REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.45 OF 2003

EDWARD BARASA.....APPELLANT

VERSUS

MARTIN M. INGUNYI.....RESPONDENT

JUDGEMENT

The Respondent was the Plaintiff in BUNGOMA CMCC No.768 of 1999 in which he had sued the Appellant seeking judgement in the following terms:

1. **Compensation for the value of destroyed sugar cane crop estimated at Kshs.72,000.**

2. **Costs**

3. **Interest at Court rates.**

The basis of the Respondent's claim was that he had leased two(2) acres of land parcel NO. NDIVISI/MIHUU/1231 from **FRANCIS MAKOKHA WANADABA** from 1994 to 1999 for purposes of growing sugar cane which was contracted to Mumias Sugar Company. However, in the months of July/August 1999, the Appellant destroyed the sugar cane crop alleging that he had leased the land from the owners. The value of the sugar cane crop was assessed at Kshs.72,000 by the Nzoia Sugar Company Agricultural Manager as the expected yield was about 42 tones. That gave rise to the suit subject of this appeal.

The Appellant denied having destroyed the Respondent's sugar cane and put him to strict proof thereof. He added that he had validly leased the land from the owner for valuable consideration and was given express consent to work on the land as it was not in use. He therefore asked the Court to dismiss the claim against him with costs.

The trial commenced before **Hon. Z.M. SALANO (SRM)** on 19th July 2000 before it was taken over by **Hon. S.M. MUNGAI (SRM)** on 7th March 2001 who completed the trial and delivered a judgement on 18th June 2003 in favour of the Respondent as prayed in the plaint.

That judgement provoked this appeal in which the Appellant has raised the following ten (10) grounds in seeking to have the decision of the trial Court set aside and the Respondent be condemned to meet the costs both here and in the Court below:

1. That the learned trial Magistrate erred in Law and in fact in entering judgement in favour of the Respondent in the sum of Ksh.72,000 which sum was not specifically proved and consequently the said award was unjustified and unsupportable in Law.

2. That the learned trial Magistrate erred in Law and in fact in awarding judgement in favour of the Respondent in the face of clear cut evidence on record by PW4 to the effect that at the time he entered into the agreement with the Appellant, there was no cane on the said field which issue was never resolved by the trial Court nor adverted to by the trial Magistrate in his analysis of the entire defence testimony.

3. That the learned trial Magistrate erred in Law and fact in holding that the Appellant breached his lease agreement and specifically clause 5 thereof and consequently arrived at a finding that it unsupportable in Law.

4. That the learned trial Magistrate erred in Law and in fact in canvassing a theory to the effect that the Appellant had mischievously inserted a clause in the agreement between him and PW4 which theory was neither apparent from the pleadings filed in Court, the evidence of the Respondent nor the issue for determination before the Court and consequently arrived at an erroneous decision.

5. That the learned trial Magistrate erred in Law and in fact in holding that the Appellant was under a duty and/or obligation to

look out for the Respondent before he entered into any agreement with PW4.

6. That the learned trial Magistrate erred in Law and in fact in failing to hold that the Respondent's claim, if at all, lay in damages as against his own witness PW4 and not against the Appellant and consequently his decision is unsupportable in Law.

7. That the learned trial Magistrate erred in Law and in fact in awarding judgment in favour of the Respondent in the face of material contradictions in the evidence of the Respondent which contradictions left gaping holes in the Respondent's case.

8. That the learned trial Magistrate erred in Law and in fact in relying on the figure at Ksh.72,000 which figure was stated to be an estimate and over which there was no evidence tendered at how it was arrived at and/or the basis of the computation.

9. That the judgement of the learned trial Magistrate is unsupportable and is against the weight of the evidence on record.

10. That the learned trial Magistrate erred in Law and in fat in relying on exhibits which had little or no probative evidential value.

The appeal was placed before **AMOLLO J** who on 5th June 2014 directed that it be canvassed by way of written submissions. The record shows that the Appellant filed his submissions on 21st August 2014 and the Respondent on 17th June 2014. It is not clear what happened thereafter. What is clear however is that on 21st June 2018, I stumbled upon this file which had erroneously been listed for dismissal on 28th June 2018 under Order 17 of the Civil Procedure Rules. I therefore directed that the partied be informed that the judgment in the appeal would be delivered on 19th July 2018. The delay in delivering this judgment, and which is highly regretted, can only be attributed to the registry which failed to place the file before **AMOLLO J** when parties filed their submissions way back in June and August 2014.

