



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CIVIL APPEAL NO. 90 OF 2014**

**BETWEEN**

**RICHARD ARINA DEDE ..... APPELLANT**

**AND**

**MICHAEL AWINO OUMA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. D. O. Chepkwony, SPM dated 1<sup>st</sup> August 2014 in Nyando Senior Principal Magistrates Court Civil Case No.333 of 2012)*

**JUDGMENT**

1. The respondent sued the appellant in the subordinate court claiming that between 23<sup>rd</sup> June 2012 and 24<sup>th</sup> July 2012, the appellant without any reasonable cause allowed his animals to graze on his sugarcane causing him loss and damage assessed at Kshs. 32,520/- which the appellant agreed to pay him. In his defence, the appellant denied that his animals entered the respondent's land, grazed and destroyed the respondent's sugarcane. He also denied that he agreed to compensate the respondent. He averred that respondent's suit was bad in law and incurably defective.
2. The trial magistrate ruled in favour of the respondent and awarded him Kshs. 32,520/-. It is this judgment that has precipitated this appeal. In the memorandum of appeal dated 19<sup>th</sup> August 2014, the appellant contends that the trial court misapprehended the entire evidence and the law in ruling in favour of the respondent. He contends that the trial magistrate misapprehended the burden and instance of proof and generally made the decision against the weight of evidence. He also attacked the judgment on the ground that the claim was for special damages which were neither pleaded nor proved.
3. Mr Onsongo, counsel for the appellant, submitted that there was no evidence to support the trial court findings and that the respondent did not prove that his case. He urged the court to carefully scrutinize the evidence and set aside the judgment. On his part, the respondent supported the trial court judgment and urged the court to uphold it.
4. This being a first appeal, this court is required in law to re-consider and re-evaluate the evidence adduced before the trial magistrate and before reaching its own independent determination whether or not to uphold the decision of the trial magistrate. The court must bear in mind that it neither saw nor heard the witnesses testify (see *Peters v Sunday Post Ltd [1958] EA 424*). In order to proceed with this task, it is necessary to outline the evidence as it emerged before the trial court.
5. The respondent, Michael Awino Ouma (PW 1), testified that he had planted sugar cane on land he owned in Kang'o Sub-location. On 24<sup>th</sup> July 2012, he went to visit his farm and found the appellant's

cattle grazing on his land. He called Joseph Adongo (PW 2), a clan elder, who came to the scene and noted that the respondent's sugarcane had been damaged. Moses Odhiambo Okwama (PW 3) testified that his farm was next to that of PW 1 and that on 24<sup>th</sup> October 2012, he found animals grazing on PW 1's sugarcane. He told the court that he called the appellant and informed him of the fact but he did not turn up.

6. PW 1 also called the Assistant Chief of Kang'o Sub-location, Adolfas Mboya Ogolla (PW 3) who confirmed that PW 1 called him on 24<sup>th</sup> July 2012 to inform him that the appellant's cattle were grazing on his sugarcane. He then called PW 2 and told him to go and confirm the position and report back to him. PW 3 further testified that respondent came to his office several times seeking to sort out the issue with the appellant but the appellant did not turn up despite being called several times. He then referred the respondent to Ombeyi Police Post. PW 3 recalled that the Agricultural Officer (PW 4) called him on 7<sup>th</sup> August 2012 informing him that he was going to assess the damaged crop. PW 3 recalled that on 17<sup>th</sup> August 2012 when he was at Ombeyi Police Post with the respondent, the appellant came and they discussed the issue and he undertook in writing to pay Kshs. 32,520/- in four installments.

7. The Muhoroni Agricultural Extension Officer, Elly Omure (PW 4), testified that he was requested by Ombeyi Police Post, through a letter dated 9<sup>th</sup> August 2012, to carry out a crop damage assessment on PW 1's farm. He proceeded there in presence of PW 1 and an elder and reported that the 15<sup>th</sup> month first ratoon crop had been damaged by cattle. He assessed the value of the damage at Kshs. 32,250/-.

8. The appellant (DW 1) testified that he came to know about the case on 16<sup>th</sup> July 2012 when he met PW 1, the Assistant Chief, a police officer from Ombeyi Police Post and a boda boda operator on the way to his farm. He was informed that his cattle were found grazing on PW 1's land on 24<sup>th</sup> June 2012 and that the matter had been reported to the Police, Chief and the Agriculture Extension Officer. He was told to report to the Police Post to find out about the case. When he went there he found PW 1 and was informed that the matter would proceed to court. In cross-examination, he denied that he had written or signed anything at the police station.

