

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC APPEAL NO. 1 OF 2018

JOSEPH OKOLE OMUKAGA

APPELLANT

= VERSUS =

**THE CHAIRMAN CONSTITUENCY DEVELOPMENT FUND
TESO SOUTH CONSTITUENCY** **1ST**
RESPONDENT

**KENYA RURAL ROADS AUTHORITY
(BUSIA REGION)** **2ND**
RESPONDENT

(Being an appeal from the judgment of **HON. M. A. ODHIAMBO RESIDENT
MAGISTRATE** delivered on 10th August 2018 in **BUSIA CHIEF MAGISTRATE'S
COURT CIVIL CASE NO 265 of 2015**)

J U D G M E N T

1. **JOSEPH OKOLE OMUKAGA** (the Appellant herein) was the Plaintiff in **BUSIA CHIEF MAGISTRATE'S COURT CIVIL CASE NO 265 of 2015** in which he had impleaded **THE CHAIRMAN TESO SOUTH CONSTITUENCY DEVELOPMENT FUND** and **THE KENYA RURAL ROADS AUTHORITY** (the 1st and 2nd Respondents respectively) seeking the main remedy that the Respondents be permanently enjoined from evading,

trespassing onto, cultivating or in any way dealing with his land parcel **NO SOUTH TESO/APOKOR/2977** (the suit land) as well as general damages for the sugar cane destroyed thereon plus costs and interest.

2. The basis of the Appellant's suit was that he is the proprietor of the suit land upon which the Respondents purported to create a public road without any colour of right and in the process, damaged his sugar cane worth Kshs.240,000.
3. The Respondents filed a joint defence denying that they had encroached onto the suit land and purported to build a public road thereon and damaged the Appellant's sugar cane valued at Kshs.240,000.00 and put him to strict proof thereof. They pleaded that it was the Appellant who had encroached on the road reserve for the **AMUKURA-KAMUNOIT ROAD**. They added further that the said road serves various public facilities being **AMUKURA MARKET, KAMUNOIT PRIMARY SCHOOL, KOSERA PRIMARY SCHOOL, KAMUNOIT DAM** as well as the proposed Teacher Training College and is therefore in public interest that the same be improved. Further, that the contractual arrangements have been entered into with a third party being the contractor who is improving the said road and

who will be prejudiced. The Respondents pleaded that the public road has been in existence since 1967 with a road reserve width of 9 metres which did not extend to the suit land.

4. The suit came up for hearing on 24th April 2018 and further hearing on 15th May 2018 when the Appellant was the only witness who testified in support of his case and also produced supporting documentary evidence.
5. In a reserved judgment, the trial magistrate dismissed the Appellant's suit on 10th August 2018 finding that although the Appellant had proved ownership of the suit land, he had not proved that he was entitled to the orders of an injunction or for the damage of the crop thereon. Each party was ordered to pay their own costs.
6. The Appellant was aggrieved by that judgment and lodged this appeal on 3rd September 2018. He sought an order that the said judgment be set aside and instead, judgment be entered for him as prayed in his plaint.
7. The following six (6) grounds of appeal have been proffered:
 - 1) That the learned trial magistrate erred in law and in fact in failing to appreciate the factual and legal

issues before her for determination and thereby misdirected herself in making a finding that the Appellant had not established a case for an order of permanent injunction against the Respondents on land parcel **NO SOUTH TESO/APOKOR/2977**.

- 2) That the learned trial magistrate erred in law and in fact in failing to appreciate that the un-controverted evidence adduced by the Appellant was way above the threshold expected in establishing a case in civil cases on the balance of probabilities and thereby wrongfully dismissed the Plaintiff's case.
- 3) That the learned trial magistrate erred in law and in fact in disregarding the Agricultural Officer's report on the extent of damage of the Appellant's sugar cane assessed at Kshs.79,399 for single harvest and the Appellant missed out on 5 harvest and the Court's duty was to award General damages based on established proven evidence in Court and not necessarily as pleaded or submitted on which duty she abdicated in dismissing the claim for General damages.

