REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL CASE NO. 15 OF 2011

MUMIAS SUGAR CO. LTD. …................….......................... APPELLANT

VERSUS

KENYA NATIONAL TRADING CORP. LTD........................ RESPONDENT

[Being an appeal from the judgment of the Bungoma Chief Magistrate's court [F. Kyambia (SRM) delivered on 27th January 2011 in Bungoma Chief Magistrate's court civil case no. 203 of 2007]

JUDGMENT

1. This appeal arises from the judgment in CMCC no. 203 of 2007 Kenya National Trading Corporation Ltd. Versus Kenya Railways Corporation and Mumias Sugar Company Ltd. In a judgment dated 27th January 2011 the trial court entered in favour of the plaintiff (now respondent) as against the 1st and 2nd defendant(now appellant) jointly and severally. It is that judgment that has given rise to this appeal.

2. The appellant being aggrieved with the said judgment preferred this appeal on grounds,

> **1. That the learned trial magistrate erred both in law and fact in finding in favour of the respondent when the respondent failed to prove in court that it owned the piece of land in dispute and/or that any act of trespass had actually been committed against the respondent's property.**
>
> **2. That the learned trial magistrate erred both in law and fact in making a finding in favour of the respondent when no proof of the appellant's involvement in the acts constituting he alleged trespass was tendered.**
>
> **3. That the learned trial magistrate erred both in law and/or fact in proceeding to condemn the appellant without due regard to its right of easement over the land parcel in question as recognized under the law.**
>
> **4. That the honourable trial magistrate erred in both law and/or fact in proceeding to deliver a judgment in favour of the respondent on the basis of an invalidly amended plaint.**
>
> **5. That the honourable trial magistrate erred in both law and fact in failing to consider the**

appellant's defence and evidence on record and proceeding to shift the burden of proof to the said appellant.

6. That the honourable trial magistrate erred in both law and/or fact in proceeding to find and award general damages of kshs. 157,101/= to the respondent when the same had not been strictly proved as is required under the law.

The appellant seeks for the appeal to be allowed and for the respondent to pay costs. The appeal was vigorously opposed by the respondent.

3. Counsel for the rival parties filed submissions dated 8th March 2013 and 20th March 2014 respectively. At the hearing of the appeal the appellant's counsel argued that the trial court treated the case as a simple matter of ownership. He submitted that the pits giving rise to the issue before court were identified to it by Kenya Railway Corporation the 1st defendant in the trial court and therefore the issue for determination was between the respondent (plaintiff) . Further there was no proof that the pits were indeed on the respondent's side, and neither proof of trespass as had been alleged.

In his submissions counsel for the appellant also took issue with the ammended defence in that it did not comply with the law. He argued also that special damages were neither pleaded nor proved.

4. In responding to the appeal, counsel for the respondent submitted that the respondent proved its case. Further it was her case that grounds of appeal relied upon did not arise from the trial court pleadings and the judgment namely issues of easement and amendment of plant in its written submissions the respondent submitted that the issue of ownership was not before the trial court. Further that there was admission of trespass by both defendants in the trial court. The ammended plaint was consented to by parties and therefore no issue arises and on issue of damages it was submitted that the same was proved.

5. This being the 1st appellate it has to consider the evidence afresh, analyze and evaluate the same in order to arrive at an independent opinion bearing in mind that the trial court heard evidence first hand.

This issue for the courts determination was whether or not there was an act of trespass on the respondents land L.R. No. Bungoma Town/567 measuring 0.225 of a hectare by appellant and Kenya Railways Corporation if so what would be the general and special damages.

6. In an amended plaint the respondent claimed that the appellant and the co-defendant in the suit invaded and\or committed illegal acts of trespass and commented the same to their use jointly and severally the suit property being Bungoma Town/567 measuring 0.225 hectares, further that the two removed a fence that had been erected thereon. The respondent claimed general damages and special damages amounting to Kshs. 157,101/= together with costs.

7. The defendants filed separate defences. The appellant herein on it's part denied the allegations and claimed to have leased the said land from the 1st defendant. It specifically denied acts of trespass or collusion as alleged.

8. The issue of ownership of Bungoma Town/567 did not arise. The respondent annexed a copy of lease and a duplicate of search as proof of ownership. The said documents were not challenged neither did the appellant lay any claims on the said land.

9. Were there acts of demolition of a fence and trespass to the said land?From the evidence of PW1 the appellant and the 1st defendant (in the trial court) dug septic tanks on their property where molasseses waste was emptied. To access the pits the appellants again passed through the said land. Further that an initial fence erected was removed necessitating erection of a second fence to secure the property. He claimed that the respondent incurred expenses amounting to Kshs. 157,101/=.

In cross examination the witnesses stated that their property shared a fence with the property of the 1st

defendant.

10.1St defendant did not adduce any evidence on its part. The 2nd appellant called one witness.

DW1 who stated that the appellant did not destroy any fence belonging to the respondent. That the 1st defendant gave them storage facilities for storage of molasseses. He confirmed that the respondent had at some point complained usage of their land but he maintained that the land belonged to the 1st defendant. He also confirmed that the respondent fenced their land blocking passage of the tanks. He alleged that the 1st defendant did demolish a fence. On cross examination he admitted that there was molasseses waste being emitted from the tanks onto the suit property. He further accepted that they had dug holes of 1m x 1m deep on the said land however his evidence was they were not aware that land belonged to the respondent.

11. From the evidence of the two witnesses mentioned about PW1 and PW2 it is obvious that the appellant herein with the arrangement it had with the 1st defendant passed through the respondents land to where the septic tanks they had leased from the 1st defendant were. These they did over time until the respondent fenced off. That is an admission also that an earlier fence was destroyed.

The third admission is that the septic tanks emitted waste onto the respondent's land.

12. Having the admission on DW1 in mind I concur with the findings of the trial court that the respondent proved on a balance of probability that indeed there were acts of trespass by the appellant and the 1st defendant on its land. I do also agree with the finding that for the said reasons the appellant and the defendant (in the trial court) are liable jointly and severally.

In the premises therefore I do not wish to disturb the findings of special damages of Kshs. 157,101/=.

For the aforesaid reasons the appeal collapses. It is dismissed with costs.

Dated at Bungoma this 24th day of March 2015.

ALI-ARONI

JUDGE.