Kimitei v Tuitoek (Civil Appeal E013 of 2023)
[2025] KEHC 2332 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2332 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CIVIL APPEAL E013 OF 2023

JRA WANANDA, J

FEBRUARY 7, 2025

BETWEEN

JOSEPH KITILIT KIMITEI ..... APPELLANT

AND

PIUS TUITOEK ..... RESPONDENT

JUDGMENT

1. This Appeal is against the Judgment delivered on 30/10/2023 in Iten Senior Magistrate's Court Civil Case No. E056 of 2021. The Appellant was the Defendant therein and the Respondent was the Plaintiff. The Appeal is in respect to findings on both liability and quantum of damages awarded as compensation for damage to the Respondent's farm crops by cattle alleged to belong to the Appellant.

2. The background of the matter is that by the Plaint filed on 22/12/2021 through Messrs T. Cheruiyot & Co. Advocates, the Respondent pleaded that at all material times, he and the Appellant were neighbours within the same locality, that on diverse dates including 27/09/2021, 28/09/2021 and 29/09/2021, the Appellant so negligently failed to control his livestock and which then damaged and destroyed the Respondent's crops in his farm. As particulars of negligence, he blamed the Appellant for failing to exercise proper control of his livestock, and failing or ignoring to put the livestock in an enclosure. He averred that as a result of the destruction, he suffered damage to his crops (tomatoes and beans) which damage he particularized at the sum of Kshs 78,000/- and sought compensation thereof as special damages. He also sought interest and costs of the suit.

3. I note from the record that default Judgment was initially entered against the Appellant for failure to enter appearance or file a defence in time. The same was however set aside and the Appellant allowed to defend the case. Consequently, the Appellant filed his Statement on 8/02/2022, through Messrs Nyekwei & Co. Advocates. The defence generally denied all the allegations made in the Plaint.

4. The suit was in a series comprising 2 others arising, apparently, from the same incident but involving different Plaintiffs, and in respect to which Judgment was entered in each in favour of the respective Plaintiffs. All 3 suits have now elicited Appeals as follows:

Iten SPMCC No.	Plaintiff	Iten High Court Civil Appeal No.
E055 of 2021	Edwin Kurgat	E015 of 2023
E056 of 2021	Pius Tuitoek	E013 of 2023
E057 of 2021	Philip Kandie	E014 of 2023

5. For this reason, it was agreed by the parties that this Ruling will also apply, as far as is practical, to the other two said Appeals.

6. Be that as it may, the suit proceeded to trial wherein the Respondent called 3 witnesses, while the Appellant did not call any. After the hearing, the trial Court delivered its Judgment on 30/10/2023, as aforesaid, in favour of the Respondent, at the sum of Kshs 78,000/- as prayed, plus costs and interest.

Respondent's (Plaintiff) evidence before the trial Court

7. Led by Mr. Cheruiyot Advocate, PW1, Alex Kiprop, adopted his Witness Statement which basically reiterated the narrative already contained in the Plaint. Under cross-examination by Mr. Nyekwei Advocate, he testified that he is employed by the Respondent and does not know the Appellant who is not a neighbour and neither does he know the owner of the farm where the crops were planted. He stated that the crops were destroyed at night, that he has a house on the same parcel of land, the farm is not fenced and that he guards it at night. He stated that the Appellant's herder is known as "Kimoi" and that the incident was reported to the Agricultural Officer. In re-examination, he reiterated that he was present when the incident occurred and that the said "Kimoi" had freed the cows.

8. PW2 was the Respondent (Plaintiff), Pius Kibet Mutai. He, too, adopted his Witness Statement. In cross-examination, he stated that the affected land is 4 acres but conceded that he had not disclosed the parcel number and that the Agricultural Officer's Report refers to "bananas and pawpaws". It was also his testimony that the Appellant resides at Cheptego while the Respondent lives in Chepsigot. He added that the cows in issue are under the Appellant's caretaker, one 'Kimoi" whom he had not sued. In re-examination, he contended that the ownership of the affected parcel of land was not in dispute. He then clarified that where the Appellant keeps his cows is next to the Respondent's farm although the Appellant lives in Cheptebo.

