REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 51 OF 2014

(Being appeal from Naivasha PMCC 582 of 2007)

(Formerly Nakuru HCCA 128 of 2007)

MARULA ESTATES LIMITED……APPELLANT

-VERSUS-

WILSON ERSON KURSAS……RESPONDENT

J U D G M E N T

1. This is an appeal from the judgment and decree in favour of the Respondent issued in the lower court in 2007. The Appellant was ordered to pay general damages amounting to Shs. 160,000/= (less 10% contribution) and special damages in the sum of Shs 2,500/= to the Respondent.

2. Six grounds of appeal are listed in the memorandum of appeal as follows:-

"1) THAT the learned trial magistrate erred in law and in fact in finding that the Plaintiff had proved his case to required standards.

2. THAT the learned trial magistrate erred in law in finding that the Respondent was an employee of the Appellant despite there being lack of evidence.

3. THAT the learned trial magistrate grossly erred in law and in fact in finding that the Appellant was liable despite the Appellant not being a custodian of Buffaloes.

4. THAT the learned trial magistrate erred in failing to find out that the respondent suit was not made out in negligence.

5. THAT the learned trial magistrate erred in law in failing to find that liability cannot arise in respect of acts of wild animals, as there is a statutory body charged with responsibility and obligation arises therefor.

6. THAT the learned trial magistrate erred in awarding excessive damages in the circumstances."

The parties agreed to dispose of the appeal by way of written submission.

3. The undisputed facts of the appeal are that on 22nd May 2006 the Respondent was attacked and injured by a buffalo while herding cows on the Appellant's farm in Naivasha. He was treated at A.I.C Kijabe Hospital between the 22nd May 2006 and 24th May, 2006. On 4/8/2006 Dr. Wellington Kiamba examined him and prepared a medical report.

4. The Respondent subsequently filed a suit for damages against the Appellant, his alleged employer at the time. The suit was based on the tort of negligence. The Appellant denied liability. At the trial however only the Respondent adduced evidence.

5. In its written submissions the Appellant only canvassed ground 2, 3 and 4. On the 2nd ground it was argued that the Respondent did not prove that he was an employee of the Appellant at the time of the attack. Reliance was placed on the case **of Lagony Construction Limited & Ano. -Versus- Wanjohi Njuguna [2006] eKLR**.
6. On the issue of liability (3rd ground) it was submitted that the Appellants were not liable for the injuries sustained by the Respondent because, a public body, namely the Kenya Wildlife Services, not enjoined in this suit was responsible for the management of wildlife, and not the Appellant. Regarding proof of negligence (ground 4) it was argued that the Respondent did not establish the particulars of negligence pleaded.

7. The Respondent, taking up the last issue first, maintained that the Appellant as an employer of the Respondent did not ensure a safe working environment having failed to fence off the farm to keep out wild animals. That, at any rate the Appellant did not call aby evidence to controvert the Respondent's evidence.

8. On the question of liability the Respondent contended that the Appellant never raised the issue of Kenya Wildlife Services' responsibility in pleadings or evidence and it is too late to raise the matter at this stage. Finally, the Respondent stated that the proof of employment lay in the **LD104** form produced as Exhibit 2 which established that the Appellant was the employer of the Respondent in the material period.

9. This being a first appeal, it is the duty of the court to re-evaluate the evidence, analyse it and come to its own conclusions, while giving allowance to the fact that the appeal court did not hear or see the witnesses testify. (**See Peters -Vs- Sunday Post Limited [1958] EA 424**; **Selle & Anor –Vs- Associated Motor Boat Co. Ltd & Others [1968]EA 123** and **Kogo –Vs- Nyamogo and Nyamogo Advocates [2004]1 KLR 367)**.
10. Having re-evaluated the evidence and the arguments made for and against the appeals I take the following view: The Appellant did not challenge the fact that it completed the **LD104** form in respect of the injuries sustained by the Respondent. The same was produced as Exhibit 2. This was essentially a statutory report to the responsible government department to the effect that the Appellant's employee had been injured while on duty. The purpose of the form is to facilitate payment of workmen's injury benefits. The Appellant cannot therefore be heard to say at this stage that the Respondent did not prove his status as an employee of the Appellant.

11. In the **Lagony case** the Plaintiff himself had expressly denied being an employee of the Defendant. Ground 2 of the appeal therefore has no merit. As an employer, the Appellant clearly owed the Respondent a duty of care that the working environment was reasonably safe. The Respondent's duties at the material time was to herd the Appellant's cattle and he was injured by a buffalo which strayed into the employer's farm. Evidently the farm was located in an area where the presence of such wild animals was common.

12. In his evidence the Respondent faulted the Appellant for not securing the farm with a fence to keep the wild animals at bay. In the course of his judgment the learned magistrate stated *interalia*:

> **"The court has also noted that if the defendant provided a safe working environment for the Plaintiff, then there is no way this wild animal would have entered into the farm. The Plaintiff lays the blame to the Defendant, and looking at the circumstances under which the accident occurred, it is my humble view that the Plaintiff cannot be said to have in any contributed to the accident occurrence. The court is of the view that the Defendant is wholly to blame. The defence did not call any evidene, and therefore no evidence to challenge the Plaintiff's case (sic)."**

13. I could not agree more with these statements. There is no reason to fault the conclusions reached by the court. And, as regards the culpability or otherwise of Kenya Wildlife Service, the Appellants could have but did not enjoin them as third parties or adduce evidence in proof of their responsibility for the roaming animal that injured the Plaintiff.

14. The Court of Appeal (**Hancox J A**) in **Ephanatus Mwangi & Ano. –Vs- Duncan Mwangi Wambugu [1982-88] IKAR 278** stated:

> **"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."**

15. In my considered, view the findings of the trial court were based on a proper evaluation of the evidence before it. The Appellants as it were, did not controvert the case put forth by the Plaintiff, which, on all accounts accorded with the standard of proof on a balance of probabilities. With respect, it was not the duty of the trial court to introduce and assign liability against a party (Kenya Wildlife Services) which had not been enjoined in the suit or to make surmises as to its liability without proper evidence. The 3rd and 4th grounds of appeal similarly have no merit.

16. It would seem that the Appellant abandoned the remaining grounds of appeal. In the result, therefore there is no merit in this appeal and I dismiss it with costs to the Respondent.

Delivered and signed this 19th day of June , 2015.

In the presence of:-

..... For Appellant

.....For Respondent

Court Assistant Stephen

C. W. MEOLI

JUDGE