REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.18 OF 2016

OJIERO ONDIEGI OUKO ..... APPELLANT

VERSUS

JORAM ODERO LORE..... 1ST RESPONDENT

OJWANGONDIEGI .....2ND RESPONDENT

HEZRON OPUGE ONDIEGI..... 3RD RESPONDENT

ISAYA NYANDIKO ONGADI.....4TH RESPONDENT

(Being and appeal from the judgment delivered on 15th June 2016 in Oyugis Civil case No.107 of 2011 – Hon. J.P. Nandi, SRM)

JUDGMENT

[1] The appellant, **Ojiero Ondiegi Ouko**, was the plaintiff in **Oyugis CMCC No.107 of 2012**, in which he sued the four respondents/defendants Viz **Joram Odero Lore, Ojwang Ondiegi, Hezron Opuge Ondiegi** and **Isaya Nyadiko Ongadi**, for general damages arising from willful and malicious destruction of his crops and trees allegedly by the respondents.

He pleaded that he was the owner of an unsurveyed parcel of land in an area known as Lake Delta within Karachuonyo on which he planted blue gum trees and cultivated food crops such as yams, sugarcane, bananas, cassavas, paw-paw, avocados, mangoes and oranges which were destroyed by the respondents with the aim of displacing him from the land.

[2] The appellant also pleaded that the destruction of the crops and trees commenced sometime in the year 2005 and that the damage caused was assessed by forest and agricultural officers. He contended that the respondents were liable to pay the damage as assessed in terms of the appropriate assessment reports dated 30th July 2012 and 29th July 2011. He therefore prayed for judgment against the respondents together with costs of the suit and interest.

[3] In a joint amended statement of defence, the respondents denied the appellant's claim and contended that the plaint did not disclose any or reasonable cause of action against them or that it was misconceived, bad-in-law, frivolous, vexatious and/or an abuse of the process of the court. They implied that the alleged un-surveyed parcel of land never belonged to the appellant and was actually a **"no man's"** parcel of land and contended that the claim against them was criminal in nature yet they were neither arrested nor charged in court accordingly. They therefore prayed for the dismissal of the appellant's suit with costs.

[4] The hearing of the case proceeded ex-parte after the respondents and their advocate failed to appear on the scheduled date of the hearing despite being served with the necessary hearing notice.

After trial, the learned trial magistrate concluded that the appellant had failed to prove his case on a balance of probabilities and that the evidence did not disclose when the cause of action arose and who owned the un-surveyed parcel of land. That, the appellant failed to establish ownership of the land and its alleged acreage.

The appellant's case was therefore dismissed with no orders as to costs.

[5] Being dissatisfied with the judgment of the trial court, the appellant preferred five grounds of appeal as set out in the memorandum of appeal dated and filed herein on 13th July 2016.

Basically, the appellant contends that the trial court erred in law and infact by failing to appreciate and evaluate the evidence adduced by

himself and failing to notice that the evidence was uncontradicted and unchallenged and also failing to rely on it. That, the trial court misdirected itself on the assessment of the evidence adduced before it.

[6] The hearing of the appeal proceeded by way of written submissions. In that regard, the appellant filed his submissions on 11th April 2019 through **Nyanga & Co. advocates** while the respondents represented by **Moracha & Co. Advocates**, did not file their submissions.

The duty of this court was to re-consider the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

[7] Briefly, the appellant's evidence was that the trees and food crops planted on his farm at Maguti near lake Victoria within Kendu Bay were destroyed in the year 2012 by people believed or said to be the respondents who also hailed from that area.

He reported the incident to the local agricultural officer and an assessment of the damage was carried out. Necessary reports were contained in the letters dated 13th February 1997 (**P. Exhibit 1**) and 7th February 1997 (**P. Exhibit 2**). Compensation reports dated 29th July 2014 (**P. Exhibit 4**) and 19th April 2012 (**P. Exhibit 5**) were obtained and so was the title to the land (**P. Exhibit 3**).

[8] The appellant stated further that the incident was reported to the police and a letter dated 21st July 2005 (**P. Exhibit 6**) was issued. A demand letter dated 24th October 2005 (**P. Exhibit 7**) was then issued to the respondents.

Another letter dated 5th June 2005 (**P. Exhibit 8**) was issued to the respondents by the area chief. A further letter dated 26th July 2012 (**P. Exhibit 9 (a)**) was also issued by the chief. Additional letters (**P. Exhibit 9 b - e** and **P. Exhibit 10**) were issued by the Officer Commanding Police Station (OCS), the Agricultural Officer and the District Commissioner. Further demand notices (**P. Exhibit 11** and **12**) were issued to the respondents and photographs of the damaged banana plants (**P. Exhibit 13**) were taken on 23rd August 2012.

The appellant thus prayed for compensation for his damaged trees and crops.

[9] The trial court carefully considered the appellant's evidence and in doing so, was very much alive to the appellant's obligation to establish or prove her claim on balance of probabilities by arriving at the following finding:-

> **"The plaint does not disclose exactly when the illegal destruction of the trees and crops took place. The plaintiff averred that sometimes in 2005 the defendants started destroying his trees and crops. He relied on the assessment reports, that of 30/7/12 and 29/7/11. There is no evidence on record showing what was destroyed in 2005.**
>
> **The plaintiff in his plaint did not indicate that the defendant destroyed his crops on 29/7/11 and 30/7/12 or in the year 2011 and 2012.**
>
> **There is no clear evidence on record showing that the plaintiff was utilizing the an unsurveyed parcel of land around lake Delta area within Karachuonyo and to what extent. The plaintiff did not tender any evidence disclosing the acreage he was utilizing. In the end, I find that the plaintiff has not been able to establish his case on balance of probabilities. The evidence on record did not disclose when the case of action arose, who owns the unsurveyed land. The plaintiff failed to establish ownership of the land and its acreage. Finally, I dismiss the plaintiff's case with no order as to costs."**

[10] Having re-visited the evidence, this court did not see any reason or basis to disagree with the trial court and depart from its findings. Indeed, the appellant's evidence which stood on its own was devoid of any probative value in establishing ownership of the land and its identity or description. The evidence did not also establish the existence of the alleged trees and crops in the year 2005 and the destruction thereof by the respondent in the same year.

There was clear contradiction between the evidence and the pleading in relation to the actual year or years that the destruction occurred. There wasn't even a scintilla evidence to prove the respondents' alleged culpability in the destruction.

[11] The exhibition of several letters from several government offices was not sufficient to establish the claim and even if the letters were capable of showing that the destruction occurred, they could not show the exact date or year of the destruction and the involvement of the respondents in the same.

Most significantly, the monetary value of the damaged trees and crops was not disclosed in the statement of claim and if this was done in the exhibited letters, then the appellant ought to have claimed special rather than general damages or the monetary value of the trees and crops.

[12] In sum, the evidence availed before the trial court was incapable of establishing the claim against the respondents on a balance of probabilities. It also created much doubt as to whether the appellant really had a genuine cause of action against the respondents who denied the claim and even if they failed to attend the hearing and adduce evidence, the obligation to establish the claim remained with the appellant and the appellant only.

[13] The trial court clearly and properly appreciated and evaluated the evidence adduced by the appellant before arriving at its impugned decision.

In the circumstances, the five grounds of appeal preferred herein by the appellant are unsustained.

The appeal is lacking in merit and is hereby dismissed with costs to the respondents.

Ordered accordingly.

J.R. KARANJAH

JUDGE

02.10.2019

[Dated and delivered this **2nd** day of **October, 2019**]