



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

Civil Appeal 43 of 2011

JOHN MUTHIKE NJIRUAPPELLANT

VERSUS

JEPHTER NJAGWA..... RESPONDENT

(AN APPEAL FROM THE RULING DELIVERED ON 10TH MARCH 2011 BY HON. D.A. OCHARO - SRM AT WANGURU SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE NO. 76 OF 2010)

J U D G M E N T

The Appellant (John Muthike Njiru) had in the lower Court sued the Respondent (Jepheter Njagwa) over a plot No.22 in Tebere section of Mwea division.

The matter proceeded to full hearing and the learned trial Magistrate dismissed the claim.

He has now appealed against that Judgment raising five grounds;

1. That the learned Magistrate erred in fact and in law in failing to give reasons how he arrived at his decision.
2. That the learned Magistrate erred in fact and in law in failing to uphold that the plot in dispute is the legal property of the Appellant.
3. That the learned Magistrate erred in fact and in law in holding that the Appellant has no cause of action against the Respondent.
4. That the learned Magistrate erred in fact and in law in failing to uphold the evidence adduced by the Appellant.
5. That the learned Magistrate erred in fact and in law in dismissing the Appellant's suit with costs.

This being a first appeal this Court has a duty to scrutinize and reevaluate the trial evidence and arrive at its own decision. I am guided by the case of *NAMUSISI & OTHERS –V- NTABAAZI [2006]1 E.A. 247*

(SCU).

The Appellant was the only witness who gave evidence on behalf of the Plaintiff. He stated that he owned the plot No.22 which was allocated to him by the Manager of National Irrigation Board and Kirinyaga County Council. And in 2009 the Defendant entered onto his said plot and started cultivating it. He produced a temporary allocation letter dated 21/9/2001.

The Defendant testified and called two witnesses. He stated that he works on plot No.23 which belongs to Sarah Wanjiku Kimani who testified as witness No.3. This plot he said borders plot No.22. He denied ever utilizing plot No.22.

Defence witness No.2 stated that he is a lessee of plot No.22 which belongs to the Plaintiff. He said the Defendant cultivates plot No.23 which belongs to Sarah Kimani. In cross-examination this witness said there is a construction and trees on his plot. There were also trees on plot No.23.

The 3rd defence witness Sarah Wanjiku Kimani stated that she was the owner of plot No.23 which is cultivated by the Defendant. She also said there is a boundary between the plots.

At the time of the hearing of the Appeal the Appellant submitted that he appealed because after the Judgment the Respondent went and cut his trees and uprooted beacons. He further said the Respondent was given his plot. It was only the Manager and Committee of National Irrigation Board which could decide the case and not the Court.

The Respondent asked the Court to dismiss the Appeal as the lower Court made the right Judgment.

The Appellant's prayer in his plaint was this;

"A permanent injunction restraining the Defendant, his agents and/or servant from entering, cultivating or interfering with the Plaintiff's quiet enjoyment of his plot No.22 Tebere Mwea Division".

From the evidence that was adduced it's clear that there is no dispute over the ownership of the plot No.22. It belongs to the Appellant. The 2nd Defence witness has even leased that plot from the Appellant herein. What has also come out is that an adjacent plot No.23 belongs to the 3rd Defence witness who has placed the Respondent there as a caretaker.

The Appellant's contention is that the Respondent moved into his plot No.22 and cultivates it. Besides his word of mouth there was no evidence to confirm that. There are several neighbours there who could have come to confirm that the Respondent cultivates plot No.22. The Defendant called 2 witnesses who indicated that the Respondent cultivates Plot No.23. The 2nd Defence witness infact says he cultivates plot No.22 leased to him by the Appellant himself.

Finally the Appellant submitted that it was only the Manager and committee of the Irrigation Board and not the Court that could have decided on this matter. Fair enough, but who filed the suit in Court? Was it not the Appellant who took the matter to Court?

I find no fault in the decision of the learned trial Magistrate which I will not interfere with. The result is that the Appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED AT EMBU THIS 6TH DAY OF JUNE 2012

H.I. ONG'UDI

JUDGE

In the presence of:

Both parties present

Njue – C/c