



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

**Civil Appeal 128 of 2002**

**CHARLES MBUVI:.....APPELLANT**

**VERSUS**

**VINCENT NG'ANG'A :.....RESPONDENT**

**(Appeal from the Ruling in Machakos Chief Magistrate's Court Civil Case No. 725<sup>B</sup> of 2001 by Mr. Pareno, SRM on 17/10/2002)**

**JUDGEMENT**

1. The Appeal herein arises from the Ruling dated 17.10.2002 by S. Pareno Esq, Senior Resident Magistrate in SPMCC No. 725 'B' of 2001 at Machakos. In that Ruling, the learned magistrate determined that the dispute before him was one that should have been placed before a Land Disputes Tribunal to determine vide its mandate as donated by section 3 of the Land Disputes Tribunal Act No. 18 of 1990. That being the case, the suit was "**dismissed**" with costs to the Defendant. I should add that the learned trial magistrate found for a fact that what was before him was a dispute as to alleged trespass to land and he had no jurisdiction to determine it. The Appellant who was the Plaintiff thereafter instituted this Appeal on the following grounds:-

i. The learned trial magistrate erred in law and misapprehended the provisions of section 3 of the Land Disputes Tribunal Act No. 18 of 1990 when he upheld the Respondent's Preliminary Objection that the court had no jurisdiction to entertain the claim for special damages which was quantified and held that it was a claim to be dealt with by the Tribunal which finding was wrong and contrary to the provisions of section 3 of the Land Disputes Tribunal Act.

ii. The learned trial magistrate erred in Law and fact and misapprehended the claim for compensation arising out of damages and/or entering into the Appellant's lands and causing damage which was and/or quantified and which damages were special and general and the Land Disputes Act do not allow the Land Disputes Tribunal to assess damages and court failed in failing to proceed and determine the claim on merits as it was claim for special damages.

iii. The learned trial magistrate erred in law in failing to note and hold that the Land Disputes Tribunal Act did not have and/or jurisdiction away from court in claim in respect of special and general damages caused as a result of trespass to land unless there is any other claim/or relief brought under section 3 of the Land Disputes Tribunal Act.

2. The Appellant seeks that the order dismissing his suit be set aside and the suit be determined on its merits.

3. In submissions, advocates reiterated the submissions before the lower court save that Mr. Mulwa for the Respondent pointed me to the decision of *Sitati, J.* in Kalondu Mutuku vs Mune Mutungi HCC.A 87/97 (Machakos) which I will return to in due course.

4. To contextualize the matters I have raised above, in the Plaintiff filed on 22.8.2001, the Appellant pleaded at paragraph 4 and 5 thereof that on various dates between December 2000 and June 2001, the Defendant unlawfully grazed his livestock on the Plaintiff's parcels of land known as **Nguu Ranch plots Numbers 102, 103 and 106** and as a result thereof, the Plaintiff suffered the loss of 1350 bales of hay each valued at Kshs. 100/= . His prayers in the Plaintiff were therefore for judgment as follows:-

- a. Kshs. 135,000/=
- b. Costs of the suit
- c. Interest on (a) and (b) above

5. In Kalondu Mutuku's case (supra), the claim was for Kshs. 6,000/= allegedly suffered by the Plaintiff when the Defendant's goats strayed into the Plaintiff's land and destroyed fruits therein. On the question of jurisdiction, the learned judge (*Sitati, J.*) on appeal found that although there was a specific claim made for damages for trespass, the magistrate's court had no jurisdiction to entertain the claim by dint of section 3(1) of the Land Disputes Tribunals Act No. 18 of 1990. That section provides as follows:-

***“Subject to this Act, all cases of a civil nature involving a dispute as to-***

**a) *the division of, or the determination of boundaries to,***

***land, including land held in common;***

**b) *a claim to occupy or work land, or***

**c) *trespass to land,***

***shall be heard and determined by a Tribunal established under section 4.”***

6. In this case, the question as was before *Sitati J.* is, was the Appellant's claim a ***“trespass to land”*** or was it merely a claim for damages? I would accept the definition of trespass as ***“an unlawful act committed against the person or property of another person especially wrongful entry on another's real property.”*** ***“Cattle trespass”*** on the specific is defined as ***“trespass by one's cattle or other animals another's land, as a result of which the other might either distrain them damage feasant or sue for trespass in the local courts.”*** - *Black's Law Dictionary, 8<sup>th</sup> edition.*

7. Prior to the enactment of Act No. 18 of 1990 aforesaid matters of trespass were filed, heard and determine generally in Magistrate's Courts. The Land Disputes Tribunals Act however specifically created Land Tribunals to hear and determine those matters. The dispute in the instant case is said to be one relating to “damages for trespass” because what is pleaded is a specific sum arising from alleged trespass. The question that one must ask is this; can damages for trespass be proved before trespass itself is proved? The answer is obviously no. Damages suffered, if at all, follow proof of the fact of trespass. If it is then agreed that the subordinate court cannot have jurisdiction to determine the question of trespass, as is agreed by the parties in this Appeal, how can it go on to determine the secondary question of damages suffered as a result of trespass?

8. The argument that the Land Disputes Tribunals cannot adjudicate on matters for ***“damages for trespass”*** was one that found favour with *G.B.M. Kariuki, J.* in *Esther Kavaya vs Wislon Musungu HCC.A 15/2003 (Kakamega) [2006] eKLR* but if one looks at the issue with the background of the Land Disputes Act then it follows that upon the act of trespass being found in favour of one party by the Tribunal, that party can then institute a specific suit for damages as the Appellant did. It may be a tedious

and windy way to justice but that is the way of the law. Thankfully, the Land Disputes Tribunals Act is being relooked at by the Law Reform Commission, hopefully for the better

9. In any event, I am convinced that the Appeal herein has no merit and is best dismissed with costs to the Respondent.

10. Orders accordingly.

Dated and delivered at Machakos this **25<sup>th</sup>** day of **June 2008**

**Isaac Lenaola**

**Judge**

In the presence: Mr.Makau for Appellant

Mr. F.M. Mulwa for Respondent

**Isaac Lenaola**

**Judge**