duty bound to prove existence of those facts on a balance of probabilities. (**See Section 107 of the Evidence Act**). She was under the obligation to prove that the dispute between her and her husband with the Respondent regarding ownership of the land, the trees and pasture that stood herein belonged to them and by the Respondent cutting them he damaged their property. These facts were not proved since the land dispute had not been resolved.

17. In the result the learned trial Magistrate did not fall into error in dismissing the suit. Therefore, the Appeal fails and is dismissed with costs to the Respondent.

18. It is so ordered.

**Dated, Signed and Delivered at Kitui this 25<sup>th</sup> day of April, 2019.**

**L. N. MUTENDE**

**JUDGE**