



**REPUBLIC OF KENYA**

**IN THE HIGHCOURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 103 OF 2013**

**BONIFACE MUTUKU NDETI.....APPELLANT**

**VERSUS**

**ELIZABETH NZULA KIOKO.....RESPONDENT**

**JUDGEMENT**

1. Being dissatisfied with the judgment of the Honourable M.W. Murage, Chief Magistrate, made on 29/4/2013 in **Machakos CMCCC No. 265 of 2001**, the Appellant brought this appeal on the grounds set out in the Memorandum of Appeal filed on 30/5/2013. These include that the learned magistrate failed to analyze and consider the evidence adduced by the Appellant and erroneously found for the defendant; and that the learned magistrate erred by failing to appreciate that on a balance of probabilities the plaintiff had proved his case.
2. Parties filed submissions. The appellant disagrees with the finding of the lower court and urges the court to re-evaluate the evidence on record and assess it and make its own conclusions. He says that the three witnesses presented evidence that is on record and proved to the required standards that loss and damage was suffered by the appellant and the court ought to have found in his favor. He further submits that the defendant did not challenge the plaintiff's case and did not call any witnesses to substantiate her averments.
3. The Respondent agreed that the learned magistrate made a correct finding of law when she stated that the evidence of the plaintiff's witnesses in support of the plaintiff's case is inconsistent. The Respondent submitted that PW1 and PW2 did not adduce evidence to substantiate their allegations that the defendant's cows destroyed the crops. She submitted that the suit as filed was in bad faith and is an abuse of the court process. She relied on the case of **LILIAN BIRIR V AMBROSE LEAMON (2016) Eklr Nakuru Civil Appeal no 116 of 2013** which noted that mere statements are not enough to show that the respondent is culpable; there must be evidence to that effect.
4. The court has looked at the judgment delivered by the Honourable M.W. Murage, Chief Magistrate, attached to the record of appeal. The learned Magistrate relied on the evidence of the plaintiff's 3<sup>rd</sup> witness who was an agricultural officer and who testified that she did an assessment based on the dates that were given to her and did not visit the scene, she relied on what the plaintiff counsel told her. She took cognizance of the fact that the elders who filed a report in PW3's office did not visit the scene nor were they called as witnesses.
5. The trial court noted that the evidence of the three witnesses called by the plaintiff is inconsistent. The court noted that the assessment report is not supported by evidence, the reports were not produced and neither did any eye witness testify.
6. This court must consider the evidence that was adduced before the trial court and draw its own conclusions bearing in mind the fact that it had neither seen nor heard the witnesses. The court is not bound to follow the trial court's findings of facts if it appears that she clearly failed on some point to take account of particular circumstances or probabilities in arriving at her decision. See **SELE VS ASSOCIATED MOTOR BOAT CO.LTD [1968] EA 123**.
7. Boniface Mutuku Ndeti (PW1) was the plaintiff and stated that the Respondent was his sister in law. He testified that the Respondent's cows had entered his farm and destroyed crops on several occasions namely 11/12/1999, 10/1/2001, 13/1/2001 and 25/1/2001 and that he alerted the village elders who visited the farm and confirmed the damage. He also stated that he reported to the police who referred him to the area chief. He finally stated that 481 maize stocks had been destroyed and which were later assessed by an agricultural officer at Kshs. 2,400/=. On cross examination he admitted that his land borders the road where several villagers graze their animals. He also admitted that some of the dates mentioned by him on damage to crops were incorrect.
8. Susan Ndunge Mutuku (PW2) was wife to the Appellant and who maintained that crops had been damaged by the Respondent's cows. On cross examination she confirmed that she had problems with the Respondent.
9. Francisca Mwanzia (PW3) was the agricultural officer who stated that she prepared a crop damage assessment report and she relied on the clan elders reports and what she was told by the Appellant's advocate. On cross examination she admitted that she did not visit the Appellant's farm.

