



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Appeal 3 of 2009

ISMAEL OLE LOBULU... ..APPELLANT
VERSUS
MUNGA KATAKA DZOMBORESPONDENT

RULING

This is an appeal from the judgment of Hon. P. M. Kiema which was delivered on 18th December 2008 in Kilifi Civil Case No. 311 of 2008.

The appellant had sued the respondent for the sum of Kshs. 17,110/- being expenses and costs incurred by the appellant while defending a land dispute between himself and the respondent in the year 2002 to 2008. The sum was made up of:-

- (a) costs for putting a boundary of the shamba, being 7,800/-
- (b) compensation for burnt trees – Kshs. 1,600/-
- (c) expenses spent at the chief's office – Kshs. 1,800/-
- (d) traveling tickets for attending court 5,400/-
- (e) court fees for obtaining proceedings Kshs. 510/-

The appellant also claimed from the respondent for the loss of use of his shamba at the rate of Kshs. 25,000/- per year from 2002 to 2008 and loss of duty while attending a court case which was later dismissed – being 500/- per day for 40 days. The matter proceeded on formal proof after respondent failed to enter appearance or file defence.

At the hearing, the appellant told the trial magistrate that respondent had invaded his plot and cultivated on ½ acre and he demanded to be paid. He produced documents to support his claim. The trial magistrate considered the evidence and held as follows:

“...the plaintiff has failed to prove on a balance of probability, the prayers for loss of use of his shamba (prayer (b)) and loss of business (prayer C). The documents produced do not show that plaintiff is entitled to the sum claimed.”

The trial magistrate found no evidence to support claim of Kshs. 25,000/- per year as loss of use of the shamba or loss of business at 500/- per day – saying:-

“No documents were produced. The plaintiff cannot expect the court to award damages based on speculation”

However for the sum of Kshs. 17,100/- the trial magistrate found the same proved and entered judgment in appellant's favour.

In his memorandum of appeal, the appellant states that the trial magistrate was:

- a) biased
- b) Erred in law and fact by finding that he had not proved the loss of business and use of the shamba.
- c) Erred by rejecting the appellant's evidence and the supporting documents

- d) Failed to adequately consider the appellants evidence
- e) Misdirected himself in holding that the appellant was not the lawful owner of the plot
- f) The judgment contradicted the entire evidence adduced by the appellant

At the hearing of the appeal, the appellant submitted that the trial magistrate gave a very low award taking into account only four days instead of 24 days.

Further that the respondent had admitted using his shamba and requested for time to harvest before vacating it, yet the court never awarded anything for that period of use and which he refers to as mesne profits. It was his contention that the trial magistrate misdirected himself.

According to the pleadings presented before the lower court, the sum of Kshs. 17,110/- was made up of various sums incurred by the appellant as a result of the dispute between him and the respondent – and indeed this is what was supported by the documents appellant produced at the trial.

Significant finding in the criminal case where respondent had been charged was that the trial magistrate was not concerned with who owned the shamba, but rather the destruction of the trees thereon.

From the evidence which was presented at the trial court, there was nothing to support the claim on loss of user at the rate of 25,000/- per year or loss of business at the rate of 500/-. My finding is that the learned trial magistrate duly considered the evidence tendered and made a proper finding – there was no error in fact or law – the figures the appellant pegged his claim on prayer (b) and (c) seem to have simply been plucked from the abacus and the trial magistrate was being asked to stamp an approval barely on speculation.

The upshot is that the appeal has no merit and must fail – the same is dismissed, with costs to the respondent.

Delivered and dated this 24th day of **February 2010** at Malindi.

H. A. Omondi

JUDGE