

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL APPEAL NO. E042 OF 2022**

**ISAAC KIPYEGON LANGAT .....**

**.....APPELLANT**

**VERSUS**

**HARUN WAINAINA KIBENGE .....**

**RESPONDENT**

*(An appeal against from the Judgment in Nakuru CMCC No. 941 of  
2016 delivered by Hon. B. Limo Senior Resident Magistrate on 16<sup>th</sup>  
March, 2022)*

**JUDGMENT**

1. The respondent who was the plaintiff in the lower court sued the appellant vide the plaint dated 17<sup>th</sup> August, 2016 which was later amended on 28<sup>th</sup> September, 2018 seeking various reliefs namely:

- a) *A declaration that the Plaintiff is the legitimate owner of the 18 row Seeds Planter make ATESPAR18ROW (SEA) DRILLS SERIAL NUMBER 1568.*
- b) *The Defendant be ordered to buy the Plaintiff a new 18 row Seeds Planter make ATESPAR18ROW (SEA) DRILLS. SERIAL NUMBER 1568 and/or in the. alternative deposit Kshs 400,000 in court being the equivalent money-*

*required to buy a new Seed Planter make ATEPARI8ROW(SEA) DRILLS SERIAL NUMBER153*

- c) *Damages for loss of income as pleaded at paragraph 12 above.*
  - d) *Costs of this suit plus interest at court rate*
  - e) *Any other order QI further relief that this Honourable court may deem fit and just to grant.*
2. The claim was denied by the appellant vide its defence dated 21<sup>st</sup> August, 2016 and later amended on 28<sup>th</sup> February, 2019.
3. The matter proceeded to hearing with both parties calling various witnesses. On 16<sup>th</sup> March, 2022 the trial magistrate delivered Judgment in favour of the respondent, in terms of prayers a-e, above.
- 4.** The appellant being dissatisfied with the Judgment filed this appeal dated 28<sup>th</sup> March, 2022, on the following grounds:
- i. *THAT the learned trial magistrate erred in law and in fact in failing to give sufficient and convincing reasons for his decision and or determination.*
  - ii. *THAT the learned trial magistrate erred in failing to make a concise statement of law and the magistrate erred in law and fact in framing of issues and judgement in their entirety.*
  - iii. *THAT the learned trial magistrate erred in law and fact in finding that that the respondent had proved his case to the required standards contrary to the evidence on record.*

- iv. *THAT the learned trial magistrate erred in law and fact in finding the appellant liable for the confiscation of the respondent's planter contrary to the overwhelming evidence on record.*
- v. *THAT the learned trial magistrate erred in law and fact in failing to consider the appellant's written submissions on the issue of damages for loss of income in the wake of lack of sufficient evidence and proof by the respondent at the trial of the suit.*
- vi. *THAT the learned trial magistrate erred in law and fact in failing to consider the appellant's written submissions on the issue of purchase of a new 18 row seed planter make ATESPAR 18 ROW(SEA) DRILLS SERIAL NUMBER 1568 and or in the alternative deposit of Kshs 400,000/= in court being equivalent money required to buy a new seed planter.*
- vii. *THAT the learned trial magistrate erred in law and fact when he failed to appreciate and consider the appellant's defence, evidence adduced and submissions filed.*

### **Respondent's case**

5. The respondent called four witnesses who testified. He testified as PW1 - **Harun Wainaina Kibuge**. He stated that he was a businessman and owned the planter the subject of this matter. He produced the sale agreement (P. Exb 1) plus

invoice, delivery notes (P. Exb 2). At the time of incident, he had given the planter to Mr. Mburu (PW4) when the same was taken away. He went to the D. O's Office since the planter had been taken there, but later taken to Nakuru. He then reported to the police. His advocates wrote to the appellant a letter (P Exb 4) which was received and stamped by the appellant. It was never responded to. He produced 2 photos of the lorry that took the planter (P Exb 5). He never saw the planter until the 11<sup>th</sup> 2019 (sic) when Kerita drove it on the road. He prayed to recover money lost in the four (4) seasons at Ksh 300,000/= per season with Kshs 400,000/= being the price of the planter.

6. In cross examination he said he was not served with notification of sale by Equity Bank. He confirmed he was not known to the 1<sup>st</sup> defendant and that the hire of the planter to PW4 was verbal. He reported the matter to the police but no action was taken. He did not have any records to show any financial gains from use of the planter. He had sought for compensation of Ksh 240,000/=. The planter was returned after five (5) days. He did not know the vehicle which took the planter.
7. In re-examination he said no one is claiming ownership of the planter and it had been sold. He denied knowing Mr. Kirima nor Isaac.
8. PW2 - **Julius Kirima** the manager of Samuel Mburu (PW4) stated that as he travelled from Nakuru to Mau Narok he

met a District Officer (D.O.) and he recognized the tractor which was towing the 18 rows planter. It was towed to the D. O's office. He later called the respondent and informed him about the planter. He took a picture (P. Exb 5) of the vehicle which took the planter. It was - KAU 963C.

