



**Mwakisaghu v Konde & another (Civil Appeal E014 of 2024)
[2024] KEHC 11232 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E014 OF 2024
GMA DULU, J
SEPTEMBER 18, 2024**

BETWEEN

MWAKIO MWAKISAGHU APPELLANT

AND

WYCLIFFE MALAMBO KONDE 1ST RESPONDENT

VAINES WALI NYARUBE 2ND RESPONDENT

(From the judgment in Taveta Court Small Claims Case No. 005 of 2023 delivered by Hon. M. S. Maluki (RM) on 26th January 2024)

JUDGMENT

1. In a judgment delivered on 26th January 2024, in Taveta Small Claims Case No. 005 of 2023 the trial Magistrate found in favour of the claimants Wycliffe Malambo Konde, and Vaines Wali Nyarube (now respondents) and concluded as follows:-

“12. In the upshot, judgment is entered in favour of the claimant against the respondent in the sum of Kshs. 249,231/= plus costs and interest at court rates from the date of judgment until payment in full.”

2. Dissatisfied with the decision of the Magistrate’s court above, the appellant Mwakio Mwakisaghu (who was the respondent in the trial court), has come to this court on appeal through counsel Salim Newton Kifuso & Company Advocates, on the following grounds:-

1. That the learned Magistrate erred in law in failing to find that the claimant had not (should be had) discharged the burden of proof on the threshold required by the law.
2. The learned judge (should be Magistrate) erred in law in disregarding the respondent’s defence of alibi.



3. That the learned Magistrate erred in law and fact in finding the respondent liable without any evidence on record.
3. With the above grounds of appeal, the appellant has asked this court to set aside the trial court's judgment, and award costs to the appellant.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Salim Newton Kifuso & Company Advocates for the appellant (wrongly described as the respondent), as well as the submissions filed by Mwazighe & Company Advocates for the respondents. I have to acknowledge that both sides relied upon decided court cases.
5. This being a first appeal, I am reminded that I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences. On this requirement, in my view, it will suffice if I cite only one case relied upon by counsel herein Abok James Odera t/a A. J. Odera & Associates =Versus= John Patrick Machira t/a Machira & Company Advocates (2013) eKLR, in which the Court of Appeal stated 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-analyse 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.”
6. In deciding this appeal also, I have to bear in mind that the burden was on the claimant (now respondents) to prove their claim against the appellant. This legal burden is codified under Section 107, 108 and 109 of the *Evidence Act* (Cap.80).
7. In addition, I have to bear in mind that this being a civil claim or case, the standard of proof was on the balance of probabilities, the elements of which were ably explained in the English case of Miller =Versus= Minister of Pensions (1942) 2 ALLER 372 that –

“.....if the evidence is such that the tribunal can say we think it more probable than not, the burden is discharged, but if the probabilities are equal it is not.”
8. I have on my part perused and considered the entire record of proceedings before the trial court. The first witness for the claimants was Peter Mwashighadi – Senior Livestock Production Officer who testified on behalf of another livestock officer Eliud Nyagak, who had prepared the hay destruction and valuation report but had died on 29th May 2023. This evidence was tendered under Section 33 and 77 of the *Evidence Act* (Cap.80).
9. It was Peter Mwashighadi's testimony that 6 acres of farm trees, thorny trees and 3 acres of pasture were destroyed. In cross-examination, this witness testified that there was no evidence of grazing cows seen, and that no photographs were taken. The witness also confirmed that pastures were spread all over Tsavo East and Tsavo West National Park, not just the subject farm.
10. The second witness of the respondents was Nyarua Vainess Wali whose evidence was that his farm was unlawfully grazed. He testified further that the appellant had on several previous occasions brought animals to graze his farm. That he actually saw him and others graze his farm and had previously reported the matter to the Chief. It was his evidence that at one point previously, he held the cattle and the Chief called the culprits. He testified that he had previously taken photos of the cows, and that though the appellant and others admitted ownership of cows, they refused to go to the Chief.



11. It was his further evidence that there were no wild animals in that area due to the presence of cows. In cross-examination, he agreed that no photographs of cows or grass were brought to court in these proceedings. That was the respondent's evidence.
12. The appellant on his part, called Erick Mwakio, who adopted his witness statement, and testified that in 2022 they were called to the Chief on allegations causing damage by grazing the claimants' land.
13. This witness testified that he also reported the incident to the Officer Commanding Police Station (OCS), who advised that the matter be settled amicably. In cross-examination, he stated that all his cows had died in 2022, though at the time he was called to the Chief, he owned live cattle. He maintained however, that the alleged pasture was destroyed by wild animals. That was the appellant's witness.
14. Having evaluated all the evidence on record, I find that it was established that the appellant and respondents herein knew each other well before the alleged incident of pasture grazing. They were neighbours. The respondents had land on which grass was grown for grazing, and the appellant who was a neighbour owned cows in 2022.
15. From the evidence on record, there is also an undisputed report made to the area Chief of a claim on grazing on the respondents' land in 2022. That dispute was also reported to the Officer Commanding Police Station in the area, and was later escalated to the Small Claims Court, on a claim for compensation, and the decision therefrom is the subject of this present appeal.
16. In my view, though no photographs of the land, grass and cows was testified to, or relied upon in the evidence, the reported dispute on grazing grass of the respondents by the cows of the appellant, was established on the balance of probabilities. In my view, the evidence on both sides on record established that the grass of the respondents was grazed not by the wild animals but by cows belonging to the respondent and others.
17. The only issue which remains for determination therefore, in my view, is the assessment of the amount of compensation.
18. On the value of the subject grass, I would have expected the government officer assessing the compensation, to have either made a sketch drawing of the farm and destroyed grass (hay), or taken photographs of the farm showing the area of the damaged grass to support the amounts or value of grass affected. He did not do so, and no evidence was tendered in court to that effect.
19. Secondly, in my view, a government "Crops Officer", not "Livestock Officer", should have assessed the value of the grass (hay) in question. The assessment herein however of the value or cost of the damaged grass, was done by a "Livestock Officer" not a "Crops Officer." The value assessed therefore could not be relied upon as in my view it was not done by an expert.
20. The above two weaknesses in my view, affected the assessment of the value of the damaged grass (hay), but not the liability of the appellant.
21. In my view therefore, the learned Magistrate erred in awarding the total value assessed by the Livestock Officer. On the balance of probabilities however, and on the evidence of both sides, in my view the trial Magistrate should have come at a compromise figure for compensation, which I find to be 50% of the amount claimed. I will thus reduce the figure awarded of Kshs. 249,231/= by 50%, which translates to $Kshs. 249,231 \times 50/100 = Kshs. 124,615/=$
22. To conclude, I allow the appeal in part. I uphold the liability as determined by the trial court. I however, set aside the amount of award, and order that the appellant herein will instead pay the respondents Kshs. 124,615/= as compensation for the illegally grazed grass (hay), plus interest until payment in full.



23. As the appeal has succeeded in part, parties will bear their respective costs of this appeal. The appellant will however bear the costs of the trial court proceedings.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Omondi for appellant

Mr. Mwandoto for respondent

