REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 79 OF 2015

BETWEEN

CHANNAN AGRICULTURAL CONTRACTORS LIMITED ……. 1ST APPELLANT

KIBOS SUGAR AND ALLIED INDUSTRIES LIMITED ……...2ND APPELLANT

AND

JOHN OINDO ASOYO ……..……...……....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.P.L.Shinyada, SRM in the Chief Magistrates Court at Kisumu in Civil Case No. 469 of 2010 dated 14th August 2015)

JUDGMENT

1. The appellants were the 1st and 2nd defendants respectively in the subordinate court while the respondent was the plaintiff. The facts giving rise to the claim as set out in the plaint are that sometime in 2006, the respondent was contracted by the 2nd appellant ("Kibos Sugar") to prepare its farms using his tractor and plough. In October 2006, the respondent left the plough at the Kibos Sugar yard since his tractor had broken down and was unable to lift the plough. The respondent averred that in the same year, 1st appellant ("Channan") unlawfully and fraudulently removed the plough from the Kibos Sugar premises and proceeded to use it.

2. The respondent claimed that Channan refused to release the plough to him despite several requests. He accused it of using the plough for 45 months to the extent that it was damaged. He claimed damages at a rate of Kshs. 200/- per day which was the amount he paid to rent the plough from Edward Onyango Ogwang. He also claimed Kshs 136,639/- and Kshs. 15,000/- being the cost of repairing the plough and cost of bolts respectively in addition to general damages for detinue. The respondent claimed the following reliefs;

(a) General Damages.

(b) An order directing the 1st and 2nd Defendants to release and restore the said plough to the Plaintiff's custody forthwith, plus the cost of repairs and hire charges, or in the alternative, pay its full value.

(c) Costs of this suit plus interest thereon.

3. In their separate statements of defence, the appellants denied the allegations against them. Channan averred in the alternative that the plough was already damaged when it was brought to its yard and that

the respondent refused to pay the agreed security charges. Kibos Sugar pleaded in the alternative that the respondent failed to plough the land contracted thereby leading to reduced cane production. It also averred that the respondent did not have the capacity to institute the suit as he was not the owner of the plough. Channan subsequently amended it defence to include a counterclaim, claiming Kshs. 1,564,966.41 being reasonable safe keeping and security charges for keeping the plough.

4. In the judgment, the trial magistrate found as a fact that Kibos Sugar handed over the plough to Channan for storage and that on 3rd May 2013, during the proceedings, the parties recorded a consent that the Channan would release the plough to the respondent. The trial magistrate therefore concluded that the consent was an admission on the part of the Channan that it was holding the plough. The trial magistrate held the appellants liable for unlawfully withholding the plough and that Channan had converted it to its own use. The court awarded the respondent Kshs. 1,000,000.00 as general damages and directed the appellants to restore the plough to the respondent in proper working condition and in the event the plough was not in proper working condition, to compensate the respondent the current value of the plough. In addition, the respondent was awarded costs of the claim. The court dismissed the counterclaim by Kibos Sugar.

5. The appellants appealed against the judgment and in the memorandum of appeal dated 14th September 2015, they challenged the judgment on several grounds which counsel for the appellant, Mr Onyango, adopted and condensed into three broad arguments. He submitted that the basis of the suit was never proved since the appellant did not give the respondent any assurance that they would look after the plough. He also submitted that the respondent did not lead any evidence to suggest that the appellants had a responsibility to take care of the plough. Counsel further submitted that the trial magistrate did not consider the testimony of DW 1 and DW 2 who testified that the plough was abandoned. Counsel also argued that there was no basis for the award of special damages as these were neither pleaded nor proved.

6. Mr Orengo, counsel for the respondent, opposed the appeal. He submitted that the plough was left in the appellants' custody and that it was not released despite several attempts to get it back. He pointed out that the appellants conceded that they had the plough when they recorded the consent releasing it to the respondent. Counsel further submitted that the respondent's claim was based on the tort of detinue hence he was entitled to general damages once the claim was proved.

7. The duty of the first appellate court is now established. It was elucidated by Sir Clement De Lestang in ***Selle v Associated Motor Boat Company Ltd*** **[1968] EA 123** as follows:

> *This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.*
>
> *However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally.*

8. The thrust of this appeal is whether the appellants wrongfully withheld and converted the respondents plough and if so, the nature and extent of relief the respondent is entitled. The respondent's cause of action is for the wrongful detention and dealing with a chattel in a manner inconsistent with possession or right of the owner which, in common law, falls under the tort of detinue. The cause of action arises where the claimant has the right to immediate possession of the chattel and the tortfeasor refuses to deliver it up on demand. In ***Attorney General v Zaherali J. Sunderji t/a Crystal Ice Cream*** **NRB CA Civil Appeal No. 20 of 1984 [1986]eKLR**, the Court of Appeal stated as follows:

> *The gist of detinue, a form of action which lies for recovery of personal chattels from one who has acquired possession of them lawfully but retains it without right, is the wrongful detainer and not the original taking. The plaintiff proves property in himself and possession in the defendant in detinue sur trover.*

9. To prove his case, the respondent had to establish that he owned the plough and that he made the demand for its return and that he suffered loss and damage for failure to return the plough. As to whether the plough belonged to the respondent, it is not in dispute that Kibos Sugar contracted the respondent to plough it farms. Although the respondent did not have his own plough, he had leased one from Edward Onyango Ogwang (PW 2). The appellants suggested that the since the respondent was not the owner of the plough, he could not maintain the case against the appellants. I reject this contention for three reasons. First, Sugar Kibos is estopped from denying that the plough belonged to the respondent because it contracted the respondent to plough the land and the contract was indeed performed in part. Second, the respondent as lessee of the plough from PW 2 was entitled to immediate possession of the plough from the appellants and could mount the action for its return. Third, by the consent recorded releasing the plough to the respondent, the appellants admitted and recognised the respondent's claim to the plough.

10. It is also not in dispute that the respondent left his plough with Kibos Sugar. The respondent told the court that when his tractor broke down in October 2006, he left it at the yard. This fact was admitted by Ambrose Ochieng Abungu (DW 1) who testified that when his tractor broke down, the respondent requested Kibos Sugar to keep the plough while he repaired the tractor. DW 1 told the court that when Kibos Sugar decided to expand its premises, it requested and Channan agreed to store the plough and other equipment that was lying in its yard. Painito Akoni Okoyo (DW 2), the General Manager for Channan, confirmed that in 2007, Channan agreed to take the equipment on condition that Kibos Sugar agreed to pay rent. In addition, the consent recorded on court on 3rd May 2013, was clear that Channan was in possession of the plough. For purposes of liability, it did not matter how the appellants came into possession of plough; whether it was abandoned or otherwise as urged by the appellants. As was held in ***Charles Douglas Cullen v Parsam Hansraj (Supra)*** and ***Attorney General v Zaherali Sunderji (Supra)***, the substance of the cause of action is retaining the chattel once the demand has been made.

11. As to whether the respondent made a demand, he testified that towards the end of 2007, when PW 2 asked for his plough, he called the Kibos Sugar accountant who told him that the plough had been taken by Channan. He went to the Channan premises but he did not find it. It was only in 2012 when he went with PW 2 that he found the plough with Channan's logo on it. He declined an offer by the Channan's director to purchase the plough. He thereafter wrote a letter dated 21st September 2010 to Channan authorising PW 2 to collect the plough but the same was not released. PW 2 testified that he took the letter to the Channan but was referred to Kibos Sugar as it was alleged that the respondent owed some money. He sent Zedekiah Odhiambo Ogada (PW 3) to pay Kshs. 5,000/- on behalf of respondent upon which the accountant endorsed on the letter that the plough could be released as the outstanding sum had been paid. He proceeded with PW 3 to Channan's premises where he identified the plough which was by this time worn out. Although a Mr Chatte of Channan offered him Kshs. 100,000 to purchase of the plough, he rejected the offer and the plough was not returned to PW 2. DW 2 testified that at the time of hearing the plough had not been released to the respondent.

12. It is clear from the collective testimony of the respondent's witnesses and DW 2's admission, that the plough had not been released to the respondent by the appellants despite his request. The consent recorded by the parties was not honoured. I therefore find and hold that not only was the plough in possession of the appellants but it was not released despite request by the respondent. Since neither appellant filed a notice of claim or indemnity against the other, both appellants are liable. This leads me to consideration of the next issue which is what remedies are available to the respondent.

13. In ***Dharamshi v Karsan*** **[1974] EA 41**, the court held that in an action for detinue a plaintiff is entitled prima facie to the value of the goods, together with any special loss which is the natural and direct result of the wrong. The valuation of the goods should be assessed as at the date of the judgment. Further, a plaintiff can recover the return or value of his detained goods as well as damages for their detention. In the more recent case of ***Kenya Commercial Bank Ltd v Sheikh Osman Mohammed*** **NRB Civil Appeal No. 179 of 2010 [2013]eKLR**, the Court of Appeal observed that;

> *[28] ….. To the extent that the learned trial judge found that the cause of action in detinue was proved, the learned judge was right, in principle, in taking the view that the remedy of general damages would be available. In* ***General and Finance Facilities Ltd V Cooks Car (Romford) Ltd***

> ***(1963) 2 All ER 314**, Diplock L.J took the view that the remedies available in a claim founded on the tort of detinue may take the form of the value of the chattel as assessed as from the date of judgment and damages for its detention; or the return of the chattel or its value as from the date of judgment and damages; or the return of the chattel and damages for detention.*
>
> *[29] Damages for detention in law include the normal loss suffered as a result of the detention of the goods so that the plaintiff is awarded these damages in addition to the monetary value of the goods detained or the return of the goods itself.*

