REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CIVIL APPEAL NO. 11 OF 2017

LUCIA WANJIKU MUIRURI....................................APPELLANT

VERSUS

NAOMI WAITHIRA WANYOIKE..........................RESPONDENT

(Being an Appeal from the Judgment of the Honourable C. Kutwa (PM), delivered on the 15th June 2017, in the Principal Magistrate Court of Kenya at Githunguri in Civil Suit No. 35 of 2015)

BETWEEN

NAOMI WAITHERA WANYOIKE ....PLAINTIFF

VERSUS

LUCIA WANJIKU MUIRURI ....DEFENDANT

JUDGMENT

The Appellant herein **Lucia Wanjiku Muiruri** was a Defendant in **Civil Suit No. 35 of 2015** at Githunguri Principal Magistrate Court. The Respondent herein **Naomi Waithera Wanyoike** was the Plaintiff in the above stated suit wherein she had sought for the following orders against the Defendant (Appellant) herein:-

a. ***General damages, the exact amount to be determined by the court.***

b. ***Costs of the suit.***

c. ***Interest on a), b) and c) at court's rates***.

The **Plaintiff (Respondent)** herein had averred that she was the lawful owner of land parcel **No. Gatamaiyu/Kagwe/734,** on which she owned blue gum trees of over **50 years of** age. She had also alleged that on or around **24th May 2013** and **30th July 2013,** the **Defendant (Appellant)** trespassed into the said parcel of land and cut down several trees which belonged to the Plaintiff and extracted timber without the Plaintiff's knowledge and consent. Further, that the Defendant (Appellant) had been cautioned by authority not to interfere and to trespass upon the Plaintiff's (Respondent's) land, but she did not heed the same. That the Defendant (Appellant) ignored the said warning and proceeded to cut down the above stated trees and due to that action by the Defendant (Appellant) the Plaintiff (Respondent) suffered loss and damage. She particularized the loss in paragraph 6 of the Plaint and urged the court to allow her claim.

The said suit was contested by the Defendant/Appellant herein who filed her Defence on **23rd July 2015,** and denied the Plaintiff's (Respondent's) claim. She admitted that the Plaintiff owns the land parcel No. **Gatamaiyu/Kagwe/734,** and she owns **Gatamaiyu/Kagwe/1198,** which parcels of land are adjacent to each other. She also averred that the parcel of land was initially owned by her husband, **Paul Muiruri Nganga** and the Plaintiff's (Respondent's) parcel of land was purchased by her late husband **Francis Ng'ang'ira** on or about **1986.** It was her contention that the trees in issue were planted in **1970,** by her husband and herself and they have since been using and harvesting the said trees without any dispute whatsoever. That even after the Plaintiff's (Respondent's) husband purchased **Gatamaiyu/Kagwe/734**, the Defendant (Appellant) and her husband continued to cut and harvest the said trees without any objection whatsoever. However, in June **2013,** she harvested the trees in issue and suddenly the Plaintiff (Respondent) claimed that she as the owner of **Gatamaiyu/Kagwe/734,** the said trees belonged to her. Thereafter, the Plaintiff (Respondent) reported the matter to the local administration who after hearing the dispute, determined that the Plaintiff (Respondent) was not entitled to any compensation for the felled trees as she was not the owner of the same.

The Defendant (Appellant) had denied that the Plaintiff (Respondent) was entitled to any compensation as alleged in the Plaint. She had

sought for the dismissal of the Plaintiff's (Respondent's) suit with costs.

The matter proceeded for hearing before the trial Magistrate and the Respondent who was PW 1 gave evidence for herself and called one more witness. In her evidence, she adopted her witness statement wherein she had stated that she is the owner of **Gatamaiyu/Kagwe/734** which neighbours the Defendant's parcel of land **Gatamaiyu/Kagwe/1198**. Further, that there exists a boundary dispute between the two neighbours. That the said boundary dispute was resolved by the relevant authorities and the Defendant (Appellant) was warned not to interfere with the boundary or fell any trees near the boundary area until the issue was fully resolved by the authorities. However, the Defendant disobeyed the said warning and cut down **nine trees** which had existed for over 50 years. That when she reported the matter to the relevant authorities, she was advised to file a civil suit to recover the loss.

