



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 62 OF 2008

JEREMIAH NJERU ALLAN.....APPELLANT

VERSUS

ESTERIA NYONGA RESPONDENT

J U D G M E N T

An Appeal from the Judgment of HON. F.M. Omenta – PM

sitting at SIAKAGO in SPMCC CASE NO. 33 OF 2007 delivered on 29/5/2008).

1. Jeremiah Njeru Allan “*the Appellant*” had been sued in the lower Court by Nyongo Esteria “*the Respondent*” for special damages for destruction of the Respondent’s crops by the Appellant’s goats and cattle.
2. The Appellant filed his defence dated 23rd October 2007 and denied every claim made by the Respondent. The matter proceeded to full hearing. The trial Court made a finding in favour of the Respondent and entered Judgment for her in the sum of shs.25,265/= plus costs and interest.
3. The Appellant being dissatisfied filed the appeal citing the following grounds;
 - i. *The learned Principal Magistrate erred in awarding damages which already had been pleaded and proved.*
 - ii. *The learned Principal Magistrate erred in relying on witnesses who had not witnessed the destruction of crops.*
 - iii. *The learned Principal Magistrate erred in entertaining a trespass case when he had no jurisdiction to do so.*
 - iv. *The learned Principal Magistrate erred in deciding the case against the Appellant and his livestock that destroyed the Respondent’s crops.*
 - v. *The learned Principal Magistrate erred in ignoring the evidence that the Respondent had harvested her crops in the land and yet awarding damages as compensation for the same.*
 - vi. *The learned Principal Magistrate erred in ignoring evidence of grudge between the Appellant and the Respondent.*
4. Both parties were represented and Counsels agreed to dispose of the appeal by written submissions. The Appellant’s submissions were filed by the late Mr. Utuku. He submitted that the Respondent harvested crops from the shamba yet she was compensated. Further that the pleadings were at variance with the evidence adduced.
5. It was his submission that the Appellant’s evidence was not considered by the Court. He had produced a lease agreement and his claim of the Respondent extorting money from him was not considered. He finally submitted that the trial Court had no jurisdiction to adjudicate over this matter as it was based on trespass.

6. Mr. Okwaro filed submissions on behalf of the Respondent. His submissions is that the Respondent adduced credible and consistent evidence to support her case of destruction of her crops by the Appellant's goats. And that an assessment was done by an Agricultural Extension Officer (PW4). And that it's the damaged crops which were assessed.
7. The Respondent's case in the lower Court was that the Appellant leased a portion two (2) acres of his land to her on condition that she took care of his portion too as a guard. He kept goats on his portion which used to destroy her crops. The destruction complained of occurred in January 2007 and on 4th January 2007 she harvested the row cowpeas which filled five (5) bags. On 6th January 2007 she harvested other crops. All along she kept reporting the matter to the administration. He would be asked to compensate her but he would refuse. A report was made to the chief and an Agricultural Officer was asked to carry out an assessment. The officer asked the Appellant to pay her shs.9,000/= which he refused to pay. Again the goats destroyed all the crops and the damage was assessed by the Agricultural Extension Officer at shs.23,267/=. The damage was later assessed at shs.25,265/= (PEXB1).
8. PW2 – Njeru Kamunyi found the crops destroyed on 4th and 6th January 2007. After talking to the Appellant he was asked to compensate her but he refused. PW3 – Jospeter Njeru Njue saw the Appellant's animals destroying the Respondent's crops and sent his child to drive them away. This was on 2nd January 2007. On the next two (2) days of destruction he did not see the animals. He only got reports.
9. PW4 – Truphena Mbeti Nyaga who is the Agricultural Extension Officer said he went to the Respondent's farm and assessed the damage to her crops as follows;
 - i. On 1st February 2007 – damages assessed at kshs.9,200/=.
 - ii. On 9th February 2007 – damages assessed at kshs.23,200/=,
 - iii. June 2007 – damages assessed at kshs.25,125/= after adding natured pigeon peas and cassava (PEX 1A, B & 2).
10. The Appellant in his evidence said he is a Vicar with the Anglican Church. He denied all that the Respondent had told the Court saying in the year 2003 he leased to the Respondent two acres of land and she was to pay kshs.200/= plus kshs.2,500/= per season which she had not honoured. She tilled the land for four (4) years and when she wanted more land he refused to give it to her.
11. He said her crops were destroyed at night and she did not know whose animals had caused the damages, as the land was not fenced and many people own land in the area. And that the assessment was done in his absence. He said he had only agreed to pay shs.1,000/= to maintain their relationship. He produced a lease agreement. His witness said he was not aware of the problem between the two parties as he was not called by the Appellant who usually called him in case of any issue. All he knew was that the Appellant had issued the Respondent with a Notice to vacate the portion in issue.
12. This being a first appeal it is the duty of this Court to re-evaluate the evidence, assess it and reach its own conclusion remembering that it had neither seen nor heard the witnesses and hence making due allowance for that. See
 - i. ***SELLE & ANOTHER –V- ASSOCIATED MOTOR BOAT CO. LTD AND OTHERS [1968]E.A. 123,***
 - ii. ***KAMAU –V- MUNGAI & ANOTHER [2006]1 KLR 150***
13. I have carefully considered the submissions by both Counsels plus the grounds of appeal. I have equally considered the evidence on record and the findings by the trial Court.
14. I find the issues falling for determination to be as follows;
 - i. Whether the Court had jurisdiction to deal with the matter.
 - ii. Whether the Respondent proved her case as is required by law.
 - iii. Orders to be issued if any.

