



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Appeal 70 of 2003

MERCY WANJIRU KAMUYU APPELLANT

AND

KARIUKI NJINE RESPONDENT

J U D G M E N T

This appeal arose from a suit filed in the Resident Magistrate's Court at Baricho by Kariuki Njine (hereinafter referred to as the Respondent) in which he sought judgment against Mercy Wanjiru Kamuyu (hereinafter referred to as the appellant) for mesne profits and general damages for trespass as well as eviction of the appellant and her agents or servants from land parcel No. Kiine/Kibingoti/Nguguine/2154. The trial magistrate dismissed the claim for mesne profits and general damages but granted the order for eviction of the appellant from land parcels No. Kiine/Kibingoti/Ngugu-ine/2519 and 2520 formerly part of land parcel Kiine/Kibingoti/Ngugu-ine/2154.

The appellant has raised 4 grounds in her memorandum of appeal, the gist of which is that the suit before the Resident Magistrate was statute barred, that the trial magistrate lacked jurisdiction to entertain the matter which in any case was res judicata and finally that the trial magistrate exhibited bias by shutting out the appellants crucial witnesses.

The hearing of the appeal proceeded ex-parte as the Respondent failed to attend court despite having been duly served.

During the trial in the lower court the Respondent and 3 other witnesses testified in support of the Respondent's case. Their evidence was that the appellant had trespassed onto the Respondent's land and that this was confirmed by the Government Surveyor who produced a demarcation map in respect of the disputed land in land Dispute Tribunal case No. 9 of 2001. The appellant had however refused to move from the land causing the Respondent to file this suit against her.

The appellant also testified and called 3 witnesses. Their evidence was that the appellant was occupying land parcel Number Kiine/Kibingoti/Ngugu-ine/365 which belongs to her father the late Obed Kamuyu Njairia. She maintained that her late father had given her 3 acres of the land. The appellant maintained that there was an earlier demarcation map which showed that the land she was occupying was part of Kiine/Kibingoti/Ngugu-ine/365.

In his judgment the trial magistrate found that the issue as to whether the appellant was occupying the Respondent's land was considered and determined in land Dispute Tribunal Case No. 9 of 2001, and that none of the parties had challenged the tribunal award. He accepted the evidence of the surveyor as adduced in land Dispute Tribunal case No. 9 of 2001 and found that the appellant was in occupation of

the Respondent's land. The trial magistrate further found that there was insufficient evidence upon which it could grant mesne profits or damages for trespass, but proceeded to issue the order of eviction against the appellant.

It is evident from the record of appeal and the original record, of the lower court, that the dispute between the appellant and the Respondent was first dealt with by the Baricho Land Dispute Tribunal where the Respondent had referred a trespass and boundary dispute between him and the appellant over land parcel Kiine/Ngugu-ini/2154. The Respondent then claimed that the appellant had trespassed onto his land and built thereon without his authority.

The Tribunal in its award dated 9th November 2001 found that there was a genuine boundary dispute which could only be resolved by the surveyor using the demarcation map. The tribunal therefore ordered that a government surveyor to correct the boundary using the demarcation map.

This award was filed in the District Magistrate's Court at Baricho and adopted as judgment in Land Disputes Tribunal case No. 9 of 2001. Subsequently the Kirinyaga District Surveyor one Humphrey Mwitari appeared before the District Magistrate's Court at Baricho on 3rd May 2002 with a copy of the demarcation map certified by the Chief cartographer. It is not clear what finally transpired in land Dispute Tribunal case No. 9 of 2001 as the proceedings which were produced as P. Exh. 5 in the magistrate's court appear incomplete. It is however against this background that the Respondent brought this suit in the Resident Magistrate's Court at Baricho on 11th February 2003.

In the light of this background, a question arises as to when the Respondent's cause of action arose. In his plaint before the lower court, the Respondent pleaded that the appellant unlawfully occupied part of Kiine/Kibingoti/ 2154 in the year 1990. He even prayed for mesne profits from 1990 till the date the appellant is evicted from the land. This was consistent with the evidence adduced before the trial magistrate that the appellant occupied the land in 1990. That means that the Respondent's cause of action arose in the year 1990.

An issue then arises as to whether the Respondent's suit filed in November 2003 was statute barred. Although the defence of limitation was pleaded by the appellant, the trial magistrate simply glossed over the matter as follows:

"In addition though the court does not wish to decide issues that may have to be decided in future, it is not clear when the Plaintiff's right of action accrued but according to the pleadings the court can safely find that in 2001 a suit was filed by the plaintiff with the Baricho land Disputes Tribunal and there is insufficient evidence that the Plaintiff is affected by laches."

Obviously the trial magistrate erred in failing to appreciate that the Respondent had pleaded the date when his cause of action arose and that was the year 1990. Although the trial magistrate made reference to the Baricho land Disputes Tribunal Case filed in the year 2001, he failed to appreciate that the plaint filed by the Respondent was not seeking to enforce the award of the land Disputes Tribunal (in which case limitation would start to run from the date of the award) but the plaint was for a completely independent cause of action of trespass and eviction. I find that the limitation period in respect of this cause of action started to run in 1990 when the cause of action arose. In the case of the tort of trespass the cause of action was statute barred 3 years later and in the case of the claim for eviction from land, the claim became statute barred 12 years as per sections 4(2) and section 7 of the limitation of Actions Act.

It is further evident that the suit before the trial magistrate involved the same parties and the same issues as the matter which was before the Baricho land Disputes Tribunal whose award was adopted by the Baricho District Magistrate's Court in Land Dispute Tribunal Case No. 9 of 2001. As indicated earlier the proceedings in respect of Land Disputes Tribunal No. 9 of 2001 produced in the lower court appeared incomplete and so it is difficult to tell what transpired. Be that as it may the issues raised having been precisely the same it was not right for the Respondent to bring a new suit. Moreover section 3(1) of the Land Disputes Tribunal Act 1990 as read with section 159 of the Registered Land Act (Cap 300) requires disputes involving determination of boundaries to land or trespass to land to be determined in accordance

with the Land Dispute's Tribunal Act of 1990. Such a suit can only originate from the land Disputes Tribunal and not directly filed in the magistrate's court.

For the aforesaid reasons, I find that the trial magistrate erred in entertaining the Respondent's suit as the same was not only statute barred, but the court lacked jurisdiction to hear it, and the suit was also an abuse of the process of the court it having been brought in contravention of section 7 of the Civil Procedure Act.

I therefore allow this appeal set aside the orders made by the Resident magistrate and substitute it thereof with an order dismissing the Respondent's suit.

Those shall be the orders of this court.

Dated signed and delivered this 8th day of June 2006.

H. M. OKWENGU

JUDGE