In cross examination, she stated that the trees were planted by the person who sold the land to her family and that the said land was purchased by her husband. Further, that when the trees were felled, they had not resolved the boundary dispute. She produced the nine photographs of the felled trees as **exhibit 2** and demand letter as **exhibit no. 3**.

PW 2 James Maina Muriuki a Forester, based at Lari Sub-County Forest Office produced a **valuation report** dated **23rd November 2013.** That he went to value the trees that had been cut on the Plaintiff's land and he prepared the above report which he produced as exhibit 1 in Court. In cross examination, he stated that the trees were eleven in numbers and they were **eucalyptus blue gum.** Further, that the Plaintiff is the owner of the trees and she is the one who took him to the land. That he assessed the trees that he was shown and he does not know if the trees were within a common boundary. He gave the value of the damaged trees as **Kshs. 1,800,000/=.**

On her part of the **Defendant (Appellant)**, gave evidence for herself and called one more witness. She adopted her witness statement dated **22nd July 2015,** and stated her late husband and herself planted the trees in question. That the said trees were part of the boundary feature that ran across the length of the shared boundary. Further that by the time the Plaintiff's (Respondent) late husband bought the land, the trees were already mature and the Defendant (Appellant) and her husband were still harvesting the said trees. She further stated that she harvested the said trees without any issues until **2013** when the Plaintiff raised a complaint. It was her testimony that she harvested the trees before the boundary was aligned and therefore she is the owner of the trees and Plaintiff (Respondent) has no claim whatsoever over the said trees. She had urged the court to dismiss the suit with costs.

In cross examination, she stated that they planted the trees in 1965 and that she is not the one who sold the trees to the Plaintiff (Respondent). That the Plaintiff (Respondent) bought the land from her neighbor but the trees were in her land. She also confirmed that the two parcels of land **LR No. 734 and 1198** are adjacent to each other. That the Plaintiff took her to the police and after the report, the boundary was aligned and that the trees were on her side of the land.

DW 2 Peter Karanja Kabathi also adopted his witness statement dated **22nd July 2016,** as his evidence in court. He had stated in the said statement that he is a nephew to **Gathuru Karanja** who sold the land to the Plaintiff's husband **Francis Ng'ang'ira.** That the said uncle was never a resident on the suit land. He also stated that the Plaintiff's (Respondent) husband bought the land in **1986,** but the trees in question were planted by the late **Paul Muiruri** and his wife (Defendant) in the year **1970,** when he was in **class 5**. Further that the said trees were part of the boundary features that ran across the length of the shared boundary and there were no issues at all. That the late **Paul Muiruri and** his family were using and harvesting the said trees. That the Plaintiff (Respondent) got married in **1973,** when the said trees had already been planted and that there was no dispute as to who owned the trees until **2013,** when the boundaries were aligned. He further stated that by the time the boundary was aligned, the Defendant (Appellant) had already harvested the trees.

In cross examination, he stated that it was the Defendant who planted the trees and was harvesting them. That he did not witness the planting of the trees, but they were planted by the Defendant in **1965**. However, the trees were found to be in the Defendant's land after the alignment of the boundary. He also confirmed that the Plaintiff's husband bought the land in **1986** but he did not know if his uncle sold the land together with the trees to the Plaintiff (Respondent) husband. He reconfirmed that it was the Defendant who used to harvest the trees and the Plaintiff never contested the Defendant's action.

