



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 118 OF 2018

JANE AWINO OUMA.....APPELLANT

VERSUS

JASHON OYUGI OBURO.....RESPONDENT

[Being an appeal arising from the Judgment and decree of Hon. P. K. Rugut SRM

dated 16th October 2018 in Tamu SRMCC No. 23 of 2010]

JUDGMENT

The Appellant, **JANE AWINO OUMA**, had sued the Respondent, **JASHON OYUGI OBURO** for compensation in respect of the sugarcane and beans which the Respondent had destroyed.

1. It was the Appellant's case that she had leased land parcel No. **061/485, God Mbuoro Scheme**; and that she had cultivated crops on the said land.
2. The Appellant asserted that the Defendant entered onto the said parcel of land, and damaged the crops which had been planted thereon.
3. The Appellant requested the Agricultural Officer to carry out an assessment of the value of the damaged crops; and the said Officer reported that the value was Kshs 65,340/=.
4. On the basis of the valuation, the Appellant sued the Respondent for compensation.
5. However, the learned trial magistrate dismissed the suit, on the grounds that the case had not been proved as required by law.
6. In her appeal, the Appellant asserted that the trial Court had erred when it held that the Respondent was not liable for the damage to the crop, while the evidence showed that it was the Respondent who had actually cut down the cane.
7. The said destruction was said to have been carried out without the consent of the Appellant. In the circumstances, the Appellant asserted that the trial Court erred when it dismissed the suit.
8. In totality, the Appellant asserted that the decision made by the learned trial magistrate was against the weight of the evidence on record.
9. Therefore, the Appellant asked this Court to set aside the judgment of the trial court, and to substitute it with an order granting the orders which the Appellant had asked for in her Plaintiff.
10. In the judgment dated 16th October 2018, the learned trial magistrate held that the evidence on record proved that the sugarcane and beans in issue, had been cut down by the Defendant.
11. Secondly, the trial court held that the sugarcane and the beans belonged to the Plaintiff.
12. However, the trial court noted that before the crops were cut down, consent to do so had been sought and obtained from **DAVID OUMA**.
13. The learned trial magistrate noted that the only role that the Defendant played was to cut down the crops. As far as the trial court was

concerned;

“..... the person who ought to be in the picture, in any event, is the person who gave the consent for the land to be cleared, and not necessarily the one who executed the duty.”

14. It was the considered opinion of the learned trial magistrate that;

“The position of the defendant can best be described as an innocent bystander, who acted on the instructions of DW2. He was not acting maliciously.”

15. In her submissions, the Appellant stated that there was no dispute about the fact that she had leased the suit property, from **CHRISTOPHER ODHIAMBO** for 6 years. She pointed out that the said lease was embodied in Lease Agreement dated 18th October 2007.

16. As the crops on the plot belonged to her, the Appellant emphasized that anyone who wished to cut down the said crops should have sought her consent.

17. As the crops did not belong to **DAVID OUMA**, the Appellant faulted the trial court for holding that the consent of David Ouma was sufficient to justify the action taken by the Respondent, when he destroyed the crops.

18. The Appellant's position was that the Respondent should have sought her consent, as the crops belonged to her.

19. In any event, the said David Ouma did not testify at the trial; therefore the Appellant submitted that there was neither proof that David Ouma had given his consent; nor was there evidence about the capacity which he had, to give such consent.

20. The Appellant submitted that even if the reason for the destruction of her crops was to enable the family of **CHRISTOPHER ODHIAMBO NYARIWO**, have a place to bury him; that could not justify the destruction of her crops.

21. The Appellant's position was that after the deceased had leased the suit property to her, nobody (including the said deceased) had any right to interfere with the Appellant's right to utilize the said parcel of land.

22. Furthermore, the Appellant pointed out that she had personally told the Respondent that she had objections to the Defendant's action of cutting down her crops. In the circumstances, the Appellant submitted that the Defendant cannot be deemed as an innocent bystander.

23. Finally, the Appellant pointed out that, during a meeting held by the officials of **GAKWAMBA FARMERS CO-OPERATIVE SOCIETY**, on 13th December 2009, the Respondent had agreed to compensate her. Therefore, the Appellant submitted that the minutes of the meeting in question, provided proof that the Defendant had admitted liability.

24. In answer to the appeal, the Respondent submitted thus;

“It was an undisputed fact that the the person who entered into the said agreement with the appellant was the one who died and had his remains interred in the aforementioned land.

His burial site necessitated the clearance of the land by cutting down the sugarcane and beans therein.”

25. It is clear from that submission, that the Respondent acknowledged the fact that there was an agreement between the Plaintiff and Christopher Odhiambo Nyariwo.

26. The Defendant justified the clearance of the land by saying that there was a need to prepare the burial site for Christopher Odhiambo Nyariwo.

27. In his testimony during the trial, the Defendant confirmed that he is the person who cut down the crop on the parcel of land. However, he testified that he did not know that the land had been leased by the Plaintiff, from the Nyariwo family.

