REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 29 OF 2008

ISAAC NDERITU NYAGA……..……..APPELLANT

Versus

STANLEY GATHANGA)

JOHN MBUTHIA WANJIKU)…….…….RESPONDENTS

(Appeal from original Judgment and Order of the Resident Magistrate Courts at Othaya in

S.R.M.CC No.31 OF 2004 by MUTUKU M.W. - RM)

J U D G M E N T

The respondent jointly filed a suit in the Resident Magistrate's Court at Othaya through **Messrs Lucy Mwai & Company Advocates** against the appellant praying that the appellant be ordered to remove the cypress and saligna trees along his common boundary with land parcel numbers **Mahiga/Kihome/431** and **432** belonging to the respondents respectively and also an order restraining the appellant from planting any other trees along the said common boundary. The respondents further prayed for General damages for the loss caused by the shade and roots of the trees on the common boundary, that had encroached into their respective parcels of land, costs and interest.

The suit was informed by these facts; that the respondents were the owners of land parcel numbers **Mahiga/Kihome/431** and **Mahiga/Kihome/432** respectively. The appellant was however the owner of **Mahiga/Kihome/433.** The said three land parcels had common boundary. The appellant however grew cypress and saligna trees along the common boundary and their roots and shade had destroyed the tea bushes on the land parcels belonging to the respondents aforesaid causing them loss and damage. Despite repeated demands for the appellant to cut the trees he had out of spite refused and or neglected to do so. Hence the suit.

On being served, with summons, the appellant reacted by entering an appearance and filing a defence through **Messrs Kebuka Wachira & Company Advocates**. In his statement of defence he averred that though both himself and the 1st respondent were the owners of their respective parcels of land set out in the plaint, the 2nd respondent was not the owner of land parcel **Mahiga/Kihome/432**. Otherwise the appellant denied all the averments in plaint. In particular he denied that he had planted trees along the boundary and that their roots and shade had destroyed any tea bushes belonging to the respondents. He

further contended that the 2nd respondent had no locus standi to sue him. Finally he averred that there had been another suit being Othaya RMCC No.5 of 2003 in which he had sued the 1st respondent. He therefore prayed for the dismissal of the suit.

The suit was heard by **Ms Mutuku, RM** commencing on 25th August, 2006 with the court's visit to the disputed boundary. At the scene, the court was in the company of **John Mwaura** Acting District Land Registrar, Nyeri who testified at the Locus in quo. The court noted that some branches from fully grown trees from the land parcel belonging to the appellant extended into the land parcel belonging to **Hanna Muthoni Mburu.** Some trees had also grown in width and encroached into the same suit premises. The tree shade and roots had affected the tea grown on the said land parcel. The same situation obtained in respect of land parcel belonging to the 1st respondent. That is in so far as the testimony of the District Land Registrar was concerned.

The 1st respondent testified that the appellant was a neighbour. He was the registered proprietor of **Mahiga/Kihome/431** whereas the appellant was the registered proprietor of **Mahiga/Kihome/433**. He testified that the appellant had planted Eucalyptus trees amongst other trees right on the boundary between the two parcels of land. As a result their shade had affected adversely his tea bushes. He was thus not harvesting anything from the tea bushes. The trees had grown past the boundary. There were by laws by Gitugi Tea Factory which stipulated that a member should plant trees about six metres away from the boundary. Once the trees mature, they should be cut. The appellant and 1st respondent were both members of the same tea factory and were bound by the said by law. He had severally asked the appellant to remove the trees but he had refused. Indeed even the tea factory had offered to assist him cut down the trees but he had declined the offer. The appellant personally planted the trees. As a former tea extension officer he was well aware of the damage caused by his said trees.

The 2nd respondent testified along similar lines as the 1st respondent save to add that his suit premises **Mahiga/Kihome/432** actually belonged to his grandmother who had passed on. Nonetheless he was utilizing the suit premises.

Finally the respondents called **Luke Muriti**, field services manager, Gitugi Tea Factory to testify. His evidence was that the disputants were all farmers under Gitugi Tea Factory. That the appellants land stood between the respondents' parcels of land. The parties were bound by Gitugi Tea Factory by-laws which bars any farmer from planting trees next to the other's piece of land. He had visited the scene and shown the appellant the trees he was supposed to cut. As at the time he was testifying the appellant had yet to cut the trees. There was penality if a farmer breached the by-law including barring such farmer from delivering his tea to the factory.