- 4) That the learned trial magistrate failed to appreciate that it was the existence of interim orders which stopped them from trespassing and destroying the Appellant's sugar cane and the same was to last upon determination of the suit and hence the prayer for a permanent injunction.
 - 5) That the learned trial magistrate erred in law and in fact in failing to appreciate that the Appellant's evidence was un-challenged and had been proved to the required standard.
 - 6) That the learned trial magistrate erred in law and in fact by failing to appreciate and apply the established principle of issuing injunctive orders and thereby wrongfully dismissed the Appellant's suit.
8. The appeal having been admitted to hearing by **A. OMOLLO J** on 23rd January 2020, it was placed before me for directions on 18th February 2025 when **MR OKUTTA** counsel for the Appellant informed me that **MR RAPANDO** counsel for the Respondent had not been attending Court. I directed that the appeal be canvassed by way of written submission to be filed on or before 5th March 2025. However, by 25th March 2025,

only **MR OKUTTA** instructed by the firm of **OUMA OKUTTA & ASSOCIATES ADVOCATES** for the Appellant had filed his submissions **MR RAPANDO** instructed by the firm of **J. M. RAPANDO ADVOCATES** for the Respondent had not filed any submissions though duly served with the Appellant's submissions and neither did he attend Court.

9. I have considered the appeal, the record and the submissions by the Appellant's counsel.
10. This is a first appeal. My duty was set out by the then East African Court of Appeal in the case of **OKENO -V- R 1972 E.A 31** as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -v- R 1957 E.A 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weight conflicting evidence and draw it's own conclusions (Shantilal M. Ruwala -V- R E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and

conclusions; it must make its own findings and draw it's own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witness, see Peters -v- Sunday Post 1958 E.A. 424."

My duty is therefore to re-consider and re-evaluate the evidence which was before the trial magistrate and draw my own conclusions. Where the trial Court's findings were based on no evidence or where that Court is shown to have acted on wrong principles, then this Court as an appellate Court must interfere - see also **SELLE & ANOTHER -V- ASSOCIATES MOTOR BOAT COMPANY LTD 1968 E.A 123** and also **MWANASAKONI -V- KENYA BUS SERVICES LTD 1958 KLR 931 [1085 eKLR]**. In the case of **PETERS -V- SUNDAY POST LTD 1958 E.A. 424**, it was held thus:

"Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no

evidence to support a particular conclusion; or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate so to decide.”

I shall be guided by the above precedents and the law in determining this appeal.

11. In the impugned judgment the trial magistrate set out the following to be the issues for determination:

- 1) Whether the Appellant had established ownership of the suit land.**
- 2) Whether the Appellant established sufficient grounds for grant of an injunction.**
- 3) Whether the Appellant established facts of destruction of the sugarcane and who was to blame for the said destruction.**
- 4) Who is to bear the costs.**

I shall similarly take the same path even as I consider the six (6) grounds of appeal.

12. On the first issue, the trial magistrate made a finding, and rightly so, that the Appellant having produced the title deed to

the suit land had proved ownership of the same. There can be no doubt about that.

13. As to whether the Appellant had established sufficient grounds for the grant of an injunction, the trial magistrate is faulted in grounds **NO 1** and **4** for misdirecting herself in making a finding that the Appellant had not established a case for an order of a permanent injunction against the Respondent and also by failing to appreciate that it was the existence of the interim orders which had stopped the Respondents from trespassing on the suit land and destroying the Appellant's sugar cane. In paragraph **NO 6** of his plaint, the Appellant had pleaded as follows:

6: "The Plaintiff's claim against the Defendant is for an order of temporary injunction to restrain the Defendants either by itself, agents, workers or employees from further entering, invading, digging, cultivating or paving a road path or way on parcel of land SOUTH TESO/APOKOR/2977 and further damaging cultivated crop of sugar cane or any crop cultivated on the said parcel of land."

It is clear that the above pleading was an erroneous slip on the part of counsel and that what was intended was infact an order of permanent injunction. This is because the Appellant had already been granted an order of temporary injunction by the trial Court on 24th August 2015 following a Notice of Motion dated 31st July 2015. That Motion sought, inter alia, an order of temporary injunction restraining the Respondents from entering, invading, digging, cultivating or paving a road path on the suit land or damaging the crops thereon pending the hearing of the suit. That order was extended on 19th October 2015 and an application by the Respondents to set it aside was dismissed vide a ruling delivered on 18th April 2016. The trial of the suit then commenced on 24th April 2018 no doubt with the temporary order of injunction still in place.

