No. 2822

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 120 OF 2010

STEPHEN MUNGE KENTEHA.....APPELLANT

-VERSUS-

DAVID LESHOO KENTEYIA)
JULIUS KERUNGA KENTEYIA)
TARAYIA KENTEYIA alias SAMUEL KAMASIA)
STEPHEN OLE KIPUKEL).....RESPONDENTS

JUDGMENT

(Being an appeal from the Judgment and decree of the Senior Resident Magistrate's Court

at Kilgoris Hon. R. A Oganyo in SRMCCC No. 7 of 2006 delivered on 3rd June, 2009)

This appeal arises from the judgment and decree of **Hon. R. A Oganyo**, **SRM** in **Kilgoris SRMCCC No. 7 of 2006** delivered on 3rd June, 2009. By the said judgment and decree, the learned magistrate dismissed the suit lodged by the appellant against the respondents jointly and severally.

From the plaint filed, it would appear that the appellant's claim was anchored on the fact that he was a licencee of a portion of land measuring 2.37 acres or thereabouts out of the land parcel **No. Transmara/Ololchani/434** registered in the name of his father, **Daniel Kiprono Naimoja**. As a licencee of his father, he had planted a crop of maize on the portion aforesaid. On or about 3rd September, 2004, the 2nd and 3rd respondent by themselves, their agents, servants and or employees together with the 4th respondent as an agent, servant and or employee of the 1st respondent jointly and severally but unlawfully, carelessly and or negligently let loose their cattle into the parcel of land aforesaid that destroyed the appellant's maize crop which had matured. As a consequence the appellant suffered loss and damage for which he held the respondents liable. He therefore claimed from them a total of kshs.

93,378/- being the value of the crop destroyed.

The respondents as expected denied the appellant's claim in their joint statement of defence. They however admitted that they were brothers but denied ownership of the cattle that destroyed the appellant's maize crop. They averred that since the appellant was not the registered owner of the suit premises, he lacked the requisite ***locus standi*** to commence and maintain the suit against them. That the disputed portion of the suit premises with the maize crop had been the subject of various proceedings including **Kisii HCCC Miscellaneous 221 of 2004** which was disposed of on 24th May, 2005. Further that the disputed portion was decreed by the district Land Adjudication Officer and Surveyor, Transmara District as part and parcel of land parcel **Transmara/Ololchani/429** registered in the name of the 1st respondent. Consequently the suit did not lie. Finally, they averred that on the material day, they were at their places of business and work, respectively, far from the suit premises. Consequently, the suit against them was mischievous, misconceived and bad in law.

The appellant testified in support of his claim. He called 4 other witnesses to back him up. Briefly their testimony was that with the permission of his father who was the registered proprietor of the suit premises, the appellant cultivated a crop of maize on about 2.37 acres of the suit premises. When the said crop was almost ready for harvest, the 1st, 2nd and 3rd respondents being owners of herds of cattle being looked after by the 4th respondent on 3rd September, 2004 let them loose, they strayed and entered into the portion and destroyed the same maize crop causing the appellant loss and damage which the agricultural officer assessed at kshs. 93,378/=. The appellant had been alerted of the destruction and rushed to the scene only to find that the cattle had been removed by some children of the respondent assisted by his neighbours. They had been taken to his father's house. The cattle were later in the evening collected by the 4th respondent and two wives of the 3rd respondent. The appellant reported the incident to the local Assistant chief who convened two meeting to discuss the matter. However on both occasions, the respondents failed to turn up.

On the other hand, the respondents' evidence was that they did not own the alleged cattle. They claimed that they were being framed with suit because of the long standing land dispute between them and the appellant's father.

The learned magistrate having evaluated the pleadings, the evidence tendered, rival written submission on record and the law reached the verdict that

"…the plaintiff has not proved his case against the defendants on a balance of probabilities hence I dismiss the suit with costs to the defendants…".

That order of dismissal triggered this appeal. Through **Messrs Asati & Company Advocates**, the appellant challenged the judgment and decree aforesaid on four grounds to wit:-

"1. The learned trial magistrate erred in law and in fact in dismissing the plaintiff's case against the weight of the evidence adduced.

2. The learned trial magistrate erred in law and in fact in failing to find that the appellant had proved his case on a balance of probabilities.

3. The learned trial magistrate erred in law and in fact in holding that vicarious liability had not been

proved against the 1st defendant.

