



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 117 of 2009

BENSON MAINA GATHITHI.....APPELLANT

VERSUS

WARIBU CHONGO.....RESPONDENT

(Appeal arising from the decision of I. K. O'renge, Resident Magistrate, in Senior Principal Magistrate's Civil Case No. 265 of 2006 delivered on delivered on 19th November 2008 at Murang'a)

JUDGMENT

This judgment is the result of the appeal filed against the judgment of I. K. Oreng, learned Resident Magistrate vide Murang'a **S.P.M.C.C. NO. 265 OF 2006** delivered on 19th November 2008. By the plaint dated 8th August 2006, **WARIBU CHONGO**, the Respondent herein, sued **BENSON MAINA GATHITHI**, the Appellant herein, claiming for *inter alia*:

(a) A declaration that all the blue gum trees growing at the common boundary of land parcel No. LOC. 8/MATHARITE/300 and LOC. 8/MATHARITE/301 belong to the Plaintiff and compensation at the market value of the cut down 15 blue gum trees.

(b) Costs of the suit.

The Appellant filed a defence to deny the Respondent's claim. The suit was heard and in his judgment delivered on 19th November 2008, I. K. Oreng entered judgment in favour of the Respondent in the following terms:

(i) That the trees growing on the common boundary between Land parcel No. LOC. 8/MATHARITE/300 and LOC. 8/MATHARITE/301 belonged to the Plaintiff (Respondent).

(ii) The defendant (Appellant) to compensate the Plaintiff the damaged trees at the value of Ksh.161,000/=

(iii) Costs of the suit and interest.

The Appellant was aggrieved hence he was prompted to file this appeal.

On appeal, the Appellant put forward the following grounds in his Memorandum of Appeal:

1. ***The Learned Trial Magistrate erred in Law and fact in failing to appreciate the fact that trees growing on land are never independent of the land they grow in. They form part of the land. The defendant having bought the land with trees growing on it had no obligation to enquire the history of who or when they were planted on the land he bought.***
2. ***The Learned Magistrate erred in law in failing to determine in which land the trees were growing.***
3. ***The Learned Trial Magistrate erred in law and fact in failing to appreciate that conceptually trees cannot grow on a boundary. The boundary being a line of delimitation without a width upon which trees can grow.***

4. *The learned trial Magistrate failed in law and fact in accepting the evidence of a valuer (PW 1) who valued trees that were on the common boundary between LOC. 8/MATHARITE/300 and LOC. 8/MATHARITE/299, while the appellant and the respondent disputed trees were between LOC. 8/MATHARITE/300 and LOC. 8/MATHARITE/3001 and therefore wrongfully gave judgment in favour of the respondent.*

5. *The Learned trial Magistrate decided the case against clear evidence that the trees cut were inside the appellant's land and failed to take into consideration or at all evidence that the area Chief and the Divisional Chief had so found in a complaint by the respondent/Plaintiff against the appellant/defendant.*

6. *The Learned Magistrate erred in law by adopting the valuation of PW 1 without considering the trees in the valuation related to a different area as the one in issue."*

When the appeal came up for hearing, learned counsel recorded a consent order with the approval of this court to have the appeal disposed of by written submissions.

I have considered the case that was before the trial court by way of re-evaluation. I have also taken into account the written submissions. The Respondent (Plaintiff (P.W.2)) told the trial court that there was no common boundary between **LOC. 8/MATHARITE/300** and **LOC. 8/MATHARITE/301** but what existed was a path used by cows going to the river. The Plaintiff said he bought the area map which indicates there was no common boundary. The Respondent further stated that he used barbed wire to fence the path and later planted blue gum trees. The Respondent claimed that the Appellant (defendant) took possession of **LOC. 8/MATHARITE/301** in 2001 whereupon he planted tea bushes and in the process he encroached into the path lying between the two parcels of land. The Respondent alleged that the Appellant cut 17 of his trees in 2006 which were already mature. The Respondent further stated that the path had been changed and relocated to the common boundary between **LOC. 8/MATHARITE/301** and **LOC. 8/MATHARITE/302** on 8th February 1996. The Respondent claimed he was not notified of the change of boundaries. The Appellant is said to have cut the trees and split the same as timber. The Respondent engaged the services of Zenith Valuers who valued the property at Ksh.161,000/=. In cross-examination the Respondent told the trial court that the Appellant bought his land in 2001 after the path had been changed and his trees were in **LOC. 8/MATHARITE/301**. **JOSEPH THIONG'O MAINA** (P.W.3) testified in support of the Respondent's case. P.W. 3 confirmed there were trees planted by the Respondent along the boundary between **LOC. 8/MATHARITE/300** and **LOC. 8/MATHARITE/301**. P.W.3 confirmed that the trees were planted in **LOC. 8/MATHARITE/300**. P.W. 3 said that the path was changed so that the path and trees fell in **LOC. 8/MATHARITE/301**.

