IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 110 OF 2015

BETWEEN

TRANSMARA SUGAR COMPANY.....APPELLANT

AND

DANIEL NYABUTO MOMANYI.....RESPONDENT

(An appeal arising from the Judgment of the High Court of Kenya at Kisii, (Wakiaga, J) dated 29th day of September, 2015

in

CIVIL APPEAL NO. 36 OF 2013)

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JUDGMENT OF ASIKE-MAKHANDIA, J.A

By a re-amended Plaint, the respondent filed suit against the appellant at the Principal Magistrate's Court in Kilgoris claiming special damages and compensation for destroyed crops, costs of the suit and interest. The facts in support of the claim are that the respondent leased a farm being Land Parcel No. Ololchani/785 from a one Moses Konchellah. Pursuant to the lease agreement, the respondent ploughed four (4) acres and planted tomatoes, beans and cabbages. On or about 26th September 2010, the agents and or servants of the appellant unlawfully and maliciously destroyed all the crops by ploughing the land using a tractor. It was urged that the appellant company was vicariously liable for the acts and omissions of its agents or servants in destroying the crops.

The respondent specifically pleaded the particulars of damages as:

(a) 3 acres of tomatoes at expected yield of 15 tonnes per acre by 3 by 32 kg at Ksh. 600.

(b) 1 acre of cabbage at expected yield of 40 tonnes per acre at Ksh. 20 per kg.

(c) Beans relay planted compose acre and

(d) Labour.

In the re-amended plaint, the respondent prayed for special damages in the sum of Ksh. 900,000 as compensation for the destroyed crops.

In its re-amended statement of defence, the appellant denied that the respondent had leased Land Parcel No. Ololchani/785 from a one Moses Konchellah. Conversely, the appellant contended that it is the one that leased Land Parcel No. Ololchani/785 from the said Moses Konchellah to grow sugar cane intended for its white sugar production and was granted vacant possession thereof. If at all there were any crops on the land, the person who violated the lease agreement with the respondent was the said Moses Konchellah. Any liability to the appellant should be visited upon Mosses Konchellah as the lessor of the land.

In the interim, Samwel Ntalamia Olonana was charged in Kilgoris Criminal Case No. 154 of 2011 with the offence of malicious damage to property contrary to Section 339 (1) of the Penal Code. The particulars were that on the 26th September 2010 at Nyangusu in Transmara District, he willfully and unlawfully destroyed planted cabbages, tomatoes and beans planted on a 4-acre piece of land the property of Daniel Nyabuto Momanyi – the respondent herein. In finding that Samwel Ntalamia Olonana was guilty of the offence as charged, the trial

magistrate held that the Samwel featured prominently as the agent of Transmara Sugar Company everywhere including the supervision of destruction of the crops.

Upon hearing the parties in relation to the claim for special damages, the trial magistrate entered judgment for the respondent against the appellant in the sum of Ksh. 900,000/= together with costs and interest from the date of judgment i.e. 8th March 2013. In entering judgment, the magistrate stated as follows:

> ***…****To my mind, the first two issues were substantively determined in Kilgoris Criminal Case No. 154 of 2011. The judgment produced as P exh. 5 shows that the court made a specific finding that the accused in that case was an agent of the defendant and had supervised the destruction of the plaintiff's crops. The same also shows that as a consequence he was convicted for the offence of malicious damage to property belonging to the plaintiff. That decision was not challenged and therefore holds true even in this proceedings.*
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> *It has also been proved on a balance of probabilities that the defendant is vicariously liable for the destruction of the plaintiff's crops in the proceedings herein as well as in Kilgoris SRMCC No. 154 of 2011.*
>
> *The plaintiff has claimed special damages to the tune of Ksh. 900,000/= and has explained that he forbore to claim Ksh. 1.8 million because of the initial lack of pecuniary jurisdiction by this court. It is trite that special damages must not only be pleaded but must also be specifically proved and to my mind, only the items on tomatoes and cabbages were specifically pleaded. Two experts were called one by the plaintiff the other by the defendant….. DW1 did not give an expert report on the expected output although it is admitted that the crops would have yielded something. The only expert report available is therefore that done by PW1. It was his assessment that the crops being 3 acres of tomatoes, 1 acre of cabbage and 1 acre of beans would have given a total yield of Ksh. 1,692,200/=. I find it has been proved on a balance of probabilities that this is indeed the sum that would have been realized from the said crops.*
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> *The plaintiff has however pleaded Ksh. 900,000/= and going by the rule that parties are bound by their pleadings, I can only enter judgment for the plaintiff for the sum pleaded.*
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> *For the foregoing reasons, I enter judgment in favour of the plaintiff for the sum of Ksh. 900,000/= as special damages together with costs and interest on the same from the date of this judgment.*