14. The trial magistrate fell into the same error and treated the suit against him as seeking an order of temporary injunction. At page 3 of the impugned judgment (page 59 of the record of appeal), she states as follows:

“Issue 2 on whether or not Plaintiff has established sufficient grounds for grant of injunction. In determining issue NO 2 I will be guided by the

principles set out in the celebrated case of Giella - V- Cassman Brown 1973 E.A. 357.”

The trial magistrate then proceeds to add as follows:

“Prima facie case. The 1st principle is whether or not the Plaintiff has established a prima facie case....

The 2nd limb is that if no injunction is issued applicant will suffer irreparable loss.”

The trial magistrate erred in law and in fact in regarding what was before her as a prayer for an order of temporary injunction. That was not the case. What was before her was a prayer for an order of permanent injunction to restrain the Respondents from interfering with the suit land by invading, trespassing, cultivating or dealing with it in a manner adverse to his interest. And although in paragraph 6 of his amended plaint dated 31st July 2015 he had pleaded that the Respondents were paving a road on the suit land, the Court would have expected photographs of that road. In the impugned judgment, the trial magistrate made the finding that the Respondent **“abandoned the work in 2015 hence issuing an injunction would be a chase after the wind”**.

I also notice from the replying affidavit dated 31st August 2015 by one **VINCENT OKOCHIL** the 1st Respondent's chairman that the **AMUKURA-KUMUNOIT** road has existed for over 40 years long before the land Adjudication exercise. The trial magistrate took the view that the evidence of a surveyor was necessary to show that indeed there was road works on the suit land. And although the trial magistrate considered the prayer as one of a temporary injunction and applied the wrong principles, I am persuaded that she nonetheless arrived at a correct decision because it appears from the totality of the evidence herein that there was nothing to injunct.

15. However, with regard to the damages awardable for the destruction of the Appellant's sugarcane crop, the trial magistrate addressed that issue as follows in page 4 of the impugned judgment under issue **NO 3**:

“The report from agricultural officer dated 10th July 2015 established the fact that Plaintiff's sugar cane was destroyed. Once the fact is established, this Court is called upon to determine whether or not Plaintiff is entitled to compensation. Although the Plaintiff's prayers are for general damages,

claims in nature of crop destruction where the value can be ascertained falls under the category of special damages. This is specifically so given the fact that fact (sic) the Plaintiff placed his loss at Kshs.240,000 as per paragraph 4 of the amended plaint dated 31st July 2015 ...

The report places the loss at Kshs.79,939/= while the Plaintiff submissions places the loss at Kshs.490,000/= this Court is at a loss to determine exactly what amount the Plaintiff claims from the Defendant. Whether it is Kshs.79,939/= contained in crop assessment report, Kshs.240,000 as per the amended plaint or 490,000 as per submissions dated 9th July 2018.”

In the impugned judgment, the trial Court declined to award any damages on the ground that the Appellant **“had full access to his parcel of land to mitigate any loss”**. In his report dated 10th July 2015 and which was produced during the trial, the Agricultural Extension Officer **MR OTAMA JOSHUA** states as follows in the last paragraph under **SUMMARY:**

“The farmer needs to be compensated the equivalent to the expected returns amounting to Kshs.79,939.50 (seventy-nine thousand, nine hundred thirty-nine cents fifty only).

Kindly assist the farmer recover to value of the damages he has incurred or otherwise arbitrate between them to achieve an amicable solution for peaceful co-existence.”

In paragraph 10(b) of his amended plaint, the Appellant had pleaded as follows:

(b) “General damages of sugar cane destroyed on land parcel NO SOUTH TESO/APOKOR/2977”.

In his submissions, counsel for the Appellant has stated as follows in paragraph 12(2):

2: “That the Appellant be awarded the sum of Kshs.400,000/= prayed for as general damages premised on the Agricultural Report tendered together with interest at Court rate from date of filing suit.”

