

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

CIVIL APPEAL NO. 57 OF 2003

**(Appeal from the Judgement of the Senior Resident Magistrate at Vihiga, F. M. KINYANJUI
ESQ., in SRM Civil Case No.73 of 2002 delivered on 25
th
March, 2003)**

WILLIAM MAHANGIRU ANALO :::::::::::::::::::::::::::::: APPELLANT

VERSUS

NORAH KAVOCHI :::::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGEMENT

The appellant, William Mahangiru Analo, was sued in the Senior Resident Magistrate Court in SRM Civil Suit No. 73 of 2002 at Vihiga by Nora Kavochi Analo, the Respondent herein for the following two main reliefs:

(a) a declaration that the two trees of the five mature trees belong to the (Respondent) Plaintiff and injunction do issue restraining the Defendant from selling the same and in the alternative payment of the value of cut (sic) trees to be assessed by the courts;

(b) Costs of the suit.

The appellant was a step son of the Respondent. He was the administrator of the estate of the late husband of the Respondent, one Enos Analo which comprised Land title No. North Maragoli/Kisatiru/43.

The Respondent claimed in the suit in the lower court to be entitled to inherit from the estate of her husband inter alia two mature trees out of five mature trees by virtue of division of her deceased husband's estate arrived at through a ceremony called "***Luvego remembrance***" conducted on 6.3.92 by Maragoli elders and presided over by the area Assistant chief. Both the Appellant and the Respondent subjected themselves to the decision of the "***Luvego***" as far as the distribution of the trees were concerned. The appellant entered appearance to the suit but did not file defence. When the suit came up for hearing on 7.1.2003, the Respondent testified but the Appellant who was also present in court with his advocate, did not testify. The Respondent told the court that the Appellant had cut down the trees to which she was entitled. In cross examination, the Respondent stated that the Appellant had been ordered by the Luvego Committee to pay to her for 2½ trees at the rate of Shs.1500/= per tree making a total of 3750/=.

The trial magistrate, **F. M. Kinyanjui Esq.**, observed that the Respondent had in the words of the learned magistrate, thrown in the towel by failing to testify. That was a misdirection. It amounted to shifting the burden of proof. The trial magistrate himself assessed the value of the trees claimed at Shs.10,000/= and ordered the Appellant to pay that amount to the Respondent plus costs of the suit.

Mr. Akwala, learned counsel for the Appellant argued only grounds 3 and 5 of the appeal from the judgement of the trial magistrate. He abandoned the other grounds. He contended that there was no evidence to justify the Respondent's claim. He observed that the Respondent himself had attributed a price of Shs.1500/= to each tree but the learned trial magistrate had assessed the value himself at

Shs.10,000/= although he had no expertise to do so.

I have perused the lower court record and the appeal and have given due consideration to the arguments advanced by Mr. Akwala on the appellant's behalf. A judicial officer cannot double up also as an expert witness and it was wrong for the trial magistrate to take it upon himself the role of an expert in assessing the value of the trees. In any case, the assessment was theoretical as the trees in question were neither viewed by the court nor described. Moreover, no basis was given for the random valuation. The Respondent in her evidence was content with a sum of Shs.3750/= at the rate of Shs.1500/= per tree. That is the figure that was not contested by the Appellant.

The judgement of the learned trial magistrate is set aside and in its place is substituted an order that the appellant shall pay to the Respondent Shs.3750/= plus half the costs of this appeal and the costs of the suit in the lower court. It is so ordered.

Dated at Kakamega this 15th day of April, 2005.

G. B. M. KARIUKI

J U D G E