I have considered the appeal and the submissions which were filed both by the firm of J.O. MAKALI ADVOCATE for the Appellant and R. ABURILI ADVOCATE for the Respondent.

This being a first appeal I must, as rightly submitted by Counsel for the Appellant, reconsiders the evidence evaluate it and draw my own conclusions thought always bearing in mind that I neither saw nor heard the witnesses and I should therefore make due allowance in that respect – **SELLE -V- ASSOCIATED MOTOR BOAT COMPANY LTD 1968 E.A. 123.**

Similarly, an appellate Court will not ordinarily interfere with the findings of fact by the trial Court unless they were based on no evidence at all or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the finding – **MWANASOKONI -V- KENGA BUS SERVICE LTD 1982-88 1 KAR** and also **KIRUGA -V- KIRUGA & ANOTHER 1998 KLR 348.**

I shall consider grounds one(1) and eight(8) together which take issue with the trial Magistrate for awarding the Respondent the sum of Ksh.72,000 when it was not specifically proved and was based on an estimate over which there was no evidence. Citing LORD GODDARD CJ in the case of **BONHAM CARTER -V- HYDE PARK HOTEL LTD 1948 64 TLR 177** as approved in **IDI AYUB SHABANI -V- CITY COUNCIL OF NAIROBI 1985 KLR 516**, Counsel for the Appellant has submitted that special damages must be pleaded and specifically proved and should not be thrown to the Court by a Party saying: **"this is what I have lost, I ask you to give me these damages"**. Counsel for the Appellant is right. Special damages must be specified proved and pleaded. In her submissions, Counsel for the Respondent has stated that the special damages were proved by the evidence of **PW2 HUDSON WAMBIA** who assessed the value of the damaged sugar at Ksh.72,000. It is clear from the Plaint as filed in the subordinate Court that the Respondent pleaded in paragraph three(3) thereof that the Appellant destroyed his sugar cane whose value was pleaded in paragraph five(5)(a) as valued at Ksh.72,000. In support of that pleading, the Respondent called as his witness **HUDSON WAMBIA (PW2)** a field Superintendent with Nzoia Sugar Company who testified that in May 1999 at the request of the Respondent, he visited the land on which there was a sugar cane crop which had been destroyed by up-rooting. He prepared a report which was produced as Respondent's Exhibit No.2 and he assessed that the Respondent would have harvested fourty two(42) tones of sugar worth Ksh.72,000. The report was produced without any objection by the Appellant whose evidence falls in the category of an expert which the trial Magistrate accepted. I see no reason to depart from that finding by the trial Magistrate. In his submissions, Counsel for the Appellant has stated that the cane assessment report by **HUDSON WAMBUA (PW2)** was a mere estimation. There is no doubt however that **HUDSON WAMBIA (PW2)** being a field Superintended with Nzoia Sugar Company was qualified to prepare the report which he did. There was no other evidence to contradict with his opinion and therefore there was no basis upon which the trial Court, and this Court can reject the said report.

Most importantly, the report, as I have stated above, was produced without any objection. Special damages need not only be proved through receipts invoices, audited accounts waybills etc. they can be proved by other evidence which the Court can consider once placed before it – **CAPITAL FISH KENYA LTD -V- KP&L CO. C.A. CIVIL APPEAL NO.189 OF 2014 (2016 eKLR).** Civil Cases are determined on the basis of a balance of probabilities and since the cane assessment report produced by **HUDSON WAMBIA (PW2)** was the only evidence placed before the trial Magistrate as evidence of the value of the damaged sugar cane crop and in the absence of any other evidence to contradict such report and also bearing in mind that the report was not objected to during the trial, that was the only evidence available to the trial Magistrate upon which to determine the value of the damaged cane and it was cogent evidence upon which the trial Magistrate could make a finding that the Respondent's damaged cane was worth Ksh.72,000. The trial Magistrate did not therefore err either in Law or in fact in his finding that the Respondent had pleaded and proved that his damaged cane was worth Ksh.72,000/-. Grounds one(1) and eight(8) of the appeal must therefore fail.

