

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 79 OF 2002

MUIYA MUASYA ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

MULEI MUTYAMBI ::::::::::::::::::::::::::::::::::: RESPONDENT

J U D G E M E N T

This appeal arises out of the judgement in Kitui PMCC 249/2001 where the plaintiff now the Respondent sued the defendant now the appellant for Kshs. 5100/0 costs of the suit and interest which was an elders award made on 11.9.2000 whereby the appellant was supposed to have paid the respondent 3 goats or Kshs. 3000/- and Ksh 2100/- as compensation. The course of action allegedly arose out of the process of eating bread or oath on behalf of the appellant and respondent.

The appellant filed a defence denying the claim and a counterclaim against the respondent for Ksh. 7000/- which was damages awarded to her by elders against the Respondent. The respondent filed a defence to counterclaim and reply to defence. Judgement was entered in favour of the Respondent whereas the appellants counterclaim was dismissed. The appellant was dissatisfied with the judgement of the lower court and filed this appeal dated 8.10.2003 in which she cites 4 grounds. I will consider the goods collectively.

Though the Respondent was duly served with hearing notice, he did not attend and the court being satisfied with the service proceeded to hear the appeal.

A brief background of the case is that the appellant agreed with the respondent that the appellant could use his land for 2 seasons. After using it for one season the appellant found the Respondent grazing his donkey and goats on the land yet her peas were still on the land. She reported the matter to the assistant Chief who ordered that the Respondent do pay her 3 sacks of cow peas or Ksh. 7000/-. According to Respondent the Appellant had told court he did not need to till the land anymore and on the elders making that award he decided to ask the chief that the Appellant and Respondent go to take an oath to ascertain who was telling the truth. When the oath was allegedly administered, the Appellant was unable to swallow whatever substance she was asked to eat but the Respondent swallowed and so it was concluded that the Appellant was lying and the elders made an award of Ksh. 3000/- to be paid to the Respondent by Appellant and a further Kshs 2100/- which was paid to the chief to facilitate the administration of the oath.

The question is whether the transaction of taking an oath was enforceable in law. The exercise of oath taking is illegal and it is not enforceable under the Oaths and Statutory Act Cap 15, it was not before an administrator for oaths. It was not taken before a court of law. I do agree with the appellant that the nature of the oath is unknown, so is the administrator. The administrator was not called as a witness. He did not confirm whether he received the 3000/- charged and for which the Magistrate gave judgement. Ksh.2100/- allegedly paid to the chief is also not proved to have been paid. The recipient of the money was never called as a witness to say for what purpose it was paid. The Magistrate purported to rely on some agreement annexed at page 11 of the record of appeal. At no time in the proceedings was it produced and marked as a court exhibit. It is written in unknown language.

There is no translation of it into the English language. The Magistrate however relied on it in finding in favour of the Respondent that it was witnessed that 5100/- was owed and due to the Respondent. The said document is improperly before the court. It was sneaked into the proceedings and the court should not have referred to it especially that it is not in the court language. All that the court had were allegations made by the Respondent of some illegal exercise that took place which the Appellant totally denied. It being illegal the court erred in enforcing a Criminal Act and entering judgement for the Respondent instead of dismissing it.

The Appellant has counterclaim where she claimed 7000/-. She claimed to have used the Respondent's land only one season unlike what they had agreed. He had then taken his donkey and goats to graze thereon. In his evidence Respondent did agree that the Appellant used the land for only one season and that she did not want to use it again. If indeed she did not want it then why would she go and report to the chief. The Respondent also agreed that the matter was referred to Assistant Chief who ordered him to pay 3 sacks cow peas or 7000/-. The Respondent actually did admit the Appellants claim which is based on an oral contract to till land and was enforceable in law. I do find that on a balance of probability the Appellant had proved her claim in the counterclaim the respondent having admitted it and the Magistrate should have gone ahead to enter judgement for the Appellant against the Respondent.

The sum of this is that the Trial Magistrate did misdirected himself and erred in law and fact as per the 4 grounds based on in the Memorandum of Appeal and the court will therefore allow this appeal.

The lower court's judgement is hereby quashed and the Plaintiff/Respondent's suit is dismissed with costs to the Defendant/Appellant. The Defendant/Appellant's counterclaim is allowed and judgement entered for the Appellant against Respondent for Ksh. 7000/- plus costs of the counterclaim, costs of the suit in the lower court and on appeal plus interest.

Dated, read and delivered at Machakos this 25th day of March, 2004.

R. V. WENDOH

JUDGE