9. In cross examination he said he did not know the appellant and he never saw him driving the planter though it was Kotalo who took it. Mr. Kirima he said is his cousin.

10. PW3 **No. 112160 Cpl Henry Musembi** of Mau Narok police station stated that from the station OB No. 13/9/8/2016 (P. Exb 3) the respondent reported that on 8<sup>th</sup> August, 2016 at about 16.00 hrs a group of people claiming to be from Kolato Auctioneers in company of A. P officers came to PW4 to collect the planter claiming it to belong to Kirima. The report was recorded by P. C Kirui who had since been transferred.

11. In cross examination he said he was not the investigating officer. He was not aware of Kolato Auctioneers. No statements had been recorded and no charges had been preferred against the auctioneers.

12. PW4 - **Dickson Kuria Mbugu**, a resident of Mau Narok, businessman and a farmer said he knew the respondent as a friend and farmer. He stated that on 8<sup>th</sup> August, 2016 the respondent gave him an 18 rows seed planter. While on his farm Kiarie came there saying he was from Kolato Auctioneers. He told him the planter belonged to another

person. So, he went to the AP camp to get an officer. The auctioneers later came with the police and took away the planter. He had notified the respondent who arrived the next morning and together they went to the police station and reported. The lorry that took the planter returned it leaving it on the road. He knew Kiarie the auctioneer.

13. In cross examination he said him and respondent had a lease agreement of the planter. One of the AP officers who came for the planter is Langat. Further that Kiarie showed him the card. He admitted to not having lodged any complaint at the police station and no one was charged. That the person who took the planter stayed with it for 40 days. It was returned while in bad state. He did not see the persons who returned the planter.

14. In re examination he said he knew the people who took the planter. That Kiarie did not show him anything save for an sos card of Kolato Auctioneers. Kiarie was not the owner of the lorry that picked the planter. That the planter was in good shape after its return on the road.

### **Appellant's case**

15. The appellant testified as DW1 stating that he is a licensed auctioneer and operated as Kolato Auctioneers. He denied knowing the respondent. He denied seizing the respondent's planter, nor being summoned to the police station. He said he did not know if there was any incident of the planter being dumped on the road. There was no report of

assessment of the planter said to have been damaged. He stated that the people in the photos are not known to him and so is the vehicle in the photo. He explained that the notice he had was dated 3<sup>rd</sup> August, 2016 and was to one Simon Kirima in respect of a tractor registration No. KBB 3533X. This was on instructions from Equity Bank against Mr. Kirima. That the respondent's planter was not indicated in the said notice. He produced the notification of sale and letter from Equity bank as D. Exb1 and 2 respectively. He explained that what was proclaimed was only the tractor.

16. In cross examination he said he had been instructed to re-posses 20 or 16 row planters, and he was only attached a tractor. He did not know one Mr. Kirima but Mr. Samuel Kiarie. He was not aware if Mr. Kiarie repossessed the respondent's planter. He confirmed that the photo produced had an 18 row planter and he had seen the cabin and rear of the lorry. He was aware of the case reported at the police station. He denied dumping the planter on the road. He did not call Mr. Kirima as a witness. The planter was under lease and if confiscated its not liable to determine the loss.

17. The appeal was disposed of through written submissions.

### **Appellant's submissions**

18. These were filed by S. M. Omare & Company advocates and are dated 8<sup>th</sup> July, 2025. Counsel abandoned grounds (i) and (ii) of the Memorandum of appal dated 28<sup>th</sup> March, 2022. He submitted on grounds 3 & 4 together. He made reference to

the evidence of PW2 who denied knowing the appellant. On the evidence of PW4 counsel submitted that the witness who was present when the planter was taken made mention of a “Kiarie” or “Keino” who came with APs and that the said ‘Kiarie’ is an auctioneer. He submitted that the appellant does not go by the name of “Kiarie” or “Kieno” and the said ‘Kiarie’ was not sued nor called as a witness. The D.O whose Land rover was towing the planter was also not sued nor called as a witness. Further that it was not demonstrated that the lorry that transported the planter belonged to the appellant. The owner of the said lorry, he argues was not sued.

19. Secondly that it was not pleaded that the people who took the planter were agents or employees of the appellant or that they acted on his instructions

20. On ground 5 counsel submitted that the pleaded special damages were never proved as is required by the law. Reference was made to the cases of: **Capital Fish Kenya Limited V The Kenya Power & Lighting Company Civil Appeal No. 18 of 2014**, and **Otieno, Ragot & Company Advocates V Kenya Airports Authority [2021] KECA 587 (KLR)**. Counsel submitted that no records were produced to show how much the respondent used to make out of the use of the planter. There was also an issue as to when the planter was returned. Was it after 5 or 40 days? Reference was made to the evidence of PW2 and PW4.