4. The learned trial magistrate misdirected herself in analyzing the evidence before her…".

When the appeal came up for directions before me on 2nd March, 2011, **Mrs. Asati** and **Mr. Oguttu**, respective learned counsels for the appellant and respondents agreed amongst other directions that they canvass the appeal by way of written submissions. They subsequently filed and exchanged the written submissions which I have carefully read and considered alongside cited authorities.

Before entering into consideration of the grounds of appeal, I think it is necessary to set out what I consider to be the approach, function and duty of the court in connection with this appeal. An appeal from the subordinate court to this court is by way of a re-trial but this court is bound not necessarily to accept the findings of fact by the court below but this court must re-consider the evidence, re-evaluate it and make its own conclusions, although always bearing in mind that it has not had the advantage of the trial magistrate in seeing and hearing witnesses. See **Selle –vs- Associated Motor Boat Company (1965) E. A 123**.

I will of course bear in mind the foregoing as I consider this appeal. I have no doubt in my mind that the trial court misapprehended the evidence led by the appellant and his witnesses in support of his claim and accordingly arrived at an erroneous decision. First and foremost, the trial court dismissed the appellant's claim on the ground of ***locus standi***. She anchored that finding on section 30 of the **Land Adjudication Act** which forbids any person from instituting civil proceedings concerning an interest in land in an adjudication section without the consent in writing of the adjudication officer. It is however instructive that this issue was not specifically pleaded much as it is a point of law. Nor was it canvassed in evidence. Further, I do not think that the said provision of the law was available to the respondents. The appellant was not coming to court to claim an interest in the land. He acknowledged that the land belonged to his father. That he was only a lesee. In that capacity he had planted maize crop on a portion of land given to him for that purpose by his father. The maize crop was destroyed by the cattle belonging to the respondents. His father who testified as PW5 confirmed that he had allowed his son, the appellant to grow a crop of maize on his portion of land. The ownership of the land by PW5 was thus not in dispute. The appellant's claim was not about his competing interest in the land as against his father nor against the respondents. The appellant's claim was not based on damage to the land but for the damage caused to his crop of maize by the respondents' cattle. If the appellant had come to court claiming that the land belonged to him as opposed to his father or respondents, then and only then could the provision of the law cited have come into play. In any event, the learned magistrate in her judgment had found as a fact that the appellant had ***locus standi*** to mount the suit as a licencee. Having so found in her judgment, I do not think that it was still open to her to proceed and dismiss the suit on account of lack of ***locus standi*** on the part of the appellant again.

The respondents have submitted that to the extent that the appellant claimed that he had leased the land from his father but failed to tender in court, any evidence of such lease, then the appellant had no lease whatsoever. Accordingly, he could not have mounted the suit on that basis. Alternatively, they argued that if the appellant was a licencee, then he was not seized or possessed of any legal mandate or capacity to lodge the suit in his name. And that if the appellant's claim touched on trespass, again such suit could only be mounted by the registered proprietor of the land.
I do not buy any of these arguments. The plaint as filed was clear. The appellant described himself therein as a licencee. He testified that he had the permission of the owner of the land to occupy the land. The owner of the land too testified and confirmed that he had granted the appellant permission to use the portion of his land. The issue of a lease and indeed a lease document does not therefore arise. This was a local arrangement between a father and son. I think that it would be expecting too much to insist on a written lease in the circumstances. In any case the appellant's case is that he was a licencee. It cannot also be true that a licencee cannot mount a suit in his own right. I am not aware of any such legal requirement. It is the appellant who grew the maize crop. The owner of the land had no interest in the same. It is the appellant who suffered the loss which was personal to him. The suit was to recover damages for that loss. I do not see how then the appellant should have roped the owner of the land who had already given him permission to plant the crop. The appellant's claim as correctly pointed out by the

respondents was based on trespass to his crop. The trespass was limited to the destruction of his crop by the respondents' cattle and was not continuous. The owner of the land had no interest in the appellant's crop. Why then should he be the one to sue?

The other issue worth of consideration is whether or not there was any incidence of the respondents' cattle straying into the appellant's maize and the ownership of the said cattle. The respondents' case is that there was no such trespass and the cattle if at all did not belong to them. They base that conclusion on the fact that the cattle were released to the owners prior to reporting the incident to the government officers on the ground. Besides, the appellant failed to call the elders who allegedly witnessed the release of the offending cattle as witnesses. Such failure could only point to one conclusion; their evidence would have been adverse to the appellant's case. Finally, they have submitted that the incident complained of did not take place and the suit in the subordinate court, was apparently influenced by the appellant's desire to circumvent the criminal case which had been mounted against him.

