



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Coram: Justice D. K Kemei**

**CIVIL APPEAL NO. 3 OF 2016**

**MUSAU MUE.....APPELLANT**

**VERSUS**

**MBITHI SYOKAU.....RESPONDENT**

**(Being an Appeal from the Judgement and Orders of the Resident**

**Magistrate Miss. T. N Sinkiyian delivered on 11<sup>th</sup> December, 2015 in**

**the Senior Principal Magistrate's Court at Kangundo Civil Case No. 15 of 2013)**

**MUSAU MUE.....PLAINTIFF**

**VERSUS**

**MBITHI SYOKAU.....DEFENDANT**

**JUDGEMENT**

1. The appeal arises from the judgement of Hon. Sinkiyian in Kangundo Senior Principal Magistrate's Court Civil Case No.15 of 2013 delivered on 11<sup>th</sup> December, 2013 wherein she dismissed the appellant's suit with costs to the Respondent

2. Aggrieved by the said decision, the Appellant preferred this appeal and raised the following grounds in the memorandum of appeal which are as follows:-

i. **THAT** the learned Magistrate erred in law and in fact in failing to access the overwhelming evidence and submissions presented by and for the Appellant.

ii. **THAT** the learned Magistrate erred in law and in fact in finding that no prove was adduced to prove that the cows and goats belonged to the Respondent.

iii. **THAT** the learned Magistrate erred in law and in fact in finding that the Appellant did not refer to any specific distinguishing marks that made him ascertain that the cows that destroyed his crops belonged to the Defendant despite the fact that the cows were detained by the Appellant from his farm and were released to the Respondent.

iv. **THAT** the learned Magistrate erred in law and in fact in failing to rely on the Plaintiff's word that the cows that damaged his crops belonged to the Respondent as evidence in the matter.

v. **THAT** the learned Magistrate erred in Law and in fact in failing to find it safe to rely on the Plaintiff's word and that the animals belonged to the Defendant despite the fact that there was enough evidence that the animals that damaged the crops belonged to the Respondent.

vi. **THAT** the learned Magistrate erred in law and in fact in failing to find that the Respondent's animals were the trespassers of the suit property of the Appellant and therefore failed in finding the Respondent was liable to pay the damage that was incurred on the Appellants crops amounting to **KSHS. 50, 400/=**.

vii. **THAT** learned Magistrate erred in law and in fact in finding that there were contradictions in the Agricultural Officer's testimony despite there being no such contradiction.

viii. **THAT** the learned Magistrate erred in law and in fact in failing to find that the Defendant's animals grazed the Plaintiff/Appellant's crops and grass amounting to **KSHS. 50,400/=**

ix. **THAT** the learned Magistrate erred in law and in fact in failing to direct that the Defendant /Respondent do pay **KSHS. 50, 400/=** to the Appellant being the value of grazed crops and grass destroyed by the Respondent animals.

x. **THAT** the learned Magistrate erred in law in failing to grant of execution of her Judgement/Orders pending the hearing and determination of this Appeal in disregard to the grave consequences been presented against the Appellant.

3. Both parties were represented and Counsels agreed to dispose the Appeal by written submissions. The Appellant's submissions were filed by the firm of Mutinda Kimeu & Company Advocates. It was submitted that the learned trial magistrate having received evidence that the animals that damaged the Appellant's crops and land belonged to the Respondent was wrong in concluding that no evidence had been adduced that the animals belonged to the Respondent.

4. It was submitted that the Appellant's evidence was not considered by the trial court. Learned counsel invited the court to consider the evidence of PC Giyabe who was a defence witness and who testified that he released the animals he had found at Appellant's home to the Defendant's wife. Learned counsel contended that the trial court erred in finding that the Appellant failed to prove that the animals which damaged the Appellant's crops belonged to the Defendant/Respondent. He finally submitted that the trial court erred in law and fact by failing to assess the overwhelming evidence and submissions by the Appellant.

5. The Appellant's case in the trial court was that on the 5<sup>th</sup> of August 2012 at 10.00 pm the Appellant found the Respondent's cattle and goats grazing on his land and reported the matter to Kinyui Police Post. An assessment was done by an Agricultural Officer which was produced in court as annexure (**MF1**). He maintained that the officer asked the Respondent to compensate him in the sum of KSHS. 50, 400/= as assessed.

6. Ann Mbeti Ngovi (Pw2) and Monica Mue (PW3) testified and confirmed that they saw the Respondent's cattle grazing on the Appellant's land. Joseph Kilonzo (PW4) the Agricultural Officer testified that on the 5<sup>th</sup> of December 2012 he received a letter from the police requiring him to go and assess some crop that had been damaged at the Appellant's land. He confirmed that pigeon peas, Cameroon grass and natural grass had been damaged and which he assessed the damage at KSHS. 50, 400/= as follows;

i. Pigeon peas assessed at KSHS. 21,600/-

ii. Cameroon grass (nappier) assessed at KSHS. 4,800/=

iii. Natural grass assessed at KSHS 24,000/=

iv. Total loss at KSHS 50,400/=

7. The firm of Mulyungi & Mulyungi filed submissions on behalf of the Respondent. It was submitted that the Judgement of the trial court was proper and in full consideration of the facts and evidence presented before it. Counsel submitted that a court of law relies upon evidence adduced before it in determining a claim and not the words of the Plaintiff/Appellant. Counsel submitted that the Respondent aligns himself with the sentiments of the trial court in dismissing the suit as the Appellant had failed to prove his case on a balance of probabilities.

