REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 186 OF 2016

(FORMERLY MURANGA HIGH COURT CIVIL APPEAL NO. 21 OF 2014)

PATRICK KARANJA NGUGI……..…....APPELLANT

VERSUS

ONESMUS MUTURI MBURU……....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Thika (Hon. B. J. Ndeda) Delivered on 25/11/2013 in Thika CM Civil Case No. 1087 of 2007)

JUDGMENT

1. By a Plaint dated 02/12/2007, the Respondent herein launched a suit against the Appellant sounding in breach of contract and torts. The basic claim in the Plaint was that the Respondent had entered into a Written Lease Agreement with the Appellant on 19/04/2007 *vide* which the Appellant allegedly demised 10 acres of the land parcel known as LR No. 10743/7 ("Suit Property") for a period of three years and eight months with effect from 01/05/2007.

2. The Respondent claimed in the Plaint that he took possession of the Suit Property and cleared bush, prepared the land for cultivation and planted seven acres worth of French beans and baby corn. However, the Respondent further claimed in the Plaint, the Appellant, without any lawful justification or excuse, entered the Suit Premises with his agents and employees and destroyed the property as he attempted to dig holes ostensibly to plant coffee and bananas. In the process, the Plaint claimed, the Appellant extensively destroyed the French beans and baby corn planted by the Respondent.

3. Additionally, the Respondent was apprehensive that the Appellant planned to evict him from the Suit Property since the Appellant had allegedly verbalized such a threat.

4. The Respondent prayed for judgment against the Appellant for damages for the destroyed crops and for an order of permanent injunction restraining the Appellants from interfering with his peaceful possession of the Suit Property during the agreed lease period.

5. Simultaneously with the Plaint, the Respondent filed a Notice of Motion Application praying for temporary injunction against the Appellant over the Suit Property. That Application was orally withdrawn on 11/02/2008 and the parties agreed to have the main suit set down for hearing.

6. It would appear that on 09/02/2009, the Respondent's Application to amend his Plaint was allowed. I say "appears" because the certified copy of the proceedings has proceedings for 09/02/2009 up to the point that the counsel for the Respondent is orally making the formal application before the Honourable Gicheha, Senior Resident Magistrate. There is no formal order by the Court in the Certified Copy of the

Proceedings. The next entry is for 05/03/2009 – at the registry for taking a hearing date. I referred to the original Court file. I found the entry for 09/02/2009. It has Mr. Gichachi making the Application. It also has the word "Court" indicating that the Court made an order – but that part is now torn out. It is not clear if the tearing of that part was intentional or is part of wear and tear. However, the Learned Trial Magistrate refers to the amendment in her judgment and says that the Plaint was amended.

7. I have also seen the Respondent's Application filed in the Lower Court dated 28/11/2008 which is supported by the Affidavit by the Respondent. The Plaintiff attaches the Proposed Amended Plaint to the Affidavit and prays that it be deemed as duly filed. I have also seen an Affidavit of Service indicating that the Application together with a Hearing Notice indicating that the Application was scheduled for 09/02/2009 were served on the Appellant's lawyers on 17/12/2008.

8. Given this context, I have concluded that the Plaint was, in fact, amended on 09/02/2009. The Amended Plaint particularized the special damages in the amount of Kshs. 596,470/-. It also deletes the prayer for permanent injunction. This was explained to have been necessary because the Suit Property had been sold to a third party anyway so it was no longer a feasible prayer.

9. The case proceeded to a full hearing. The Respondent called two witnesses and also testified. The Appellant equally testified and called three witnesses. After hearing all the witnesses and the submissions by the parties, the Learned Trial Magistrate ruled in favour of the Respondent, holding that he had proved his case on a balance of probabilities. In material part, the Learned Magistrate held as follows:

> *The main question is was the lease agreement breached (sic). My finding from the evidence adduced is that though there were issues between the Plaintiff and the Defendant substantially the lease agreement was breached by the Defendant the evidence is clear (sic). The Defendant refused to receive the balance after he sold the suit land. This was the initial breach the upshot being that the contract was not properly rescinded if at all it was rescinded and submitted by the Defendant. By the Defendant selling the land the way he did, he breached the lease agreement and after the people the Defendant sold the land to got on this land, they then destroyed the Plaintiff's crops which had been planted on the land. The evidence is undisputed….So who is to blame? It is clearly the Defendant and to what extent is the blame? To me, I concur with the plaintiff's submission. In the absence of contradictory evidence from an expert opinion (sic) court is bowed (sic) by the available expert opinion PW1, the District Agricultural Officer opined that the told cost of the French Beans and baby corn on 7 acres amounted to Kshs. 216,740/- and the loss estimated at Kshs. 380,000/- making a total of Kshs. 596,470/-. In the absence of any other authoritative opinion, I shall be bound by the opinion.*

