



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 53 of 2005

ANDREW BAINGARU APPELLANT

VERSUS

M'IKIUGU M'MUGAMBI RESPONDENT

***(Being an appeal against the judgment of Hon. G. Oyugi R.M. in Tigania RMCC No. 8 of 2004
delivered on 7th June 2005)***

JUDGMENT

This appeal is filed in respect of the judgment by the lower court whereby the respondent had sued the appellant seeking judgment for special damages of Kshs. 1,700/=. The respondent alleged that the appellant had uprooted 14 eucalyptus trees and ten euphobia plants. In the plaint, he valued each eucalyptus trees to be at Kshs. 100/=. In respect of the euphobia plants, he assessed it to be Kshs. 30/=. In evidence, the plaintiff stated that the defendant uprooted 14 of his gum trees. He stated that the appellant uprooted the trees on 12th January 2004 but later on being cross examined by the defendant stated that the uprooting took place on 26th but he was unable to tell the month or the year. Further, in his evidence, he stated that the euphobia plants was costing Kshs. 12/= each. In respect of the eucalyptus trees, he said that each was fetching Kshs. 120/=. This, as can be seen, contradicted his pleadings. His evidence was supported by two of his sons. PW2 who had been sitting in court when the respondent adduced evidence, stated that the defendant uprooted the trees on 26th December 2003. He then stated that they collected 9 of the trees that had been uprooted and were unable to get any others. He did not mention how many plants of the euphobia that were uprooted. PW3 who was sitting in court when plaintiff gave evidence also said that the defendant uprooted 9 trees. He said that he later learnt that the respondent had collected further 5 trees that had been uprooted. He too said that the appellant uprooted the trees on 26th December 2003. In the middle of the hearing of the respondent's case, an application was made by the respondent to amend the plaint. The amendment that was sought was to cancel out the date of uprooting the trees from 12th January 2004 to 26th December 2003. Although the respondent was given leave to amend his plaint, he never did file the amended plaint as required nor did he pay for the amendment. Having failed to do so, he cannot rely on the draft amended plaint in this case. The lower court erred to have considered the draft amended plaint and to have entered judgment for the

respondent as prayed in that amended plaint. PW4 was an agricultural officer. He was approached by the respondent on 5th February 2004 to do a report on the damage caused to the respondent's trees. He counted 14 eucalyptus trees whose value he stated was Kshs. 1,400/= in total. When one calculates that amount, it comes to Kshs. 100/= for each tree. He further stated that there were 410 euphobia trees which he placed the value at Kshs. 300/=. Again a simple calculation shows that the value of each euphobia was Kshs. 30/=. That evidence although supported the plaint of the respondent contradicted entirely the evidence of the respondent/plaintiff himself. As it has been stated before, he gave different value to the trees and to the euphobia. The appellant, it should be stated, filed a defence denying the respondent's claim. In his evidence, he stated that there had been a boundary dispute between him and the respondent. At some time before the alleged incident of uprooting trees, he had complained before the panel of elders that the respondent had uprooted his beans. The matter was arbitrated and in the end it was found that the respondent had encroached the appellant's land and had uprooted his beans. According to the appellant, the respondent was fined by the elders 6 bags of beans. Up to the date when the appellant gave evidence, the respondent had not paid that fine. The appellant called the elders that had arbitrated over the dispute and they all stated that there had been a boundary dispute which was resolved in favour of the appellant. The learned magistrate on receiving that evidence found that the respondent had proved his case on a balance of probability and entered judgment for Kshs. 1,700/= special damages and costs as prayed in the amended plaint. The appellant was aggrieved and has filed this appeal. In considering those grounds of appeal, I also confirm that I have read the written submissions by the parties. The appellant in the first ground stated as follows:-

1. ***That the learned trial magistrate erred in fact and in law in finding that the respondent who was the plaintiff in the lower court had proved his case against the appellant on a balance of probabilities which was contrary to the weight of the evidence adduced at the trial.***