9. PW3, Francis Kite, testified that he is an Agricultural Officer attached at Keiyo South sub-County, Soy Ward. He then produced his Report dated 30/07/2021 as an Exhibit. In cross-examination, he conceded that the Plaint refers to "tomatoes and beans" yet his Report refers to "bananas and pawpaws", and that he did not break down the figures in his Report. He stated further that in the Report, he indicated that the farm is fairly fenced and was guarded at night, but conceded that he did not take photographs thereof.

Appeal

10. Aggrieved by the trial Court's said Judgment, the Appellant filed this Appeal on 30/11/2023. In the Memorandum of Appeal, the following 7 grounds were cited:

    i. The Learned trial Magistrate erred in law and fact in failing to hold that the Respondent had failed to prove his case on the balance of probabilities.

    ii. The Learned trial Magistrate erred in finding in favour of the Respondent despite overwhelming evidence to the contrary.

    iii. The Learned trial Magistrate erred in law and fact in failing to analyze the Appellant's evidence in defence before rejecting his defence.

    iv. The Learned trial Magistrate erred in law and fact in failing to give reasons for rejecting the Defence evidence.

    v. That Learned trial Magistrate erred in law in disregarding the submissions by the Appellant.

    vi. The Learned trial Magistrate erred in law and fact in considering extraneous matters in arriving at her decision.

    vii. That Learned trial Magistrate erred in law in arriving at a decision against the weight of evidence.

11. The Appeal was then canvassed by way of written Submissions. The Appellants' Submissions is dated 20/09/2024 while the Respondent's is dated 14/10/2024.

Appellant's Submissions

12. The Appellant's Counsel submitted that it is apparent from the Judgment of the trial Court that there is no record of the trial Court's finding on whether the Respondent's "tomatoes and beans" plantation was damaged and why the Appellant is liable. Regarding the crop damage, he submitted that in order for the trial Court to find that the Respondent's crop was damaged, the Court had to establish, first, that he was in possession of land on which the crop stood, secondly, that the Plaintiff had invested in cultivation of the crops in issue and finally, the extent of the damage. He contended that the Respondent submitted on the foregoing by stating that he had no particulars of the land in which the crop stood, that this was despite the Respondent's admission that land parcels in the area in issue were registered and titles issued in individual names, and that there is no evidence that the Respondent had any farm as alleged in the Plaint. According to him, the Respondent cannot have had food crops if he had no evidence of possession of land on which the crops stood.

13. He submitted further that the Respondent had not produced any records on expenditure or purchase of farm input, such as seeds, fertilizer, pesticides, herbicides and labour cost and so it would not be possible to ascertain if the crop complained of was really his. He submitted that "he who alleges must prove" and that the onus was therefore on the Respondent to prove that he had land on which he had planted crops that were destroyed by the Appellant's livestock, thereby occasioning damage. He submitted further that although the Plaintiff, in the Plaint, averred that his "tomatoes and beans" were damaged, no evidence was led to demonstrate this allegation and that instead, the Respondent produced a demand notice and Assessment Report showing that the crops destroyed were "pawpaws and bananas". He contended that parties are bound by their pleadings and that it was therefore incumbent upon the Respondent to adduce evidence in relation to "tomatoes and beans". He cited

the case of Njeru & Another vs Nyakundi (Civil Appeal E021/2022 [2022] KEHC 13963 [KLR] (11th October 2022) (Judgment).

14. Counsel also contended that although the claim was based on negligence for which the Respondent gave particulars, the trial Court did not make a finding on whether the livestock complained of belonged to the Appellant and as such, no basis was laid to hold the Appellant liable for the damage. He also submitted that the Respondent stated that the livestock in issue was under the management of the Respondent's hersdsman by the name "Kimoi", that the inference therefore is that "Kimoi" was negligent while the Appellant was vicariously liable for the acts of his agent, that however, the Appellant denied having employed the said "Kimoi" and that it was therefore necessary to join the Appellant alleged agent as a crucial party to the suit. He cited Civil Appeal No. 31/1981, Anyanzwa vs Caspers and submitted that the Appellant could not be held vicariously liable if his alleged employee had not been found liable for negligence. In conclusion, he submitted that the trial Court only mentioned in passing that it had considered the defence submissions yet it had the duty to analyze the issues raised by the defence and give reasons for its findings, but failed to do so thus occasioning a miscarriage of justice. He cited the case of County Government of Narok vs British Pharmaceutical Ltd (*CA No. 20/2020*).

