



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

Civil Appeal 91 of 2006

M'IKIUGU M'MUKANGU APPELLANT

VERSUS

SHADRACK KITHINJI RESPONDENT

(From the judgment of the Hon. Mr. A.K. Kaniaru Principal Magistrate in Nkubu PMCC No. 49 of 2005 delivered on 5th March 2007)

JUDGMENT

The respondent in the lower court filed a claim against the appellant seeking an order for judgment for Kshs. 52,860/= and in the alternative to that prayer that he be allowed to harvest tea bushes on the appellant's land for one year or in further alternative that he be allowed by the appellant to transfer his tea bushes from the appellant's land. The case on being heard by the lower court judgment was in favour of the respondent. In the considered judgment of the learned magistrate he stated thus:-

“As the court is concerned, the evidence on record proves the plaintiff's case very well on a balance of probabilities (sic). We award the plaintiff what he claims in his plaint. We ask the plaintiff to choose his way of realizing his compensation. Only one way should be chosen otherwise not all the alternatives stated preferably (a) and (b) in the plaint can be pursued simultaneously.”

The appellant was aggrieved by that judgment and has brought for consideration by this court this appeal with the following grounds:-

1. ***The learned magistrate erred in law and in facts in deciding the whole suit against the weight of evidence.***

2. ***The learned magistrate erred in law and in facts in failing to find that the respondent was a trespasser over the appellants land and as such he was evicted therefrom.***

3. ***The learned magistrate erred in law and in facts in failing to find that the case before him had been heard and determined by a competent tribunal vide LDT Case No. 54 of 2002 Meru law Courts and as such the case before him was res-judicata.***

Those grounds can, in my view, be considered together. In evidence, the respondent stated that in the year 2000 he purchased property Nkuene/Upper Mikumbune/1297. The appellant also purchased a parcel of land and transfer took place in respect of their respective parcels of land. He produced his title deed in evidence. He also produced the green card. He stated that his parcel of land that of the appellant's land border each other. The subdivision of both parcels was done at the same time. In concluding that purchases, he proceeded to plant some tea bushes. In the year 2002 the appellant filed a matter before the Land Dispute Tribunal. According to the respondent, the appellant was dissatisfied with the issue relating to their boundary. It should be noted that both parties' parcels of land emanate from parcel number 215. The Land Dispute Tribunal ordered resurveying of the 2 parcels to determine the boundary. The respondent stated in evidence that as a result of that resurvey the boundaries of their parcels of land was changed. As a result of that change, some of the tea bushes he had planted were found to be in the appellant's land and other tea bushes on his land belonged to his neighbours. His claim before court was for compensation of Kshs. 52,860/= representing the tea bushes that were on the appellant's land. In the alternative he asked that he be allowed to uproot those tea bushes. He called as a witness a tea extension assistant officer who had assessed the value of the tea bushes belonging to the plaintiff which ended up being on the appellant land. The extension officer found that there were 2,693 tea bushes belonging to the respondent valued at Kshs. 25/= making a total amount payable to the respondent to be Kshs. 66,075/= shillings. The appellant confirmed in evidence that they were neighbours with the respondent. He denied that part of the respondent land was made to be his land after the resurvey. In his evidence he said that it was the respondent who had taken his land. It was as a result of that that he took the matter to the Land Dispute Tribunal. In his words he stated that the respondent stole from him 1 acre and planted tea on that portion. He then stated:-

“Yes. I had told the plaintiff (respondent) not to plant that tea. He refused and told me to go where I wanted. I sued him at the Tribunal. The tribunal ordered the plaintiff give (sic) me back my land. He gave back my land.”

On being cross examined the appellant further stated that the respondent had planted the tea after the resurvey had been done. I have considered that evidence and I have also considered the submissions filed by the parties in this matter. The respondent in my view, failed to prove by documentary evidence before court that the resurvey that was ordered by the Land Dispute Tribunal moved the boundary. What is clear from the evidence is that the respondent had settled on a portion of land that belonged to the appellant. It was after the resurvey that he moved to his portion of land. He was therefore until that time, a trespasser on the appellant's land. He cannot then claim for compensation when he carried out the act of planting the tea bushes on the appellant's land when he was a trespasser. In this regard I whole heartedly agree with the submissions made by the appellant's counsel. Even the alternative prayer sought to uproot the tea bushes in my view, cannot be issued because for it to be issued would be to allow the respondent to continue to trespass upon the appellant's land. But I think this appeal also will succeed on the fact that

the lower court failed to give a decisive judgment and instead left the matter into the respondent's hand for him to determine which method he would use to recover the amount he claimed. They were in total three alternatives pleaded by the respondent. Firstly, he prayed for judgment for Kshs. 52,860/=. In the alternative he prayed that he be allowed to harvest the tea bushes for one year. In yet further alternative, he prayed that he be allowed to transfer the tea bushes from the appellant's land to his. In the light of those 3 alternatives, the lower court was duty bound to give judgment for one of the alternatives. It is only on doing so that the court will be able to monitor the execution of its judgment. On that score and the other reasons given above, this appeal will succeed. The judgment of the court therefore is:-

1. That the judgment in RM Court Nkubu Civil Case No. 49 of 2005 of 23rd August 2006 is hereby set aside and is substituted with an order dismissing the respondent's suit in that case with costs of that suit being awarded to the appellant.

2. The appellant is also awarded the costs of this appeal.

Dated and delivered at Meru this 26th November 2009.

MARY KASANGO

JUDGE