



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 241 of 2002

1. RIOBA NSONGO)

2. NYAMOHANGA NSONGO) APPELLANTS

VERSUS

GISIRI SAGWE RESPONDENT

JUDGMENT

The respondent sued the appellant seeking court to declare that the appellants who were the defendants, occupied land No.BUKIRA/BWISABOKA/548 unlawfully, for an eviction order against the respondent, a permanent injunction, damages for loss of user and costs. The court heard the case and found that the Respondent and granted all the prayers. Damages for loss of user were assessed as shs.100,000/=.

The appellant, being dissatisfied with the judgment brought this appeal.

Appellant in his Memorandum of appeal had listed 6 grounds of appeal which were argued by Mr. Nyasimi for the appellant.

In ground 3 the appellant stated that the trial magistrate acted unfairly and in total prejudice of the appellants by denying them chance to call their witness. I would wish to deal with that prayer first.

A look at the proceedings show that the plaintiffs case started on

22nd February 2001 after numerous adjournments the defence case opened on 31st July 2001 when one witness gave evidence. For a reason not shown on record it was adjourned upto 2nd August 2001 when two witnesses gave evidence. Mr. Abisai for the appellant then applied for adjournment another witness named as one SAMUEL MARWA but that application was rejected by the court. That is the issue raised in ground 3 of the appeal.

The magistrate in his ruling stated that defence had ample time to call its witnesses as they were aware of the case. Indeed it is true that defence was aware of the case but as counsel for appellant submitted the date of

2nd August 2001 was given on 31st July 2001. Those were 3 days before the hearing. Counsel indicated that the witness was a police officer stationed in Nairobi and the period of 3 days was not enough to get him. That was a good reason and the trial magistrate did not state why he rejected it.

The witness being an employed person would need enough notice to arrange for permission to be away from duty. It is clear therefore the court erred and denied the appellant chance to call all their witnesses. Possibly if he heard the evidence from the witness he would have reached a difficult decision.

I will therefore allow the appeal as the appellants were prejudiced.

I will order the case be reheard by another magistrate of competent jurisdiction.

Having ordered a retrial I will abstain from dealing with the other issues raised in the other grounds as that may prejudice the retrial.

Each party will bear its own costs of this appeal.

Dated 3rd October, 2006.

KABURU BAUNI

JUDGE

cc. Mobisa.

N/A Applicant) Both had notice.

N/A for Respondent)