Respondent's Submissions

15. On his part, the Respondent's Counsel submitted that at the trial, the Respondent sought assessment of the damaged crops from the Ward Agricultural Officer whom the Respondent called as a witness and who produced the Assessment Report, which the Appellant's Advocate did not object to. According to him therefore, the Respondent proved his case on a balance of probabilities and he cited the case of Evans Nyakwana vs Cleophas Bwana Ongaro (2015) eKLR. He cited the case of William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526, and the case of Palace Investments Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR.

16. He then added that the Respondent received a phone call from his labourer about the destruction and that the cattle had been arrested in the Respondent's farm making it clear on identification, that the Respondent had planted tomato seedlings which had been destroyed by the cattle, that the parties being neighbours, the issue of identification was an easy one and that the Appellant did not dispute that indeed the cattle belonged to him. He submitted further that the damage was confirmed by the Agricultural Officer who testified that he had personally visited the farm and witnessed the level of destruction and made a Report. He cited the case of Arina Dede v Michael Awino Ouma [2016] eKLR, the case of Kenya Industrial Estates Limited v Lee Enterprises Ltd, and the case of Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR. In conclusion, he prayed that the Appeal be dismissed with costs.

Determination

17. The duty of an appellate Court was set out in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

18. The above was reiterated by the Court of Appeal in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, as follows:

> " [A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

19. In my view, the broad issue that arises for determination in this appeal is "whether the trial Court was justified in holding that the Respondent had proved his case to the standard required in law".

20. Regarding the extent of the powers of an Appellate Court, it is settled that an appellate Court will only interfere with the conclusions and findings of a trial Court if the same were not supported by evidence or were premised on wrong principles of law. This was the import of the holding in the case of Mwangi V. Wambugu (1984) KLR 453, where the Court of Appeal held, inter alia, as follows:

> " A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

21. Looking the trial Court's Judgment, I agree with the Appellant that it did not sufficiently analyze and determine the issues that were placed before it. Fortunately, as aforesaid, my duty as an Appellate Court is to re-evaluate, re-assess and re-analyze the record and make my own independent findings, as I shall now do.

22. The first limb of the Appellant's Counsel grounds as argued in his Submissions can be summarized as follows:

    a. That that in order for the trial Court to find that the Respondent's crop was damaged, the Court had to establish, first, that the Appellant was in possession of land on which the crop stood. He contended that the Respondent conceded that he had no particulars of the parcel of land in which the crops were planted, that this was despite the Respondent's admission that land parcels in the area in issue were registered and titles issued in individual names, and that there is no evidence that the Respondent had any farm as alleged in the Plaint. According to him, the Respondent cannot have had food crops if he had no evidence of possession of land on which the crops stood.

    b. That the trial Court ought to have been satisfied that the Respondent had invested in cultivation of the crops, and the extent of the damage. According to him, the Respondent did not produce any records on expenditure or purchase of farm input, such as seeds, fertilizer, pesticides, herbicides and labour cost and as such, it was not possible to ascertain if the crops complained of were really his.

    c. That the claim was based on negligence for which the Respondent gave particulars, but the trial Court did not make a finding on whether the livestock complained of belonged to the Appellant and as such, no basis was laid to hold the Appellant liable for the crop damage.

d. That the Respondent stated that the livestock in issue were under the management of the Respondent's hersdsman by the name "Kimoi", that the inference therefore is that "Kimoi" was negligent while the Appellant was vicariously liable for the acts of his agent, that however, the Appellant denied having employed the said "Kimoi" and that it was therefore necessary to join the Appellant alleged agent as a crucial party to the suit. He submitted that the Appellant could not be held vicariously liable if his alleged employee had not been found liable for negligence.

23. In respect to the above arguments, my observation is that the Appellant did not present anything to contradict the Respondent's averment that he (Respondent) was in occupation of the parcel of land in issue, that he had cultivated thereon and that the crops cultivated were destroyed by the Appellant's cows. The Respondent called 3 witnesses who testified on his behalf, and who advanced his case as pleaded, and whom the trial Magistrate saw and believed. On his part, the Appellant did not testify nor call any witness at all. In the circumstances, the Respondent's testimony and that of his witnesses, both oral, and as contained in the respective Witness Statements, remained uncontroverted.

