REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 71 of 2000

ISAAC KIMANI KAMAU….……APPELLANT

VERSUS

WILLIAM MUNYUNGU CHEGE...…….RESPONDENT

JUDGMENT

This is an appeal against the judgment of the Senior Resident Magistrate delivered on 16th June 2000 in Molo SRMCC No. 77 of 1993 in which he entered judgment for the respondent with costs as prayed in the plaint and ordered the eviction of the appellant from the suit land.

In their submissions counsel for the respondents challenged the competence of the appeal on the ground that contrary to **Order 3 Rule 9A** of the **Civil Procedure Rules** M/S Karanja Mbugua & Co. Advocates filed this appeal without first obtaining leave of court. M/S D. K. Otwere Advocates who had acted for the appellant in the lower court gave their consent to M/S Karanja Mbugua & Co. Advocates to replace them on 30th June 2000 while M/S Karanja Mbugua & Co. Advocates had already filed this appeal the previous day. In the circumstances they contended that this appeal is bad in law and should be struck out.

I find no merit in this contention. **Order 3 Rule 9A** of the **Civil Procedure Rules** is intended to protect advocates who have acted in cases upto judgment from being defrauded of their fees. An appeal arising from the judgment in such a suit constitutes a different action which entitles the parties to instruct counsel of their choice. If either of the parties decides to retain counsel who represented him in the lower court, he will have to pay them fees for the appeal. In the circumstances I find that M/S Karanja Mbugua & Co. Advocates did not require leave or consent from the appellant's previous advocates for them to file this appeal. I therefore find the appeal competent and accordingly overrule the preliminary objection raised by counsel for the respondent.

On the merits of the appeal counsel for the appellant submitted that the claim in the suit giving rise to this appeal having been one of trespass the Senior Resident Magistrate's court had no jurisdiction to hear it. In their opinion the matter should have been filed before the

area Land Disputes Tribunal in accordance to **Section 3(1)(c)** of the **Land Disputes Tribunal Act No. 18 of 1990**. They cited the case of **Muhia Vs Mutura [1999] 1 EA 2002** in support of that submission. Even if that court had

jurisdiction they urged me to find that the learned trial magistrate had failed to write judgment as required by **Order 20 Rule 4** of the **Civil Procedure Rules** and allow the appeal. They said the learned trial magistrate failed to make findings on the prayers for general damages for trespass and mesne profits.

For the respondents M/S Waiganjo and Co. Advocates referred me to **Section 2** of the **Land Control Act** which defines agricultural land as being land outside a municipally, township or trading centre and submitted that in the absence of any evidence that the suit land was not within Molo Township I cannot make a finding that the matter fell within the jurisdiction of the Land District Tribunal. They therefore urged me to dismiss the appeal with costs.

I have considered these submissions and read the lower court record. **Section 107** of the **Evidence Act** requires a party who alleges a fact to prove it. In this case it is the appellant who is alleging that the suit land is agricultural land and that the trespass claim in this matter should have been filed before the

area Land Disputes Tribunal. They have therefore the burden of proving that allegation.

I agree with counsel for the respondent that there is nothing on record to show that the land in dispute in this case was not within Molo Township. In the circumstances I find that the appellant has failed to prove the allegation that the trial court had no jurisdiction to entertain the matter.

Whereas I agree with counsel for the appellant that the learned trial magistrate did not write a proper judgment as required by **Order 20 Rule 4** of the **Civil Procedure Rules**, I nevertheless find that that omission has not caused a miscarriage of justice in this case. The respondent had prayed for an award of general damages and mesne profits for trespass to his land and the eviction of the appellant. The learned trial magistrate only ordered the eviction and said nothing about his claim for general damages. The respondent has not cross-appealed against that failure to determine his claim for general damages. He appears to have been satisfied with the eviction of the appellant that is why I find that the learned trial magistrate's omission to determine the damages claim has not occasioned a miscarriage of justice. Consequently I dismiss this appeal with costs.

DATED and DELIVERED this 28th day of April, 2010.

D. K. MARAGA
JUDGE.