



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 38 of 1999

NZOMO MWANGANGI APPELLANT

VERSUS

MALII MUSAVA RESPONDENT

J U D G M E N T

This is an appeal from the decision of the subordinate court in **Kitui Civil Case No. 49 of 1996**. In the plaint dated 3rd June 1996, it was averred under paragraph 2 of the plaintiff that:-

2. The plaintiff's claim against the defendant is recovery of Kshs.9,600/= being the award by the Land Disputes Tribunal on or about 2/6/95 being the value of sisal plants uprooted by the defendant from the plaintiff's shamba, full particulars whereof are known to the defendant.

In the same plaint the plaintiff asked to be granted for the following reliefs:-

- 1. Kshs.9,600/= as aforesaid.**
- 2. Interest at court rates.**
- 3. Costs of this suit.**

The allegations in the plaint were denied in a defence dated 21st June 1996. It was denied that the defendant had uprooted sisal plants, and that there was any decision of the Tribunal assessing the value of the allegedly destroyed sisal plants.

Needless to say, the allegations in the plaint had to be proved by the plaintiff through evidence to be tendered at the trial.

At the trial, plaintiff called two witnesses. These were the plaintiff himself, and another; who was a village elder **Nyamai Ngao** (PW2). The defendant testified and called one witness **Mwangangi Nzilulu**, as a defence witness.

After hearing the evidence, the learned magistrate delivered a one page judgment. He relied heavily on findings of the Land Disputes Tribunal dated 2/6/1995, which was produced as exhibit by the plaintiff/respondent, and found in favour of the respondent.

The appellant, being aggrieved by the decision of the subordinate court, has appealed to this court on five grounds. This counsel **Wambua Kilonzo & Company** filed submissions on 16/12/2009. The respondent

through counsel **M/s Kalili & Company** also filed submissions on 11/5/2010.

I have perused the evidence and judgment of the subordinate court and the written submissions.

This is a matter in which **Waweru J** had given a judgment date for 01/10/2010. However, in December 2011 the file was placed before me, and parties' counsel agreed that I should deliver the judgment.

I will start by reminding myself that this being a first appeal, the court is required to reconsider the evidence afresh – See **Selle –vs- Associated Boat Co. Ltd (1968) EA 123**.

I have re-evaluated the evidence afresh. This appeal will succeed for two reasons. Both reasons relate to the proof of the allegations on the balance of probabilities. In civil cases the burden is always on the plaintiff to prove his or her case on the balance of probabilities – See **Kirugi & Another –vs- Kabiya & 3 Others (1987) KLR 347** wherein the Court of Appeal stated that the burden is always on the plaintiff to prove his case and such burden is not lessened even if the case is heard by way of formal proof.

The first reason relates to the proof of the allegation that the appellant uprooted the sisal plants on the boundary of the land of the respondent. Both the respondent and his witness did not say how or when the appellant uprooted the sisal plants. They did not say how they came to know that he uprooted the sisal plants. This court cannot act on perceptions. The respondent was duty bound to state how he was convinced or how he came to know that the appellant uprooted his sisal plants and provide the supporting evidence to the court. He did not. This means that he did not prove that his sisal plants were uprooted by the appellant.

The second reason, is the failure of the plaintiff to prove the amount of Kshs.9,600/= as the value of the allegedly uprooted sisal plants, and how that value was arrived at. The Land Tribunal's decision relied upon by the respondent, just contains the opinion of the elders. It did not have the evidence that supports that valuation. In my view, the valuation of plants or agricultural plants, would need to be supported by the evidence of an agricultural economist trained in the valuation of plants or crops. There being no such evidence from the expert, my conclusion is that the respondent failed to prove the value of the allegedly uprooted sisal plants on the balance of probabilities.

For the above reasons, the appeal will succeed. I allow the appeal and set aside the judgment of the subordinate court. I award the costs of the appeal, as well as the costs of the proceedings in the subordinate court, to the appellant.

Dated and delivered at Machakos this 26th day of **November** 2012.

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George Dulu
Judge

In the presence of:

Mr Obare holding brief for Wambua Kilonzo for Appellant

N/A for respondent
Nyalo – Court clerk