14. The appellants complained in the memorandum of appeal that the trial magistrate gave order that were both ambiguous and incapable of being carried out. The trial magistrate made the following order:

> *[2] The defendants are hereby directed to release and restore the plough in issue which should be in a proper working condition to the plaintiff. In the event the said plough was not in proper working condition then the defendants will compensate the plaintiff the current market value of the plough.*

15. I agree with the appellant's contention that the relief granted was ambiguous and incomplete. The trial magistrate did not define what *"proper working condition"* was and did not make any finding as to the market value of the plough. These issues would lead to further litigation as the parties would have to be reheard. It was the duty of the trial court to give clear and unambiguous relief. As the case of ***Kenya Commercial Bank Ltd v Sheikh Osman Mohammed*** **(Supra)** shows, the reliefs are in the alternative and the trial magistrate had the option, based on the evidence, to decide what relief to grant. Since the consent recorded was not complied with and given the time that had elapsed, it was unlikely that the plough would be returned to the respondent and if at all in good condition. In the circumstances, the trial magistrate ought to have awarded the respondent the value of the plough and the consequential loss suffered. Since the value of the plough was known and the consequential loss quantified, this removed the remedy from the realm of general damages.

16. The respondent, at paragraph 14 of the plaint, pleaded that the value of the plough was Kshs. 600,000/-. Although the sum was not set out in the prayers, it was clearly pleaded in the body of the plaint and evidence led on it. When cross-examined by the appellants' advocate, PW 1 put the cost of a new plough at Kshs. 300,000/- to 350,000/- in 2010. PW 2 testified that when he went to see Mr Chatte of Channan, he was offered Kshs. 100,000/- as the cost of the plough which he rejected and counter-offered Kshs. 270,000/-. He testified that the value of a new plough was about Kshs. 360,000/-.

17. Although the respondent did not provide a quotation from a company selling similar ploughs, I hold that on the balance of probabilities the respondent proved the value of the plough and based on the testimony of PW 1 and PW 2, I would assess the same at Kshs. 320,000/- and not the Kshs. 600,000/- pleaded. Their testimony was credible as they were in the business of ploughing and were familiar with the price of such items. On the other hand, despite the clear pleading, the appellants, who had the opportunity to provide counter evidence, did provide any other basis for assessing the cost of a plough. I would therefore award the respondent Kshs. 320,000/- as the cost of a new plough.

18. The next aspect of damages is the loss flowing from the withholding of the plough or failure to release it. The respondent claimed Kshs. 234,000/- being hire charges for 45 months. The trial magistrate did not consider this aspect of the claim separately but seemed to conflate this claim with the claim for general damages when she concluded:

> *I am minded to award the plaintiff Kshs. 1,000,000.00 as general damages for detinue, which I hereby award, putting in mind that the plough was hired at some fee [Kshs. 200] per day and the length of time the plaintiff has had to wait to get back the plough from the defendant in order to return it to the lawful owner.*

19. A claim for loss of use constitutes special damages and must be pleaded and proved. As to whether the respondent proved this claim, the evidence is clear that the tractor had a mechanical problem. Even if

the plough was available, the respondent would not have performed his contract with Kibos which was tenable for one year from July 2006. By the time the tractor became available at the end of 2007, the respondent's contract with Kibos Sugar had expired. The respondent could not therefore place his failure to pay hire charges on the appellants. I would therefore dismiss this claim.

20. As I pointed out, the trial magistrate assessed general damages based on loss of use of the plough but it is clear from the case of ***Kenya Commercial Bank Ltd v Sheikh Osman Mohammed*** **(Supra)** that the respondent is entitled to general damages separately in addition to the special damages as pleaded. In this case, general damages are not at large but are nominal and intended to recognise the fact that the respondent's right was violated rather provide compensation for actual loss which is catered for by award of special damages. In this respect, the learned trial magistrate erred in point of principle in awarding general damages of Kshs. 1,000,000.00. I set aside this award and substitute it with an award of Kshs. 100,000/-.

21. Turning to the counterclaim, I agree with the trial magistrate's conclusion that the plough was moved from the Kibos Sugar yard on condition that the Channan would pay would pay it the cost of security and transport. This conclusion was supported by the testimony of DW 1 and DW 2. The respondent was not party to the agreement and could not be made liable for the total cost of storage and transport.

22. In conclusion, I allow the appeal to the extent that I set aside the prayers granted and substitute the same with the judgment for the respondent against the appellants jointly and severally for;

(a) Kshs. 100,000/- as general damages.

(b) Kshs. 320,000/- being the cost of a plough.

(c) Costs of the suit in the subordinate costs and half the costs of this appeal.

(d) Interest on (a) from the date of judgment in the subordinate court and interest on (b) from the date of filing suit in the subordinate court.

DATED and **DELIVERED** at **KISUMU this 30th day of January 2017.**

D.S. MAJANJA

JUDGE

Mr Onyango instructed by Olel, Onyango and Ingutiah Advocates for the appellants.

Mr M. Orengo, Advocate for the respondent.