



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**

**CIVIL APPEAL NO. 138 OF 1998**

**WAMBUA NZAU ::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**DAVID MUTHUI MUTUA ::::::::::::::::::::::::::::::::::: RESPONDENT**

**J U D G E M E N T**

The appellant was the defendant in DMCC 71/1996 where he had been sued by the plaintiff now respondent for recovery of Kshs. 10,000/- being the amount which the respondent had paid to casual workers to fence his land, clear some bushes and build a house. The said land is situate at Thua Sub Location, Zombe Location. When the casual workers went to fence the said land the appellant chased them away as he claimed the land to be his and the respondent was aggrieved by the appellant's action and filed the suit in Kitui claiming the money he had paid to the workers. The appellant filed a defence in that case denying that the said sum was due from him and further that the plaintiffs/respondents suit did not disclose any cause of action. The case was heard by the District Magistrate who awarded the respondent Ksh 5,000/- plus half the costs of the suit. The appellant is dissatisfied with the finding of the Magistrate and appeals against that decision citing those grounds in his memorandum of appeal.

It is the contention of the appellant that since the Magistrate found that he was the rightful owner of the land that was in dispute he should not have ordered the appellant to compensate the respondent with Shs. 5,000/-. I do agree with the Magistrate's finding that the said land did belong to the appellant as there was an award by the Land Disputes Tribunal which was produced as Ex. No. 1 (certified copy). It was dated 11.10.1997 and it was a dispute between the Appellant and one Kula Muthamba. Appellant also produced in evidence P Ex 2 a letter from the chief dated 24.6.1996 in which the chief was stopping any party from dealing with the land in question till the matter was resolved. Another letter DEX. 1 from the District Officer of the area dated 10.9.1996 was also urging no party to interfere with the land in dispute between the appellant Wambua Nzau and Kula Muthamba before the case between them was determined. If indeed this is the same land the respondent was buying as of 1994 – 96 as per his evidence it was already a source of dispute between the appellant and one Kula Muthama and as of 1996 when the respondent was purporting to fence it. The Land Disputes Tribunal had given it the appellant.

P.W.1 was the one sent to fence. He said that appellant chased him with bows and arrows but that on the 2nd occasion, the appellant actually called the chief and they both chased the workers away. It seems the Magistrate was persuaded that the appellant took the law into his own hands by chasing the workers on both occasions that respondent sent them to the shamba instead of going to court to ask for an injunction. At least from the evidence of respondent witness, it is true that that on the 2nd occasion the appellant called the chief who helped chase away the workers. The appellant is justified and has a duty to protect his property. Apart from the court being told that the appellant was armed, nobody was injured. The respondent's workers were trespassers on his land and I believe he could use reasonable force to remove such trespassers. There is no evidence of unreasonable force.

P.W.1 admitted that an area of 45 acres had been fenced out of the 60 acres of land. They had spent 6,000/- on fencing. At the time they were first chased if at all it means there was a balance of 2000/- with the workers. The workers were given a further 2000/- for construction of the house when they were again chased. It means that about 4000/- was not spent on the land. If the court were to make an award it would have awarded the 4000/- not 5000/- because the claim is for a specific amount 10,000/- spent on the shamba.

The plaintiff's witness admitted that he did not do the work as agreed with respondent. At the time they were chased, he still had the money. That being the case, it was the witness to refund to respondent what he had not spent. Another person the respondent may have pursued if he wanted compensation for the loss is the person who sold to him the land who seems not to have disclosed that the said land had been subject of a dispute and the Land Disputes Tribunal had awarded it to appellant. I do agree with appellant that since the appellant is the owner of the said disputed land it was wrong for the court to ask him to pay a trespasser 5000/- for trespassing on appellants land. Besides there was no basis for the said award and I do agree that it was an arbitrary award which the Magistrate reached by blaming both parties contrary to his finding of who owned the land.

The 2nd ground in the Memorandum of Appeal is that the respondent's suit did not disclose a cause of action. As rightly found by lower court, this was not respondent's land. No reason is given for respondent's workers to be present on it. In his submissions the respondent purported to produce some agreements entered into in respect of the sale of land but he can not produce them at this stage. In any case as I have earlier observed by the time the respondent claims to have bought the land between 1994 – 6 there was already a dispute over this land between the appellant and one Kula Muthama. Respondent also showed the court some unsigned document allegedly from the Land Disputes Tribunal which seem to be proceedings that were recorded in 1999 when the lower court judgement had already been written. The documents that the appellant has are of little help to the court at this stage. In his submissions he seemed to give evidence that he should have given in the lower court to prove ownership of the land. I have already considered that issue above.

All in all I do find that the Trial Magistrate erred in awarding the respondent Kshs. 5,000/- as compensation and half the costs of the suit. The award was made without regard to the evidence on record and I will therefore allow the appellants appeal, the judgement of the lower court is set aside with all the consequential orders and this appeal is allowed with costs to the appellant for both this appeal and the lower court.

Dated, read and delivered at Machakos this 26th day of february,2004.

**R. V. WENDOH**

**JUDGE**