REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HCCA NO. 10 OF 2016

FRANCIS NYARIBARI.....APPELLANT

=VRS=

KENNEDY OMBATI.....RESPONDENT

[Being an Appeal from the Judgement of Hon. E. K. Nyutu (PM) dated the 1st day of April, 2016 in the original NYAMIRA PM CC NO. 135 OF 2012]

JUDGEMENT

On 12th July 2012 the appellant sued the respondent for a sum of Kshs. 3,980/= together with interest, general damages, costs and interest. The sum claimed was the amount which the appellant stated was due and owing from the respondent in respect of crops destroyed by the respondent in the appellant's land known as West Mugirango/Siamani/2875. After hearing evidence from both sides the trial magistrate dismissed the claim. Being aggrieved the appellant preferred this appeal. The same is premised on the following grounds: -

1. The Learned Magistrate correctly held that the plaintiff had proved his case all long but erred in law and fact in her conclusion by dismissing the same on the ground that the plaintiff had violated the High Court Decree in KISIIH CCNO.143 of 1998 by later transferring the land to his wife.

2. The learned trial magistrate erred in law and fact in failing to note that the case before her was one of the destroyed crops when the land was still registered in the appellant's name and that any transfer of land afterwards did not affect the claim.

3. That the trial Magistrate failed to note that it is the Decree holder or if he is deceased the Administrator of the deceased's estate to pursue the decree and have the portion of the Appellant land sub divided and given to her or him.

4. The learned trial magistrate failed to appreciate the fact that in the absence of decree hold or any interested party the appellant could not sub-divide his land and give it to no existing person.

5. That the share of land measuring 50 ft by 100 ft of land parcel No. West Mugirango/Siamani/2875 had not been hived out from the whole parcel of land and therefore could not be ascertained on the ground and therefore the whole land belonged to the appellant.

6. That the entire land is still intact in the name of the appellant's wife and any interested party can safely apply to the High Court to enforce his or her rights and in any case the court can not assist the indolent.

7. That under the law even if James Atina Osugo (the decree holder) who is now deceased had any share in land parcel no. West Mugirango/Siamani/2875 when he dies and no one pursues to get the said share the whole land remains with the appellant and no one else can interfere with the crops in the whole of the said land including the defendant who has no loco stadii to own the crops in the appellant land.

8. The learned trial magistrate therefore erred in law and fact in dismissing the case on matters of the High Court which concerns land and not crops (nappier grass) and which do not concern the lower court.

9. That the grounds for dismissing the suit do not hold water and are on the wrong reasoning.

10. That there should be judgement for the plaintiff with costs in the lower court.

11. The learned trial magistrate erred in law and fact in equating the defendant to any lawful heir or beneficiary to the estate of James Atina Osugo (deceased) when the court had earlier found the defendant to be a stranger and not entitled to the

destroyed crops (grass).

The appellant prays that this appeal be allowed with costs and that judgement be entered in his favour for a sum of Kshs. 3,890/= with costs in the lower court. The appeal was canvassed by way of written submissions. Mr. Okenye, Learned Advocate for the appellant submitted that a search certificate proved that at the material time Land Parcel No. West Mugirango/Siamani/2875 belonged to the appellant and that the trial magistrate found that for a fact. He submitted that the land was still in the appellant's name when the report of the damage of the napier grass was made to the police on 19th October 2011. He submitted that the court made a finding that the woman who allegedly sold the land, on which the napier grass was growing, to the respondent had no interest in the land to do so. Mr. Okenye submitted that the land parcel is intact although it is registered in the name of the appellant's name. Counsel further contended that the trial magistrate failed to note that under the Law of Limitations Act no action may be brought upon judgement after the end of 12 years. He submitted that judgement in Kisii HCCC 143 of 1998 was delivered on 13th June 2002 while judgement in this suit was delivered on 1st April 2016 which is a period of 14 years. He wondered why no action was taken in respect of the former judgement yet the parties were aware of this case. He urged this court to allow the appeal.

Though duly notified the Advocates for the respondents did not file their submissions.

The claim by the appellant in the lower court was in respect of a napier crop that he assented the respondent had damaged. My finding is that what was central therefore was the destruction of the napier and not the ownership of the land upon which the napier was growing much as ownership would have come into play in helping to determine ownership of the napier. To succeed therefore the appellant was required to prove that the napier was in fact his, that the respondent had damaged the napier on the date or time alleged and that he (respondent) was liable for the damage. The sum claimed was the value of the napier and that he was entitled to general damages in addition to the value of the damaged crops.

I have considered the grounds of appeal and the submissions of Counsel for the appellant. However, as the first appellate court I have a duty to reconsider and re-evaluate the evidence in the court below so as to arrive at my own conclusion. I do so being alive to the principle that in so doing I must be alive to the fact that I neither saw nor heard the witnesses give evidence.

In the plaint the appellant did not state the date on which his napier was damaged. However, it was his testimony that the respondent's employee cut the napier on 8th August 2011. He stated that he reported the matter to the police and was given a note to take to the Agricultural Officer to assess the damage.

The Agricultural Officer (Pw2) testified that he received the note on 19th October 2011 and on 25th October 2011 he visited the scene and assessed the damage. He thereafter prepared a report which he tendered in evidence. It is however baffling, and this he was not able to answer, how he was able to tell that the napier was damaged yet he went there 2 ½ months after the napier was allegedly destroyed. There was no confirmation from the police that indeed they received a report from the appellant concerning the damage and that they in fact went there and confirmed the napier had been cut. Moreover, the sum claimed was a liquidated amount which required strict proof but the figure given by the Agricultural Officer appears to have been based on guess work. If indeed there is a guideline provided for crop assessment and that was what he relied on, then he should have produced that schedule as well. The alternative was for the appellant to produce the receipts for the seed and the inputs and labour if they were available to him. What I am saying is that the appellant did not prove, albeit on a balance of probabilities, that his napier grass was damaged on the date alleged in his plaint and neither did he prove that the sum claimed was due to him on account of the alleged damaged crop. Instead he turned his claim into a dispute concerning land which was not the issue in dispute in his case.

I find no merit in this appeal and it is dismissed. As the respondent did not file any submissions there shall be no order for costs.

It is so ordered.

Signed, dated and Delivered at Nyamira this 12th day of October, 2018.

E. N. MAINA

JUDGE