9. Dismas Onyango Orage (DW 2), the appellant's cousin, testified that appellant's animals did not graze on the respondent's land on 23<sup>rd</sup> June 2012 as he was on his own farm with the appellant's herdsman. He told the court that on his way home with the appellant's herdsman, he heard PW 1 quarrelling with one Gabriel Okwara about letting his animals on his land. Caren Ochieng Omondi (DW 3), testified that she had leased her farm to PW 1 and while DW 1 was her brother in law. She told the court that on 23<sup>rd</sup> June 2012, she was weeding her sugarcane close to PW 1's land when DW 1's animals came with those of DW 2 but did not cross onto PW 1's land. She further testified that Okwara came close by with his animals while the PW 1 was in the shamba whereupon they started quarrelling but Okwara left.

10. The issue for determination is whether the appellant's cattle destroyed the respondent's sugar cane and consequently whether the respondent was entitled to compensation as prayed in the plaint. The respondent had the burden of proving his case on the balance of probabilities.

11. here is no dispute that the respondent's crop was destroyed as this confirmed by witnesses from both sides. The respondent's case was that the appellant's animals destroyed his sugarcane crop on 24<sup>th</sup> July 2012. Having considered the evidence, I am satisfied that the respondent proved his case on the balance of probabilities. His case was supported by the testimony of PW 2, PW 3 and PW 4. Although PW 3 referred to the incident taking place on 24<sup>th</sup> October 2012, this was likely an error but considering that PW 1 confirmed that he was present at the scene. The weight of the PW 1's case is given credence by the fact that he reported the incident to the Assistant Chief and the Police who took further action to have the crop damage assessed. As to whether the cattle belonged to the appellant, it is noteworthy the parties were known to each other as coming from the same village and there is no reason to believe that the witnesses could mistake the appellant's cattle. In any case, the defence witnesses, DW 2 and DW 3 put the appellant's cattle within the vicinity of the respondent's land making more likely that the cattle usually grazed within that area.

12. On the hand, the appellant's case failed to rebut the respondent's case. Both DW 2 and DW 3 referred to an incident that took place on 23<sup>rd</sup> June 2012 hence the trial magistrate was right to conclude that their testimony was doubtful. Further, the attempt by DW 2 and DW 3 to bring Gabriel Okwara into the picture was an afterthought as this was never put to or suggested to PW 1 or his witnesses in cross-examination. The appellant had the opportunity of calling the said Gabriel Okwara, whom he admitted was a neighbour, but failed to do so.

13. The value of the destroyed crop was satisfactorily proved by the extension officer. The issue raised by the appellant is whether the claim, being one for special damages, was pleaded. At paragraph 5 and 6 the appellant pleaded that the value of the damage to his crop was Kshs. 32, 520/- which the appellant agreed to pay. However, in the prayers, the appellant did not pray for special damages but general damages. Was this a fatal defect to the appellant's case?

14. The Court of Appeal in ***Coast Bus Service Ltd v Murunga Danyi CA Civil Appeal No. 192 of 1992 (UR)*** stated as follows;

*We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as done in this case, that the particulars of special damages were to be supplied at the time of trial ..... It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars.*

15. The purpose of pleading special damages is to enable a party know the case it is to meet. In this case the claim was clearly set out in the body of the pleading and supported by sufficient evidence. The learned magistrate in her judgment clearly appreciated the import of **Article 159(2)(b)** of the Constitution which imposes on the court the duty to do substantial justice without undue regard to technicalities. This obligation is translated in the overriding objective given statutory imprimatur in **section 1A and 1B** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)***. The claim was clearly pleaded and proved and to rule otherwise would be elevate technicalities to a fetish as the appellant knew the case he was to meet.

16. The judgment of the trial court is affirmed and the appeal dismissed with costs to the respondent.

17. In view of the nature of the claim, I assess costs of this appeal at Kshs. 15,000/-

**DATED and DELIVERED at KISUMU this 31<sup>st</sup> day of October 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Onsongo instructed by Onsongo and Company Advocates for the appellant.

Respondent in person.