Grounds two(2), three(3), four(4) and five(5) can also be disposed off together. They raise the issues that there was no cane on the land when the Appellant entered into an agreement with PW4 which issue was never resolved by the trial Court, that the trial Magistrate erred both in Law and in fact when he held that the Appellant had breached the agreement in the face of clear cut provisions of the said agreement and specifically clause five(5) thereof, that the trial Magistrate erred in Law and in fact in canvassing a theory to the effect that the Appellant had mischievously inserted a clause in the agreement between him and PW4 which theory was neither apparent from the pleadings, the evidence nor was it an issue for determination and that the trial Magistrate erred in Law and in fact in holding that the Appellant was under

an obligation to look out for the Respondent before he entered into the agreement with PW4.

The fulcrum of the Respondent's case was that on 23rd January 1994, he had entered into an agreement with **FRANCIS MAKOKHA WANDIBA (PW4)** to lease his had upto 1999 to grow sugar but in July / August 1999, the Appellant grazed his cattle on the land and up-rooted the sugar cane.

In the circumstances, what the Respondent needed to prove was that there was sugar cane on the land in July / August 1999 when the Appellant destroyed it. Whether or not there was sugar cane on the land on 23rd January 1994 when the Respondent and **FRANCIS MAKOKHA WANDABA (PW4)** entered into the agreement would not really be relevant. The incident subject of the Respondent's suit occurred in July / August 1999. This issue was resolved by the trial Magistrate who made the following finding in his judgement.

> ***"The plaintiff and his witnesses especially WAMBIA (PW2) and WAFULA (PW3) deponed that the up-rooted the cane meant for the third and lase harvest of the plaintiff estimated at ksh.72,000 per the assessment of WAMBIA (PW2)"***

So this issue was resolved by the trial Magistrate who was satisfied from the evidence of the Respondent and his witnesses that the Appellant had up-rooted the Respondent's sugar cane. The evidence of **PATRICK WAFULA (PW3)** who was then the village elder was more explicit. He testified that when the Respondent reported to him on July / August 1999, he (PW3) confronted the Appellant with the complaint. This is what the witness told the trial Court in his evidence in chief:

> ***"I approached the defendant. He told me that the lease of the Plaintiff had expired. He admitted that he had hired people to up-root the cane. I went and reported to the Assistant Chief."***

When this same witness was cross-examined by Mr. MAKALI ADVOCATE, he said:

> ***"I asked him. He told me he had instructed the two MASIKA and SHIUNDU to up-root the cane as the Plaintiff's lease had expired."***

The Appellant denied having up-rooted any sugar cane although in cross-examination by Ms. ABURILI ADVOCATE he said he had **"up-rooted dry cane stumps"**. The trial Magistrate considered all this and was satisfied that the Respondent had spoken the truth and proved his cane as required. Having considered the evidence by both Parties, I am satisfied that the trial Magistrate reached the correct decision in finding that the Appellant had destroyed the Respondent's sugar cane as pleaded. As to when the Appellant was to start utilizing the land, the agreement between the Appellant and **FRANCIS MAKOKHA WANDABA (PW4)** dated 27th June 1999 provided as follows in paragraphs two(2) and five(5) which are relevant:

> **2: *"The period for the lease is two(2) years starting the year 2000 to the year 2001.***
>
> **5: *"EDWARD BARASA is free to start preparing the piece from the date of this agreement".***

The agreement was drawn by lay persons. Indeed **FRANCIS MAKOKHA WANDABA (PW4)** admitted that the agreement was drawn by the Appellant since he (PW4) did not did not understand English but trusted that the Appellant would properly read what was agreed. While there is a contradiction between clauses two(2) and five(5) of that agreement, it is clear from the evidence of PW4 that his intention was that the Appellant starts utilizing the land in 2000. This is what he said in his evidence in chief:

> ***"I entered into an agreement with the defendant on 27.6.99 leasing the same shamba to him to plant cane in the year 2000. He wrote the agreement. I cannot read English. I trusted the defendant to indicate the correct position. He was leasing the cane for two years. This is the agreement…***
>
> ***Agreement is correct to the effect that defendant was to lease the cane for the period 2000 upto 2001."***

When he was cross-examined by Mr. MAKALI ADVOCATE, this is what he said:

> ***"It is true that I allowed the defendant to start work on the shamba immediately… He was to start in the year 2000."***

Given the contradiction between clauses two(2) and five(5) of the agreement between the Appellant and PW4 dated 27th June 1999, the trial Magistrate was entitled to resolve it by looking at the evidence by the parties and it was clear to the trial Magistrate, as it is clear to me, that the Appellant could only have started utilizing the land from 2000 since there was already a subsisting agreement between PW4 and the Respondent and which was to last upto 1999. This is how the trial Magistrate resolved that issue:

> ***"The long and short of the whole scenario is that the defendant entered the shamba in question while the lease of the Plaintiff was still running and in breach of his lease agreement which stipulated that this was to run from 2000 upto 2001."***

On the evidence on record, the trial Court arrived at the correct decision in resolving that contradiction in clauses two(2) and five(5) of the agreement dated 27th June 1999.