As it can be seen, the appellant is submitting that the respondent did not prove his claim on a balance of probability. I am in agreement with him. This is because the plaintiff's plaint stated that the trees were uprooted on 12th January 2004. When the respondent gave evidence, at first he stated that they were uprooted on that day but later said that they were uprooted on 26th but failed to give the month or year. PW2 and 3 contradicted the respondent by saying that the trees were uprooted on 26th December 2003. That contradiction was significant enough to lead the court to find that the respondent had not proved his case on the required standard of proof. What is interesting is after the respondent gave evidence, he then sought to amend his plaint to cancel the date of uprooting from 12th January 2004 to read 26th December 2003. As said before, that amended plaint remains in the draft form because it was never filed in court. It remained attached to the chamber summons seeking leave to amend the same. Further, there are serious contradictions in respect of how many trees were recovered after the uprooting. The plaintiff only talked of 14 trees whilst PW2 and 3 talked of 9 trees. Indeed, PW2 is on record as having stated:-

“We did not get the others (trees).”

PW2 and 3 were unable to state how many, if so, euphobia plants were uprooted. In fact, the evidence relating to the number of euphobia plants uprooted was given by the agricultural officer, PW4. On the whole, there is no clear evidence on the number

of trees uprooted and there is no clear evidence on the actual value of those trees. For that reason, the appellant's ground number 1 does succeed. On ground number 2 and 3, the appellant stated as follows:-

2. ***That the learned trial magistrate erred in fact and in law in allowing the respondent's witnesses namely PW 2 and PW3 to testify in the trial when the said witnesses had been present in court when PW1 was testifying. PW3 was actually present in court when both PW1 and PW2 testified.***
3. ***That the learned trial magistrate erred in fact and in law in attaching undue weight to the evidence adduced by PW2 and PW3 in arriving at the decision that the respondent proved his case against the appellant yet the two witnesses had contradicted themselves in every material particulars and were also present in court when PW1 gave his testimony.***

Those two grounds relate to the fact that PW2 and 3 were seated in court whilst the respondent adduced his evidence. Indeed, the proceedings of the lower court indicate that they were seated in court. In my view, the learned magistrate should not have placed high reliance on that evidence in view of that. Looking at that evidence of PW2 and 3, it is clear that they were doing damage control of the respondent's evidence when they stated that the uprooting took place on 26th December 2003. It was necessary for the learned magistrate to have noted that. I therefore find that the appellant's grounds number 2 and 3 do succeed. On ground number 4, the appellant stated as follows:-

4. ***That the learned trial magistrate erred in fact in relying on plaintiff's exhibit No. 1 the assessment report presented to court by PW4 in determining the value of the allegedly damaged trees when the said report had been prepared more than two months since the date of alleged uprooting without considering that the young trees of about 3 feet in height are extremely perishable.***

In view of the fact that it is not clear exactly when the uprooting took place, it is difficult to state with certainty the passage of time between the uprooting and the report of the agricultural officer. In any case, the appellant in cross examining the agricultural officer did not question him on the passage of time and the effect, if any, to the plants that had been uprooted. That ground has no merit. Ground 5 of the appellant is as follows:-

5. ***That the learned trial magistrate erred in fact and in law in failing to take into account the fact that the respondent's and the appellant's shambas are not demarcated and that it is only the appellant's witnesses who had shed some light in the case on the issue of ownership of the disputed boundary between the appellant's and respondent's shamba and that the "Council of elders" found in the appellant's favor.***

In respect of that ground, I am in agreement with the respondent that the issue of boundary dispute or of whether the farm of the respondent and the appellant was demarcated was not before the lower court during the trial. It was not part and parcel of the pleadings. This ground also fails. In the end, however, I make a finding that the plaintiff's case in the lower court was not proved on a balance of probability as required by rules of Evidence. I have given my reasons for finding so in this judgment. Therefore, the judgment of this court is that the judgment of the lower court by G. Oyugi RM in RM Court Tigania Civil Case No. 8 of 2004 is hereby set aside and is substituted with an order dismissing the respondent's claim in the lower court. The costs of the lower court case and of this appeal are awarded to the appellant.

Dated and delivered at Meru this 19th day of March 2010.

MARY KASANGO
JUDGE