10. The Respondent tendered her evidence in defence and did not call any witness. Her case was that she was not in good terms with the Appellant. She admitted that the Appellant's farm is near a road accessible to several people and whenever crops were damaged he would always blame her. She further stated that the Appellant had been harassing her for many years forcing her to relocate to another place.

11. Parties canvassed the appeal by way of written submissions.

It was submitted for the Appellant that the trial court failed to analyze in detail the Appellant's evidence and that of his two witnesses which confirmed that indeed elders and area chief had visited the farm in question and confirmed the damage to the crops and further backed by the agricultural officer who produced the assessment report. It was further submitted that the Respondent did not call witnesses to back her averments and hence the trial court ought to have established that the Appellant's case had been proved on balance of probabilities. Reliance was placed in the case of **RONAL M. KAMUTI VS MUSEMBI MUASYA [2016] eKLR** where a similar issue arose and the court found in favor of the Appellant. Learned counsel for the Appellant therefore submitted that the appeal should be allowed and the judgement of the trial court be set aside and substituted with an order allowing the plaintiff's claim as prayed.

It was submitted for the Respondent that the Appellant's case had not been proved on a balance of probabilities since the village elders who were alleged to have visited the farm and prepared reports were not called to testify. Further the agricultural officer did not visit the farm and only relied on reports by the elders and Appellant's Advocates. It was also submitted that the burden of proof was upon the Appellant to discharge and having failed to do so the trial court had no option but to find that the claim had not been proved and proceeded to dismiss the suit. Reliance was placed in the case of **LILIAN BIRIR VS AMBROSE LEAMON [2016] eKLR** where it was held that the plaintiff must adduce evidence from which on balance of probability a connection between the two may be drawn. Learned counsel for the Appellant sought for the dismissal of the appeal with costs.

### **Determination**

12. I have considered the submissions presented as well as the rival evidence adduced before the trial court. The only issue for determination herein is whether the Appellant's case had been proved on a balance of probabilities before the trial court.

13. To start with, the burden of proof lay with the Appellant to discharge before the trial court as per the provisions of Sections 107, 108 and 109 of the Evidence Act. The Appellant called two witnesses in support of his case while the Respondent testified alone. It emerged from the evidence that the Appellant and Respondent had not been on good terms and that their relationship was strained for a very long period until the Respondent moved from the area. The Appellant's complaint was that his maize crops had been damaged by the Respondent's cows. A crop damage assessment was produced by the agricultural officer (PW3). However, the said agricultural officer admitted on cross examination that she did not visit the farm in question and only relied on reports by village elders. The said clan elders and area chief who were said to have visited the farm were never called to testify so as to corroborate the evidence of the Appellant. This was quite crucial and the failure by the Appellant to do so weakened his case against the Respondent. The Respondent clearly stated that the Appellant who was her brother in law had been harassing her year in year out and this thus lends credence that the case mounted by the Appellant against her had been motivated by the said frosty relations. The Respondent stated that she could not cope with the harassment and relocated elsewhere. Again it transpired from the evidence that the Appellant's farm bordered a public road of access and there was possibility that other animals belonging to the villagers could have caused the damage.

14. After considering the entire evidence adduced before the trial court, I am inclined to agree with the finding of the trial magistrate that the Appellant failed to prove his case on a balance of probabilities. The authority cited by the Appellant's counsel is easily distinguishable in the sense that even though the circumstances appear almost similar to those of the parties herein, the departure is on the fact that the agricultural officer did visit the farm in question and carried the assessment unlike in the present case. The failure by the agricultural officer to visit the farm herself and confirm the damage and further the failure to call the village elders and area chief completely weakened the Appellant's case against the Respondent.

I am therefore unable to find any error on the part of the trial court in arriving at the conclusion that the Appellant's case did not pass the threshold of proof.

15. In the result, it is the finding of this court that this appeal lacks merit. The same is ordered dismissed with costs to the Respondent.

**Dated and delivered at Machakos this 6<sup>th</sup> day of November, 2018.**

**D.K. KEMEI**

**JUDGE**