



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 156 OF 2002

(APEAL FROM A JUDGMENT IN MURANG'A CIVIL CASE NO. 167 OF 1994
BY J. B. A. OLUKOYE – R.M. ON 19/9/2001)

RACHEL NJERI MWANGI APPELLANT

VERSUS

JACOB WANDERI RESPONDENT

J U D G M E N T

Rachel Njeri Mwangi (hereinafter referred to as the Appellant) brought a suit in the Resident Magistrate's Court at Murang'a seeking judgment against Jacob Wanderi (hereinafter referred to as the Respondent) for Kshs.34,000/= being the value of trees unlawfully cut down by the Respondents and his agents on the Appellants land known as LOC 7/Gakoigo/1296. The Appellant also claimed general damages for trespass and costs of the suit.

Four witnesses testified in proof of the Appellant's case before the trial court.

These were the Appellant, Stanley Kiama Waweru (P.W.2) who is a neighbour of both Appellant and Respondent, Margaret Njoki Wanjohi (P.W.3) a daughter in law of the Appellant and Loice Kabura (P.W.4) who also stays around same area as the Appellant.

The Appellant's evidence was that on 16th February 1994 one John Kimani an employee of the Respondent climbed a tree which was on the Appellant's land 2½ feet away from his boundary with one Njoroge who is respondent's brother. Kimani started cutting the tree branches claiming the Respondent had sent him. The Appellant however told him not to cut the trees and he went away after cutting a Branch of the tree.

On 23/2/94 the same John Kimani cut another native tree from the Appellant's land. This time the Respondent and his wife were present and insisted that Kimani had to cut the tree.

On 7/3/94, the Appellant P.W.1 & P.W.3 were at the Appellant's, home when they heard the sound of a power saw cutting trees. On checking they found someone using a power saw to cut trees on the Appellant's side of the land. When the Appellant protested, the Respondent who was present told the sawyer to continue cutting the trees. Several trees were cut down and then cut into pieces. They were taken across the boundary to the land of Njoroge where the logs were burnt for charcoal. The Appellant produced a list of the trees which were cut together with their values. She testified that the total value of all the trees destroyed was Kshs.34,000/=. The Appellant maintained that the trees were hers and that she had not authorised the Respondent to cut down the trees nor did the Respondent give her the tree logs or charcoal after cutting down the trees.

The Respondent in his defence denied having entered the Appellant's land or having cut down the Appellant's trees. Apart from the Respondent one Elias Maina Mwangi also testified.

The defence evidence was that the Appellant's land borders the land of Njoroge Muraguri a brother to the Respondent. There was a dispute between the Appellant and Njoroge concerning the trees. The Appellant sued Njoroge in Civil case No. 180 of 1992 over the trees. The suit was heard and it was resolved that the trees belonged to Njoroge. On 7/3/94. Njoroge instructed D.W.2 to cut down some trees D.W.2 started cutting the trees using a power saw and it was then that the Appellant arrived protesting at the cutting of the trees. Njoroge however insisted that he had the right to cut down the trees and D.W.2 therefore completed the exercise.

The trial magistrate having considered the evidence was not satisfied that the Appellant had proved that the trees cut were on her land, nor did she prove the value of the cut trees. The magistrate therefore found the Appellant's suit not proved and dismissed it with costs to the Respondent.

Being dissatisfied the Appellant has now appealed against the magistrate's judgment citing 6 grounds. In a nutshell the Appellant complains that the judgment of the magistrate was against the weight of the evidence as the Appellant had proved that the trees cut grew on her land and belonged to her, and that the trial magistrate was wrong in blaming the Appellant for the failure to visit the scene and that there was no need for a Report from the land Registrar or a valuation report from a valuer.

I have carefully reconsidered and evaluated all the evidence that was adduced before the trial magistrate. I find that it was not disputed that some trees were cut down and that these trees were near the boundary of the appellant's land and the land of Njoroge. The issues for determination were:

- Whether the Appellant proved that the cut trees were on her land and therefore belonged to her.
- Whether the trees were cut by the Respondent or his servant or a gent.
- Whether the value of the trees has been established to be Kshs.34,000/= and whether the Appellant is entitled to recover this amount from the Respondent.
- Whether the Respondent was liable to the Appellant for damages in trespass.

The Appellant's evidence was that the trees cut down were on her side about 2½ feet away from the boundary. This was however denied by the defence who claimed the trees were on Njoroge's land and supported their evidence by copy of a judgment in Murang'a Civil Case No. 180 of 1992 which involved a boundary dispute between the Appellant and Njoroge and some trees allegedly cut by Njoroge which the court ruled were on Njoroge's land. It is clear that the Appellant and Njoroge had a problem over the boundary. It was therefore not sufficient for the Appellant to claim the trees were on her side of the land without support of expert evidence to this effect. While the trial magistrate was wrong in her finding that the court could have determined to whom the trees belonged by visiting the scene, the trial magistrate was right in finding that the Appellant ought to have called the land registrar or any other such expert to prove that indeed the cut trees were on land parcel No. LOC 7/Gakoigo/1296 as she claimed in the plaint. The Appellant therefore failed to discharge the burden in proving that the cut trees were on her land and belonged to her.

As regards the person who cut down the trees or at whose insistence the trees were cut. The plaintiff testified that it is the Respondent who instructed his servants and the sawyer to cut down the trees. Although this was denied by the Respondent. I find that the Respondent and his witness did not speak the truth in this regard. All four witnesses who testified for the Appellant stated it was the Respondent who instructed that the trees be cut down. While the witnesses may have been mistaken about the actual boundary for the land as between the Appellant and Njoroge, there was no reason why the witnesses would have lied that it was the Respondent who instructed that the trees be cut down when it was in fact Njoroge who had done so. I therefore reject the Respondent's evidence in this regard and find that the Respondent did instruct his servants and agents to cut down the trees.

The Appellant claimed Kshs.34,000/= as the value of the trees cut down. She purported to be in the business of selling trees and therefore able to value trees. Other than the fact that she sells trees the

Appellant did not tell the court of any special training or expertise that she had to enable her value trees. The trial magistrate was right in finding her evidence insufficient to prove the value of the trees. Moreover the trial magistrate erred in allowing her to adduce evidence in respect of a special damage when the same were not particularized.

All in all I find that the Appellant failed to prove his claim and the trial magistrate was therefore right in dismissing her suit.

Accordingly I find no merit in this appeal and do dismiss it with costs to the Respondent.

Dated signed and delivered at Nyeri this 26th March 2004.

H. M. OKWENGU

JUDGE