28. **DW2, PHANICE AUMA OTIENO NYAWIRO**, testified that after Christopher died, she went home and found that sugarcane had been planted on the parcel of land in issue herein.

29. **DW2** said that the sister-in-law to the Plaintiff suggested that Christopher be buried at a cemetery. However, **DW2** rejected the said suggestion, as it was against their customs.

30. According to **DW2**, she sought the consent of **DAVID OUMA**, (who is the husband of the Plaintiff), to cut down the sugarcane, so that they could have a place to bury Christopher.

31. **DW2** said that the Plaintiff was present when the consent of her husband was being sought.

32. **DW2** corroborated the evidence of the Defendant, about the fact that the Defendant cut down the crops, on the instructions of the family

of Christopher.

33. Although **DW2** testified that they did get permission to cut down the crops, she also said that;

“I constructed a house first then buried Christopher. After the burial, I asked them to raise any issues, since the family was there.

No issue was raised then.

Later I was summoned to the chief’s office in Tamu. I was accused of cutting the sugarcane.

I told the chief, I had sought permission and I was given.

The chief questioned on the consent and the plaintiff agreed;

she disputed the portion she had given us to bury. The chief could not sort out the issue.”

34. In my reading of that evidence, I find it to be conflicted. But, in order to place it in perspective, I set out some more evidence tendered by **DW2**.

35. At the start of her evidence-in-chief, she said;

“..... I don’t know the plaintiff”

36. In cross-examination **DW2** reiterated as follows;

“I don’t know the plaintiff, I only knew her husband.

I knew her when she took us to the chief; the cane had been cut then. We had also buried. When David Ouma gave me the consent, I didn’t know about the plaintiff.

I knew the plaintiff was David’s wife when I went to the chief.”

37. If the witness did not know the Plaintiff until after the burial, I find that it cannot have been true that the Plaintiff had given consent to **DW2**, for clearance of the crops, so that Christopher could be buried on the parcel of land on which the Plaintiff had planted crops.

38. It is noteworthy that in the defence, it was categorically denied that the Plaintiff had leased the land in question. The Defendant also denied that the Plaintiff had planted sugarcane and maize on the said parcel of land.

39. In the circumstances, it defies logic, for the Defendant’s witnesses to now assert that they sought and obtained the Plaintiff’s consent to cut down the crops. If the Defendant did not know the Plaintiff, he or his witnesses could not have asked her for consent to cut down the crops which she had planted.

40. I also find that it was most improbable that **DW2** told the Plaintiff to raise any issues, and that the Plaintiff actually raised issues, if, as alleged by **DW2**, the Plaintiff had already given her consent.

41. The Respondent has now submitted that the Plaintiff should be estopped from seeking any relief since she had acted through her husband, who gave consent, in his capacity as her agent.

42. **DW2**’s testimony, which I have covered above, was that the Plaintiff was present when her husband gave consent. I have already held that that was most improbable.

43. The Defence does not assert the alleged agency between the Plaintiff and her husband. Therefore, the submissions which are founded upon an alleged agency, are inconsistent with the line of defence which the Defendant had raised.

44. As concerns the contention that the lease agreement was not enforceable against the Defendant, I find, firstly that no such defence was raised before the trial court.

45. Secondly, the Plaintiff was not seeking to enforce the lease against the Defendant.

46. In my understanding, the Plaintiff could have been perceived to be seeking to enforce the lease agreement if she had asked the Court to compel the Defendant to specifically perform the terms of the said lease.

47. In his submissions, the Respondent has already acknowledged that there was an agreement between the Appellant and Christopher. Pursuant to the said agreement, the Appellant moved onto the land and planted crops upon it.

48. As the crops were destroyed by the Defendant, the Plaintiff only sought compensation. She did not seek specific performance.
49. I hold the considered view that the Appellant was entitled to seek compensation from the Defendant, as it is the said Defendant who cut down her crops.
50. In the event that the Defendant felt justified because he was acting on the instructions of **DW2** or any other person, it would have been his duty to seek to enjoin such person to the suit.
51. The Appellant had no duty to sue either **DW2** or any other person who might have given instructions to the Defendant.
52. Contrary to the finding by the learned trial magistrate, the Defendant was not an “*Innocent Bystander*”. He was actively involved in the actual destruction of the Plaintiff’s crops.
53. His liability stems from his tortious actions.
54. In the result, the appeal is successful. I therefore set aside the dismissal of the Plaintiff’s suit; and substitute it with a judgment in favour of the Plaintiff, as prayed in the Plaint.
55. I so order because the Plaintiff not only pleaded the Special Damages, but she also adduced evidence which proved the value of the loss she sustained.
56. The interest on the decretal amount of Kshs 65,340/= shall be calculated at Court rates from 8th October 2015, when the trial Court delivered its judgment.
57. The costs of the suit and the costs of the appeal are awarded to the Appellant.

DATED, SIGNED and DELIVERED at KISUMU

This 2nd day of **December** 2021

FRED A. OCHIENG

JUDGE