For the appellant, he testified that he had brought his suit premises **Mahiga/Kihome/433** in 1967. He told the respondents of his desire to plant trees on his land. They had no objection so long as it was not on the boundary. He called in an agricultural officer who advised that he should not cultivate the suit premises as it was prone to landslides. He instead advised him to plant trees. He did so. However he maintained that the trees were not on the boundary. There were no tea bushes planted then by the respondents. They were planted after the commencement of the case. He had cut down the trees next to the tea bushes. He conceded that he was barred from picking and delivering his tea to the tea factory because of his alleged breach of the by law aforesaid. This case according to him was a frame up.

He called **William Gachunia Ndirangu** as a witness. He was Divisional Water Officer, Othaya. In October, 2003, the Provincial Director Environmental Committee made an assessment of the appellant's suit premises. He attended as the Divisional Officer. He made a report in which he recommended that the trees should not be cut down. This witness was followed by **David Ndirangu Macharia**, Divisional Crops Officer, Nyeri District. His evidence was that he received a letter from Central Provincial Environmental Officer, he visited the suit premises and made a report which confirmed that the roots of the trees of the appellant's land had encroached on the respondents' parcels of land and they had cut them.

At the conclusion of the formal hearing of the case, parties filed written submissions. In a reserved judgment delivered on 23rd November, 2008, the learned Magistrate found for the respondents holding;

"**I am alive to the gradient of the land and the fact that trees are a good way of conserving the environment. However, I find that the defendant is not justified to plant his trees so close to the plaintiffs piece of land. I enter judgment against the defendant against (sic) the plaintiffs. The defendant is further ordered to remove the cypress and saligna trees along his common boundaries with land parcel Mahiga/Kihoe/431 and Mahiga/**

Kihome/432. Further, the defendant is restrained from planting any other trees along the said common boundaries."

The appellant was not happy with the above result. Accordingly he entered this appeal in person. He advanced a total of 13 grounds of appeal. There were:

1. "The learned Resident Magistrate erred in law and in fact in failing to note that in the plaint the 2nd respondent wrote that the land parcel No.Mahiga/Kihome/432 belongs to him as the owner while he is not the owner.

2. The learned Resident Magistrate erred in law and in fact in failing to consider the evidence of the appellants witness DW3 Mr. David Ndirangu Macharia who told the court that the land was steep and this would protect the land from soil erosion and that any land over 50% slope is the best managed by planting trees.

3. The learned Resident Magistrate erred in law and in fact in failing to consider the evidence of the appellant to the effect that he was advised by the divisional Agricultural Officer Othaya Division to plant trees and that the appellant should not build any living houses because of soil erosion and land slide way back in 1969 and since then there has never been any buildings on this land.

4. The learned Resident Magistrate erred in law and in fact in failing to consider the report of Soil and Water Conservation Officer and Divisional Water Officer who were sent to the land parcel No.Kihome/Mahiga/433 by provincial director of Environment Central Province after the appellant sought the report that land (sic) and the area as a whole.

5. The learned Resident Magistrate erred in law and in fact in failing to consider that the 2nd respondent planted the tea bushes during the pendency of this case to defeat the end (sic) of justice.

6. The learned Resident Magistrate erred in law and in fact in failing to consider that the Provincial director Environment; directed the environment committee to visit this land and make a comprehensive assessment on the land of appellant the said Mahiga/Kihome/433 and its situation for a report of the situation.

7. The learned Resident Magistrate erred in law and in fact in stating in her judgment that she visited that land and saw the trees whereas she did not go down the steep and hilly ground on the appellants land and stayed just near the road and the appellant wonders how she could write such a judgment and nobody in his companion (sic) went down the steep hill almost a clief (sic) of about 65% sloppy.

8. The learned Resident Magistrate erred in law and in fact in failing to consider the measurement taken by the Acting district surveyor who accompanied her to the land and in fact, there should be no proper report of either district surveyor or the Magistrate herself because none of them went down the steep hill.