10. The Appellant is aggrieved by the findings and judgment of the Learned Trial Magistrate and have preferred this appeal. In his Memorandum of Appeal, the Appellant listed six grounds of Appeal as follows:

> a. THAT the Learned Magistrate erred in law and in fact and in law in awarding special damages without proof thereof.
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> b. THAT the Learned Magistrate erred in his interpretation of the terms of a purported lease between the Appellant and the Respondent.
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> c. THAT the Learned Magistrate erred in fact and law in entering judgment for the plaintiff contrary to the weight of evidence.
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> d. THAT the Learned Magistrate erred in disregarding the evidence of the Appellant and his witness.
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> e. THAT the Learned Magistrate erred in misdirecting himself as to the weight of the evidence tendered by the Respondent and his witness.

f. The Learned Magistrate erred in arriving at a wrong decision.

11. The Appeal is opposed. Both parties agreed to argue the appeal by way of Written Submissions. Each filed their submissions and neither deemed it necessary to orally highlight.

12. I have carefully read all the submissions and authorities relied on by the parties. I will begin by re-stating the correct standard of review in appeal cases from the Subordinate Court.

13. The duty of the first Appellate Court is to subject the whole of the evidence presented at trial to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that the Appellate Judge did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the Court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123***in the following terms:

> *I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

14. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

> *It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.*
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> *"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."*

15. The appropriate standard of review established in these cases can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. Second, in reconsidering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the Trial Court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate Court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

16. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

17. The first complaint by the Appellant is that the Learned Trial Magistrate was wrong to have found the Appellant culpable after finding that the damage to the crops happened after the sale of the property to a third party, to wit, Mugumo Coffee Farm Ltd. The Appellant argues that this finding should have meant that it is the third party – Mugumo Coffee Farm Ltd – that was responsible for the damage and absolved the Appellant.

18. This argument is, with respect, misguided. The Appellant entered into a Lease Agreement with the Respondent. It was for three years and eight months with a termination clause that gave either party the right to terminate by serving a three-month notice. By the Lease Agreement terms, therefore, the Appellant was bound to ensure the Respondent enjoyed quiet possession of the property during the leased period. If he sold the property to a third party, he ought to have sold it subject to the lease agreement. Privity of contract remained between the Respondent and the Appellant – and any injury suffered by the Respondent as a result of the Appellant's breach was directly attributable to the Appellant notwithstanding change in ownership of the title. Differently put, the Appellant remained contractually bound to the Respondent notwithstanding the Appellant's decision to sell the property.

19. In actual fact, the Appellant understood this fact very well. His entire defence at the lower Court was not only to show that he had sold the property, but that that the new owners understood the boundaries of the land he had leased out to the Respondent so that they do not destroy his crops. At trial, his defence was never that the sale and transfer to Mugumo meant that he was no longer contractually bound; rather, his defence was that neither he nor the transferee damaged the property.

20. Next, the Appellant complains that the special damages were not proved to the required standard. As I understand it, the Appellant raises three arguments in this regard. First, he disputes the method used by the Agricultural Officer to compute the loss. He says that no evidence was tendered as to what the markets of the day were for the produce that was allegedly damaged. He argues that the failure to tender this evidence was fatal. He suggests, for example, that the expert ought to have demonstrated that he did random sampling to come up with his figures.

21. The Agricultural Officer had been requested to assess the extent of the damage to the crops. He did this by estimating how much the total yield would have been and then he further estimated how much the yield would have cost in the market place. In my view, the Agricultural Officer did not need to do any random sampling to come up with his figures. He was asked to do the assessment due to his expertise – and it is that expertise that informed the figures that he used.

22. It is important to point out that the Agricultural Officer testified as an expert witness. He duly established his expertise in the introductory part of this testimony. The Appellant's counsel did not seem

to impugn his expertise or his field of expertise. The Court, thus, accepted his evidence as one of an expert.

23. Section 48 of the Evidence Act permits Courts to accept the opinions of science or art if made by persons specially skilled in such science or art. The Court must, of course, first form the opinion that the witness is an expert or one who is especially skilled in that branch of science or art, to the satisfaction of the Court. This is a question of fact to be determined by the Trial Court. In this case, the record does not reflect any controversy over the expertise of the Agricultural Officer.

24. It is trite that even after accepting that a witness is an expert, the Court does not accept his opinions lock, stock and barrel. To do so would be to surrender the judicial function to the expert. Instead, the Court is expected to subject the reasoning behind the Expert's opinion to scrutiny in order to determine how much weight to attach to it. To this extent, the expert is expected to explain how he arrived at his decision and his methodology. In determining how much weight to put on the expert opinion, the Court considers a number of factors including: the circumstances of each case; the standing of the expert; the skill and experience of the expert; the care and discrimination with which he approached the question on which he is expressing his; and, where applicable, the extent to which the expert has used in aid the advances in modern sciences in coming to his expert opinion (See ***H.A. Charles Perera vs M. L. Motha 65 NLR 294***.).