After the close of the **viva voce evidence**, the parties filed their respective written submissions. Thereafter the trial Magistrate delivered his determination on **15th June 2017** and upheld the Plaintiff's (Respondent's) claim and held that:-

> ***"I am satisfied that the Defendant harvested Nine (9) trees. As per the valuation report, one tree was valued at Kshs. 101,758/=. The total value of the harvested nine trees is Kshs. 915,823/=/. I do award the Plaintiff Kshs. 915,823/=……… I therefore enter judgment for the Plaintiff for Kshs. 915,823 with costs."***

The Appellant herein was aggrieved by the above determination and she sought to challenge the said determination through the **Memorandum of Appeal,** filed in court on **4th July 2017**. She sought to set aside the Judgment of the lower court of awarding of **Kshs. 915,823/=** and costs to the Plaintiff. She also sought the dismissal of the Plaintiff's (Respondent's) claim at the lower court with costs to herself.

The grounds upon which the Appellant has sought for the Appeal to be allowed are as follows:

1**. *That the Learned Trial Magistrate erred in law by shifting the burden of proof to the Defendant and in weighing the Defendant's evidence on a higher scale than that of balance of probabilities.***

2. ***That the Learned Trial Magistrate erred in law and in fact in failing to consider that the main issue was ownership of the suit commercial trees and not the land and hence applied the wrong legal principle.***

1. 3. ***That the Learned Trial Magistrate misapprehended the fact that the Defendant planted the trees hence arriving at***

the wrong conclusion finding in favour of the Plaintiff.

4. ***That the Learned Trial Magistrate erred in law by failing to apply the applicable legal principles enshrined in binding judicial precedents hence arriving at the wrong interpretation of the law in application to the facts of the case and the evidence on record.***

5. ***That the Learned Trail Magistrate judgment is not supported by the evidence on record and the applicable law.***

1. ***That the Learned Trial Magistrate erred in law in awarding costs of the suit to the Plaintiff having found that the Plaintiff failed to prove her entire claim.***

The Appeal is contested by the Respondent. It was canvassed by way of written submissions. The Appellant filed her submissions on **3rd July 2019** through the Law Firm of **Njuguna & Partners Advocates**. It was submitted that though there is no dispute that the Respondent and the Appellant parcels of land are adjacent to each other, there is a boundary dispute which was resolved after the trees had been cut.

It was her submission that the trees were planted by her late husband. However, the trial Magistrate erroneously stated in his judgment that it was the Appellant's husband who sold **Gatamaiyu/Kagwe/734,** to the Respondent's husband. But according to the evidence on record, the said **Gatamaiyu/Kagwe/734** was sold to the Respondent's husband by the Uncle of DW 2. Further the Appellant submitted that she is the owner of the trees in issues as the said trees were planted by her late husband and herself. Further that upon the Respondent taking over ownership of **Gatamaiyu/Kagwe/734 in 1986**, she did not contest the ownership of the trees in dispute until **June 2013.** The Appellant relied on the case of **Joseph Mung'aya Makotsi –vs- Kenya Power & Lightning Company Ltd & Another (2014) eKLR** where the court faced with similar issue held that:-

> ***"The Plaintiff demonstrated that he is the one who planted the trees and they belong to him. I am of the view that he can claim for the trees since it was his investment."***

It was also submitted that the trial court went against the above holding and delivered an erroneous judgment. For this, the Appellant relied on the case of **Okiya Omtatah Okoiti & Another –vs- Attorney General & 2 others (2015) eKLR** which cited with approval the case of **Dodhia –vs- National & Grindlays Bank Limited & Another (1970) EA 195,** where the court held that:-

> ***"The adherence to the principle of judicial precedent or stare decisis is of utmost importance in the administration of justice in the courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behavior and transactions as between themselves and also with the state."***

The Appellant submitted that the trial court went against the principles of law by making a decision that is contrary to that enshrined in judicial precedents and hence delivered an erroneous judgment.