9. The learned Resident Magistrate erred in law and in fact in visiting the lands in dispute to view the landscape to enable her to write a better judgment and yet she failed either (sic) send

somebody from the court office from the road where she reached or go down herself to accomplish the mission for what (sic) she had gone there.

10. The learned resident magistrate erred in law and in fact in considering the evidence of the plaintiff's (sic) a true and worth of any credit.

11. The learned Resident Magistrate erred in law and in fact in failing to note that the appellant's trees are inside the appellants land parcel No.Mahiga/Kihome/433 and they are not on the boundary as the respondents had alleged.

12. The learned Resident Magistrate erred in law and in fact in refusing to consider the evidence of the soil and environment officers who had made a comprehensive report to her concerning this particular area including this land parcel Nos.Mahiga/Kihome/431, 432 and 433 and to note that the tea bushes planted there do not produce good quality due to the steepness of the area and the advice in 1969 was that the appellant and the other members from that area should plant trees to conserve sold erosion and land slides.

13. The learned Resident Magistrate erred in law and in fact in bringing to that case some extraneous matters to support the respondent's evidence thereby causing the Resident Magistrate's Court to arrive on (sic) wrong conclusion."

When the appeal come before me for hearing on 13th July, 2009 the parties agreed to argue the same by way of written submissions. Subsequent thereto they all filed and exchanged written submissions which I have carefully read and considered. However, I do not think that the decision on this appeal will turn on the merits of the various grounds of appeal advanced by the appellant as aforesaid. Instead it will be determined on a narrow but crucial technical ground. That ground is captured in the written submissions of the respondents thus

"…..**On technicality, the appellant filed the appeal herein but failed to extract the decree appealed from. This is a fatal omission and the appellant's appeal ought to fail and the same be dismissed with costs….."**

Despite this technical point having been raised and the appellant having been made aware of the same, he did not see the need or reason to respond to it. As it is therefore that technical objection to the competence or otherwise of the appeal remains unchallenged.

Section 65 of the Civil Procedure Act deals with appeals from subordinate court to the High Court. It is therein specifically provided that:

"…..**Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall be to the High Court, from any original <u>Decree</u>** *(emphasis added)* **or part of a <u>Decree</u> of the subordinate court, other than a Magistrate's Court of the third class, on a question of law or fact."**

This provision of the law is emphatic that the appeal to the High Court is from a decree issued by the subordinate court. That makes it mandatory that the appellant must extract a decree from the judgment of the lower court that he seeks to impugn and or over turn. If he does not do so, then there will be no substratum for the appeal. I have carefully combed through the record of appeal as well as the original record of the learned Magistrate and I am satisfied that no decree from the judgment of the learned Magistrate dated 23rd May, 2008 was ever extracted and included in the record. Of course I am aware that unlike in this court, decrees in the subordinate court are drawn and extracted by the court itself. However for the court to do so it must be moved as an appropriate. Whoever desires the decree has to apply to the court and pay for it. There is no evidence of the appellant having made such an application nor paid for it.

Similarly *order XLI* of the Civil Procedure Rules deal with appeals. *Rule 1 (A)* thereof makes it

mandatory the filing of the decree and order appealed from as part of the record of appeal. It provides;

"**Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under** *section 79B* **of the Act until such certified copy is filed."**

So that in the event again that the decree is not made available as part of the record of appeal as in this case, the appeal shall be deemed to be incompetent.

Of course I am aware of the provisions of *order XLI rule 8(4)* of the Civil Procedure Rules which deals with admission of appeals. Before allowing the appeal to go on for hearing the judge is required to be satisfied that the judgment, order or decree appealed from, and, where appropriate, the order (*if any*) giving leave to appeal; among other documents must be in the court record. However the court does not act suo moto. It must be moved as appropriate. In the circumstances of this case the appellant moved the court by an application dated 6th March, 2009 claiming that the record was in order and that the appeal should be set down for hearing. However, the appellant knew then and or ought to have known that the record did not have the decree nor did he seek the leave of court to file the decree later. The appellant deliberately misled the court to give directions for the appeal to proceed to hearing knowing very well that the record was incomplete. He must bear the consequences.

The consequences of the foregoing is that I find the appeal incompetent for want of decree and is accordingly struck out with costs to the respondents.

Dated and delivered at Nyeri this 8th day of October, 2009.

M.S.A. MAKHANDIA

JUDGE