It is not in doubt that the appellant's father and the respondents' and or their father have been locked in a dispute over that portion of land for sometime. That may perhaps explain why the respondents' cattle were deliberately unleashed to destroy the maize crop on the same. Afterall it is in the evidence of the 1st respondent that the said portion of land had been adjudged to him. It cannot be true as claimed by the respondent that the incident never occurred. The appellant himself testified to that fact. His evidence was buttressed by the evidence of PW1 and PW2 who assisted the children belonging to the respondents in removing the cattle from the portion of land. Further PW3 who was the Assistant Chief for the area received a report of the incident from the appellant. He visited the scene the following day and saw the destruction. He thereafter summoned two meetings discuss and resolve the dispute but the respondents' failed to turn up. Further PW4, the agricultural officer visited the scene and saw the destruction as well. That was the basis of his report. I cannot think of any reason why PW1, PW2, PW3 and PW4 would gang up to falsely testify against the respondents. They had nothing to gain from undertaking such an exercise. PW1 and PW2 were among the elders who witnessed the cows as they destroyed the maize crop. Infact they were the ones who escorted the cattle out of the portion of land. They testified. I also do not think that the appellant would have deliberately destroyed his crop of maize merely to set up the respondents in the case.

It is not in dispute that the 4th respondent came for the cattle in the evening in the company of the two wives of the 3rd respondent and one **Kikwai**. It is not in dispute as well that the 4th respondent was an employee of the 1st defendant. The 1st respondent admitted that much. Why would he and the wives of the 3rd respondent come for the cattle if they did not belong to them. The cattle also bore No. 614 associated with the home of the respondents. This fact was not disputed by the respondents. The appellant and respondents are neighbours. It is not possible that the appellant would have mistaken other people's cattle for the respondents'. The respondents too did not deny that they own cattle. Their only borne of contention was the number. Some of them though categorically stated that they had not counted their cattle. It matters not that the elders who witnessed the release of the cows did not testify. There was sufficient evidence that the cows were released to people from the homestead of the respondents and names were given. The respondents did not discount those names. With all the above evidence, I would agree with the submissions of counsel for the appellant that the trial magistrate erred in holding that ***"… There was no clear cut proof of ownership of the cattle in question…".***

The appellant's claim was in the nature of special damages. It related to the costs of the production of the crop and its value. The respondents take the view that having pleaded special damages, it was incumbent upon the appellant to render and or tender receipts and other documentary proof, to show that indeed the amounts pleaded were appropriately expended. To them the appellant rendered no such evidence and if the appellant was to place reliance on the Agricultural officer's report, the same did not show the plot number in respect of which the assessment was undertaken.
It is trite law that a claim for special damages must not only be specifically pleaded but must also be specifically proved. The appellant specifically pleaded kshs. 93,397/= as the amount of loss he had incurred. He testified on the same. There was the evidence of the Agricultural officer who produced a report to buttress the appellant's claim. The tendering of the report in evidence was not objected to by the

respondents on account of having no plot number. Having been admitted in evidence it could not have been taken to refer to any other plot other than the plot in dispute. The claim of the appellant was with regard to his destroyed crop of maize. The report deals with that aspect of the matter. Thus it could not have been a report authored in respect of another parcel of land or claim. It is not mandatory that special damages be proved by production of receipts only. There are other ways of proving special damages. Other documents apart from receipts can do the trick. In this case, the report of the Agricultural Officer which was hardly challenged was sufficient proof of special damages.

Finally, the learned magistrate again erroneously held that ***"… the 1st defendant was not at home when the incident allegedly occurred. It was said that he was vicariously liable for the acts of the 4th defendant. There was need to establish the master/servant relationship between them, which was not done..."*.** The evidence on record in my view irresistibly point at the 4th respondent being an employee of the 1st respondent. The 1st respondent admitted as much. There was thus no basis for the learned magistrate to hold as aforesaid. Infact the magistrate proceeded on the basis of the aforementioned holding to find that the appellant had not proved negligence on the part of the respondent which as I have already said, was erroneous.

On the whole, I am satisfied that the appellant had proved his case against the respondents on the balance of probabilities and was therefore entitled to judgment. In the premises, I allow the appeal and set aside the Judgment and decree of the trial court dismissing the appellant's suit. In substitution, I enter judgment in favour of the appellant in the sum of kshs. 93,378/= plus costs and interest. Of course the interest will accrue from the date of filing suit. The appellant too shall have the costs of this appeal.

Judgment dated, signed and **delivered** this 30th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE