



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 28 of 2002

1. MBILIKII NZUKI

2. RONALD MOKI MBILIKII ..... APPELLANTS  
VERSUS

SAMMY MUSYOKA NZAMBA ..... RESPONDENT

*(Being an appeal from the Judgment/Orders of the Senior Resident Magistrate Hon D.O. Ondabu (SRM) in Mwingi Senior Resident Magistrate Case No. 43 of 1997)*

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*(Before B. Thurania Jaden J)*

**J U D G M E N T**

The Appellant, **Mbilikii Nzuki** and **Ronald Moki Mbilikii** who are father and son respectively were sued in the lower court by the Respondent **Sammy Musyoka Nzamba**.

The Respondent claimed Kshs.5,000/= being the value of portion of his fence that he claimed that the Appellants damaged on 17/5/1996. The Respondent also claimed a further Kshs.24,000/= being the value of grass which was grazed by the Appellants' cattle on the Plaintiff's land plus costs of the suit. Each of the Appellants filed a written statement of defence denying the Respondent's claim.

After hearing the case, the trial magistrate entered judgment in favour of the Respondent at a sum of Kshs.102,200/= plus costs and interests.

The Appellants were dissatisfied with the said judgment and appealed to this court on several grounds which can be summarized as follows:-

Ø **The Respondent had no locus standi to sue Appellants as the Respondent was not the owner of the land in question.**

Ø **The Respondent's suit was incompetent for failure to obtain a letter of consent from the Land Adjudication Officer as required under section 30 of the Land Adjudication Act Cap 284 Laws of Kenya.**

Ø **The judgment was against the weight of the evidence.**

**Annie W. Thoronjo & Company Advocates appeared for the Appellants while the firm of Mwangangi & Company Advocates appeared for Respondents. The appeal was canvassed by way of written submissions which I have duly considered.**

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.**

The Respondent testified before the lower court that on 17/5/1996 he received information that the Appellants had destroyed his fence and grazed their cattle on his land. The Respondent described the land in question as 5¾ acres in size covered by about one thousand metres of a timber fence. The Respondent calculated the value of the grass at Kshs.2,000/= per month and stated that the cattle had grazed on the land for two years, but gave a total figure of Kshs.24,000/=. The Respondent gave the value of the fence at Kshs.5,000/=.

The Respondent's evidence was that he bought the parcel of land in question from one **Kalekye Muthangu** and her son **Musyoka Muthangu** in the year 1993. The son to the seller PW3 (**Musyoka**) gave evidence that he witnessed the fence being destroyed and that he saw the cattle eating the grass.

PW2 **Alexander Mulingi Munyasya**, the area assistant chief gave evidence that confirmed that he received the report regarding the destroyed fence and grazing of the grass but that he referred the matter to the chief after the Appellants failed to appear before him.

PW4 **Francis Ngusu Kitere** an agricultural officer who assessed the value of the damaged property gave the size of the land as 3½ acres. He valued the damaged fence at Kshs.1,500/=. the grass at Kshs.4,800/= and the damages due to soil erosion at Kshs.20,000/= for one year.

At the close of the Respondent's case, the lower court fixed a hearing date for the Appellants' case. The Appellants and their advocate did not turn up on the said hearing date. The Respondent's counsel begged the court's leave to put in the letter of consent from the Land Adjudication Officer stating that it was discovered that the land was under adjudication. The Application was allowed. The lower court subsequently proceeded to write the judgment.

The trial magistrate in his judgment concluded that the Respondent had proved his case on balance of probabilities and entered judgment in favour of the Respondent for Kshs.3,000/= for the damaged fence, stating that the fence was damaged twice. The Agricultural Officer (PW4) had assessed the value of the fence at Kshs.1,500/=.

The trial magistrate assessed the value of the grazed grass at Kshs.4,800/= multiplied by four years and arrived at the figure of Kshs.19,200/=. The damage by the soil erosion was assessed at Kshs.20,000/= per year multiplied by four years, coming to a total of Kshs.80,000/=. The total came to Kshs.102,200/=. Judgment was entered in favour of the Respondent against the Appellant at Kshs.102,200/= for cost and interests.

The Respondent's case was for **“recovery of Kshs.5,000/= plus 24,000/= being the value of the Plaintiff's fence and grass destroyed and grazed....”** Although the Respondent's case against the Appellant was not a land dispute, **section 2** of the **Land Adjudication Act** defines **“land”** to include things growing on land and buildings and other things permanently affixed to the land.

The consent of the Land Adjudication Officer was therefore required as provided for under **section 30 (1)** of the **Land Adjudication Act** which stipulates as follows:-

**“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.”**

Section 30 (2) provides as follows:-

**“Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.”**

The Respondent produced a letter of consent by the District Land Adjudication Officer, **Mwingi District** dated 12/9/2001 giving consent to the Respondent to sue for damages in respect of land parcel No. **138 Ngiluni Adjudication Section**. The letter of consent was however not from **Ngiluni Adjudication Section**.

Section 5 (1) of the **Land Adjudication Act** provides as follows:-

**“the adjudication officer shall by notice either-**

**(a) establish adjudication sections within the adjudication area;**

**(b) establish the whole adjudication area as an adjudication section.”**

The letter of consent is purported to be from the District Land Adjudication Section Officer, **Mwingi District**. If per chance the letter of consent covered the **Ngiluni Adjudication Section**, that ought to have been clarified by way of evidence. It is also noted that the consent letter was improperly produced by the advocate which is tantamount to giving evidence from the bar. It is not clear how the **“Notice of establishment of Land Adjudication section, Mui Location, Nuu Division, Mwingi District”** was produced during the trial. The Respondent in his evidence did not identify the land in question by the land parcel number given in the consent letter produced.

The Respondent’s suit was therefore incompetent for failure to obtain the consent of the **Ngiluni Land Adjudication Section**.

The Appellants have argued that the Respondent had no *locus standi* to institute this suit as he was not the owner of the land.

The seller of the land **Kalekye Wambua**, was not called to testify. No sale agreement was produced by the Respondent. The seller of the land is the one who could have shed light to the court in regard to the Respondent’s rights whether as owner, occupier, licensee etc. The Respondent’s evidence failed to establish whether he had the *locus standi* to institute this suit.

With the foregoing, the Respondent’s claim did not have any legs to stand on. The appeal is therefore successful and is allowed with costs.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this **16<sup>th</sup>** day of **May** 2013.

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**JUDGE**