15. **Issue No.(i)**

Jurisdiction indeed is the first issue a Court should deal with, because without it, the entire process becomes a nullity. In *THE OWNERS OF MOTOR VESSEL "LILIAN S" –V- CALTEX OIL KENYA LTD [1989]1 KLR AT PAGE 14*, Nyarangi – Judge stated;

“Jurisdiction is everything. Without it , a Court has no power to make one step, where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a Court of Law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

And in *BONIFACE WAWERU –VS- MARY NJERI & ANOTHER MISC. APPLICATION NO.639/05* Justice Ojwang (as he then was) stated;

“Jurisdiction is the first test in the legal authority of a Court or Tribunal, and its absence disqualifies the Court or Tribunal from determining the question”.

16. It was the Appellant’s submission that the Respondent’s case ought to have been filed at the then Land Disputes Tribunal. The Land Disputes Act dealt with cases of trespass to land either by claiming ownership or extending the boundary. The matter herein does not involve any of the two. What the Respondent was claiming were special damages for destruction of her crops by the Appellant’s animals.
17. The Land Disputes Tribunal has no jurisdiction to award damages and/or compensation, as sought by the Respondent. It is the Courts of law that have such jurisdiction. The answer to issue number (i) is that the Principal Magistrate’s Court at Siakago had requisite jurisdiction to deal with this matter.

18. **Issue No (ii)**

It came out in the evidence that the Appellant and Respondent are relatives. In her evidence the Respondent said the Appellant leased to her two (2) acres of land on condition that she guards his remaining portion of land on which he kept goats. What was this element of **“guarding”** that she was to undertake?. Was part of it to ensure that the Appellant’s goats remained confined to his portion?

19. The Appellant produced a lease agreement (DEXB1) involving the two parties. The Respondent did not mention anything about it. The Appellant seemed to say that he was not happy because the Respondent was not paying what she owed him in terms of this agreement. The agreement/arrangement aside the Respondent and her three witnesses confirmed that the Respondent had planted various crops on the land.
20. PW2 – Njeru Kamunyi confirmed that he saw the Appellant’s cattle in the Respondent’s portion of the land and he sent his son to drive them away. PW2 knew these cattle well and he attended meetings between the two parties over the same. The Respondent was also categorical that the destroyers of her crops were the Appellant’s cattle. The evidence of the Respondent and witnesses is that the damage was usually done during daytime. The Appellant availed no evidence to show that the crops used to be destroyed at night as alleged by him. Infact in cross-examination by the Respondent he said he had agreed to pay her kshs.1000/= so that they could not be fighting as they are relatives. He further said he even wanted to slaughter a goat for her to appease her as a sister-in-law. Why would he have wanted to appease the Respondent if he had not wronged her?
21. PW4 – Truphena Mbeti Nyaga another independent witness confirmed that the Respondent’s crops had been destroyed and she did an assessment. My finding therefore is that the Respondent proved o a balance of probabilities that her crops were destroyed by the Appellant’s animals.
22. In her evidence she said she salvaged some of the crops by harvesting them before they matured. The cassava was not harvested. Another thing that is not clear is why PW4 presented different figures of the assessment upon every visit to the farm. The projected harvest would not be changing at every visit. All in all I do find that the assessments by PW4 clearly confirm that the Respondent suffered loss as a result of the destruction of her various crops.

23. Issue No.(iii)

Taking into account that she salvaged some of the crops by harvesting early to avoid much loss, I will give her credit for that and reduce the figure of the final assessment.

24. I therefore set aside the Judgment for kshs.25,265/= and substitute it with a Judgment for shs.20,000/= plus costs and interest from the date of Judgment.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF SEPTEMBER 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Okwaro for Respondent

Njue/Kirong

Appellant