

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Civil Appeal Case 145 of 2001

LAZARO KIRUTA OLENTUYTIA APPELLANT

VERSUS

DAVID OBUNGA AMOLO RESPONDENT

JUDGMENT

Appellant LAZARO KIRUTA OLENTUYTIA sued the respondent DAVID ABUNGA AMOLO in the Senior Resident Magistrate Court Kilgoris seeking for orders of eviction and permanent injunction restraining the respondent from interfering with land No.OLOONTARE/16. He also sought for costs of the suit.

Plaintiff told court that the land in dispute was his. Demarcation was done in 1982 and land allocated to him in 1988. The father of the respondent who is now deceased filed an objection during the adjudication period against the appellant being allocated the land. The objection was heard but dismissed. The Respondent father then appealed to the Minister for Lands. That appeal is yet to be heard. Appellant said he gave the respondent father a portion of 2 acres to utilize. However after his death the respondent has ploughed 10 acres. Appellant called one JOSHUA NYAKANI OMASIRE (PW2) the Land Registrar in Transmara as a witness. PW2 said the land in dispute was in the name of appellant and one ANN WAIRIMU MAINGA. The land was however not registered in their names as there was an appeal pending.

Respondent stated the land belonged to his father. Appellant later settled on a portion of that land. During demarcation they found the land was registered in the name of appellant. His father objected. The objection was dismissed but his father appealed. Appeal not yet heard.

It was submitted that the learned magistrate erred in dismissing the suit even after making a find that the land belonged to the appellant. Even if there is an appeal it is not between the appellant and respondent but between the appellant and respondents father

Indeed the Land Registrar (PW2) said that the land was in the names of the appellant and another. However he categorically said that the land was not registered as there was an appeal pending. The appellant did not produce any document to prove his ownership of the land. Though the objection filed by the Respondents father was dismissed, until the appeal filed is fully determined he cannot claim to be the owner of the land. This is why the land office have not issued any title documents for the land. The issue of ownership is still in dispute and as the magistrate rightly ruled the appellant went to court prematurely. True the dispute is not between the Appellant and the defendant but one cannot close his mind to the fact that the appellant to the Minister is the Respondent's father. In his evidence the respondent had stated that they have lived in the land since 1961. It would be unjust to order his eviction before the issue of ownership is fully determined.

I therefore find that the magistrate came to a right conclusion. I find the appeal has no merit and it is dismissed with costs.

Dated this 11th day of April 2005

KABURU BAUNI

JUDGE