REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 15 of 2003

ESTHER KAVAYA …….. APPELLANT

V E R S U S

WILSON MUSUNGU ……...….. DEFENDANT

J U D G M E N T

On 20th December, 2002, the Chief Magistrate, A. O. Muchelule Esq., dismissed Civil Suit No.141 of 2000 *(Esther Kavaya v. Wilson Musungu)* which had been consolidated with SPM Civil Suit No.623 of 1989 *(Wilson Musungu v. Phanis Matendechele Mwani)* on the ground that he had no jurisdiction because "it was clearly a trespass suit" and in view of *section 3 (1) (a) of the Land Disputes Tribunal Act (No.18 of 1990)* he found the suit incompetent and struck it out.

The Chief Magistrate's Ruling dated 16.12.02 was said to have been delivered on 20.12.02 and it followed an application by the defendant but it is not clear from the record whether it was a formal application. What is clear is that suit No. CMCC NO.141 of 2000 had been consolidated with suit NO. 623 of 1989 on 27.11.00. In suit NO.141 of 2000, the plaintiff, Esther Kavaya, had sued Wilson Musungu (the defendant) for general damages and special damages alleged to arise from alleged damage caused by the defendant to the plaintiff's house, and to household goods, and cash crops standing on the plaintiff's land title *No. Butsotso/Shikoti/6599.*

In suit No. 623 of 1989 Wilson Musungu was the plaintiff therein, and the defendant was one Phanis Matendechele Mwani. The plaintiff in the suit claimed there was a boundary dispute between him and the defendant regarding the plaintiff's land known as *Butsotso/Shikoti/130*. The plaintiff sought an order for "*rectification of the boundary"* and removal of the defendant from the plaintiff's said land. It seems from the lower court record that judgment (undated) had been delivered and the court had ordered the re-establishment of the boundaries.

Aggrieved by the Ruling and order of the Chief Magistrate striking out the suit No.141 of 2000, the Appellant, Esther Kavaya who was the plaintiff in the said suit lodged the Appeal herein and proffered 5 grounds of appeal in which she contended that the learned Chief Magistrate erred in the finding in his said ruling that he had no jurisdiction. The appellant also submitted that the learned Chief Magistrate erred in disregarding the fact that suit No.141 of 2000 had been consolidated with suit No.623 of 1989 and that it was necessary to determine the rights of the parties in the said suits. But as suit No.623/89 had been determined, I am not sure the consolidation served any purpose.

Mr. Anziya, learned counsel for the appellant who appeared for the appellant urged the court to allow

the appeal emphasizing that the respondent had in paragraph 12 of his defence to the suit admitted the jurisdiction of the court and pointed out that parties in civil litigation are bound by their pleadings.

On his part, Mr. Munyendo, learned counsel for the respondent, contended that the ruling of the learned trial Chief Magistrate was correct as the issue of trespass was triable by the Land Disputes Tribunal set up under section 4(1) of Act 18 of 1990.

I have perused the court record and given due consideration to the grounds of appeal and the submissions proffered by both counsel for the parties to the appeal.

Jurisdiction of the court was a fundamental issue and the fact that it had been admitted did not mean that it could not be raised. In limitation, it is correctly said that for it to be raised, it must be specifically pleaded. But jurisdiction unlike limitation goes to the power to hear and determine and can be raised at any time. It was therefore correct for the trial court to address the issue.

Section 3(1) of Act 18 of 1990 confers on the District Land Disputes Tribunal set up under *section 4(1)* of that Act jurisdiction to hear cases of a civil nature involving, inter alia, a dispute as to "trespass to land". Trespass, is a tortuous wrong and is actionable without proof of damage. Halsbury's Laws of England Vol.38, Part I, 3rd Edition defines trespass as an "*unlawful entry by one person on land in the possession of another for which an action lies, although no actual damage is done"*. It goes on. *"A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it or takes possession of it or, expels the person in possession or pulls down or destroys anything permanently fixed to it or wrongfully takes minerals from it or places or……."*.

In suit No.141 of 2000 (supra), the plaintiff alleged that the defendant trespassed on his land title No. Butsotso/Shikoti/6599 and damaged his house, household goods and crops and claimed special and general damages for these. The trial magistrate failed to appreciate that the jurisdiction of the Land Disputes Tribunal does not include determination of claims for and award of damages. The claim for special and general damages in suit No.141of 2000 clearly fell outside the purview of the jurisdiction of the Land Disputes Tribunal. Although suit No.141 of 2000 had been consolidated with suit No.623 of 1989 which had virtually been determined it is disputable whether the consolidation was proper.

On the issue as to whether the appeal was filed out of time I observe that Receipt No. M041059 was issued on 6.12.03 when the Memorandum of Appeal was filed. The ruling appealed from was delivered by the lower court on 20.12.2002 although it seems to have been dated on 16.12.02. Under section 79 G of the Civil Procedure Act, Cap 21, the appeal should have been filed within thirty (30) days from the date of the delivery ruling. This means that the period for filing the appeal run from 20.12.02 to 20.1.03. Order 49 was referred to by Mr. Munyendo in his submissions when he alluded to the computation of the time for appealing. Perhaps it is desirable to point out that the order does not apply to time set by statute and must be confined to computation of time set by the Civil Procedure Rules or by orders of the court. Consequently, days during court vacation are not excluded in computation of time for filing appeal under S.79 G of the Civil Procedure Act.

Although the Memorandum of Appeal was stamped by the court registry on 6.1.03, the payment for the memorandum of appeal was made on 6.2.2003 when receipt No. M041059 was issued. The date of filing of the appeal is the date on which filing fees were paid, that is to say 6.2.2003. As no leave to file the appeal out of time had been sought or obtained and as there was no exclusion of any time from the period of thirty (30) days stipulated by section 79G of the Civil Procedure Act, the appellant not having obtained a certificate of delay from the lower court, the appeal was clearly out of time.

As a consequence of this, I strike out the appeal on the ground that it was out of time and award costs to the Respondent

Delivered, dated and signed at Kakamega this 29th day of November, 2006

G. B. M. KARIUKI

J U D G E