



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 22 OF 2014**

**BENJAMIN OKUL OTIENO.....1ST APPELLANT**

**PAUL OKOTH OKUL.....2ND APPELLANT**

**JOHN ODHIAMBO OKUL.....3RD APPELLANT**

**VERSUS**

**CHARLES OGADA OGONDA.....RESPONDENT**

**J U D G M E N T**

1). The appellant was sued by the respondents claiming *inter alia* damages for the destruction caused by the appellants cows on the respondents sugarcane. After hearing all the parties the trial court found or the respondents and awarded him damages of Kshs. 423,360/=. The appellant being dissatisfied has filed this appeal citing several grounds.

2). The brief facts of the case are that the respondents had leased from different person about 12 acres of arable land in which he planted sugarcane. On diverse dates namely 4th September 2012, 18th September 2012 and 18th October 2012 the applicants permitted their cows which amounted to 20 to trespass onto the said land and destroyed the respondents sugarcane. The applicant testified and called several witnesses to back up his case. Apparently in his testimony the respondent confirmed that he did not see the cows destroying the sugarcane. The respondent went ahead to produce the lease agreement he had made with the owners of land.

3). **PW2 Bernard Ochieng**, is the respondent's employee. He told the court that on 4-9-2012 and 18-9-2012 he found the animals grazing on the farm and were being herded by one Owino the appellants respondents employee. Owino demanded Kshs. 150 from him but he refused. **PW3 James Otieno Olwendo**, testimony corroborated that of PW2. He told the court that he assisted PW2 on 4-9-2012 and 8-9-2012 to remove the cows from the farm. **PW4 Jacob Otieno Ngare**, who is an agricultural officer produced the crop assessment report which he prepared on 26-9-201. He valued the loan at

Kshs. 423,360/=.

4). On their part the appellants denied the accusation. They said that they do not live in the same homestead and that they live about 3 km away from each other. They denied that they have such number of cows and that they have ever employed an herder by the name Owino.

5). The court has carefully perused the proceedings as well as the parties written submissions. The

Court has equally analysed the trial court's judgment.

The issues to be asked herein are:

- a) Did the respondent lease the suit property?**
- b) Whose cows destroyed the respondents sugarcane?**
- c) How authoritative is the report by the agricultural officer?**
- d) Was there any negligence on the part of the appellants?**
- e) Did the trial court evaluate the evidence as presented?**

6). On the first issue, there is sufficient evidence as per the exhibits of the lease agreements produced that the respondent leased the suit parcels of land. Although the owners (lessors) were not called to testify I do find that the respondent established that fact.

7). The only trouble the court is unable to comprehend is the number of the suit land. Evidence was led by the PW3 that his land was number 1850 and is about 100 meters from that of the respondent. What was difficult in ascertaining the leased parcels of land?

8). The next issue to be determined is the ownership of the cows. This question runs across the entire evidence of both parties. The respondents' witnesses especially PW2 and PW3 told the court that the cows were being herded by one Owino and that they could easily identify him.

This argument was fiercely contested by the appellant who argued that they do not have such number of cows. They each said that they never owned more than 3 cows and that they tether them in their homes. They further said that they do not have a herdsman by the name Owino.

9). Having gone through the proceedings I do find that in the absence of any identifiable mark it is very difficult to confirm the veracity of this claim. PW2 and PW3 should have taken a further step of detaining the animals on the number of days they arrested and as prudent neighbours take them to the nearest police station or at least the chief's camp.

10). The nature of the damage caused by the alleged animals was criminal in nature. They ought to have ensured that Mr. Owino is arrested and taken to face the force of law. Apparently no officer from the provincial administration was involved in the process. No village elder, sub chief or chief was involved. Surely this was a serious crime.

11). More perplexing is the fact that the said Mr. Owino who had committed a felony ought to have been enjoined as a party. The mere fact that he permitted the cows to trespass which were under his custody was sufficient enough to be enjoined in the proceedings.

Interestingly the agricultural officer did not help things either. His report is merely general. He failed to attach any documents to establish the registration details of the suit property. He did not bother to check from the lands office the true owners of the land, whether they are the ones who leased it to the respondent. Further he did not involve the appellants and his basic argument was that in such situations they are known to be violent. How could he value or assess any crops damaged without the presence of the accused person or at most the presence of the owners of the land. Even further why did he not involve the area provincial administration who would have been as expected neutral parties and perhaps provided him with security if need be. In any case, he was acting courtesy of instructions from the OCS who would have provided him with security if he needed.

For the foregoing reasons I find that the respondent failed to link the destruction of the sugarcane to the appellant. Infact the amount of

Kshs. 423,360/= was never specifically proved. The respondent did not attach any proof of expenditure incurred in planting the said sugarcane if he did. It was therefore unsafe for the trial court to solely rely on the agricultural officer report without further evidence from the respondent.

Having analysed the evidence on record I do find that the respondent did not establish their case on a balance of probability as expected. The defence by the appellant was not analysed sufficiently. The upshot therefore is to allow this appeal with costs to the appellants.

**Dated, signed and delivered at Kisumu this 18th day of February, 2014.**

**H.K.  
JUDGE**

**CHEMITEI**