It is clear from that submission as read together with paragraph 10(b) of the amended plaint that the Appellant

should have crafted his pleadings in a better manner. No special damages were quantified in the amended plaint and the Agricultural Officer's report assessed the Appellant's loss at Kshs.79,939.50 only. That amount ought to have been pleaded as special damages since it had already been quantified by the Agricultural Officer's report. There was no evidence from the Respondents to contradict that sum and therefore, there was no reason why the trial magistrate declined to award it notwithstanding the lapse in the pleadings. When the Appellant testified on 24th April 2018, he is recorded as saying the following:

“I then went to the ward Agricultural Officer. Agricultural Officer assessed the damages caused and prepared a report dated 10.7.15. The report was informing that my sugar can had been damaged. The value of sugar cane damaged was 79,939/=. I have so far missed out on five cutting. My claim would amount to 79,939 x 5 cuttings. This is 400,000/=. MFI4 - Report from Agricultural Officer.

I would wish to be granted permanent injunction against them for interfering with my land. I am also praying for the damages of Kshs.400,000/=. I am also asking for the costs of the suit.”

As I have already stated above, the Appellant could have done better with his pleadings. But that notwithstanding, a Court of law is under a duty to deliver substantive justice without regard to procedural technicalities - **Article 159(2) (d)** of the **Constitution**. It is clear from the evidence herein that though not specifically pleaded as special damages, the sum of Kshs.79,939.50 was actual loss which the Appellant suffered when the Respondents damaged his sugar cane. There was no evidence to suggest that he suffered that loss five (5) times and if he did, a further report ought to have been preferred by the Agricultural Officer. In the absence of such further report, the special damages claim can only be Kshs.79,939.50 as quantified in that report.

16. The Appellant pleaded **“general damages”** in paragraph 10 (b) of his amended plaint as already stated above. In the circumstances of this case, the trial Court ought to have made an award under that head in keeping with the above cited

constitutional provision and also the case of **ODD JOBS -V- MUBIA 1970 E.A. 476** in which it was held that a Court may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue had been left to the Court for decision. In the circumstances of this case, the trial magistrate ought to have awarded an appropriate sum as general damages since it is obvious that the sum of Kshs.79,939.50 cannot be general damages. In his submissions, the Appellant's counsel has stated **"that the Appellant be awarded the sum of Kshs.400,000 prayed for as General damages ..."**. The power of this Court, is provided for under **Section 78(2)** of the **Civil Procedure Act** as follows:

2: "Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein."

Since the damaging of the Appellant's sugar can amounted to an act of trespass on the suit land, an award of general

damages was available to the Appellant in addition to the Kshs.79,939.50 which, as is now clear, could only be special damages. In the circumstances of this case. I will make an award of Kshs.400,000 as general damages.

17. With regard to costs, the Respondents filed a joint defence although they did not turn up for the hearing. They have also not participated in this appeal although duly served. The Appellant is entitled to costs both here and in the Court below.
18. The up-shot of all the above is that having considered this appeal, I allow it and make the following disposal orders:

a) The judgment of the trial magistrate delivered on 10th August 2018 is set aside.

b) In it's place there shall be judgment for the Appellant against the Respondent's jointly and severally in the following terms:

- 1) Special damages of Kshs.79,939.50**
- 2) General damages of Kshs.400,000.**
- 3) Interest on (1) shall be from the date of filing the suit and on (2) from the date of this judgment.**

c) The Respondents shall meet half the costs of the Appellant here and in the Court below.

BOAZ N. OLAO

JUDGE

26TH FEBRUARY 2026

Judgment dated, signed and delivered by way of electronic mail on this 26th day of February 2026 with notice to the parties.

Right of Appeal

BOAZ N. OLAO

JUDGE

26TH FEBRUARY 2026

Explanatory notes:

This judgment was due for delivery on 9th October 2025. However, following my transfer from Busia to Iten Court w.e.f 15th December 2025 I had to prioritize my part heard cases. That has contributed towards the delay in delivering this judgment. The same was unavoidable and is registered.

BOAZ N. OLAO

JUDGE
26TH FEBRUARY 2026

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