Further that the trial Magistrate disregarded all the facts presented to the trial court when he delivered the judgment. It was contended that it is trite in law of Evidence that *"**he who alleges must prove**"*. See Section **107 of the Evidence Act**, which provides that:-

> ***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.***
>
> ***(2)when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person***

That it was clear that the Appellant planted the trees in issue and used to harvest them for over **40 years** and the Respondent did not oppose the Appellant's use of the said trees for **27 years.** Therefore the Respondent failed to prove her claim against the Appellant on a balance of probabilities. she relied on the case of **Evans Kidero –vs- Speaker of the Nairobi City County Assembly & Another (2015) eKLR** where the Court held that:-

> ***"The balance of probabilities standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not…"***

In summary, it was the Appellant's submissions that from the evidence on record, the Respondent did not prove her case on a balance of probabilities as required by law. She urged the court to allow the Appeal and award her costs of the said Appeal.

On her part, the Respondent filed her written submissions on **22nd May 2019,** and urged the court to dismiss the instant Appeal.

On the first ground of shifting the burden of proof to the Defendant, it was submitted that all the Plaintiff needed to do was to prove that the land from which the trees were harvested was hers and it was without her consent which she easily did. Further that Appellant confirmed that the land from which she harvested the trees belonged to the Respondent and that she had testified:-

> ***"I was the one harvesting the trees before the Plaintiff took possession of the land. She bought the land from my neighbor."***

She also submitted that DW 2 stated that the trees were found to be in the Plaintiff's land after alignment of the boundary. It was her further submission that the Respondent's husband bought the land in the year **1986** and the trees in question were harvested in May and July **2013** by the Appellant and that was a criminal encroachment.

On the second ground that the main issue was ownership of the trees and not land, it was submitted that before ownership of the trees, one must know the tress were on whose land. The trees herein were harvested without the consent of the owner.

On the ground that the court misapprehended that the Defendant planted the trees and not the Plaintiff, it was submitted that the Appellant had admitted that she is not the one who sold the land to the Respondent and that the Respondent bought the land from the neighbor thus the Appellant could not have planted the said trees. Further that even if she planted the trees, they were on the Respondent's land and she did not obtain consent from the owner to harvest the said trees.

On the ground of failure to abide to the applicable legal principle in binding precedents based on facts and record, it was submitted that this was a plain case where the Appellant had expressly admitted that the land belonged to the Respondent. All that the Court needed was to assess the value of the trees in question and to that effect the Respondent had submitted a **valuation report,** which was not challenged by the Appellant.

On the ground that the judgment is unsupported by the evidence on records and applicable cases, it was submitted that was a sweeping statement which was baseless since the judgment of the court was founded on evidence adduced by the parties and it met the required standard of proof on a balance of probabilities.

On award of costs to the Plaintiff, it was submitted that costs always follow the suit. That judgment was entered in favour of the Respondent and as such, she was entitled to costs of the suit. In conclusion, the Respondent urged the court to dismiss the instant Appeal with costs.

The above analysis summarizes the pleadings and evidence before the trial court. Further it captures the grounds of Appeal and submissions by the parties herein. Therefore, the court is called upon to make a determination of this Appeal filed by the Appellant as provided by Section 78 of the Civil Procedure Act wherein the court is called upon to analyze the whole evidence evaluate, assess, weigh, investigate and scrutinize it and give it its own independent conclusion.

However, the court will be alive to the fact that it neither saw nor heard the witnesses. Therefore it must give allowance for that and the findings of the trial court must be given due deference unless it falls foul of proper evaluation of the evidence on record and that the trial Magistrate acted on a wrong principle in arriving at the findings. See the case of **Selle –vs- Associated Mobi Boat Co (1968) EA 123**:-

> ***An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).***

Further the court will only interfere with the discretion of the trial court where it is shown that such discretion was exercised contrary to the law and that the trial court misapprehended the applicable law and failed to take into account the relevant facts or take into account an irrelevant fact or that on the fact and law as are known, the decision is plainly wrong. (see case of **Ocean Freight Shipping Company Ltd –vs- Oakdale Commodities Ltd, Civil Appeal No. 198 of 1995**):-where the Court held that;

> ***"…..and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong"***

The court has now carefully considered the grounds of Appeal, written submissions and the proceedings and judgment of the trial court. The court too has considered the applicable law and finds that the issues for determination are as set out in the **Memorandum of Appeal**.

