**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENY AT MIGORI**

**CIVIL APPEAL NO. 16 OF 2016**

**MICHAEL ODHIAMBO LIGAWA.....APPELLANT**

**-VERSUS-**

**SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT**

***(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Resident Magistrate in Rongo Senior Resident Magistrate's Civil Suit No. 218 of 2012 delivered on 08/03/2016)***

**JUDGMENT**

1. By a Plaint dated 28/09/2012, **MICHAEL ODHIAMBO LIGAWA,** the Appellant herein sought for the return and/or restitution of five heads of cattle or the equivalent monetary value thereof from the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD**. That was in **Rongo Senior Resident Magistrate's Civil Suit No. 218 of 2012** (hereinafter referred to as **'the suit'**).

2. The suit was defended and upon hearing, only one cow/bull was restored to the Appellant. That decision, delivered on 08/03/2016, is what prompted this appeal.

3. By a Memorandum of Appeal dated 06/04/2016, the Appellant preferred the following four grounds as follows: -

> ***1. The learned trial magistrate erred in law and fact when he gave a judgment which was against the weight of evidence given by both parties.***
>
> ***2. The learned trial magistrate erred in fact and in law by purporting to raise the threshold of standard of proof to a level higher than that required by law.***
>
> ***3. The learned trial magistrate erred in law and fact when he held that each party should bear their own costs.***
>
> ***4. The learned trial magistrate was biased against the Appellant.***

4. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant duly complied and filed his written submissions but the Respondent did not do so even after having been adequately indulged. The Appellant, in a nutshell, faulted the trial court in partly allowing his claim. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with 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 findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348).**

5. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties. The Appellant's claim relates to the return and/or the restitution of five heads of cattle or compensation thereof to the tune of Kshs. 150,000/=. A scrutiny of the pleadings and the evidence reveal that indeed it is a claim for special damages as the Appellant is *inter alia* not seeking damages at large or general damages.

6. Such a claim must therefore be pleaded and specifically proved. (See: ***Coast Bus Service Limited v. Murunga & others Nairobi CA No. 192 of 1992 (UR), Kampala City Council v. Nakaye [1972]ea 446, Ouma v. Nairobi City Council [1976] KLR 297*** and ***Eldama Ravine Distributors Limited and another v. Chebon Civil Appeal Number 22 of 1991 (UR).*** The degree and certainty thereof however depend on the circumstances and the nature of the act complained of. (See the Court of Appeal decision at Kisumu in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR).**

7. There is no doubt that the claims were pleaded in the Plaint. The Appellant stated in paragraphs 4 to 9 inclusive of the Plaint as follows: -

> '4.***The Plaintiff avers and shall maintain that on or about 18th July 2010, the Defendant and/or her employees, servants and/or agents to wit cane guards seized 16 herds of Cattle belonging to the Plaintiff on false, unfounded and mischievous allegations that the same had been found grazing on the Defendant's nucleus sugarcane estate.***
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> ***5. The Plaintiff avers further and shall that subsequent to the aforesaid seizure, the 16 herds of cattle were detained by the Defendant and/or her employees, servants and/or agents until it was thereafter established upon investigations that the complaint culminating into the seizure of the herd of cattle was misconceived and untrue and the Officer Commanding Awendo Police Station Ordered that the cattle be released to the Plaintiff.***
>
> ***6. The Plaintiff avers further and shall maintain that at the time of the release of the said cattle, 2 herds out of the aforesaid 16 herds of cattle could not be accounted for by the Defendant and/or her employees, servants and/or agents. In the foregoing regard, two (2) herds of cattle were not released to the Plaintiff.***
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> ***7. The Plaintiff further avers and shall maintain that on or about 29th April, 2012, the Defendant and/or her employees, servants and/or agents to wit cane against seized a further 3 herds of cattle belonging to the Plaintiff on false, unfounded and mischievous allegations that he same had been found grazing on the Defendant's nucleus sugarcane estate.***
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> ***8. The Plaintiff avers further and shall maintain that subsequent to the seizure referred to in paragraph (7) above, the Plaintiff lodged a complaint with the Police at Awendo Police Station vide OB Number 17/30/4/12 whereupon the Defendant and/or her agents, employees or servants were directed by the Officer Commanding Awendo Police Station to return / restore the said cattle to the Plaintiff.***
>
> ***9. The Plaintiff avers further and shall maintain that the Defendant and/or her employees, servants and / or agents, upon the aforesaid Order by the Officer Commanding Awendo Police Station to return / restore the cattle to the Plaintiff agreed to release only 1 heard of cattle to the Plaintiff, which offer the Plaintiff decline. The Plaintiff avers further and shall maintain that consequently with the foregoing regard, the Defendant and/or her employees, servants and / or agents are withholding the 3 herds of cattle to date.***

8. As to proof of the claims, **Sections 107** and **108** of the **Evidence Act**, Chapter 80 of the Laws of Kenya placed that burden of proof on the Appellant. It was hence required of the Appellant to adduce evidence

in answer to the following issues: -

i. That the Appellant was the owner of the heads of cattle in issue;

ii. The specific number of the heads of cattle seized by the Respondent in the two instances;

iii. The exact number of the heads of cattle released to the Appellant by the Respondent, if any; and

iv. If there was any justification in not releasing all the cattle seized by the Respondent, if at all that happened;

v. The value of the cattle or each of them.