Counsel contended that it was returned on 13<sup>th</sup> August 2016 and there was no evidence of damage to it, nor any repairs made on it. That there was also no evidence of when it was restored to good working order if at all. He therefore dismissed the respondent's claim for alleged losses for four (4) seasons.

21. Counsel further argued that the respondent had failed to mitigate his losses. He cited the case of **African Highland Produce Limited V John Kisorio (2001) KECA 364 (KLR)** in support. He argued that the respondent did not show any steps he took to mitigate his losses, if any.

22. On ground 6 counsel reiterated what he had submitted on mitigating losses. Secondly that the planter was not new and had depreciated. That having been bought in 2004 it had by 2019 deteriorated to the value of Ksh 47,226.77. He submitted that ground 7 was covered by the submissions in grounds 3-6. He urged the court to allow the appeal and dismiss the respondents case with costs both in the lower court and this court.

### **Respondents Submissions**

23. These were filed by Elizabeth Wangari & Co advocates and are dated 3<sup>rd</sup> September, 2025. Counsel gave a brief summary of the facts. She identified four issues for determination. On whether the trial court erred in finding that the respondent proved that the appellant unlawfully confiscated the suit planter, counsel condensed grounds 3 &

4 of the appeal. She submitted that PW4 mentioned Kiarie as the person who approached him in the company of AP Officers. She disputed the names shown as “Keino or Kione” in the typed proceedings. Counsel pointed out that the evidence of the appellant was full of contradictions which should be noted by the court. Referring to the letter by Equity bank, she urged that the bank was specific on what properties were to be repossessed which did not include the respondent’s property. She urged this court to uphold the lower court’s finding on this.

24. On whether the trial court erred in finding that the respondent was entitled to damages for loss of income of Ksh 1,200,000/=, she argued that the bank gave clear instruction to the appellant which were not adhered to. On this she referred to the case of **Co-operative Insurance Company Ltd V Secucentre Ltd & another [2016] eKLR** which quoted with approval the case of **House of Lords in Stevenson V Roward V Roward [1830] 6 ALL ER 668** which held:

*“If an agent departs from the usual practice of introducing the double manner of holding, and having neglected to procure confirmation, he was bound to make good the loss”*

25. She also relied on the case of **National Industrial credit Bank Ltd V S. K. Ndegwa Auctioneer [2005] eKLR**. She thus submitted that the respondent was never given an

opportunity to be heard before the repossession. He thus suffered loss for the years 2016, 2017 and 2018. That this was never challenged and further that proof of loss of income need not be proved through documentary evidence. On this she referred to the case of **Kimatu Mbuvi T/a Kimaru Mbuvi & bros V Augustine Munyao Kioko [2006] KECA 130 (KLR)** which was decided by the Court of Appeal.

26. On whether the trial court erred in finding that the respondent was entitled to an order for purchase of a new planter or in the alternative deposit of Ksh 400,000/= being the money required to buy a new planter by the appellant, counsel answered in the negative. She argued that contrary to the appellant's submissions the evidence of PW4 was that the planter was never returned but was dumped. That the issue of depreciation under the Income Tax Act was not only not pleaded and/or litigated but is of no relevance. She referred to the case of **Sakuda V Pyrotechnics company Ltd [2022] KEHC 10612 (KLR)** which held:

*"I agree with the respondent that the Appellant cannot be allowed to plead new issues during the appeal. He had the opportunity to do so in the lower court but he did not plead the issues he is now bringing up"*

27. On who should bear the costs of the appeal she urged that the same is discretionary and ordinarily costs follow the event under section 27 of the Civil Procedure Act. She

therefore prayed for costs both in the trial court and this court.

### **Analysis and determination**

28. This is a first appeal and this court has a duty to reexamine and reevaluate the evidence on record and come to its own conclusion. It must also appreciate the fact that unlike the trial court it did not have the advantage of hearing and seeing the witnesses and must give an allowance for that.

29. This was the holding in **Selle V Associated Motor Boat Company [1968] E.A 123 at 126** where the Court of Appeal held:

*“..... An appeal to this court from a trial by the High court is by way of retrial and the principles upon which this court acts in such appeal are well settled. Briefly but, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstance or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.*

30. Upon careful consideration of the record of appeal, grounds of appeal, submissions by both parties, cited authorities and the law, I find the following issues to fall for determination:

- (i) Whether the respondent proved his claim against the appellant to the required standard
- (ii) Whether the trial court erred in ordering for a new planter to be bought by the appellant or for a deposit of Ksh 400,000/= to be made in court by the appellant
- (iii) Was there justification for the award of Ksh 1,200,000/= to the respondent?
- (iv) Who should be condemned to pay costs of the appeal.