There is no doubt that the Respondent herein filed Civil Suit No. **35 of 2015** at **Githunguri SPM Court**. She had sought for General Damages against the Appellant who allegedly cut down her trees. The Appellant had denied that the said trees belonged to the Respondent. She had averred that the trees in issue were planted by herself and her late husband. However, judgment was entered in favour of the Respondent. It is trite that '***he who alleges must prove'.*** It is the Respondent herein who had alleged and the onerous task of proving the case was upon her. This is found in **Section 107 of the Evidence Act** which provides;

> ***"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.***
>
> ***(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

In his judgment the trial Magistrate made a finding to the effect that there is no doubt that the Plaintiff (Respondent) owned the land parcel no**. Gatamaiyu/Kagwe/734,** and the Defendant (Appellant) owns parcel **no. 1198** and that the two parcels of land are adjacent to each other. He further found that the boundary was aligned which revealed that the trees in issue were in the Plaintiff's land. He however found:-

> **"it is not dispute that it is the Defendant's husband who planted the trees".**

The issue that the trial magistrate drew for determination is ***who owns the trees in dispute.***

Indeed that was the crux of the matter. Interesting, the trial magistrate found that the Plaintiff (Respondent) bought the parcel of land in **1986** and the said land was sold by the Defendant (Appellant) husband. From the evidence on record, that was not the evidence adduced by the parties. He further went on and stated that:

> "***By the time she cut the trees in 2013, the Defendant had already sold the land and the trees to the Plaintiff."***

Again with due respect to the trial Magistrate, the court finds this to be a wrong analysis of the evidence on record.

Having now considered the available evidence and the submissions, the court will now determine the issues raised in the Memorandum of Appeal.

i ***Did the trial Magistrate err in law by shifting the burden of proof to the Defendant and weighed the Defendant's evidence on a higher scale than that of balance of probability***.

In this ground, the Appellant alleged that though the Respondent did not give evidence to warrant the judgment of the court, the trial Magistrate still believed the evidence and dismissed the Appellant's evidence of having used and harvested the trees for **27 years.** Indeed this court has held above that it was the Respondent who had alleged and therefore she needed to prove her case. The trial Magistrate found and held that when the Plaintiff (Respondent) family was handed over the land , they immediately settled on it. There was no dispute over the ownership of Plaintiff/Respondent's land. The trial Magistrate held that there was no dispute that the trees in issue were planted by the Defendant's husband. If that was the case, the Plaintiff (Respondent) needed to avail evidence that the said husband of the Defendant (Appellant) surrendered the trees to the Plaintiff (Respondent). There was no such evidence and the court is satisfied that the trial court shifted the burden of proof to the Defendant (Appellant) herein and thus arrived at a wrong decision.

ii. ***Did the learned trial Magistrate erred in law and fact in failing to consider that the main issue was ownership of the commercial trees and not the land and hence applied the wrong principle?***

Having considered the findings of the trial Magistrate, he correctly captured the issued for determination and the said issue was "**who owns the trees in dispute"**.

