



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC APPEAL CASE NO. 02 OF 2018**

**JOEL MUTIE NZUKI.....APPELLANT**

**VERSUS**

**WILLIAM MAKOVO NGUU..... RESPONDENT**

**JUDGMENT**

1) This is an appeal from the judgment of the learned Senior Resident Magistrate's court in Kilungu SRMCC no. 2 of 2010 delivered on 23<sup>rd</sup> March, 2011.

2) In his plaint filed at the subordinate court the Appellant sought the following orders;

- a) **An order that the Plaintiff is sole proprietor and entitled to Plot no. 959 Kisekini Adjudication Section Makueni.**
- b) **Special of Kshs. 237,534/=.**
- c) **A perpetual order restraining the Defendant by himself, servants and agents from entering and interfering with Plot No. 959 Kisekini Adjudication Section Makueni.**
- d) **General damages.**
- e) **Costs of this suit.**

3) The Respondent filed his defence where he denied the Appellant's claim.

4) Upon conclusion of the trial at the subordinate court, the learned Senior Resident Magistrate in his judgment found in favour of the Respondent. Aggrieved by the judgment of the learned Senior Resident Magistrate, the Appellant filed this appeal where he has raised the following grounds:-

1. **The trial magistrate misdirected himself in law and fact when he failed to consider the whole of the plaint including the prayers thereto but decided to dwell on paragraph no. 3 of the plaint which was an error apparent on the face of the plaint.**
2. **The trial magistrate erred in law and fact when he failed to consider the evidence given by the Plaintiff and his witnesses in that the land in question was plot no. 959 Kisekini Adjudication Section and not plot no. 956 Kisekini Adjudication Section.**
3. **The trial magistrate erred in law and fact when he failed to use all the evidence given by the Plaintiff witnesses and also the Defendant who personally stated he has been cutting down trees and selling the same on plot no. 959 Kisekini Adjudication Section.**
4. **The trial magistrate erred in law and fact when he failed to consider that the locus standi was visited, saw the damage caused and even determined the correct suit land that is plot no. 959 Kisekini Adjudication Section.**
5. **The trial magistrate erred in law and fact when he failed to consider the evidence of PW3 and PW4 as expert witnesses who stated that the land belonged solely to the Plaintiff and also that of the Land Adjudication Office Kisekini Adjudication Section when the court together with the officer visited the suit land and showed the extend of the damage on the suit land that is plot no. 959 Kisekini Adjudication Section and the owner being the Plaintiff according to the records.**
6. **The trial magistrate erred in law and fact when he failed to consider that the plaint prayed for special damages for**

Kshs. 237,534/= only and that the extra amount should not be considered as it was not prayed for in the plaint as the assessments done were two and on diverse dates.

7. The trial magistrate erred in law and fact when he failed to consider that the special damages sought were as per paragraph 5 of the plaint together with prayer number 2 of the plaint.

8. The trial magistrate erred in law and fact when he failed to consider the Defendants evidence in that he admitted he caused damage in plot no. 959 Kisekini Adjudication Section and that the Defendant was unable to prove that the same belonged to him.

9. The trial magistrate erred in law and fact when he brought on board issues of the Defendant to be declared to a trespasser in the plaint when the Plaintiff did not intend to do so in his plaint and failed to consider that the Defendant in his evidence admitted that he was a trespasser and even cut down trees on suit land that is plot number 959 Kisekini Adjudication Section.

5) I have carefully read the submissions that were filed by the parties herein.

6) This being a first appeal, the court must reconsider the evidence, evaluate it 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 (*See Selle V Associate Motor Boat Co. Ltd [1968] EA123 at page 126 letter H and Williamson Diamonds Ltd V Brown [1970]EA 1 at pages 15 and 16 letters 1 to c*).

7) In his evidence before the Subordinate Court, the Appellant who was PW1 told the court that he was the Proprietor of plot no. 959 Kisekini Adjudication Section. He said that he has a letter confirming ownership (Pex no. 1) from District Land Adjudication Settlement Officer. He went on to say that he has constructed his home on the land which he started using in 1981 and solely relies on it. That on the 24<sup>th</sup> March, 2009, the Respondent trespassed into the land and started to cut down trees to make timber. He said that he Respondent was stopped by the court. The Appellant said that he had a consent (pex no.2) from the District Lands Adjudication and Settlement Officer. That he hired the services of the forester, Kilome/Kilungu Division who assessed the value of the damaged trees as Kshs. 237,534 as can be seen from the reports dated 25<sup>th</sup> March, 2009 and 20<sup>th</sup> April, 2010 produced as Pex no. 4 and 5 respectively. It was also his evidence that the Respondent does not reside in the suit land.