8. This being a first appeal it is the duty of this Court to re-evaluate the evidence, assess it and reach its own conclusion remembering that it had neither seen nor heard the witnesses and hence making due allowance for that. See the cases of **Selle & Another –V- Associated Motor Boat Co. Ltd And Others [1968] E.A. 123**, and **Kamau –V- Mungai & Another [2006]1 KLR 150**

9. I have carefully considered the submissions by both counsels plus the grounds of appeal. I have equally considered the evidence on record and the findings by the trial court. I find the following issues necessary for determination;

i. *Whether the Appellant proved his case as is required by law.*

ii. *What orders can the court make?*

10. On whether the Appellant proved his case as is required by law, it came out in the evidence that the Appellant and Respondent are neighbors. In his evidence the Appellant stated that immediately he saw the situation of his crops and lands on the material date, he proceeded to Kinyui Police Post where he made a report. He testified that he called the Respondent but who refused to come and settle the issue at Kinyui Police Post. According to the Appellant, the Respondent is still grazing his livestock on the appellant's land and that was why he decided to bring the suit to this Honourable Court. He produced documentation showing that he did hand over the matter to the police for action. The Appellant seemed to suggest that he was not happy with the fact that despite the damages the Respondent is still grazing his livestock on his land and even after being invited to the police post he refused to heed the same.

11. **PW2**, Anne Mbeti Ngovi, a farmer and sister-in-law to the Appellant, confirmed that on 12<sup>th</sup> August 2012 she went to the farm only to find goats and cattle grazing on grass and cow peas. On cross examination, she stated that photographs were taken by police from Kinyui and that despite the Appellant filing a complaint to the police she did not know why no action had not been taken.

12. **PW3**, Monica Mue, a housewife and niece to the Appellant, confirmed that she went to the farm and found goats and cattle grazing on grass and cow peas belonging to the appellant.

13. **PW4**, Joseph Kilonzo, testified that he received a letter from Kinyui police post dated 12/8/2012 and that he visited the farm on the 5/12/2012 where he did an assessment and came up with the sum of Kshs 50,400/ as the amount of damages. He confirmed that the police and the respondent was not present during the assessment and that those present were the appellant and his witnesses.

14. Francis Mbithi (**DW1**) testified that his animals did not trespass onto the appellant's farm as alleged. He added that he received a phone call from the appellant regarding the crop damage and that he had suggested to him that they invite the clan elder so that they all assess the alleged damage but the appellant declined and bragged that the police would see who between them had more money. He stated that his wife was not even alerted at the time as he was away in Nairobi and further that the assessment was done in his absence.

15. No.32392 P.C Isaac Giyabe (**DW2**) then based at Kinyui Police Patrol Base testified that the appellant came to report that he had found the respondent's animals grazing on his land and that he referred him to an agricultural officer to assess damages. He later visited the farm but did not see any damages as alleged by the appellant. He also confirmed that he did not accompany the agricultural officer during the assessment.

16. After carefully analyzing the entire evidence I find that the appellant's case is riddled with several contradictions. The incident is said to have taken place on 5/8/2012 and that the appellant did not report immediately until the 12/8/2012. The agricultural officer's report is dated 16/8/2012 yet he visited the farm on 5/12/2012. There was no way that a report could be prepared before a physical visit on the farm. Again, it is noted that the visit was conducted in the presence of only the appellant and his relatives. No reason was given as to why the respondent or his relatives who were the immediate neighbours to the appellant were not invited. Even the village elder who could have acted as an independent witness was not called to participate. Clearly, the burden of proof lay squarely upon the appellant to discharge under the provisions of section 107 and 109 of the Evidence Act. Certain glaring facts emerged from the testimonies and which left no doubt that the appellant's case had not been proved on balance of probabilities such as lack of description of the land in question, identification of the animals as belonging to the respondent and no other person in the area, the investigating officer's version during the visit vis a vis that of the agricultural officer and the existence of a frosty relationship between the appellant and the respondent. It would seem that the evidence of the agricultural officer and his report put paid the appellant's case in that it was not believable that the agricultural officer could prepare a report on the damage to crops on 16/8/2012 and then visit the scene on 5/12/2012! This was incredible and the appellant could not have succeeded in his case and hence its dismissal by the trial court. I am unable to fault the findings by the learned trial magistrate that the appellant's case had not been proved on a balance of probabilities.

17. In the final analysis the order which commends itself is that the appeal is devoid of merit. The same is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 31<sup>ST</sup> DAY OF MAY, 2021.**

**D. K. Kemei**

**Judge**