REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL 45'B' OF 1998

JULIUS MUTUMA MUCHENE.....APPELLANT

VERSUS

M'MWERERIA M'ITALAKUA.....RESPONDENT

JUDGMENT OF THE COURT

This is an appeal against the judgment and the decree in Maua SRMCC No. 93 of 1998 (Mr. M.N. Gicheru, SRM) dated 26.6.1998. The appellant, who was plaintiff in the lower court, has set out four grounds of appeal which are that:- 1. The learned trial magistrate erred in law in awarding the respondent Kshs. 30,000/= on inadmissible evidence.

2. The learned trial magistrate erred in law and fact in trying to separate the ownership of land parcel No. A1295 AKIRANG'ONDU Land Adjudication section and the trees growing thereon.

3. The learned trial magistrate further erred in law and fact in relying on the evidence of the elders because they were elderly to find for the respondent in the absence of any evidence from the Land Adjudication Office.

4. The judgment was against the weight of evidence on record.

In his plaint dated 28.7.1997 and filed in court the same day, the plaintiff (respondent) sued the defendant (appellant) for the sum of Kshs. 30,000/= plus costs of the suit. The plaintiff averred that in or about the month of March 1997, the defendant unlawfully and without any reasonable cause trespassed upon the plaintiff's land at Mariri and cut down 60 trees and split them into timbers and fencing posts and converted the same to his own use. That the matter was adjudicated upon by the clan elders who found in favour of the plaintiff but that the defendant failed to pay the adjudged amount. That later, the dispute was referred to the local Agricultural Office which assessed the value of the trees at Kshs. 30,000/=. When the defendant failed to pay the said sum of Kshs. 30,000/= the plaintiff sued him at Maua in SRMCC No. 93 of 1997. The defendant filed defence on 9.8.97 in which he denied the plaintiff's allegations in general and specifically denied that he cut down the 60 trees as alleged by the plaintiff. The defendant also denied the particulars of paragraph 4 of the plaint to the effect that the plaintiff took the matter to the clan elders for adjudication.

Both parties filed the respective pleadings in person. The case was heard by the learned SRM (Mr. M.N. Gicheru) who delivered judgment on 26.6.98 finding for the plaintiff in the sum of Kshs. 30,000/= plus costs of the suit and interest. In his judgment, the learned trial magistrate concluded that the plaintiff had proved his case against the defendant to the required standard and that the defendant's story of the

plaintiff having fabricated a case against him because of a land dispute between the plaintiff and the defendant's father could not be believed. The learned trial magistrate also believed the evidence of the witnesses called by the plaintiff whose evidence the learned trial magistrate said corroborated the evidence of the plaintiff.

In his evidence in chief before the trial court, the plaintiff stated that the defendant cut his (plaintiff's) trees in March 1997. That the defendant was given the land upon which the trees stood during the land demarcation process. The plaintiff produced as exhibit 1 a "TO WHOM IT MAY CONCERN" report regarding malicious cutting down of trees belonging to Mr. Mwereria M'Italakua (the plaintiff). The report mentioned that the trees in dispute belonged to the plaintiff before land adjudication and demarcation. The plaintiff also stated that the case was decided by clan elders among them Kaberia M'Itimbiri Kubai M'Muritha (PW3) and M'Ilaki Barubua. PWI – Geoffrey Gichuru told the court that during the adjudication and demarcation process, the defendant was given the whole of the plaintiff's land and a part of the witness' land and that the plaintiff had his own land. That the defendant cut down the plaintiff's trees. When PWI was crossexamined by the defendant, he told the court that the defendant had fenced the plaintiff's land unlawfully, but that he himself did not see the defendant cut down the plaintiff's trees.

PW3, Kubai M'Muritha, one of the clan elders who allegedly decided the case between the plaintiff and the defendant stated that though the land upon which the trees stood once belonged to the plaintiff, it was given to the defendant and that the defendant was cultivating on the land.

