REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CIVIL APPEAL NO. 1 OF 1992

KARIUKI NDERU …… APPELLANT

VERSUS

KIBE WACHIRA …… RESPONDENT

J U D G M E N T

The appeal before court is by Kariuki Nderu – Original defendant and Kibe Wachira – Original plaintiff in March the appellant appeals against the judgment of the Resident Magistrate Court Miss N. Owino delivered on the 11th of February, 1991. A notice of appeal was issued on the same day and the records of appeal was filed on the 7th of January 1992. Directors was taken on the 25th February 1994 in which amended records of appeal was submitted together with records of another enclosed therein.

Mr. H.P.G. Waweru for the appellant raised for grounds to the appeal.

That the magistrate had no jurisdiction to hear the suit.

That the suit is res judicata made Nakuru P.M. Land Dispute case No. 15 of 1987.

That there was no proof adduced in the case on the balance of probabilities and that

the damages awarded was not supported by any evidence. The appeal was argued on the 3rd May 1994 with Mr. Mirugi Kariuki representing the respondent.

In brief – Under the Lands Dispute cases the magistrates court act gave powers to magistrate to refer certain disputes to the panel of elders for arbitration (Section 9A). This section has since been repealed in 1993 June.

In Land dispute case 15 of 1987 – the parties were first heard by the elders and in November 1987 the award was filed in court and duly confirmed. The elders award was that the land in dispute be awarded to the appellant who has bought the same.

In 1989, the respondent filed afresh suit at Nakuru civil suit 295 of 1989 in the principal magistrate's court. He prayed for the eviction of the defendant appellant/ Defendant and also for compensation at the rate of Ksh.20,000/= per month being damages for the time the appellant was in possession of the land.

The respondent case was that the appellant is his son in law. He had chased his wife away who

came back to the respondent. The respondent gave his daughter land to live on awaiting the appellant to come and take his wife and children. After four years the appellant came but instead of taking his wife settled on the land. He prays for his eviction.

The appellant stated that he came to the land in 1972. It is true that the respondent/plaintiff was in the process of purchasing shares of the land. He had two – three certificate of land. He then was unable to pay for all the shares the appellant then helped him to pay for such shares.

He paid Ksh.450/=. Later he was requested to pay Ksh.120/= to get the respondent's/ plaintiff's wife's share. That is his mother in law's share. The old man registered the land in his name and another to his daughter and detained title deed.

In cross-examination he admitted that these arrangements were never put in writing. That the title is in the share of the plaintiff.

In the first Land dispute case the award was in second suit in favour of the appellant in the second suit in favour of the respondent. The second case was heard by two magistrates as one was appointed a judge. No objection to this had been made.

Due to this two cases the appellant's Counsel raises the issues of no jurisdiction. That there was no power for the courts then under the magistrate courts act to raise the issue of title and ownership.

The respondent's Counsel argued that by the time the case was heard the respondent had title. The ownership was known and as such there was no deliberation on title.

That the aspect of no jurisdiction did not arise. To understand this argument one has to also look at the next argument on res judicata.

The Land dispute case was head by elders and recorded as part of the court records. Then there was the second case of 1989. That this case was thus res judicata.

It is noted that during the inception of matters to the elders the system was unclear. Cases were filed direct to the elders and their findings was thereafter made part of the court's records. Though no case law was quoted on this aspect it was made clear that all cases have to be filed in court then referred to the elders and award thereafter returned to court. It was as a result of this that the argument of res judicata was never raised by the Counsels on record during the second hearing. It was important for that argument to be raised in order that it could part of the appeal records to be argued on no leave to do so was made by appellant's counsel. In this case the same magistrate who had confirmed the lands dispute case was the same one who started the second case almost two years later.

This court thus find that there is jurisdiction by the magistrate. These further the first case was a nullity as it did not comply with the law. The court finds that the question on res judicata in all new matters raised on appeal and not raised in the lower courts. See case referred to, the respondent's counsel. It dismisses this part of appeal looking at the other two arguments raised. There by no proof deduced in the case on the balance of probabilities, the appellant himself admitted that he had no proof of agreement made with the respondent, his father in law. He called no witness to verify his statement that he bought the land, even his wife who is said to have handed the receipts to the Respondent in order that he may obtained title deeds. The payments, if any, were made in the name of the respondent. He should have had elders or witnesses to have witnessed the transaction.

The court also dismisses this aspect of the appeal.

On the last point raised that of general damages awarded, this court could agree with the appellant's Counsel on matters concerning lack of evidence as to support the compensation of 5,000/= per acre by way of damages.

The magistrate herself admitted Ksh.20,000/= was derived at on no basis but as a reasonable reduction stated it should be 5,000/=. Here again there was no basis as to this. Counsel for the respondent admitted the magistrate made a mistake here. What this ought to have been was mesne profit. He requested the court to compute it as such.

There are aspects not considered in the lower court and in this court which I would like to mention. That is if the appellant is ordered to quit from the suit land – what of the improvements that he had made on the land. Further it was the respondent who invited the wife (his daughter) to the land and as such mesne profits should not be charged.

The court herein allows the last prayer and sets aside the award of Ksh.40,000/= as general damages.

It nonetheless remits this case back to the trial magistrate to look into the issue of compensation of improvement done on the land by the respondent. Values – either agricultural or land values may be called to assess the same and a finding on how much the respondent ought to be paid made.

Apart from this the appeal is otherwise dismissed with costs to the respondent.

Dated this 13th day of May 1994.

M. A. ANG'AWA

JUDGE

13.5.94.