9. In determining those issues, this Court must remain alive to the provisions of **Section 61** of the **Evidence Act** which requires no proof of any admitted fact. It is on that score that a revisit of the pleadings and the evidence is always necessary.

10. The appellant brought two separate claims in the suit. That was in order given the nature of the causes of action and that they arose from similar circumstances. None of the actions was time-barred. There was the claim on the alleged seizure of 16 heads of cattle on 18/07/2010 (hereinafter referred to as **'the first seizure'**) and the one on the alleged seizure of 3 heads of cattle on 20/04/2012 (hereinafter referred to as **'the second seizure'**).

11. The Appellant tendered evidence on the first seizure and second seizure and the Respondent called one of its employees**, James Ogongo (DW1)** as its witness. There is no dispute that the Appellant was the owner of the heads of cattle in issue. In respect to the first seizure, the Appellant contends that *inter alia* 16 heads of cattle were seized by the Respondent's employees. The Respondent through the Statement of Defence while admitting the seizure denied that the animals were 16 heads of cattle and stated that it only seized 14 heads of cattle. On the second seizure, the Appellant contended that 3 heads of cattle were seized whereas the Respondent contends that it only seized one cow.

12. According to the Appellant, he was not present when both seizures were done. He stated that he was only informed by three children namely **Bill Joseph** (then aged 13 years old), **Everlyn Anyango** (then 16years old) and **Milka Akoth** (then aged 16) years old as well). The Appellant did not call any of the said children as witnesses and it is not clear whether the children were the Appellant's children or just passing by. It is also not known if the children referred to the first seizure or the second seizure or both. The matters were also dealt with by the Awendo Police Station. On the first seizure, the police bonded the Appellant to appear before the Magistrate's Court at Rongo to face the charge of '*allowing cattle to damage crops*.'

13. The Police Bond was produced as the Appellant's Exhibit 1, but the Appellant was eventually not charged. After testifying, the Appellant through his Counsel applied for summons for the OCS Awendo Police Station to attend court and give evidence. The summons was issued on 29/08/2013 and the case was fixed for further hearing on 10/10/2013. However, that witness never testified as at 25/11/2015 when the Appellant closed its case in the suit.

14. During his testimony, the Appellant produced three demand letters from his Advocates on the return of the cattle as exhibits. They were produced as Exhibits 3, 4 and 5. There was a document which the Appellant marked as '**MFI -2**' on the return of the 14 heads of cattle wherein the Appellant had complained on his unreturned heads of cattle. Since that document was only marked for identification but not produced as an exhibit, the same did not form part of the evidential record of the trial court. (See the Court of Appeal decision in **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR).** Be that as it may, the Respondent admitted the seizure and release of 14 heads of cattle.

15. The Appellant further testified that he was called and informed that his cows were seized on 29/04/2012. He did not disclose who the caller was and that 'caller' did not testify. Even the neighbour

who allegedly informed the Appellant that he had seen one of his cows did not testify. We are at a loss as to where the cow was seen at.

16. The foregone leaves the evidence of the Appellant as the sole evidence on the number of heads of cattle allegedly seized by the Respondent on any of the instances. The Respondent denied that it seized the number of heads of cattle as alleged by the Appellant. It may be true that the Appellant owned 16 heads of cattle as at 18/07/2010 and 3 heads of cattle as at 29/04/2012. It may also be true that the Respondent only seized what it stated. There is also the possibility of some people taking advantage of the seizure, for instance someone could have quietly taken away the alleged missing heads of cattle after the Respondent left them behind. That is why it remained so cardinal that the Appellant proves the actual number of the heads of cattle seized in each instance. However, the Appellant failed to prove the exact number of the heads of cattle seized by the Respondent as he alleged.

17. Having found that the Appellant failed to prove the number of the heads of cattle seized by the Respondent on each instance and the Appellant having admitted to have received what the Respondent contended to have seized save for the one cow which the Appellant refused to collect from the Respondent, a consideration of the other issues would add no value in this appeal. I therefore concur with the finding of the trial court in ordering the release of the cow which the Respondent had detained on the instructions of the police. That was the cow which the Appellant refused to collect from the Respondent demanding a full return of all what he alleged to have been taken from him.

18. This Court likewise finds that the trial court did not err in ordering that each party do bear its own costs of the suit. Whereas the general position in law is that costs follow event, each case mutt be distinctively considered. The Appellant did not prove his case in the first instance. Had it not been the issue of the cow that the Respondent detained on instructions of the police, the suit would have been dismissed with costs. The cow was taken care of by the Respondent. That meant the Respondent continued to incur expenses to maintain the cow/since the Appellant had refused to collect it. The Respondent was infact entitled to a refund of its expenses. The Appellant was lucky that there was no counter-claim in the suit. By taking all that into account, the order on costs made by the trial court was infact so fair to the Appellant.

19. Consequently, the appeal lacks merit and is hereby dismissed. Based on the foregone argument, I hereby order that each party do bear its own costs of the appeal.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 15th day of June 2017.**

**A. C. MRIMA**

**JUDGE**