The defendant's case was that the land was his having got the same from his father and that the case against him was a fabrication arising out of a land dispute between the defendant's father and the plaintiff's father. DWI, M'Arangania M'Mula said that the trees that were cut by the defendant were sold to the defendant by the witness. Mr. Mwanzia, appearing for the appellant contended that the learned trial magistrate erred in law and fact when he purported to separate the land from the trees growing thereon. That having found as he did that the land belonged to the defendant the learned trial magistrate should not have in the same breath proceeded to find that the trees standing on the defendant's land belonged to the plaintiff. That the learned trial magistrate should have addressed his mind to the definition of land found in section 3 of the Registered Land Act (RLA) Cap 300 laws of Kenya. Section 3 of the RLA defines "land" to include "land covered with water, all things growing on land and buildings and other things permanently affixed to land" Mr. Mwanzia also relied on Order 6 Rule 4(3) of the Civil Procedure Rules (CPR) which defines land as follows:- "4(3) In this rule, "land" includes land covered with water, all things growing on land and buildings and other things permanently affixed to land." On grounds 1, 3 and 4 of the Memorandum of Appeal, Mr. Mwanzia submitted that there was no basis for the award of Kshs. 30,000/= and further that the land Adjudication Officer should have testified to corroborate the evidence of the plaintiff regarding the value of the trees. Finally, it was contended for the appellant that the judgment was against the weight of evidence.

Mr. Kirima for the respondent submitted that the appeal was without merit. That the suit land was not governed by the provisions of the RLA and that Order 6 Rule 4(3) of the CPR was also inapplicable. It was also submitted on behalf of the respondent that the learned trial magistrate who had the chance to see and appreciate the demeanor of the witnesses during the hearing of the case was better placed to decide who of the parties was to be believed and that the defendant did not call any witnesses to confirm to the court that the trees belonged to him. Mr. Kirima pointed to some apparent discrepancy in the defendant's case which discrepancies it was submitted were fatal to the defendant's case.

Though it is not expressly stated when, it is agreed by both parties that the land upon which the trees allegedly cut down by the appellant belonged to the appellant. Whereas Mr. Mwanzia contends that the definition of land as given in both the RLA and CPR is applicable to this case, Mr. Kirima submits that it does not. The first issue for the decision of this court therefore is whether the definition of land under both the RLA and the CPR applies to these proceedings and if so, was the learned trial magistrate correct in entering judgment for the plaintiff. Neither Mr. Mwanzia nor Mr. Kirima referred the court to any authorities.

Under section 2 of the RLA – "Application" the Act is said to apply to- "2(a) ……

(b) any area to which Land Adjudication Act is on or after commencement of this Act applied.

(6a) Any area to which the Land Adjudication Act applies."

On the basis of the above provisions the RLA is applicable to the land in this case so that the definition of "land" found in section 3 of the RLA and Order 6 Rule 4(3) of the CPR is applicable to this case.

The learned trial magistrate found as a fact that the land upon which the trees allegedly cut by the defendant stood belonged to the defendant. What he should have done was to proceed to define land before concluding as he did that the trees belonged to the plaintiff. The evidence on record, by both the plaintiff and his witnesses is in favour of the defendant (appellant). I have also carefully and independently considered that evidence and I do concur with Mr. Mwanzia that the learned trial magistrate was wrong in separating the soil from all things growing on the land and buildings and other things permanently affixed to land. The plaintiff's witnesses testified that the whole of the plaintiffs land was given to the defendant during the process of adjudication. All that stood or grew on the land at the time of such adjudication passed to the defendant. It was also alleged by the plaintiff at paragraph 3 of the plaint that the defendant trespassed onto the plaintiff's land and cut down the trees. There was no evidence on record to prove the claim of trespass that would have given rise to the special damages of Kshs. 30,000/= claimed by the plaintiff. The kind of trespass that the plaint seemed to infer was of a criminal nature and if indeed it was true that the defendant had trespassed, the plaintiff would have proceeded with criminal action against the defendant. Apart from p exhibit 1, the "TO WHOM IT MAY CONCERN" letter dated 20.5.97 from the Divisional agricultural Office, Igembe North Division, the plaintiff did not strictly prove his claim of Kshs. 30,000/=. What basis did the D.A.O. use in saying that one tree cost Kshs. 500/=? The said officer was not even called as a witness and it was wrong for the learned trial magistrate to admit expert documentary evidence without calling the maker thereof. This in itself caused a miscarriage of justice. I have considered the submission by Mr. Kirima on behalf of the respondent and find the same without a ground on which to stand. The respondent's main contention was that the provisions of the RLA and the CPR as regards the definition of land are not applicable to this case, but that contention cannot stand in view of the provisions of section 2 of the RLA set out hereinabove.

For the reasons that I have given above, I find that the appeal has merit. Accordingly, I allow the appeal and set aside the judgment of the learned trial magistrate delivered on 26.6.98. I dismiss the plaintiff's suit with costs to the appellant. The appellant shall also have the costs of this appeal.

It is so ordered.

Dated and delivered at Meru this 15th day of February 2005.

RUTH N. SITATI

Ag JUDGE