



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 38 OF 2011**

**ERASTUS MAGERE JUMA.....APPELLANT**

**VERSUS**

**ELISHA O. WADIDA.....1ST RESPONDENT**

**BERNARD OCHIENG WADIDA.....2ND RESPONDENT**

**JEREMIAH OKELLO WADIDA.....3RD RESPONDENT**

**JACOB ANDEGO.....4TH RESPONDENT**

**(Being an Appeal from the Judgment of Hon. C.N.Sindani R.M**

**in WinamSRMCC No. 88 of 2009 delivered on 24th March 2010)**

**JUDGMENT**

**Erastus Magere Juma(hereinafter referred to as appellant) sued Elisha O. Wadida and 4 others (hereinafter referred to as respondents) in the lower court claiming serious action for trespass and malicious damage.**

Defendants/respondents filed a statement of Defence and claimed that the plaint did not disclose a cause of action and urged the court to dismiss the claim with costs.

In a judgment delivered on **24th March 2010**, the learned trial Magistrate **dismissed the appellant's claim with costs to the respondents.**

**The Appeal**

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 8th April 2011 which set out 5 grounds that:-

- 1. The Learned trial Magistrate erred in law and in fact by failing to record the proceedings and guide the appellant who was acting on person on the manner of production of documents so as to have proper records**
- 2. The Learned trial Magistrate erred in law and in fact by failing to read the gist of the appellants statement of claim and arrived at a wrong conclusion**

3. **The Learned trial Magistrate erred in law by relying on 1st respondent's evidence without any witness to dismiss the appellant's case**

4. **The Learned trial Magistrate erred in law in failing to fairly deliberate and analyze the appellant's claim and evidence vis a vis the respondents' defence and evidence thereby dismissing the appellant's claim**

5. **The Learned trial Magistrate erred in law in failing to appreciate the standard of proof in civil cases was on a balance of probabilities and not on a balance of convenience**

## **SUBMISSIONS BY THE PARTIES**

### **Appellant's submissions**

When the appeal came up for hearing on 14.3.17, the respondents and their counsel were absent although a hearing notice had been served. The appellant in his oral submission reiterate the grounds of appeal. He further submitted that he had filed a chamber summons with an intention to amend the plaint but he was not given a chance to prosecute it.

### **The evidence**

The plaintiff in his testimony said that on 26.2.09, he had found the respondents cutting trees on his land parcel number Kisumu/Bar/1537. He prayed for damages for trespass and for the damage caused. PW2 Lilian Awour Luseno a Forest Officer testified that on 28.9.09, she visited appellant's land and found that trees valued at Kshs. 45,724/- had been destroyed. She produced a report as PEXH. 2.

1st respondent told court that the appellant was a brother to their father. He recalled that on 25.2.09; their father sent him and 3 others to cultivate land parcel 1537 as they had been previously done. That on the way; they met the appellant who told them not to go to the farm and they abandoned the exercise and returned home.

### **Analysis and Determination**

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

***“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif v Ali Mohammed Solan (1955, 22 EACA 270).”***

Circumstances under which an appellate court may interfere with a decision of the trial court were set out in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**, where the court stated as follows:-

***“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”***

I have perused the entire record of appeal and considered the submissions by the appellant. I have also perused the plaint that was filed by the appellant and I find that the plaintiff's claim was for serious action and there was no basis on which the learned trial magistrate would have awarded him any damages. Further to the foregoing, the appellant did not lead evidence to connect the respondents to the damaged trees that were found on his land 7 months after the respondents allegedly trespassed thereon. The forest officer did not state the probable period within which the trees might have been cut to enable the court to determine if they had been cut by the respondents as alleged by the appellant. And even if that fact had been established, the appellant did not amend his plaint to quantify his claim upon which the trial magistrate might have entered judgment for special damages in his favor.

As a result, this court finds that the learned trial magistrate arrived at the right decision based on the evidence placed before the court and I find no reason to interfere with that decision. For the reasons given on the assessment above, the appeal is dismissed in its entirety. The lower court's decision is confirmed. Appellant will bear his costs of this appeal.

**DATED AND DELIVERED THIS 28<sup>th</sup> DAY OF APRIL 2017**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Clerk Felix

Appellant Present in Person

Respondent 2<sup>nd</sup> Respondent present in person.

N/A for 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent.