



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 84 OF 1996**

**MWONGELA KIVYU ..... APPELLANT**

**VERSUS**

**PATRICK MWANGANGI KIUSYA ..... RESPONDENT**

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

The Respondent herein Patrick Mwangangi Kiusya filed civil suit no. 12 of 1996 at Kitui District Magistrate's Court claiming from the defendant who is the appellant herein Mwongela Kivyu a sum of Kshs.8,000.00 being the value of a fence destroyed by the defendant on 5th January, 1996.

The defendant who is the appellant herein filed a defence avering that he denies that he destroyed the plaintiffs fence on 5.1.1996 and puts the plaintiff into strict proof thereof, denied being indebted to the plaintiff to the money claimed in the plaint or any part thereof and on that basis prayed for the plaintiffs suit to be dismissed with costs. The parties were heard by the lower court and a judgement given on 26.7.1997 the subject of this appeal. The findings of the learned trial magistrate are that:-

1. The defendant felt offended when his paternal uncle sold his land to an outsider and that is why he damaged the plaintiffs fence. The plaintiff and his wife were consistent that the fence was damaged.
2. That the boundary between the land of the defendant and that of Mbai Mweke was the old foot path. It was confirmed by the land disputes tribunal and the defendant had no right whatsoever to destroy the fence of the plaintiff.
3. As for the quantum of damages the plaintiff is expected to know the expenses which he incurred on erecting the fence and he will not interfere with the assessment. The appellant was aggrieved by that decision and he has appealed to this court citing 5 grounds of appeal namely that the learned Magistrate erred in law and misdirected himself when he proceeded to conduct the trial when he lacked jurisdiction to do so as the subject matter in dispute was essentially the boundary between the appellants and the respondents lands, erred and misdirected himself when he admitted as evidence a purported judgement by the lands disputes tribunal while no such tribunal exists therefore the learned trial magistrate erred in law by admitting as evidence the alleged judgment a map which were inadmissible, erred and misdirected himself when he awarded the respondent Kshs.8,000.00 which was merely pleaded but not proved in evidence, erred and misdirected himself when he entered judgment in favour of the plaintiff when there was no sufficient evidence to warrant the same, erred when he failed to dismiss the respondents case.

Ground 1 was abandoned. In his oral submission counsel for the appellant stressed the following points.

1. That the evidence showed that there was a boundary dispute between the PW 3 and the defendant which dispute was settled by the chief. Neither before the elders or in court did the respondent ever allude to the evidence on the value of the fence destroyed.
2. That since the claim had been denied it was incumbent upon the respondent to prove the claim of Kshs.8,000.00 and no evidence was tendered towards proving that claim. 3. There was no evidence that a fence had been put up and so it was wrong for the magistrate to award kshs.8,000.00 as damages.
4. That no tribunal had been gazetted for that District and so it was wrong for the magistrate to rely on a decision of a tribunal which had not been gazetted.
5. The learned trial magistrate grossly misdirected himself when he said that he cannot interfere with the assessment of the respondent as to the value of the fence. It is their view that the case was not proved and the same should have been dismissed.

in response counsel for the appellant opposed the appeal on the following grounds.

1. That they concede the facts but still oppose the appeal because the parties were not represented in the lower court and the learned trial magistrate properly framed the issues and properly determined them.
2. The learned magistrate found that there was ample evidence to confirm that the fence was destroyed from PW 1 and PW 3 and DW 2. The learned trial magistrate had no alternative but to find that the fence had been destroyed and based the award on the value pleaded, that the tribunal members complained of were gazetted vide gazette notice 5523 of 5.11.1993.
3. That there was no error and so the appeal should be dismissed.

In reply counsel for the appellant stated that the exhibits were not in the language of the court and they were inadmissible, that the decision of the tribunal should not have been relied upon as it was not properly filed in court, the evidence of the eye witness did not go to prove the claim, that the husband found the way blocked and not their fence destroyed, they still maintain that the claim was not proved.

The duty of this court on appeal is to determine whether the conclusion reached by the lower court are to stand or not. In doing so the court will confine itself to the claim that was lodged before the lower court first determine if the respondents fence was destroyed and 2. If destroyed whether the same was worth the amount claimed of Kshs.8,000/=.

On the assessment of the evidence on the record PW 1, was not around when the fence was destroyed. PW 2 his wife was she says she witnessed it and the appellant warned her not to go there as he was holding a panga. As submitted by the respondents counsel DW2 the appellants own witness confirmed that the fence was destroyed by the appellant. It is therefore the finding of this court that indeed a fence was destroyed.

As regards the value it was up to the plaintiff respondent to show how the value was arrived at. The learned trial magistrate was wrong in ignoring a cardinal principle of law that special damages must be proved. Herein the respondent even did not testify on how he arrived at the figure of Kshs.8,000/=. It is the finding of this court that although the fence was destroyed its value was not proved and the respondent having been no evidence adduced by the respondent on how he arrived at that figure the learned trial magistrate should not have awarded the same. There is merit in that ground and the appeal will succeed on that basis.

As for costs failure to call for proof of special damages lay with the court and so no party will be penalized on costs each party will bear his own costs an appeal.

Appeal allowed for reasons given. Lower court decision awarding the respondents with special damages of Kshs.8,000/= set aside and substituted with an order of dismissal of that claim.

For the reasons given each party will bear own costs of the appeal.

4. But the appellant will have costs against the respondent in the lower court because the claim was not proved.

Dated, read and delivered at Machakos this .....day of .....,2003.

**R. NAMBUYE**

**JUDGE**