**Issue No (i) Whether the respondent proved his claim against the appellant to the required standard**

31. The respondent called 4 witnesses while the appellant called one witness. The respondent was not present when the planter was taken away. He was only given reports by PW2 and PW4. PW2's evidence is that on the material day he met a District Officer's Land rover with police officers attached to the DO's Office towing the respondent's planter. Later the planter was returned to PW4's farm but dumped on the road.

32. From the witness statement by PW2 dated 5<sup>th</sup> September, 2017 and the evidence on record PW2 did not identify the person who took away the planter. Secondly, he did not tell

the court who had mistaken the respondent's planter of 18 rows for that one of Kerema of 16 rows. According to him the motor vehicle KAU 963C (photos) is the one that returned the planter and he did not know its owner and neither did PW1, PW2 or PW4 conduct a search for the motor vehicle KAU 963C. There are two men in the photo (P Exb 5). There is no witness who told the court who these two men were. No report was made to the police about the return of the planter by the vehicle KAU 963C (P Exb 5).

33.I have read the witness statement by PW4 (Dickson Kuria Mburu) dated 8<sup>th</sup> September, 2017 and the evidence adduced by this witness in court. In his witness statement he averred that on 8<sup>th</sup> August, 2016 the appellant (Isaac Kipyegon Langat) came with two A.P officers to where he was at Mwisho wa Lami and they towed away the planter using the District Officer's Mau Narok Land Rover to Mau Narok. That the appellant returned the planter on 13<sup>th</sup> August, 2016 at Mwisho wa Lami. When he refused to take it they (sic) left with it. He even stated that he was told the attachment was by mistake. Who told him this? His evidence in court is totally different from that in the witness statement.

34.In court he said that the lorry that took the planter, is the one which returned it. That the auctioneer who took it, is Kiarie (hand written proceedings). According to PW2 and PW4 the vehicle that carried away the planter was a Land

rover belonging to the District Officer Mau Narok. And PW4 further stated that it was the same one that returned it. The vehicle in the photo produced as P. Exb 5 is not a G. K. Landrover. It is more of a trailer/carrier and it is the one that was captured by PW2 in the photo. So, which is which?

35. PW2 denied ever seeing the defendant driving the lorry or vehicle that carried the planter. On the other hand, PW4 said it was the defendant who came for the planter and returned it. Were they seeing the same thing really?

36. If indeed it was Mr. Kiarie who carried away the planter, he should have been made a party to this claim. Secondly, if it was presumed he was sent by the appellant there ought to have been evidence showing that Equity Bank had instructed Kaloto Auctioneers to attach the respondent's planter. Further it ought to have been shown that the said Kiarie was acting on the appellant's instructions.

**Issue No (ii) Whether the trial court erred in ordering for a new planter to be bought by the appellant or for a deposit of Ksh 400,000/= to be made in court by the appellant**

37. When the planter was dumped on the road after 5 or 40 days after its attachment what did the respondent do? Did he take it in? Did he leave it on the road? Was any report made on the return of the planter? Where is it? How did the respondent, PW2 and PW4 know that it had been badly damaged when no report of assessment was presented to

court? I am asking all these questions because it is not clear how the trial court arrived at the decision to have the appellant buy a new planter or deposit Ksh 400,000/= for its purchase in court. I find no justification in the issuance of the order for the appellant to buy a new planter.

**Issue No (iii) Was there justification for the award of Ksh 1,200,000/= to the respondent?**

38. Based on my findings on issues (i) and (ii) I do not find any justification for the award of the Ksh 1.2 million as damages. Was it for the alleged 5 or 40 days the respondent was not in possession of the planter? Even if it was for the unknown number of days, it was not proved that the appellant is the one who confiscated the planter.

**Issue No. (iv) Who should be condemned to pay costs of the appeal.**

39. Section 27 of the Civil Procedure Act makes provision for costs. The general rule is that costs follow the event. However, the court has the power to exercise discretion in deciding who should pay costs which I will do.

40. The upshot is that the trial court did not do a proper analysis of the material that was before it. Further he did not give sufficient reasons for the findings he arrived at.

41. I therefore find merit in the Appeal which I hereby allow. The Judgment by the trial court is set aside and substituted with an order dismissing the respondent's amended plaint dated 28<sup>th</sup> September, 2018.

42.The appellant is awarded  $\frac{1}{2}$  costs both in the lower court and High court.

43.Orders accordingly

**Delivered virtually, dated and signed this 16<sup>th</sup> day of December, 2025.**

**H. I. ONG'UDI  
JUDGE**