As to whether the trial Magistrate erred in canvassing a theory that the Appellant had mischievously inserted clause five(5) in the agreement, given the fact that PW4 was categorical in his evidence both in chief and in cross-examination that the agreement between him and the

Appellant was to run from 2000 to 2001, it was well within the trial Magistrate, powers to find, as he did, that clause five(5) had been inserted by the Appellant who took advantage of the fact that PW4 was illiterate. I see no reason to depart from that finding of fact by the trial Court.

With regard to the complaint that the trial Magistrate erred in Law and in fact in holding that the Appellant was under a duty and/or obligation to look out for the Respondent before he entered into any agreement with PW4, the Appellant admitted in cross-examination that he and the Respondent are Cousins and that PW4 is their Uncle. So the Parties are related. More significantly, the Appellant knew about the prior agreement between the Respondent and PW4 dated 23rd January 1994 over the same land. this is what he said in cross-examination:

> ***"When I signed the agreement with FRANCIS MAKOKHA, I perused the agreement which he had had signed with the Plaintiff. This is the copy (P. EXB 2). I read it. It covered the period from 1994 – 1999 for the sugar cane. I entered the land in 1999 but I never frustrated the first agreement."***

Given the relationship between the Parties and the fact that the Appellant was aware of the first agreement between the Respondent and PW4 and especially that it was to expire in 1999, the trial Magistrate cannot be said to have erred in Law and in fact when he wondered why the Appellant did not find out from his own Cousin the Respondent whether the first agreement was still in force before entering the land. indeed that is the more reason why the trial Magistrate was entitled to make the finding that he did, and rightly so in my view, that the Appellant had mischievously inserted clause five(5) into the agreement dated 27th June 1999. Grounds two(2), three(3), four(4) and five(5) of the appeal must also therefore fail.

Grounds six(6), seven(7), nine(9) and ten(10) will also be considered together. The Respondent's claim could only be against the Appellant and not PW4 whose evidence was very clear that the Appellant was only to work on the land from 2000 and not before. The trial Court could not therefore have made a finding that the Respondent's claim lay in damages against PW4. I do not see any material contradictions in the evidence that the Respondent relied on in support of his case before the trial Magistrate. Certainly there were no gaping holes in the Respondent's Case and the weight of the evidence adduced in the trial Court clearly supported the Respondent's Case. The only contradiction between clauses two(2) and five(5) in the agreement dated 27th June 1999 between the Appellant and PW4 was rightly determined in the Respondent's favour and I see no reason to depart from that finding by the trial Magistrate. And with regard to the documentary exhibits produced during the trial, they certainly were of probative value. There was sufficient evidence from **HUDSON WAMBIA (PW2)**, that the Respondent would have harvested sugar cane weighing 42 tons and valued at Ksh.72,000. This was expect evidence which was not rebutted and the trial Court did not err either in Law or in fact by relying on it. This witness testified that when he visited the land to assess the damage, he found that **"when the cane reached 9 months, people started destroying it by grazing on it and up-rooting it"**. It cannot therefore be correct, as submitted by Counsel for the Appellant, that there was no cane on the land which the Appellant could have destroyed. This evidence by PW2 was also supported by the village elder **PATRICK WAFULA (PW3).**

Although the Appellant and his witnesses denied all this, the trial Magistrate who saw and heard the witnesses testify was satisfied that the Respondent had proved his case on a balance of probabilities. I see no reason to find otherwise.

The up-shot of the above is that the Appellant's appeal lacks any merits. It is hereby dismissed. The Appellant shall meet the costs both here and in the Court below.

BOAZ N. OLAO

ELC JUDGE

19TH JULY 2018

Judgement dated, delivered and signed at Bungoma in open Court this 19th day of July 2018.

Mr. Tsimonjero for Mr. Kweyu for the Respondent present

Mr. Makali for the Appellant absent

Parties absent

BOAZ N. OLAO

JUDGE

19TH JULY 2018