



IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 133 OF 2009

MATHEKA MULONZYA..... PLAINTIFF/RESPONDENT

VERSUS

TIKU KITHEKA DEFENDANT/APPELLANT

J U D G M E N T

1. By a plaint dated 29/11/2005, the Plaintiff/Respondent sued the Defendant/Appellant seeking the following orders:-
 - a. **That the Defendant, his agents and servants be restrained from occupying or continuing to occupy the said land.**
 - b. **An order of eviction and handing over vacant possession of the portion occupied by the Defendant.**
 - c. **Damages for trespass and loss of user.**
 - d. **Costs of the suit.**
 - e. **Further or other relief this court may deem just to grant.**
2. According to the plaint, the Plaintiff was suing as the owner and occupier of a parcel of land situate at **Mutavo village, Ngaani Sub-location, Nuu Location, Mwingi District** which was not registered but was identifiable. The Plaintiff's complaint was that the Defendant had unlawfully entered the said land and started cultivating therein.
3. The Defendant/Respondent denied the claim as per the statement of defence dated 9/2/2006. The Defendant denied having trespassed into the Plaintiff's land and accused the Plaintiff and his relatives of trespassing into the same land.
4. After a full trial, the trial magistrate found the Plaintiff's case was not proved and dismissed the same with costs.
5. The Appellant was dissatisfied with the judgment and appealed to this court on the following grounds:-
 1. **"The learned magistrate erred in law and facts in dismissing the evidence of the Appellant and dismissing his suit.**
 2. **That the learned magistrate further erred in law and facts in failing to consider or not giving sufficient weight to the evidence adduced by the Plaintiff's witnesses, and further in failing to give any reasons as to why such evidence was rejected.**
 3. **The learned magistrate further erred in fact in holding that the Plaintiff did not describe his land sufficiently when there was sufficient evidence by the Plaintiff and his witnesses which so cogently described the land and the neighbours who border it on every side.**
 4. **The learned magistrate further erred in fact and law in according the Defendant's evidence and that of his one witness, when such evidence was evasive and full of contradictions.**

5. **The learned magistrate further erred in law and fact in taking into consideration the results of the Mwingi Case No. 164 of 2005 when no evidence was placed before her by way of pleadings and judgment for had the evidence been put on record she would have(found) out that the suit land was said to be adjacent to the Appellants other land.**
 6. **The learned magistrate misapprehended the case as a result arrived at the wrong conclusion both in law and fact.**
 7. **That the learned magistrate was totally wrong in holding that the suit land and the land now occupied by the Plaintiff are 4 kilometres apart when there was no evidence to support such a finding.**
 8. **That had the learned magistrate considered the weight of the evidence before her and the submissions by counsel for the Appellant she should have found that the Plaintiff had proved his case on a balance of probabilities as the law requires”.**
6. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings – *See Selle –vs- Associated Boat Co. Ltd (1968) EA 123* where it was stated as follows:-

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs Ali Mohamed Sholan (1955), 22 E.A.C.A. 270”.

7. On the issue of jurisdiction, a Preliminary Objection was raised before the lower court on the question of territorial jurisdiction. The Preliminary Objection was dismissed vide a ruling delivered on 9/10/2006. The said ruling was not challenged on appeal and cannot be re-visited at this juncture. Suffice it to say that no prejudice was occasioned to any of the parties by the issue of territorial jurisdiction.
8. Another issue raised is whether the Magistrate’s Court had jurisdiction to entertain the suit in view of the provisions of the **Land Disputes Act. Section 3 (1) of the Land Disputes Act No. 18 of 1990** states as follows:-

“Subject to this Act, all cases of a civil nature involving a dispute as to-

- a. **the division of, or the determination of boundaries to land, including land held in common;**
- b. **a claim to occupy or work land; or**
- c. **trespass to land,**

Shall be heard and determined by a Tribunal established under section 4.”

The **Land Disputes Tribunal** had no jurisdiction to deal with this matter as it touched on the issue of ownership of land.

9. The Appellant, **Mathenge Mulonzya** testified (PW1). His evidence was that he was born in 1938 and inherited the land in question from his grandfather. That the land is ancestral land which has been his family property for about seven generations and contains the families’ burial site. The Appellant described the land as very big and stated that the same is fenced and is located in **Ngaani Sub-location**. According to the Appellant’s evidence, the Respondent is not a member of their family and it is not known why the Respondent has entered the said land. That the Respondent has no right to the land and should be evicted. The Appellant further testified that the Respondent came from **Kitui area** which is some miles away (from the suitland).

10. PW2 **Kavoi Muthuka** who stated that he was born in the year 1934 and is a cousin and a neighbour to the Plaintiff gave evidence that the Respondent is the one who had trespassed into the Defendant's family land. PW2 named himself and three other neighbours as the people whose land borders the Appellant's and stated that the Respondent is not one of the neighbours.
11. The Respondent, **Jonah Tiku Kitheka** testified. (PW1) stated in his evidence that his land is about 4 km away from the Appellant's land. The Respondent stated that he purchased the land in question in the year 2003 from the **Ngunze family** after having entered into an agreement that was signed by all the parties and witnessed by two people in the presence of the area chief. The Respondent then proceeded to put up a house on the land and started grazing his animals on the land. That the Respondent sued the Appellant in **Mwingi SRMCC 164/05** for trespassing on the said land and cutting down trees.
12. The evidence adduced by the Respondent was supported by that of DW2 **Philip Musembi** who testified that he sold the land in question to the Respondent. DW2 described himself as a resident of **Nuu Location** in **Mwingi** where the Appellant and the Respondent hail from and stated that the chief, the assistant chief and the neighbours witnessed the sale.
13. The evidence on record boils down to that of the Appellant and his cousin (PW2) and on the other hand, the evidence of the Defendant and his witness (PW2). The seller of the land, the village elders, the assistant chief and the chief and the neighbours said to be aware of the position on the ground were not called to testify. No expert was called as a witness.
14. The Appellant simply described the land as follows: - "on the lower side is a neighbour called **Kavoi**, there is a hill on the one side. The boundary goes alongside the hill, crosses the river and alongside the opposite hill." The hills are not named. PW2 described the neighbours as **Kavoi Muthoka** on the **West**, **Mutie** on the **East**, **Kilonzo Mbate** on the **East** as well, **Kitavi Mbolo**, **Syengo Kimonyi** and also **Mutua Mbuvi**."
15. The size of the land is not mentioned by the Appellant although the Respondent described the land as about 20 acres. A surveyor's report could have easily verified some of the issues herein. It's little wonder that the trial magistrate found that there was a possibility that the Appellant and the Respondent were talking about two different parcels of land. It's difficult to tell if the land in question abutts the Appellants land or not.
16. Although both parties made reference to a case **No. SRMCC Mwingi 164/05**, the pleadings, proceedings or judgment were not produced. Although it can be discerned from the evidence on record that the Respondent had sued the Appellant for cutting down trees, without the production of any documents, it is not possible to tell what the outcome of the case was.
17. The judgment appealed from was. The appeal was filed on 30/7/2009 and was therefore filed within time. However, as analyzed about, although the land has not yet been subjected to the adjudication process, from the Appellant's description of the land, it is not possible to identify the land with certainty. In my view even the plaint fell short of giving a proper description of the land.
18. The Appellant failed to prove his case on a balance of probability. The appeal has no merits and I dismiss the same with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 29th day of **September** 2014.

B. THURANIRA JADEN

JUDGE