



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 96 of 2003

MWANIA MUNYWAAPPELLANT

VERSUS

1. KIOKO MUNYWA
2. MUINDE MBUVI

3. MULI MUNYWA.....
RESPONDENTS

JUDGMENT

1. This is an Appeal arising from the judgment and decree of the Machakos Resident Magistrate, the **Learned G. Ngenye**, in RMCC No. 907 of 2002. In that suit, the Respondents herein sued the Appellant for liquidated damages of **Kshs. 13,880=** plus costs and interests. The liquidated damages all arise from costs the Respondents claimed to have incurred to have an underlying dispute with the Appellant resolved.

2. The underlying dispute was over a pathway which gives access to the homes of the Respondents. The Respondent claimed that the Appellant had unlawfully closed the public path leading to their homes. To gain access to their home, the Respondents had to report the matter to the local administrative officers and attend numerous meetings called before elders. Finally, the dispute was resolved in the Respondent's favor. However, the Respondent filed Machakos RMCC No. 97 of 2003 with the sole purpose of recovering the expenses he had incurred to have the matter resolved by the administration officials and the elders.

3. In the lower court, the Appellant filed a defence which can accurately be described as a general denial. The suit proceeded to full trial.

4. The Respondents called three witnesses including **Kioko Munywoki** ("*Mr. Munywoki*") who was the first Plaintiff in the case. **Mr Munywoki** produced receipts under three categories:

a) The Respondents' subsistence during the various deliberations;

b) Travelling expenses for witnesses;

c) Allowances and subsistence for elders

5. At the trial, the Respondents also produced proceedings and minutes of the proceedings – although some are in **Kikamba** and have not been translated. The Appellant testified on his own behalf and did not call a witness.

6. At the end of the trial, the Learned Magistrate concluded as follows:

Therefore, it is obvious that the dispute was about the closed subject path and the defendant was fully involved in deliberating culminating into his unblocking of the said path. He never proved a case that he had sole right to the path. It was public path to which other public members including the plaintiffs were entitled to use. He had no authority to block. Effectively he occasioned the nuisance which led to the incurring of the expenses by the plaintiffs, being the subject of this claim. In a nutshell, therefore, [the] Defendant's defence is dismissed in its totality. I enter judgment for the plaintiffs against the defendant for the sum of **Kshs. 13, 880/=** plus costs and interests.

7. Aggrieved by the judgment of the Learned Magistrate, the Appellant preferred the present appeal. In his Memorandum of Appeal, he has outlined **five grounds** of appeal. In my view, they all boil to a singular question: was it open to the Learned Magistrate to award the liquidated damages comprised of out-of-pocket expenses incurred in settling the case out of court in the circumstances of this case?

8. I have answered this question in the negative. I have reached that conclusion on two grounds. First, if you look at the Plaint, this was not a suit asking for a declaration that the blocking of the path was illegal or compelling the opening of the path or injuncting the Appellant from blocking the path. That is not one of the prayers in the suit. That dispute had already been resolved in favor of the Respondents out of Court. This was a suit solely to recover expenses which the Respondents had incurred in pursuing that out of court settlement. The question that arises then is if it is proper to award such compensatory damages.

9. I think it is not proper to award such compensatory damages in circumstances where the out of court settlement was not done pursuant to a court order. Costs for pursuing litigation can only be awarded by a court when the litigation itself was done in Court or under the Court's supervision or pursuant to an express agreement of the parties. While in Kenya we follow the "*English Rule*" of loser pays in litigation, this does not necessarily apply to efforts to settle disputes out of Court.

10. There are many reasons why this position makes sense. First, awarding compensatory damages of the kind awarded here would have the effect of dis-incentivizing parties to settle matters out of court. Second, there is simply no way of controlling such expenses and determining whether they are truly consequential to the underlying cause of action. In court, the losing party pays the costs which are statutorily defined. It does not include such items as "*subsistence*" or travelling allowances for the litigant who prevails. Such out-of-pocket expenses are generally non-recoverable even in a suit before the Court even though one can say they are consequential upon the underlying cause of action.

11. In addition, the suit as was framed and tried neither disclosed nor proved any cause of action. The suit prays for liquidated damages of **Kshs. 13,880/=** being "*expenses incurred on transport and substance and elders allowances*" as per the particulars of special damages. With respect, that is not a cause of action known to law. As I said at the beginning of this analysis, this was not a suit to compel the Appellant to unblock the path nor to restrain him from blocking it in the future. It is simply a suit to recover monies expended in getting him to pay expenses associated with the dispute. In my view, such a cause of action does not exist and hence the suit was not maintainable in law. One can analogize the Respondents' claim to an advocate whose party has prevailed in a trial filing a Bill of Costs. In that case, such an action is allowable only because it is statutorily provided for in the Advocates Act.

12. The result is therefore that I will allow this appeal; set aside the judgment and decree of the lower court dated **18/09/2003** and award the costs of this appeal to the Appellant.

DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.

J.M. NGUGI
JUDGE