



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL CASE NO. 109 OF 2012**

**JACOB KIBITI KIRERA.....APPELLANT**

**VERSUS**

**JACKTON MUNENE TITUS.....RESPONDENT**

*(Being an appeal from the judgment of the senior resident magistrate Hon. Mburu*

*in CMCC no. 516 of 2007 delivered on 30/10/2012)*

**JUDGMENT**

**BACKGROUND**

The appellant, Jacob Kibiti Kirera was dissatisfied with the decision of the learned Magistrate delivered on 30/10/2012 and appealed on the following grounds:

- (i) That learned Magistrate erred in law and in facts in failing to find that the appellant had proved on a balance of probabilities that the respondent had illegally harvested wheat when there was sufficient evidence to that effect.
- (ii) The learned Magistrate erred in law and in fact in deciding the whole suit against the weight of evidence.

The appellant who was the plaintiff in the lower court case had sued the respondent/defendant for payment of Kshs.769,600/= being loss caused after the defendant trespassed into and harvested wheat he had planted in parcel land No. NGUSHISH SETTLEMENT SCHEME/570 measuring approximately 14 acres. The plaintiff in an amended plaint dated 14<sup>th</sup> August 2008 further averred that he leased the suit land from one Alice Gakii Kaaria and that on 24/9/2007, the defendant without any colour of right trespassed into the said land and harvested his wheat and converted the same into his own thereby causing him loss and damages assted at Kshs.769,600/=

By way of a rejoinder, the defendant filed defence denying the plaintiffs claim and all particulars of loss and averred that the suit land was allocated to his father one Titus M'Beta M'Muthara (now deceased) whose estate he was the administrator. The defendant further averred that his father (deceased) was allocated the suit land way back in the early 1980 and that his family has been in occupation since then.

**PLAINTIFF'S CASE**

In his sworn testimony, the plaintiff stated that on 14/7/2007, he was in this home in Timau. He was called by his caretaker who told him that the defendant had harvested his wheat. He stated that he had leased land parcel no. Ngusishi no. 70 from one Gakii measuring approximately 14 acres and planted wheat. He went to the scene and witnessed. Thereafter he went to Maritati police post and reported. He was given police officers who accompanied him to the farm. The police asked the defendant to stop harvesting the wheat but the defendant who had a big group refused and continued with the illegal harvest. He stated that the defendant harvested a total of 210 bags which was loaded into a lorry. He the left with the police officers to Maritati police post where he was referred to the Agricultural officer who did an estimate of the loss incurred dated 26.9.2007. On 16.06.2009, the agricultural officer did a valuation and found that the value of the wheat was Kshs.525,000. The report is contained in a report dated 16.6.2008 marked MF I 2.

The plaintiff also produced the lease agreement dated 14.3.2007 as P. exhibit no. 3. Before leasing the land, the plaintiff was shown the title deed a copy of which was marked as PM FI 4.

PW 2 was Alice Gakii who testified on oath and stated that she was the owner of land parcel No. NGUSHISHI SETTLEMENT SCHEME 570. She obtained the land in 2000 and was issued with title deed in 2008. She stated that the original title deed was produced in a high

court case which she could not remember. She stated that the case was finalized but she has not gone to collect the title deed. She said that in the year 2007 she leased the suit land, to the plaintiff who planted wheat. However the wheat was harvested by the defendant. She stated that she saw one Kagendo and several drunk youth harvesting the wheat. She did not see the defendant at the scene when she accompanied the plaintiff to the scene and later to the Timau police station. She stated that she did not see the defendant at the scene.

PW 3 was Martin Bundi. He is a farmer and lives in Timau. He stated that he planted wheat with the plaintiff. He was to guard the wheat. On 24.9.2007, they arranged to harvest the wheat. The plaintiff went and got a combine harvester. As they were harvesting, he called the plaintiff. The defendant is the one who brought the combine harvester. They harvested 210 bags. When the defendant started to harvest the wheat they went to Maritati police post where they reported and were given two police officers. The police tried to stop the defendant from harvesting the wheat in vain. The defendant left with the wheat in two lorries.

PW 4 was Joseph Murerwa. He said that he knows the plaintiff but not the defendant. He is a crops officer based in Timau. He recalled that on 16.6.2009, he got a letter from Maritati police post to do assessment of crops that had been harvested. He proceeded to the site and did the assessment and prepared a report. He identified the letter and produced it as p. exhibit no. 5 on 26/9/2007 he wrote back to the police. He did the valuation of the harvested wheat at an estimated value of 210 bags at Kshs.2500/= per bag totaling to this 525,000/=

### **DEFENDANT'S CASE**

DW 1 was no. 68199 PC Emmanuel Komari who is attached to Maritati patrol base. He stated that a report was made 24/9/2008 in OB no. 6 by Alice Kaaria regarding some harvest of her wheat from land parcel No. Ngushishi 510 by the defendants. He stated that the name of Jackson is not in the O.B. He also stated that there is no complainant by the name Jacob Kibiti. Nobody was arrested or charged with any offence. The complainant was referred to Timau police station.

DW 2 was Jackton Munene Titus. He said that he came to know the plaintiff through this case. He stated that the suit land no. Ngushishi/510 belonged to his late father Titus M'Ambeta Muthara who died in the year 2000. He is the administrator of the estate of his late father. He produced the letters of administration as D exhibit no. 2. The grant was confirmed on 4.8.2004. The certificate of confirmation was produced as D. exhibit no. 3. He stated that his father was allotted the land by Ngusishi settlement scheme. His father was sent a demand notice for arrears from the ministry of lands. The demand letter was for rent arrears of Kshs.40,000 dated 26/3/2007.

