

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
HIGH COURT CIVIL CASE NO. 7 OF 2003

NDUA KWAI.....1ST APPELLANT

MALUKI KWAI..... 2ND APPELLANT

VERSUS

JOSEPH MUTUNE

HENRY CHAMIA KILONZO.....RESPONDENT

J U D G E M E N T

The appellants Ndua Kawai and Maluki Kwai were the defendants in Principal Magistrate's Court Civil Case No. 306/99 of where the Respondent Henry Chamia Kilonzo filed a suit against them seeking orders of injunction to restrain the appellants from building, cultivating, grazing or in any way interfering with the plaintiff's parcel of Land No. Matinyani/Mutulu/100 till the suit was heard; a declaration that the defendants were trespassers on the plaintiff's parcel of land; an order of eviction from the said land and costs of the suit. The magistrate found in favour of the Respondents and the appellants are dissatisfied and aggrieved by the said judgement which was delivered on 20/12/02.

It is the Respondent's case that the appellants are squatters on the disputed land which is registered in his name and that the appellants have their own pieces of land but have put up things like kiosks on this land in dispute. According to Respondent they had a dispute before Adjudication Board which gave the land to him and an appeal to the Minister ordered that appellants vacate the land.

It was the appellants' contention that they have lived on the land since their birth, their whole family lives there. That they had a dispute before the Adjudication Board and they appealed to the Minister vide case No. 105/1977 which ordered a subdivision of the land but the Respondent went ahead to register the land in his name alone in 1978 before the orders of the Minister were implemented. They did not appeal though they were dissatisfied with Ministers order. The Land Registrar Kitui was aware of the land dispute and order of the Minister which he confirmed had not been complied with by the parties.

The Memorandum of Appeal consists of 7 grounds of appeal which were argued collectively save for ground 7 which was abandoned.

The first ground raised by the appellant's counsel Mrs Mutua is that the magistrate's court had no jurisdiction to entertain the matter. Since a dispute had been determined by the Land Adjudication Board and an appeal was made to the Minister who gave his decision which is final in terms of Section 29 of the Land Adjudication Act. The decision of the Minister was exhibited before the lower court. It directed that the parties share the land – between the 1st appellant and Respondent and that 1st Respondent was to remove his own homestead from the Respondent's land. The appellants had not appealed against that decision.

The orders of the Minister are still in existence. Though the land Registrar testified it was not shown how the Respondent managed to have the whole land registered in his names before implementation of the Minister's decision in 105/1972. It seems there was fraud on the part of the Respondent. The Minister's decision not having been challenged or set aside the lower court had no business hearing the case and giving the orders that it gave. The court indeed had no jurisdiction to entertain the matter. It is irrespective of the fact that in the defence, jurisdiction was admitted. It is for the court to determine whether the lower

court had jurisdiction or not. The lower court sat as an appellate court to the Minister's decision when it was not.

It was also the appellant's contention that the trial magistrate did not consider the evidence on record on a balance of probability. It was questionable how the Respondent obtained the title before implementation of the Minister's orders and yet the court went ahead to grant orders to the Respondent. The magistrate in his judgement considered the map produced as one of the exhibits setting out the distribution of the land. The said map was not certified as being from the Land Registrar's Office. Its source is unknown. Reliance on the map was an error.

In the appeal before the Minister, Maluki Kwai 2nd appellant was not given any share in the disputed land. He did not appeal against that decision and so there are no prayers that he could seek in his appeal. The court, however, finds that there is merit in the 1st appellant's appeal and the appeal is allowed. The lower court judgement is set aside. This court can only order that the 1st appellant be given his share of the land parcel Matinyani/Mutulu/100 in terms with the Minister's award in LR 105/77. The 2nd appellant will bear his own costs of this appeal but Respondents will bear 1st appellant's costs.

Dated at Machakos this 15th day of December 2004

Read and delivered in the presence of

R.V. WENDOH

JUDGE