



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HIGH COURT CIVIL APPEAL NO.60 OF 2017

DAVID MUGAMBI KAULA.....APPELLANT

VS

NYAMBENE ARIMI SACCO LTD.....RESPONDENT

JUDGMENT

The appellant David Mugambi Kaura was aggrieved by the judgment of the trial magistrate in Maua CMCC No. 84 of 2016 and filed appeal on the following grounds:-

1. That the trial magistrate erred in law and in fact in dismissing the appellants claim against the Respondent when the appellant evidence overweighed the Respondents during Trial.
2. That the Learned trial magistrate erred in law and fact by relying on defence statements alone without according the appellant the opportunity to cross examine the defence witnesses.
3. That the Learned trial magistrate erred in law and fact in finding that the appellant secured a loan facility from AFC for the purchase of the said cows the appellant did not have evidence of having cows.
4. That the Learned trial magistrate erred in law and in fact in finding that the seized cows but could not state which plot/farm they were seized Aruki/Akachi/735.
5. That trial magistrate erred in law and fact by dismissing while it clearly shows that the appellant was the owner of the said cows.
6. That the learned trial magistrate erred in law and fact when he observed the appellant took 2 ½ years to file a case yet the limitation barred the appellant from filing the suit.
7. That the Learned trial magistrate erred in law and fact by observing appellant had not served a demand notice to the Respondent, he had the Respondent yet among the Respondent list of documents.
8. That the Learned trial magistrate erred in law and fact when he held that appellant had not incurred any costs in having demand letter yet it was drawn by an advocate.
9. That the learned trial magistrate erred in law and fact by holding that the photographs taken were of no probative value since they could not disclose the owner of the cows or the land they were taken from yet he found the defendant took away the 2 cows.
10. That the Learned trial magistrate erred in law by dismiss the appellants case yet judgment was against the weight of evidence reasons wherefore the appellant prayed for:-

- a) The judgment/decreed and any sub-sequential orders of the trial court to be set aside with costs of the appeal and
- b) That the court do find that the appellant was entitled to reliefs sought in the lower court.
- c) That the court assess damages due to appellant to be paid by Respondents.

In summary the appellants case in the lower court was that on 24th June 2013 at around 4.00 am officers from the Respondents sacco went to his land and took and of his Friesian cows on account of a loan he learnt his fther Daniel Kaura took from the sacco. The Respondents officers were in company of police.

He said the cows were sold despite the manager of Respondent promising they would not be sold. The appellant filed statements he recorded together with his witnesses and asked the court to rely on them. In his judgment Hon Oscar Wanyaga RM acknowledges that in the defendants' statement of defence they deny the claim generally but acknowledge that they took 2 cows on account of a loan taken by one Daniel Kaura. The magistrate frames issues for determination as whether the appellant had proved the cows belonged to him. The Respondents did not come to court to prove that the cows they took belonged to Daniel Kaura who took the loan and in the view of this court the appellant had proved on a balance of probabilities that 2 cows were taken from him.

The appellants farm had Timothy Murira and Sarah Kambura were at the appellants home when the 2 cows were taken. Their evidence was not controverted neither the defendants witnesses or lawyer attended court after the appellant had testified and cross examined. Samuel Kainga also testified as having witnessed the appellants cows being taken away by 2 people from Respondents Sacco while under guard of 2 police officers. The evidence of the appellant and his witnesses in my view was sufficient proof together with admission of the defendants that cows were taken, that the cows belonged to appellant. The trial magistrate ought to have established whether appellant is the one who took loan from Respondent's Sacco and if so what the collaterals were. At paragraph 12 of statement of defence it is clearly stated that the 2 cows taken belonged to Daniel Karera M'Iburi and that appellant had no interest or no right over them.

The appellant responded to the statement of defence and it was incumbent upon Respondents to come to court to specifically controvert/challenge the appellant's averments.

The regard given to statements of the defendants witnesses filed in court file without same being interrogated was wrong. The defendants/Respondents filed documents –loan application form showing Daniel kava M'Iberi applied for a loan of Kshs 60,000/- from Kiegoi Tea Growers Sacco Ltd on 31.12.2004. It is not indicated what he selected to offer as security for the loan but repayment was guaranteed by 3 guarantors who didn't include the appellant herein. Because he had shares of 18,000/= he qualified to get Kshs 54,000/= which was advanced to him.

In consideration of the re-evaluation of the proceedings in the lower court and the subsequent judgment this court finds that the trial magistrate misdirected himself in relying on the defendant/Respondents witnesses statements to find against the appellant and yet the Respondents witnesses didn't attend court. I do find that the trial magistrate erred in failing to find that the appellant had not proved his case when his claim was not controverted by Respondents in court and when the appellants' witnesses gave overwhelming evidence that the 2 cows the Respondents officials confiscated belonged to the appellant.

There was no evidence denying that one of the cows was in calf and the other had a calf that was 6 days old. I do in the circumstances make a finding that the appellant proved on a balance of probabilities that his 2 Fresian cows unlawfully confiscated by the Respondents officials and do hereby ordered that they should be returned to him forthwith.

On damages suffered for loss of milk for 33 months the appellants the appellant didn't give particulars of the special damages incurred or anticipated special damages as a result of confiscation of his cows and he therefore didn't prove strictly that he suffered special damage.

The court would have nothing to base its assessment upon. The appeal therefore succeeds to the extent that the Respondents should make good the 2 fresian cows confiscated on account of a loan advanced to Daniel Kaura M'Iberi.

The defendants/Respondents herein didn't raise the issue of limitation of time and it was irrelevant for the trial court to make inference that because the appellant took 2 ½ years to lodge his claim and the fact that he had no correspondence between him and the Respondents showed the cows didn't belong to him.

The judgment of the lower court/trial magistrate is therefore set aside to the extent detailed in the body of the judgment herein. Costs of appeal and costs in the trial court to the appellant/plaintiff.

HON. A.ONG'INJO

JUDGE

ORULING SIGNED, DELIVERED AND DATED THIS 31ST DAY OF MAY 2018.

In the presence:

Appellant: M/S Okubasu & Munene Advocate for appellant

Respondent: Mr Gitonga Advocate for Respondent.

HON. A.ONG'INJO

JUDGE