



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Appeal 213 of 2007

**(BEING AN APPEAL FROM ORIGINAL JUDGMENT AND DECREE IN KILGORIS
SRMCC NO. 171 OF 2003 - W.N. KABERIA, RM)**

BETWEEN

OLOINYALA TALEWO APPELLANT

VERSUS

NUUYA OLE KIRONKAI RESPONDENT

JUDGMENT

The Appellant sued the Respondent seeking an order of eviction from a parcel of land known as Transmara/Moita/100, hereinafter referred as “**the suit land**”. He alleged that he was the registered owner of the suit land and that the respondent had unlawfully trespassed thereon. He also prayed for a permanent injunction to restrain the appellant from trespassing onto the suit land. He further sought general damages for trespass.

When the suit came up for hearing on 4th June 2007 neither the appellant nor his advocate attended court. The respondent testified and proved that he was the registered proprietor of the suit land and that the appellant had unlawfully occupied the same. The trial court ordered that the appellant be forcefully evicted and further granted an order of permanent injunction restraining him from re-entering

the land. The respondent was also awarded general damages of Kshs. 20,000/=for trespass upon the suit land.

Being aggrieved by the said judgment, the appellant preferred an appeal to this court. He set out the following grounds of appeal:

- “1. The learned trial Magistrate erred in law and in fact in granting the orders of forceful eviction against the appellant, and in failing to exercise his duties judiciously.**
- 2. The learned magistrate erred in law and in fact in proceeding to hear the matter before the issue of names and description of parties is determined and/or before causing the pleadings to be amended.**
- 3. The learned magistrate erred in law and in fact in entertaining a dispute that falls under the Registered Lands Act, Cap 300 Laws of Kenya in which only the High Court has jurisdiction.**
- 4. The learned magistrate erred in law and in fact in failing to find that the suit property does not have boundaries marked out clearly or at all.**
- 5. The learned magistrate erred in law and in fact in failing to appreciate that the suit property could be different from where the appellant lives and vice versa.**
- 6. The learned magistrate erred in law and in fact in failing to find that the plaintiff’s case has not been proved on a balance of probabilities.**
- 7. The learned magistrate erred in law and in fact in failing to find that any registration is fraudulent.**
- 8. The learned magistrate erred in law and in fact in not finding the court’s visit of the suit property necessary to confirm the boundaries before issuing such drastic orders.”**

The memorandum of appeal was filed on 13th September, 2007. The appellant did not file the record of appeal and the respondent compiled and filed the same on 11th December, 2007. On 27th November, 2009 the appellant’s advocate was served with a hearing notice which clearly showed that the appeal was fixed for hearing on 26th April, 2010. However, on that day the court did not sit and the hearing date was moved to 10th May, 2010. On 5th May, 2010 the

appellant's advocate was served with another hearing notice. But come the hearing date neither the appellant nor his advocate attended court. The respondent's advocate filed written submissions and urged the court to dismiss the appeal.

In the said submissions the respondent contended that he is the registered proprietor of the suit land and no evidence had been tendered to the contrary. He also proved on a balance of probabilities that he was the registered proprietor of the suit land. The issue of the names and description of the parties did not arise during the proceedings before the trial court. The same can also be said of grounds 4 and 5 in the memorandum of appeal.

As regards the jurisdiction of the Resident Magistrate's court, **section 151** of the **Registered Land Act** confers jurisdiction upon the magistrate's court to hear civil cases where the subject matter does not exceed 25,000 pounds. The issue of jurisdiction of the subordinate court was not raised at all before the trial court. There was no evidence to indicate that the value of the suit land exceeded the aforesaid sum, that is, Kshs. 500,000/=.

All in all, I find no merit in this appeal and dismiss the same with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 10TH DAY OF JUNE, 2010.

D. MUSINGA
JUDGE.
10/6/2010

Before D. Musinga, J.

Mobisa - cc

Mrs. Asati for Mr. Oguttu for the Respondent

N/A for the Appellant

COURT: Judgment delivered in open court on 10th June, 2010.

D. MUSINGA

JUDGE.