8) In his evidence in cross-examination, the Appellant told the trial court that the land has a boundary and that it did not border that of the Respondent. On being shown a map showing the boundary as place by Kilungu Court in land case number 108/1956 (Dex No. 1) the Appellant told the trial court that he had never seen the said map. He went on to say that he planted some of the trees while others were planted by his father. He said that he knew nothing about the proceedings in **CC144/1970 Nguu Nthiwa V Nzuki Muithya**.

9) The Appellant called John Muia Matheka (PW2), Godwin Mutembei Mbiuki (PW3) and Kennedy Kamau Thoigo(PW4) as his witnesses.

10) John's (PW1) evidence in chief before the trial court was plot number 959 belongs to the Appellant who inherited it in 1997 from his father. That he and the Appellant witnessed the Respondent who does not reside on the plot cut down trees.

11) His evidence in cross-examination was that from the map (Dexno.1), the trees are planted on a portion given to the Appellant's uncle.

12) Godwin's (PW3) evidence in chief before the trial court was that he was the Land Adjudication Officer Makueni/Kilungu District. That plot no. 959 Kisekini Adjudication Section is registered in the name of the Appellant as a sole proprietor. The witness went on to say that he wrote a letter (Pex. No 1) to confirm that the Appellant owns the plot. He added that he also wrote another letter (Pex No. 2) to give consent to the Appellant to file this suit.

13) His evidence in cross-examination was that the plot was allocated to the Appellant by the Demarcation Officer. He said that the sketch map (Dexno. 1) is from the court and was "made" in 1956. That he could not be able to point out which is plot no. 959 Kisekini Adjudication Section. He said that the judgement in Dex No.1 was entered in favour of the Respondent.

14) On being cross-examined by the trial court, Godwin (Pw3) told the court that the information in the register is gotten after declaring an area an adjudication section upon which notice for demarcation is given. That after demarcation on PID (aerial maps), each plot is allocated a number and the name of the proprietor. That the information is then transferred to the Demarcation book together with the sketches. That objectors have 14 days to file a committee case. That upon lapse of days, the Register is published and 60 days notice is given for any person affected to file an objection. That after the expiry of 60 days without objection being filed, the process becomes final that the plot which was subject of the trial was at the stage of hearing Arbitration Board cases. That PID maps were available even though he had not been asked to produce it.

15) After the cross-examination by the court, both the Appellant and the Respondent were given a chance to further cross-examine the witness.

16) Kennedy (PW4) told the trial court that he was a Forester Mukaa District. That he holds a diploma in Forestry from Kenya Forest College Londiani and also a Bachelor of Science Degree in Forestry from Moi University. He said that after the Appellant reported on 25<sup>th</sup> March, 2009 that his trees had been damaged, he sent his assistant to go and carry out the assessment on the trees that were in plot no. 959 Kisekini Adjudication Section. That the witness made a report on the trees damaged (Pex no. 4) that the total value of damaged trees was Kshs. 237,534/=. That when he visited the plot, he assessed the damage at Kshs. 437,409/50.

17) His evidence in cross-examination was that he could not be able to tell who was the owner of the trees.

18) On the other land, the Respondent's evidence who testified as DW1 was that he shares a common boundary with the Appellant. That the boundary was in place in the year 1956. He produced a map (Dex no. 1) which shows the boundary that was placed by the Kilungu Court in land case no. 108/1956. That parties to the case included his late father, Nguu Muithya. That in another case no 144/1970 Nguu Muithya V Ndagili Muithya, judgment was delivered in favour of the Plaintiff with costs. That there was case No. 3 of 1975 Nzuki Muithya V Nguni Muithya whose determination was in favour of the Defendant as can be seen from the judgment (Dex no.3) delivered on 15<sup>th</sup> January, 1975. That there was another case being no. L.3/1973 which was pending before the court referred it to the Tribunal. That the tribunal in turn referred it to a panel of elders who ordered him to administer traditional oath to show that the portion of land was his and he took the oath in 1984. That he is still in possession of the portion and was surprised to be sued.

19) His evidence in cross-examination was that plot no. 959 Kisekini is his and is the land where he has planted trees. He said that he cut down his trees and sold them for a figure he cannot remember. That he has no document of ownership of the plot no. 959. That the map (Dexno. 1) had no plot number. That the judgment (Dex no. 2) which involved his late father Nguu Muithya or Nguu Nthiwa has no plot number. That he had not obtained any grant to inherit his father's property. He said that the Appellant has no house in the suit land.

