



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 22 OF 2005

STEPHEN MUTIA NGULUNGU APPELLANT

VERSUS

NGUTHU MUNYALO RESPONDENT

(Being an appeal from the Judgment of Hon E.K. Makori – SRM, in Kitui Principal Magistrate’s Court Civil Suit No. 119 of 2002)

JUDGMENT

1. In the suit before the lower court, the Appellant, Stephen Mutia Ngulungu had sued the Respondent, Nguthu Munyalo for Kshs. 66,720/= being the value of his food crops and trees allegedly damaged by the Respondents animals when they trespassed into the Appellant’s land parcel No. MATINYANI/KASAINI/304.
2. The claim was denied by the Respondent as per the statement of defence dated 26/6/2002.
3. The Appellant’s case was dismissed by the Trial Court and this is what triggered this appeal.
4. The grounds of appeal are as follows:
 - 1) The Learned Senior Resident Magistrate erred and misdirected himself both in law and facts when he failed to appreciate that the claim before him was that of material damage and not ownership of land and as a result reached a conclusion that was wrong.
 - 2) The learned Senior Resident Magistrate erred and misdirected himself in both law and facts when he failed to find that the Appellant had a better title to the land as against the Respondent, and that the Respondent’s rights on the land were extinguished by the final judgement in Kitui SRMCC No. 171 of 1996, Munyalo Ngilu –vs- Valasa Ngilu which decision was cited before the said court.
 - 3) There was ample evidence that the Respondent’s animals had grazed on the appellant’s food crops and the conclusions reached by the learned Senior Resident Magistrate were against the weight of the evidence.
 - 4) The Learned Senior Resident Magistrate took a biased approach of the appellant’s case having had dealt with a case of trespass over the same parcel of land by two brothers of the Respondent and the said learned Resident Magistrate ought to have disqualified himself from handling the civil case the subject matter of this appeal.
5. The Appellant’s side called five witnesses in support of their case. The Appellant (pw1) gave evidence

and stated that he is the owner of the land in question and produced the title deed as an exhibit. That he had planted food crops on his land and the Respondent's cattle grazed on the same without his permission. He further stated that about three acres of the food crops and trees were damaged. The matter was reported to the assistant chief. The damage caused in his crops and trees was assessed by the Agricultural officer at kshs. 66,720/=. The Appellant further testified that he purchased the land from one Baraza Ngilu who had won a court case against one Munyalo Ngilu. He further stated that there is an appeal still pending in the High court where the Respondent is challenging the Lower Court decision.

6. Pw2 Katumo Musila gave evidence that essentially corroborates that of the complainant on the issue of the Respondent's cattle having grazed on the Appellant's land and destroyed food crops and trees. Pw2 did not however know how the Appellant acquired the land in question.

7. Pw3 Joseph Kilonzo Wambua an Agricultural officer assessed the damage. His evidence was that food crops and trees were destroyed. He assessed the damage at kshs. 60,710/= and produced his report in court as an exhibit.

8. Pw4 Frankline Mangi the Assistant Chief testified that he received the report of the damaged crops and even tried to arbitrate over the matter.

9. Pw5 Kiilu Kavali a village elder gave evidence that he saw the Respondent's cattle grazing on the Appellant's land which the Appellant purchased from one Baraza. Pw5 was also aware of the land dispute involving the parties herein.

10. On the Respondent's side the Respondent (Dw1) testified that the land in question is family land and the seller of the same is also a family member. That the land dispute is still pending an appeal in the High Court. He denied any trespass by his cattle and denied that any damage was caused and termed this case as a frame up. He wondered why the village elder (pw5) and his Assistant Chief (pw4) were called from outside their sub-location to come and testify instead of their area Assistant Chief or elders from their location.

11. The appeal was canvassed by way of written submissions which I have duly considered.

12. This being the first appellate court, the court's duty bound to re-evaluate the evidence on record and come to its own finding. (See **Selle –VS- Associated Boat Co. Ltd. [1968] EA 123**)

13. The Appellant's (pw1) evidence that he saw the Respondent's (Dw1) cattle grazing on the food crops and destroyed the trees was corroborated by that of pw2. Both pw1 and pw2 gave eye witness account. Pw1 and pw2 gave evidence that the cattle were driven back to the Respondent. Pw4 the Assistant Chief and Pw5 the village elder were aware of the damage caused by the Respondent's cattle to the Appellant's crops. Whether the Assistant Chief and the village elder were from the same sub-location as the land in question or not does not in any way dilute their evidence. The evidence of the Assistant chief is that he tried to arbitrate in the matter while the evidence of the village elder is that of an eye witness, whose evidence was that he saw the cattle in the farm. The Respondent's evidence that his cattle did not graze on the crops is not convincing.

14. Pw4 the Agricultural officer produced a crop assessment report. His evidence was not rebutted by any other evidence. I accept his evidence regarding the value of the damaged crops as kshs. 66,710/=.

15. The Appellant's evidence was that he purchased the land in the year 2001 and became the registered owner thereof on 15/6/2001. The matters in question arose in December 2007. His evidence fails to state when the trees were planted. At the time of the trial before the lower court in the year 2003, the Appellant conceded that there was a land dispute between the parties which was pending in the High Court. Although the Appellant's counsel later on attached a copy of a judgment in the HCC (Machakos) 24 of 2003 in his submissions, the same was not produced as part of their evidence in the Lower Court and this court cannot take the same into account at this stage as it has been irregularly placed before the court.

16. The position on the record of appeal therefore remains that there was a pending appeal before the High Court relating to the land in question. The amended plaint dated 23/4/2003 states as follows:

- ***“At all material times, the plaintiff was the owner of the land parcel No. Matinyani/Kasaini/304 and was the registered as the proprietor thereof, and was so registered as of 22/12/2001.***
- ***“On unknown dates in the month of December 2001 and particularly on 22/12/2001, the defendant unlawfully and without any probable cause negligently let his animals to trespass in the plaintiffs aforesaid parcel of land, destroying plaintiffs maize crops over a 3 acre portion of land, natural pasture spread over an area of 16 acres and the defendant also cut down 22 natural trees belonging to the plaintiff without the plaintiffs consent and/or authority.***

17. The Appellant’s claim was as the owner of the land in question. With the pending land dispute, the question of ownership was yet to be determined. It did not come out clearly from the appellant’s evidence who the occupier of which portion of the land was at the material time and what *status quo* was at the time he planted his crops on the land in question. The stay orders referred to in his evidence were not produced as an exhibit herein. The appellant admitted during cross examination that the court orders in force then was that the title deed was cancelled and the land ordered subdivided.

18. My view of the Appellant’s case is that the issue of the ownership of the land and the destruction of the crops were intertwined in such a manner that one cannot talk of the food crops and trees as separate from the land. It was through the ownership of the land that the Appellant’s other rights emanated from. The Appellant’s case is therefore distinguishable from the cited authority (**Stephen Muange Kangethe – vs- David Leshoo Kenteyia & Others 2011 eKLR**)

19. With the foregoing, I find no merit in the appeal and dismiss the same with costs.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 21st day of December, 2015

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B. THURANIRA JADEN

JUDGE