

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E168 OF 2023

PAULINA KAWIRIA MARIU.....
.....APPELLANT

VERSUS

KENYA WILDLIFE SERVICE.....
.....RESPONDENT

**(Being an Appeal from the Judgement by Hon. E.
Chesoni delivered on 3rd August,2023 in Maua Chief
Magistrate's Civil Cause No. E026 of 2023)**

JUDGEMENT

1. The Appellant in the aforementioned matter instituted a suit in the lower court against the Respondent vide a plaint dated 9th February,2022 seeking for: -
 - a. Payment of Special Damages of Ksh.1,136,880/=
 - b. General Damages.
 - c. Costs of the suit and interest.

2. She pleaded that on or about 12th February,2021, she had cultivated and planted several crops, namely kales, water melons, onions and bananas on her farm located at

Baibariu Sub-Location, Kawiru Location, Meru County, but owing to the Respondent's negligence and recklessness, rogue elephants wandered from the adjoining Meru National Park into her shamba and trampled, uprooted and fed on the crops thereby occasioning extensive damage.

3. The Respondent vide its defence dated 4th March, 2022 denied the claim by the Appellant. The Respondent denied the particulars of negligence, allegations of its breach of statutory duty and special damages as set out in the plaint. The Respondent asserted that the loss and damage suffered by the Appellant, which was denied, was substantially caused by her negligence.
4. Upon hearing both parties, the trial court held that the Appellant had not established her case on a balance of probabilities and consequently dismissed the suit with costs to the Respondent.
5. Aggrieved by that decision, the appellant has preferred this appeal. In her Memorandum of Appeal dated 6th October, 2023, the Appellant raises the following grounds of appeal: -

- a) That the Learned Magistrate erred in law and fact in dismissing the Appellant's suit on basis of prove of liability while on the other hand holding that the Appellant's property was indeed damaged.
- b) That the Learned Magistrate erred in law and fact by dismissing the Appellant's suit on basis of lack of prove on liability whereas the government agricultural officer assessment report was clear on who was indeed the owner of the damaged property.
- c) That the Learned Magistrate erred in law and fact by failure to take note of the available evidence that distinguished Appellant as the owner of the damaged property.
- d) That the Learned Magistrate ignored and failed to give any consideration on Appellant evidence that identified the owner of the damaged property.
- e) That the Learned Magistrate erred in law and fact by apportioning Appellant 20% liability while the Appellant had no control of wildlife animals and she could have done nothing to prevent invasion of her property by wild animals.

6. The Appellant thus prayed that the Appeal be allowed, Judgement of the trial court be set aside and this court assesses damages in terms of Agricultural Officer's assessment report. She also sought orders that the costs of the Appeal to be borne by the Respondent.
7. Parties took directions to canvass the Appeal via written submissions. I will not rehash the same but will, where necessary, refer to them.

Analysis & Determination

8. This being a first appeal, this court is conscious of its responsibility as pronounced in **Selle & Another -vs- Associated Motor Boat Company Ltd & others** [1968] EA 123, which is to;

“Reconsider the evidence, evaluate it, and draw its own conclusions. The court though must always bear in its mind that, ‘it has neither seen, nor heard the witnesses and should make due allowance in that respect”.

9. Having perused the entire record of appeal, I have noted one serious issue.

10. From a look at the Plaint filed before the lower court, the appellant claimed special damages of Ksh. 1,136,880/- being the assessed value of the crops destroyed in her farm.
11. I have noted that despite this claim, the appellant only paid Ksh. 2,000/- as filing fees. This was way short of the required fees, which amount to Ksh. 40,000/- as per the existing Court fees assessment schedule.
12. Section 96 of the Civil Procedure Act provides for instances where inadequate court fees are paid. It states as follows;

Power to make up deficiency of court fees

Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force

and effect as if such fee had been paid in the first instance.

13. Section 71 of the Interpretation and General Provisions Act Cap 2 provides that public officer cannot act on a document where the fee is not paid. That section provides as follows:-

“ (1) Where a person, public officer or local authority is required to do anything for which a fee is to be paid or a charge made under a written law, that person, public officer or local authority may decline to do that thing until the fee is paid or until payment of the charge is made, or, where the precise amount of the payment to be made cannot be ascertained until the thing has been done, until there is paid such an amount as may be estimated to be the correct amount by the person or public officer, or the responsible officer of the local authority, required to do the thing.”

14. In my view, the lower court had a duty to ensure that the full court fees were paid before it could proceed to hear the parties. It should thus have given the appellant an

opportunity to make up for the deficiency in the filing fees as required by the law. If there was no compliance, then the court had the power to strike out the suit or deal with it in a like manner. This did not happen.

15. Since the court fees were not paid, then the appellant should not have been heard in the first place.
16. So what orders should issue?
17. Since the proceedings in the lower court ought not to have proceeded before the full fees were paid, then the same were a nullity and they are hereby set aside. The matter is referred back to the lower court for compliance with section 96 of the Civil Procedure Act. The trial court will be at liberty to strike out the suit in case of noncompliance.
18. The respondent shall have the costs of this appeal.

Dated, signed & delivered at Meru this 5th day of March, 2026.

H.M. NYAGA

JUDGE