25. In the case at hand, the expert laid down the basis of his report: it was a field visit coupled with his scientific knowledge of the crops and the market conditions. This is what he utilized to come up with the figures of how much yield was expected from the acreage that was under cultivation and how much the yield would fetch in the market. The Appellant did not credibly impugn these figures on cross-examination and neither did he present alternative theories by an expert to demonstrate that the opinion was irrational or impermissibly speculative as he now claims on appeal. In the circumstances, I am of the opinion that the Learned Trial Magistrate was entitled to reach the conclusions that she did.

26. The Appellant also complains that the expert was wrong to traverse outside his mandate. The argument is that the expert was asked by the Police to assess damage to French beans and baby corn only but that he included other destroyed crops and materials such as Napier grass and the like. I do not think anything comes out of this complaint. The aim of the field visit was for the expert to determine how much injury the Respondent had suffered from the actions by the Appellant. While primarily the damage was to French beans and baby corn, there was other contingent damage that was found on the field. It behoved the expert to include these as well.

27. Lastly, the Appellant argues that the evidence did not justify the conclusion that seven acres of land was covered by the two crops as alleged by the Respondent. Instead, the Appellant points to the evidence by DW2 (Cpl. Peter Nyanoiga) who claimed that he saw only an area approximating the size of the courtroom covered with the two crops.

28. From the evidence adduced at trial, I think the Learned Trial Magistrate was perfectly entitled to disbelieve DW1 and, instead, take the evidence of the Respondent, as backed up by that of the Agricultural Expert as more believable. This is so for at least three reasons. First, some of the Appellant's own witnesses (for example, the Appellant himself as well as the representative from Mugumo) did not appear to impugn the Respondent's version that he had cultivated 7 of the 10 acres he had leased from the Appellant. Second, the expert witness had been sent there by the Police to independently report on the extent of the damage. He made his report to the Police – and DW2 as the Officer in charge of the investigations had an opportunity to rebut the claims of the Agricultural Officer earlier but he did not. Third, there is no apparent motive for the Agricultural Officer to concoct lies in this case. The decision to refer the matter to the Agricultural Officer for assessment was not the Respondent's but the OCS'. It is, therefore, not possible to draw the conclusion that the Agricultural Officer was biased in favour of the Respondent.

29. The Appellant also faults the Learned Trial Magistrate for not making a finding that the Appellant had already terminated the Lease Agreement with the Respondent due to a breach of contract by the

Respondent. The claim is that the Respondent had failed to pay the remaining rent in the sum of Kshs. 15,000/- hence entitling the Appellant to rescind the Lease Agreement. The Appellant claims that he served the "termination letter" on the Respondent by leaving it with his farm manager. The Farm Manager denied ever receiving such a letter.

30. Like the Trial Court, I am persuaded that there was no valid rescission of the Lease Agreement. I draw this conclusion from the surrounding circumstances. First, I believe the Respondent's account that he attempted to pay the balance of the rent but the Appellant refused to accept the same. This seems true because, first, the Appellant does not specifically deny this charge. Secondly, the Appellant had an early opportunity to make this claim at the Police Station when he was summoned over the destruction of the crops. At the Police Station, however, his defence was not that the Lease Agreement had terminated – but that he had not participated in the destruction of the crops as alleged.

31. To me, this is a clear indication that the Appellant did not treat the Lease as terminated or rescinded for breach. I have looked at the letter dated 20/08/2007 allegedly sent to the Respondent indicating that the Appellant had decided to terminate the lease following the Respondent's failure to honour the Lease Agreement. Like the Lower Court, I have grave doubts whether this letter was ever delivered to the Respondent as claimed. If it was, it should bear a signature showing such receipt. In any event, if it was delivered on or about 20/08/2007 and by its terms orders the Respondent to move out of the premises immediately, there is no explanation why the Appellant did not act on the letter by removing the Respondent from the premises before the present suit was brought.

32. In considering all the grounds of appeal argued by the Appellant, the Court has re-evaluated and re-considered the evidence presented at trial. I have found no evidence that the Learned Trial Magistrate failed to properly consider the evidence presented by the Appellant. Instead, the Learned Trial Magistrate did consider the evidence presented and found it either to be legally irrelevant or to be, on balance, less believable than that of the Respondent. Upon re-evaluation, I find that the Learned Trial Magistrate was justified in reaching the conclusions that she did.

33. The upshot is that the Appeal lacks merit and it is hereby dismissed with costs.

34. Orders accordingly.

Delivered at Kiambu this 15th Day of March, 2018.

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JOEL NGUGI

JUDGE