However, this court finds that the learned trial Magistrate misapprehended the fact that the Plaintiff (Respondent) bought the land from the Defendant (Appellant)'s husband and that the said land was sold together with the trees. Earlier on, the trial magistrate had found that the trees were planted by the Appellant's husband. He thereafter made a wrong analysis of the available evidence that the Appellant's husband sold the land and the trees to the Plaintiff (Respondent). Due to the above misapprehension, the trial Magistrate applied the wrong legal principle.

iii. **Did the trial Magistrate misapprehend the fact that the Defendant planted the trees in dispute and held that the Plaintiff planted the trees and hence arrived at a wrong conclusion?**

The trial Magistrate had correctly found that the trees in issue were planted by the Defendant (Appellant)'s husband. He did not hold that the Plaintiff (Respondent) planted the said trees. From the trial magistrate finding, he stated that the land was sold to the Plaintiff (Respondent) together with the trees. That was indeed a wrong analysis of the evidence on record and consequently the trial magistrate arrived at a wrong finding in favour of the Plaintiff (Respondent) herein.

iv. **Did the trial Magistrate err in law by failing to apply the applicable legal principle enshrined in binding judicial precedents and hence arrived at the wrong interpretation of the law and evidence on records?**

Having considered the available evidence on record at the lower court and the submissions by the parties thereon, it is indeed clear that the Appellant had relied on the case of **Joseph Mung'aya Makotsi –vs- Kenya Power & Lightning Company Ltd & Another (2014) eKLR** where the court faced with similar issue held that:-

> ***"The Plaintiff demonstrated that he is the one who planted the trees and they belong to him. I am of the view that he can claim for the trees since it was his investment."***

In the present case, the trial Magistrate had held that the trees were planted by the Defendant (Appellant)'s husband. Without any evidence that the said trees were sold to the Plaintiff (Respondent), then the said trees remained the property of the Defendant (Appellant) and indeed the trial magistrate failed to apply the binding legal principle enshrined in a judicial precedents and thus arrived at a wrong finding.

v. ***Is the learned trial Magistrate judgment not supported by the evidence on record?***

The court has considered the available evidence. It was indeed the evidence of the parties that the Plaintiff (Respondent)'s husband bought **Gatamaiyu/Kagwe/734,** in 1986, from a neighbour of the Defendant (Appellant). However, in his Judgment the trial magistrate held that it was the Defendant's (Appellant's) husband who sold the land to the Plaintiff's (Respondent's) husband and after the land was sold the current dispute arose. It is clear that the Defendant's (Appellant's) husband did not sell the land to the Plaintiff (Respondent)'s husband. Further there was no evidence of the dispute existing immediately after 1986. The dispute herein arose in 2013. Further the trial magistrate stated that "***By the time she cut the trees in 2013, the Defendant had already sold the land and the trees to the Plaintiff.."*** That part of the trial Magistrate finding was not supported by the evidence on record and therefore the court finds that the Judgment arrived at by the learned trial Magistrate was not supported by the evidence on record.

vi. **Did the trial Magistrate err in law in awarding costs of the suit to the Plaintiff?**

Section 27 of the Civil Procedure Act is clear that costs of the suit are awarded at the discretion of the court. The trial Magistrate had found in favour of the Plaintiff (Respondent) and there was nothing wrong in awarding the costs of the suit to the successful litigant.

Having now carefully considered the available evidence, having evaluated it and coming to its own independent decision, this court finds and holds that the trial Magistrate did **err** and misapprehended the fact and evidence on record and thus arrived at a wrong finding.

Consequently, the court finds that the Appeal is merited and it is allowed entirely. The upshot of the foregoing is that the judgment of the lower court dated **15th June 2017** is set aside and the Plaintiff's (Respondent's) entire claim at the lower court is dismissed with costs. Therefore the Appeal herein is allowed in terms of prayers number **(a), (b) and (c).**

Judgment Accordingly.

Dated, Signed and ***delivered*** *at* ***Thika on*** *this* ***8th*** day of ***April 2020.***

L. GACHERU

JUDGE

Lucy-Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By consent of -

Njuguna & Partners Advocates for the Appellant

Muchangi Nduati & Company Advocates for the Respondent

L. GACHERU

JUDGE