



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MERU**  
**CIVIL CASE 24 OF 1999**

**MUTURIA M'ITHILAI.....APPELLANT**

**VERSUS**

**MURIUNGI M'EKABU.....RESPONDENT**

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

The appellant was the defendant in the lower court. By a plaint dated 29th January, 1998, the Respondent herein claimed against the Respondent a principal sum of Kshs.29,500/= and the costs and interests of the suit. Paragraph 3 of the said plaint states: -

“That the Defendant, a Mr. Muturia M'Thilai entered into the Plaintiff's shamba at Limoro Village, Njia Location, and ascertained damages of crops (app. 0.75 ac) worthy Kshs.29,500/=. Thus is per D.A.E's letter of 30th October, 1997.”

The rest of the paragraphs of the Plaint are those introducing the addresses of the parties or showing the defiance of the Appellant to admit or pay the claim making the Respondent file the claim in court. The Plaint stated as well that the cause of action arose in Limoro Village in Igembe North Division.

The Appellant had filed a defence to the claim. In it he admitted the addresses of the parties but generally denied the contents of the main paragraph 3 as well as paragraph 4 and 5. He however denied also that he had damaged crops belonging to the Respondent and put him to the strict proof of his claim.

He also specifically denied liability to the Respondent's claim for Kshs.29500/= or any and put the Respondent to strict proof.

When the case went for a hearing the plaintiff did not seek to amend his plaint, although he wanted it sent back to clan elders to hear it, which was rejected by the Appellant and overruled by the court.

The court has examined the plaint at this stage. The claiming and therefore substantive paragraph, is paragraph 3, which has been quoted hereinabove. A clear reading of the same shows that it makes no language or legal sense. All it alleges is that the Appellant had on the material date, which was itself not specified, entered the Respondent's shamba and therein ascertained damages of crops worth Kshs.29,500/=. Then the Respondent hinted to a D.A.E's letter of 30.10.97. I have stressed the above clauses because the Respondent's claim depended on it. Clearly, paragraph 3 did not allege or claim that the Appellant at any stage caused any damage to the Respondent's crops. The pleadings in the plaint therefore did not show any cause of action nor the date when such cause of action arose. The Plaint should not have been allowed by the court to be the basis of a court proceedings. The Plaint should therefore have either been struck out before any evidence could be adduced and recorded, or should have been ordered to be amended by the Respondent before he based his claim on it. The end result is that the plaintiff's pleadings were incurably defective. This appeal should therefore be dismissed upon that ground alone.

However assuming that the Respondent was claiming Kshs. 29,500/= being the value of crops damaged by the Appellant, then clearly the plaintiff was claiming a specific amount being the value of the crops. By legal requirement he needed to plead it and strictly prove it as the claim amounted to special damage. There is no doubt that he specifically pleaded the figure of Kshs.29,500/=. He however needed to show in his evidence how the figure was arrived at. The trial magistrate believed that the witnesses who testified

for the Plaintiff/Respondent had seen the Appellant/Defendant uprooting the beans crop. He saw no reason why they would lie against the appellant. Examination of their evidence however shows that they did not testify as to how the figure of Kshs.29,500/=, which was claimed by the Respondent, was arrived at. Nor did this important issue figure in the honourable trial magistrate's mind. There was an allusion to a District Agricultural Officer's report in the defective plaint, but there is not indication that the report (which would probably indicate the value of the damaged crops) featured in evidence in any way. Infact, even the Respondent did not in his evidence, refer to the figure or the sum of Shs.29,500/= which he was claiming. Nor did he himself refer to the Agricultural Officer's report aforementioned. Secondly, I find the evidence of the Respondent's witness relied upon by the trial court to be totally vague, unreliable and contradictory. Pw2, Jacob Kiyuki, claimed that he did not talk to the Appellant when he saw him uproot the beans crop. And yet in the same breath he claimed to have greeted the Appellant and asked him if he was weeding the plantation. He claims to have immediately gone to see the Respondent/Plaintiff and yet he did not immediately tell the Plaintiff/Respondent that he had seen the Defendant/Appellant uprooting his crops until allegedly the Defendant came to the Plaintiff's home later in the evening. Pw1 Stephen Mbiti, on the other hand, claimed that he saw the Appellant uproot the beans crop belonging to the plaintiff and went straight to the house of the plaintiff to inform him of the wrong-doing. And yet when he talked to the Plaintiff what he first told him was that he wanted the two to join and work together in turns, by attending one day in plaintiff's shamba and the next the witnesses shamba. He also claimed that it was as he was talking to the plaintiff that the Defendant/Appellant showed up and claimed that he had that same morning uprooted plaintiff's crops. It was only when the witness saw the defendant indeed that he decided to inform the plaintiff of the uprooting of crops.

It is my view and finding, therefore, that the witnesses for the plaintiff/Respondent were totally unreliable and contradicted their own evidence. They were not by any standard worth of belief. The honourable trial magistrate should not therefore, have believed them or relied on them to find for the plaintiff/Appellant. In believing and relying on them, he erred, as there eventually was no adequate evidence to prove the plaintiff's case on the balance of probability.

Upon either reason this appeal is merited. It is allowed. Costs are to the Appellant.

Orders accordingly.

**Dated and delivered at Meru this 13th day of April, 2005.**

**D. A. ONYANCHA**

**JUDGE**