They paid Kshs.30,000 he produced the demand notice and the payment receipt as D. Exhibit no. 4 )a) & (b) respectively. The witness stated that on 24.9.2007, the suit land was being occupied by his elder brother Jasper Njogi. He is aware that his brother had planted some wheat on the suit land. His brother has since passed on in 2011. He stated that Alice Gakii has now disposed of the land around March, 2012 but before then, he was the one in occupation of the suit land.

### **RE-EVALUATION, ANALYSIS AND DECISION**

I have looked at the judgment by the learned Magistrate and his evaluation and analysis of the evidence adduced by the parties and the witnesses. I have also looked at the submissions by counsel for the appellant and the respondent. To start of this re-evaluation I will look at the evidence adduced by the plaintiff Jacob Kibiti Kibera who stated that the suit land was 14 acres planted with wheat. He also stated that his caretaker called him saying that the defendant had harvested his wheat. He went and confirmed the incident and went to Maritati police post where he made a report and was given police officers who accompanied him to the scene where they found the defendant with a big group. The defendant had already harvested 210 bags of wheat and loaded it into lorries. The police asked the defendant to stop harvesting the wheat but he refused. Her testimony is inconsistent with PW 2 Alice Gakii who was another eye witness who stated that the defendant harvested the plaintiff's wheat. She said that she saw one Kagendo and several drunk youth harvesting the wheat but she did not see the defendant. She was categorical that the defendant was not at the scene when the wheat was being harvested.

PW 3 on his part stated that on 24.9.2007 the defendant came with combine harvester and started harvesting wheat planted by the plaintiff. He called the plaintiff and they went to Maritati police post. They were given two police officers who tried to stop the defendant from harvesting the wheat in vain. The defendant left with the wheat. On cross examination the witness (PW 3) stated that the defendant had come with a group of more than 100 people. He said that they reported the name of the defendant at Maritati police post. The witness also stated that the defendant harvested 210 bags of wheat and took it away in two lorries. However he was hard pressed to give the particulars of the two lorries. PW 5 who was a police officer from Maritati patrol base stated that a report was made at the station on 24.9.2008 as OB 6 he stated that the name of the defendant is not in the O.B. He also stated that there was no complainant by Jacob Kibiti. There was no arrests made and nobody was also charged. I find the evidence adduced by the plaintiff and his five witnesses not consistent. First the plaintiff made a specific claim for a sum of Kshs.769,600/=. It was therefore incumbent upon the plaintiff to specifically prove his claim on the required standard. The learned trial magistrate noted some gaps in the plaintiff's evidence and his witnesses which cast doubt on the plaintiff's claim.

These discrepancies include whether the defendant actually harvested the plaintiffs wheat?

These discrepancies can be noted from the evidence of P.C Emmanuel Komari who stated that from the OB no. 6 of 24.9.2008, there was no suspect given as Jackton Munene. There is also no complainant in the O.B as Jacob Kibiti Kibera. The amended complaint gives the number of bags of wheat as 210 @ Kshs.630,000/=

The other items are the price of pesticides, fertilizers and herbicide valued at Kshs.84,600/= planting of 10 bags of seeds at Kshs.2100 per bag coming to Kshs.21,000 transport costs of Kshs.16,000 and watchman at Kshs.18000.

The plaintiff did not lead and prove each item in his evidence. The agricultural officer's report dated 26.9.2007 and produced on evidence as p. exhibit no. 6 shows that the suit farm was approximately 14 acres while the lease agreement produced as p. exhibit no. 3 indicates that the leased farm was 10 acres while the title deed for the suit property parcel no. Ngusishi settlement sceme/570 is 4.0 ha.

These are discrepancies that puts into doubt the number of acreage allegedly harvested by the defendant. The other issue is whether it was the defendant actually who harvested the plaintiff's wheat on 24.9.2008.

The lease agreement produced as p. exhibit no. 3 shows that the land parcel no. Ngushishi settlement scheme/570 was leased to the plaintiff by Alice Gakii Kaaria. The plaintiff has testified that he planted wheat on the suit premises. If indeed the defendant trespassed into the suit property and harvested the plaintiff's wheat on the alleged 24/9/2008, that was a criminal offence punishable in law. There is no report made and no OB produced in court showing that the defendant was a suspect in the commission of the alleged offence. Alice Gakii who was one of the plaintiff witnesses (PW 2) and who stated that she was on the scene on the material date stated that she did not see the defendant harvesting the plaintiff's wheat. She stated that she saw a group of drunk youth harvesting the plaintiff's wheat. He named one of them as Kagendo. The police did not pick the said Kagendo for questioning. I find the trial magistrate correctly pointed out the inconsistency in the evidence adduced by the plaintiff and his witnesses. I find and hold that the trial magistrate properly directed his mind to the evidence adduced and the applicable law in arriving in the decision of the court on 30<sup>th</sup> October 2012. I therefore have no reason to disturb the judgment of the trial court. My re-evaluation do not give a different verdict from that which the learned magistrate gave. In the result, I find this appeal lacking merit and the same is hereby dismissed with costs to the respondent.

**READ, DELIVERED AND SIGNED BY E. C. CHERONO, ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU THIS 7<sup>TH</sup> DAY OF DECEMBER, 2018.**

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**In the presence of:**

1. Mr. Gikunda Anampiu holding brief for Basilio Gitonga for respondent
2. M/s. Wambugu holding brief for Kimathi Kiara for the appellant
3. C/A Janet