24. For the said reasons, I do not agree that the Respondent's failure to furnish the land reference number of the land concerned, or receipts as evidence of the investment he put in the farm would render the Respondent's case fatal. Similarly, I find that the allegation that the Appellant was the owner of the livestock concerned and the said "Kimioi" was his herdsman, were not challenged through any contradictory evidence or testimony. There is therefore no basis for the argument that the Appellant could not be held vicariously liable or that the Respondent ought to have joined the said "Kimoi" as a Defendant. I therefore reject all the above grounds.

25. Counsel for the Appellant also submitted that although the Plaintiff, in the Plaint, averred that his "tomatoes and beans" were damaged, no evidence was led to demonstrate this allegation and that instead, the Respondent produced a demand notice and Assessment Report showing that the crops destroyed were in fact "pawpaws and bananas". He contended that parties are bound by their pleadings and that it was therefore incumbent upon the Respondent to adduce evidence in relation to "tomatoes and beans".

26. In respect to the principle that parties are bound by their pleadings, I cite the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, in which Hon. A. C. Mrima J, stated as follows:

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > "..... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way,

which is at variance with the averments of the pleadings goes to no issue and must be disregarded .....

... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

12. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings ....."

27. In this instant case, I note that the Plaint referred to "damaged crops". That phrase was then expounded on, in brackets, as "tomatoes and bananas". However, in the Agricultural Officer's Report produced in evidence, what was indicated as damaged was "bananas and pawpaws". My view is that the Respondent, having pleaded the phrase "damaged crops", considering the "ejusdem generis", that description was wide enough and basically, covered the subject crops canvassed at the trial.

28. Regarding the "ejusdem generis" rule, Black Law's Dictionary, 8th edition defines it in the following terms:

> " A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items on the same class as those listed ....."

29. In Spentech Engineering Limited v Methode Limited & 2 others [2017] eKLR, Hon. Onguto J also defined the "ejusdem generis" rule as follows:

> " The ejusdem generis rule of statutory construction is basically to the effect that wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same character. Of the word "other", Strouds Judicial Dictionary 3rd Ed says the following in relation to the ejusdem generis rule:
>
> > "Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things – the word 'other' will generally be read as 'other such like', so that the persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to, or different from, those specifically enumerated."

> Effectively, if one can find that things described by particular words have a common characteristic which constitutes them as a genus then you ought to limit the general words which follow them to the things of that genus."

30. In view of the foregoing, although I am not in any way condoning careless drafting of pleadings, in my opinion, the phrase "tomatoes and bananas", being merely a further expounding made in brackets, of the phrase "damaged crops" pleaded in the Plaint, cannot be exploited to vitiate the initial description used by the Respondent, or to defeat his case. In any case, there is no dispute that the term "bananas" was properly pleaded and appears both in the Plaint and in the Report. The only term that was misplaced being "pawpaws", instead of "tomatoes", my view is that it will be wholly absurd, unjust and laughable to dismiss an entire suit solely on the ground of such simple mix-up in descriptions of crops, as pleaded in the Plaint herein. Arguing otherwise would in my opinion be stretching too far the rule that "parties are bound by their pleadings". Such argument would cause a clear injustice.

31. The claim herein was a "special damages" claim. It is trite law that "special damages" must be both pleaded and proved. In the case of Hahn v. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, the Court of Appeal held as follows:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved .... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

32. Similarly, in the case of Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR the Court of Appeal again held as follows:

> " We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of."

33. It is therefore the position that the degree and certainty of pleading "special damages" depends on the circumstances and the nature of the act complained. In this case, I find that considering the circumstances and nature of the claim herein, the "special damages" claim was pleaded and proved to an acceptable degree of certainty and particularity.

34. It is also the position that in civil suits, the standard of proof is "balance of probabilities". As to what amounts to "proof on a balance of probabilities", Hon. Kimaru, J (as he then was), in the case of William Kabogo Gitau v George Thuo & 2 others [2010] 1 KLE 526, stated as follows:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

35. In view of the determinations that I have made hereinabove, and although the Judgment of the trial Court failed to analyze and/or determine the issues raised before it, my finding, after re-evaluating, re-assessing and reviewing the record, is that the Respondent, to an acceptable extent, proved his case on a balance of probabilities", within the meaning described in the above authority.

Final Order

36. In the premises, this Appeal is dismissed. As costs follow the event, the Respondent is awarded the costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF FEBRUARY 2025

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms Mutai h/b for Cheruiyot for Appellant

Mr. Kipnyekwei for Respondent

Court Assistant: Brian Kimathi