REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 46 OF 1996

PEKESHE NDEJE NDARA ……..…… APPELLANT

VERSUS

NGALE SAGO ……..…….. RESPONDENT

JUDGMENT

This is an appeal against the decision of the learned Resident Magistrate at Kaloleni in Civil Case No.74 of 1995 in which the learned Magistrate dismissed appellant's claim for damages for trespass upon certain coconut trees which he (Appellant) claims to have bought at an auction sale, together with compensation for coconut and other produce that the defendant had allegedly taken from the same coconut trees and perpetual injunction restraining the Respondent from trespassing on the said trees together with costs of the suit.

Five grounds of appeal were preferred and these are that the learned Magistrate erred in reopening the Kaloleni Civil Suit No.8 of 1961 which was resjudicata; that the learned Magistrate made wrong finding about the ownership of the coconut trees that were sold pursuant to execution of decree in Kaloleni Civil case No.8 of 1961; that the learned Magistrate should have believed the appellant who had used the trees for 20 years before the respondent started using the disputed trees; that the court erred in failing to award damages to the appellant for trespass to the coconut trees; and that the learned Magistrate erred in failing to give perpetual injunction against the Respondent.

At the time this appeal was heard the Respondent was not in court although I was satisfied that service upon him of the hearing Notice for the hearing of the appeal was proper.

I have considered the appeal, the grounds of the same appeal, and the submissions of the learned counsel for the Appellant.

First, although the record of appeal was at the time of directions certified as proper, it was not proper as it was not complete. The pleadings were not included in the same record of appeal. Plaint was not annexed and statement of Defence was not annexed.

Be that as it may according to the plaint (which is in the lower court file annexed) the Appellant set out to prove that he was the owner of 55 coconut trees which the Respondent was trespassing upon and to prove that he had suffered damages as a result of the same trespass on to his trees. He also set out according to the same plaint to prove that the Respondent had taken his coconuts and other produce and he was entitled to be compensated for the same coconut and produce taken by the Respondent. Upon proof of all those, he would convince the court to issue an order of injunction to stop the plaintiff from

trespassing on to his coconut tress.

In his evidence and the evidence of his witnesses, he did reduce the number of coconut trees to 48 but did not identify which 48 trees in that piece of land were his. The Respondent's case was that the Appellant encroached on to his land, and was harvesting coconut from his land and he stopped him. That defence meant the coconut that were in dispute had to be properly identified to the satisfaction of the court and the land also had to be identified. That was not done and the court stated as follows in his judgment:

> *"A part from the foregoing, I find that the trees claimed were not*
>
> *sufficiently identified in court. Neither was the parcel of land on which*
>
> *they are growing sufficiently described. This being the case I conclude*
>
> *that the subject matter of this suit has not been sufficiently identified."*

As I have also stated above, that is one of the main matters that the Plaintiff set out, according to plaint to prove and that is what he failed miserably to prove. He could have proved it by either moving the court to visit the scene and he could point out the trees there or he could have expert evidence perhaps with the survey map of the area showing his coconut trees as opposed to others including the ones claimed by the Respondent. Without proving identity of the trees he claimed and the ownership of the land in question, I cannot fault the learned Magistrate in his judgment. It was upon that proof that orders like that of injunction could issue for the court had to be certain of what coconut trees the Respondent was to be injuncted from trespassing if there is anything in law known as trespass to trees. Any order of injunction in such a case would be an order in futility as it cannot be enforced. Courts do not act in vain.

Further, throughout his evidence the Appellant did not in the court below mention let alone prove the damages he suffered. He did not state how much he was earning from tapping the coconuts and how much he had lost. He did not even say at any stage that he was depending on the same threes for his livelihood etc. Courts act on evidence and not on imaginations. It is the duty of plaintiff to prove his losses or at least to show how he has suffered to enable a court of law assess the damages. Apart from lack of proof of any suffering, even the allegation of trespass onto the coconut trees was not proved. He had not proved that the Respondent had taken his coconuts and other produce. In fact all he says against the Respondent after giving narrative account of his acquisition of the alleged coconut trees is as follows:

> *"Thereafter I took over the coconut trees – Ngalo Sago (defendant) was present*
>
> *at the time of the auction. I went ahead using them upto last yea r – 1995. The*
>
> *dependant's son was tapping from my trees.*
>
> *I reported to the Chief and he was warned. He stopped. Last year defendant*
>
> *barred my worker from harvesting coconuts from my trees.*
>
> *In December, 1995 the Defendant harvested coconuts from my tre es. Even now*
>
> *Defendant's son is still tapping four coconut trees. I would like defendant to state*
>
> *why he is tapping my coconut without permission."*

That is all he said in evidence as concerns the Respondent. He said in December 1995, Defendant harvested coconut from his trees, which date in December? How many coconuts harvested? Who else saw the incident; which four trees? And lastly is the dependant to be held liable for acts of his son.

I have on my own analysed the evidence that was before the learned magistrate and I do find in my humble opinion that the learned Magistrate did come to a right conclusion after fair analysis of the evidence before him.He did not re-open the Kaloleni Civil Suit No.8 of 1961. All he did was to refer to the same case in setting a base for his judgment as the claim was that the coconut trees in question were bought at an auction without the land being bought. There was nothing improper in referring to the relevant part of that case as it affected the case before him. That reference did not in my mind in any way prejudice his decision as he did not rely on that decision in arriving at his decision. In any event, even if that part of the judgment is disregarded, what remains of the judgment was still proper to lead to the decision he made in the matter before him. The appellant may have had the trees in dispute for 20 years or even over, but it was his duty to adduce evidence upon which the court could rely for a decision in his favour. He did not do that and he had only himself to blame.

This appeal must fail. It is dismissed. As the Respondent did not appear in court on the hearing day, I will not order any costs to be paid to him. Judgment accordingly.

Dated and Delivered at Mombasa this 11th Day of December, 2002.

J.W. ONYANGO OTIENO

JUDGE