20) The Respondent called Francis Muumbi Mutungi (DW2) and Martin Muthini Mwoki (DW3) as his witnesses. The two told the court that both the Appellant and the Respondent share a boundary. Francis (DW2) went on to say that the suit land belongs to the Respondent.

21) Francis (DW2) told the court in his evidence in cross-examination that he was present when the boundary was placed in 1956. He and Martin (DW3) told the court that they saw the Respondent cutting down trees which were his property.

22) In his judgment the learned Senior Resident Magistrate held that;

*"According to the plaint, the Plaintiff avers that he is the registered owner of plot number 956 Kisekini Adjudication Section. In his prayers he prays to be declared the owner and entitled to possession of plot no. 959 Kisekini Adjudication Section. This was a clear departure from the main pleading as contained in paragraph 3 of the plaint. So I cannot tell which, plot the Plaintiff wants to be declared the owner. There was no evidence led to the effect that the Plaintiff is the owner of plot number 956. Evidence was led that the Plaintiff is the owner of plot no. 959."*

23) The learned Senior Resident Magistrate went on to add that;

*"... The issue of plot no 959 is not properly brought up. It will therefore be strange to decide on this issue. It therefore follows that I cannot declare the plaintiff as the owner of plot no. 959 Kisekini Adjudication Section an issue he did not aver to in the plaint."*

24) The learned Senior Resident Magistrate went on to hold that,

*"... Unless the Plaintiff first asserts his rights that he is the owner of plot no. 959 Kisekini Adjudication Section, a perpetual injunction cannot issue the Plaintiff having failed to assert his right aforesaid, his prayer for injunction also fails. For this prayer to be issued, the Defendant must first be declared trespasser. Despite averring as such, there was no prayer for a declaration to that effect."*

25) The learned Senior Resident Magistrate further held that;

*"Unless the Defendant is declared as a trespasser, the acts done on the land cannot be deemed to be unlawful. It was alleged that the Defendant cut down trees whose value the Forester assessed at Kshs.237, 534 and also Kshs. 437,409/50. I cannot make any award because the parent prayer did not succeed. Despite this, I would not have made this award in view of the two contracting reports by the Forester. This court found itself at a loss on which report to adopt."*

26) The Appellants counsel submitted that the trial court should have administered substantive justice instead of dealing with the technicality of what he termed as an error in the plaint where the Appellant has stated that his land parcel is 956 but gone ahead to seek orders in respect of plot number 959.

27) The counsel relied on the case of **Zacharia Okoth Obado V Edward Oyuga & 3 others [2014]eKLR**. It was also the counsel's submissions should have awarded damages based on the first report that the Appellant produced.

28) On the other hand, the Respondent's counsel was of the view that the learned Senior Resident Magistrate's judgement is well reasoned and based on evidence on record.

29) Whereas I agree that Article 159(2) (d) of the Constitution behooves courts to administer justice without undue technicalities, it was incumbent upon the Appellant to reconcile the apparent contradiction in paragraph 3 of his plaint which shows the plot as 956 and the other paragraphs which talk of parcel number 959. Parties are bound by their pleadings. If the averment in paragraph 3 of the Plaint was an error as claimed by the Appellant's counsel, then the Appellant ought to have taken the earliest opportunity to clear the air on the same. In my view the learned Senior Resident Magistrate cannot be faulted for declining to make a finding on the issue of parcel number 959.

30) The Appellant was also under an obligation to inform the trial court that he was relying on first report (Dex no. 4) which gave the value of damaged property at Kshs. 237,534/ and not the second report that indicated that the value of the damaged trees was Kshs. 437,409/50.

The Appellant ought not to have produced the two contradictory reports and expect the court to decide on which one to rely on.

31) The upshot of the foregoing is that the learned Senior Resident Magistrate cannot be said to have erred in law and in fact in arriving at the decision that he made on the 23<sup>rd</sup> March, 2011. In the circumstances, I hold that the appeal herein lacks merit and I proceed to dismiss it with costs to the Respondent.

**Signed, Dated and Delivered at Makueni this 6<sup>th</sup> Day of September, 2019.**

**Mbogo C.G**

**Judge**

**In the Presence of:**

Mr. Nyabuto holding brief for Mr. Ombuga for the Respondent

No appearance for the Appellant

Ms C. Nzioka Court Assistant

**Mbogo C.G, Judge**

**6/9/2019**