The Appellant (defendant) testified before trial court without summoning the evidence of any independent witness. He said he bought **LOC. 8/MATHARITE/301** together with the trees standing thereon. He said there were blue-gum trees in his land and that there was no boundary. He said he was surprised when the Respondent brought him to court yet the trees were his. The Appellant said he bought the land with the mature blue gum trees and after the alleged path had been changed. He said he cut the trees on assumption that he bought the same with the land from the previous owner.

Having set out the case that was before the trial court, let me now consider the grounds of appeal. On the first ground it is argued that the learned Resident Magistrate had failed to appreciate that the definition of land included the trees grown thereon, hence the Respondent did not need to make inquiries as to who was the owner. The evidence of the Respondent and the Appellant agree in one aspect, that the Appellant bought **LOC. 8/MATHARITE/301** when the path had been altered so that the blue gum trees fell on the Appellant's land. *Section 3* of the Registered Land Act defines 'land' to include land covered by water, all things growing on the land, buildings and things permanently fixed to the land. The learned Resident Magistrate concluded in his judgment that the Appellant should have inquired the status of the trees on the boundary. With great respect to the learned trial Magistrate, I think he fell into error. The Appellant had clearly stated that when he bought the land he found blue gum trees which were within the land. By then the path had been changed and shifted to the portion lying between **LOC. 8/MATHARITE/301** and **LOC. 8/MATHARITE/302**. In the circumstances, the Appellant was not bound to make any inquiries in view of the definition given to land and in view of the fact that there was no boundary. In the ground two, it is argued that the learned Resident Magistrate had failed to establish where the trees stood before arriving at his conclusion. I have carefully considered the evidence tendered. It is apparent from the judgment of the learned Resident Magistrate that the trial Magistrate did not make a finding whether the trees were in **LOC. 8/MATHARITE/300** or in **LOC. 8/MATHARITE/301**. This was important in view of the fact

that there was evidence showing that there existed no boundary so that it was difficult to know exactly where the trees stood. The fourth ground argued is to the effect that the learned trial Magistrate erred when he accepted the evidence of a valuer who presented the valuation of trees standing on **LOC. 8/MATHARITE/299**. With respect, I agree with the Appellant. It was incumbent upon Zenith Valuers to value trees standing between parcel No. **LOC. 8/MATHARITE/300** and **LOC. 8/MATHARITE/301**. The suit is based on a claim of trees allegedly cut along the boundary between the aforesaid parcels of land. The valuation report therefore related to trees in a different location other than the location mentioned in the suit. It was an erroneous report. The trees valued were not in dispute. After a careful reconsideration of the case before the trial court, I am convinced the trial Resident Magistrate gave judgment in favour of the Respondent whereas the case had not been proved to the required standards in civil cases i.e. on a balance of probabilities. In the end this appeal is allowed. The judgment entered against the Appellant is set aside and is substituted with an order dismissing the suit. Any money which may have been paid to the Respondent by the Appellant in satisfaction of the decree should be refunded forthwith. Costs of the appeal and the suit is given to the Appellant.

Dated and delivered at Nyeri this 17th day of September 2010.

J. K. SERGON

JUDGE

In open Court in the presence of Ndirangu for the Appellant and Mr. Nganga holding brief Mwangi for Respondent.