



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 1 OF 2012

KIYOGA LIMITEDAPPELLANT

VERSUS

JAMES NJORO KIBUTIRIRESPONDENT

(Being an appeal from the the judgment and decree of Hon. Ndungu SPM in CMCC No. 7667 of 2009 delivered on the 7th day of December 2011)

JUDGMENT

The appellant was the defendant in the lower court while the respondent was the plaintiff. The respondent had sued the appellant for Kshs. 550,000/= being the value of five Friesian Bovine dairy cattle, one bull and Kshs. 82,800/= being loss of milk following the death of the said cows after allegedly consuming fodder sprayed by the appellant. The appellant denied the claim in its defence and filed a counter claim, claiming Kshs. 168,000/= being rent for 4 (four) acres which it paid for but the respondent failed to provide.

After the hearing in the lower court, on 7th December, 2011 a judgment was delivered in favour of the respondent herein.

From the pleadings the respondent alleged that there was an agreement between the two parties for the respondent to lease out to the appellant 20 (twenty) acres out of his land LR No. 165/9 situate in Red Hill area of Kiambu County, for a period of 1(one) year. The appellant was to use the said land for horticultural activities. It was the respondent's case that there was an express and or implied term of the agreement between the parties that the appellant was to take all reasonable precautions for the safety of the respondent's livestock that fed on pasture adjoining the leased land.

Following spraying activities at the appellant's leased land, the pasture that the respondent's livestock fed on became contaminated and upon the cattle feeding thereon, the five dairy cattle and one bull died. A post mortem revealed the cause of death was poisoning leading to the loss suffered by the respondent.

The respondent blamed the loss on the negligence, carelessness breach of statutory duty and breach of contract on the part of the appellant. In particular, the respondent blamed the appellant for failure to adequately fence off the leased portion of the farm; failure to warn the respondent of spraying activities taking place on that farm or the dangers the livestock would be exposed to by the activities being taken on the farm; exposing the respondent's cattle to danger it knew or ought to have known and controlled; spraying carelessly without due regard to the land user thereby contaminating the grazing pasture.

The appellant denied all those allegations and instead pleaded that if there was any loss, which was

denied, it was solely caused by the respondent and or his agents, servants and or employees. The value of the dead livestock and milk was also denied. Instead, the appellant raised a counter claim to the effect that whereas it paid the total value of the leased portion of land, the respondent allocated the appellant only 16 (sixteen) acres as opposed to 20 (twenty) acres.

In effect, the appellant overpaid rent by an extra Kshs. 168,000/=. Despite demand to be allocated the remaining 4 (four) acres or the overpaid amount the respondent is said to have failed or neglected to do either, resulting to the loss and damage suffered by the appellant. The appellants counter claim was therefore Kshs. 168,000/=.

The trial court believed the evidence of the respondent and gave judgment in his favour. The summary of the appellant's grounds of appeal is that the lower court failed to give cognisance to the appellant's explicit submissions on special damages; the finding of liability was against the weight of evidence; no samples of pasture were taken from the appellant's farm and there was no direct evidence linking the alleged poisoning to the appellant's farm, and so the lower court erred in law and in fact in finding that the respondent's cows had died due poisoning by the appellant.

The lower court was also faulted for treating the evidence by witnesses in unbalanced manner in that, whereas both parties gave evidence on oath the court took the respondent's evidence on its face value, and ignored settled principles of proof of special damages; the counter claim was also dismissed against the weight of evidence. Both parties filed submissions.

The agreement on record and which was produced in evidence is dated 23rd March, 2009. The activities by the appellant are said to have taken place sometimes in 2009. According to the report produced from the Faculty of Veterinary Medicine of the University of Nairobi, the respondent's livestock died on 19th August, 2009. This spraying at the appellant's leased parcel of land took place on 18th August, 2009.

Proof in civil proceedings is on a balance of probability. In analysing the evidence adduced, the trial court found as a fact that the death of the cows had been proved. The court also observed that Pexh No. 2 showed the animals died of organophosphate poisoning in chemical contents. The respondent called Dr. John Muthee Karanja, a lecturer at the University of Nairobi in the department of clinical stores. He had 20 years' experience at the time of hearing and he is the one who examined the animals that had died. He concluded the cause of death was poisoning. He also visited the site where some animals had died and some were sickly. He examined the pasture surrounding the respondent's farm and found a horticulture farm nearby.

He knew that this could be the source of poison chemicals and indeed found waste flowers disposed off at the site of the pasture. It was most likely the animals died of poisoned flowers. The suddenness of the death pointed to poisoning. I agree with the finding by the trial court that, in all probabilities the respondent had shown that it was the appellant's chemical spray on the farm, and the littering of sprayed waste on the plaintiffs pasture that caused the death of the animals.

There was clearly a breach of duty that the appellant owed to the respondent which breach lead to the loss suffered by the respondent.

I have asked the question whether or not the respondent had any duty to ensure that his animals did not feed on any poisonous waste. He knew or ought to have known that the appellant would from time to time use pesticide on the leased farm. Yet he did not use any precautions to ensure that he alerted the appellant not to dispose of any waste near the pasture that was likely to be consumed by his animals. In my judgment he contributed to the negligence but to a very minimal extent which I assess to be 10%. The appellant was therefore liable to the respondent to the degree of 90%.

The value of the dead animals was part of the evidence of the respondent and P.W 2. In the absence of any evidence to the contrary the value was established to the satisfaction of the court. The loss of milk was pleaded. No records were produced to establish that loss. In fact, the respondent testified that he did not keep the records of milk produced.

However, he told the court he was selling milk to KCC and Limuru Dairy. He also told the court that he used to bank money in some account. Although he said he could offer the records for dairy and that he kept such records, none were produced.

He had the alternative of asking for adjournment or requesting to be recalled to produce such documents. This he did not do. As special damages must be specifically pleaded and strictly proved, I find that the respondent did not meet that threshold.

The respondent therefore only succeeded in establishing the value of the dead animals which must be discounted by 10% contributory negligence, leaving a balance of Kshs. 495,000/=. The loss of milk was not proved.

On the other hand, the trial court dismissed the appellants counter claim. There is evidence that the appellant called D.W. 4 who was the area chief to testify on the disputed area. This witness confirmed that he took measurements but the appellant refused the offered area as it was sloppy and heading to the river.

There was no report of a surveyor to confirm the acreage used by the appellant. One of the appellant's witnesses D.W. 1, told the court that the appellant refused to cultivate 4 extra acres as it was towards the river. At the end of it all, it was the word of the appellant witnesses as against that of the respondent. I am persuaded that on a balance of probability the appellant failed to prove the counter claim and therefore it was rightly dismissed.

In the end this appeal is allowed in part by assigning 10% contributory negligence on the part of the respondent and setting aside the award of milk that is said to have been lost. There shall be judgment for the respondent in the sum of Kshs. 495,000/= plus costs and interests at court rates.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26th Day of April, 2017.

A. MBOGHOLI MSAGHA

JUDGE