Aggrieved by the judgment of the trial magistrate, the appellant lodged a first appeal to the High Court. The appeal was dismissed. In dismissing the appeal, the learned judge expressed as follows:

> *[23] From the evidence on record, the respondent had proved that the agent of the appellant who destroyed his crops was convicted before the criminal court and there being no appeal preferred by the same, it follows that the appellant is vicariously liable for his action which was not only unlawful but also unreasonable for which the respondent should have been awarded punitive damages.*
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> *[24] Both PW1 and DW1 confirmed that the respondent was entitled to compensation for the damages caused with their difference only being on the calculation of the amount to be awarded. I therefore find no fault with the trail events award of Ksh. 900,000/= as pleaded by the respondents.*

Further aggrieved by the judgment of the High Court, the appellant has preferred the instant appeal citing the following grounds:

> (i) The learned judge erred in only analyzing the evidence of the respondent to the exclusion of analysis of the appellant's evidence.
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> (ii) The judge ignored all the appellant's evidence that the crops had been harvested by the time the agents of the appellant entered the farm to do the operations.
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> (iii) The judge in awarding the sum of Ksh. 900,000/= in favour of the respondent ignored all factual and scientific dynamics of calculation of agricultural production as per the defence expert witness.
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> (iv) The judge ignored the lease agreement between the appellant and the lessors and which lease was on record.
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> (v) The judge ignored the appellant's evidence including credible evidence of high probative value.
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> (vi) The judge ignored the commencement and termination dates of the lease agreements that were on record.
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> (vii) The judge erred in awarding Ksh. 900,000/= without making provision for costs that would have been incurred in earning that amount.
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> (viii) The judge erred and ignored that if at all any damage was caused, it was due to breach of contract by the lessor.
>
> (ix) The judge erred and failed to cumulatively and or exhaustively evaluate the entire evidence on record.

At the hearing of the instant appeal, learned counsel Mr. Jacob Maoto Omwenga appeared for the appellant. Learned counsel Ms Mercy Mogusu appeared for the respondent. No written submissions were filed by either party. Both learned counsels relied on the submissions

made before the High Court.

In rehashing the submissions made before the High Court, counsel for the appellant emphasized that he relied on the grounds of appeal as stated in the memorandum of appeal. Counsel laid emphasis that the learned judge erred in finding that the appellant was vicariously liable for the acts and omissions of the person who damaged the crops. It was emphasized that the appellant had a lease agreement with the lessor one Mosses Konchellah and if any person were to be held liable for the damaged crops, it was the said Mosses Konchellah.

The respondent urged this Court to affirm and uphold the judgment of the learned judge. Vicarious liability was proved and established through the *Kilgoris Criminal Case No. 154 of 2011* case where the agent of the appellant was convicted.

The valuation report by the expert proved that indeed special loss and damage had been suffered by the respondent.

I have considered the grounds of appeal as well as the submissions made by the parties before the High Court. This is a second appeal which must be confined to matters of law. I have closely scrutinized the grounds of appeal as stated in the memorandum of appeal. Most of the grounds urged are contestations of fact not law. A second appeal must be confined to points or matters of law. For instance, whether crops were harvested or not is a question of fact and whether the judge ignored factual calculations of agricultural production is a question of fact.

Further, in this matter, there are two concurrent findings of fact by the two courts below. Indeed, there is a third finding of fact in the criminal case. Drawing analogy from criminal cases, in **Adan Muraguri Mungara - v - Republic, Cr. No. 347 of 2007 (Nyeri),** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the two courts below in the following terms:

> *"As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." See* ***Aggrey Mbai Injaga v Republic [2014] eKLR****."*

In the instant matter, the appellant has failed to point out any of the findings of the two courts below that was based on no evidence. The appellant urged that the judge erred in presuming without evidence that crops had been destroyed. This ground of appeal has no merit. Two expert witnesses testified before the trial court and both agreed that indeed crops had been destroyed. PW5, Mosses Konchellah testified that he had leased the land to the respondent and later to the appellant company. However, PW5 stated he was surprised that the appellant destroyed the respondent's crops before they were harvested. Further, PW5 testified that when he entered the lease agreement with the appellant company, he did not know that it was to take effect immediately. From the testimony of PW5 and the expert witnesses, I am satisfied that the two courts below did not err in finding that the respondent's crops were destroyed before harvesting.

The appellant strenuously urged that the learned judge erred and ignored the lease agreements that were tendered in evidence and that the judge ignored the commencement and termination dates of the lease agreements. The presence or absence of a lease agreement was not an issue for determination as per the pleadings filed before the trial court. Lease or no lease, a person has no right to unlawfully damage the property of another.

The appellant further urged that if at all any person were to be held liable for the damage, then it was to be the lessor Mosses Konchellah. In my considered view, the appellant company was at liberty to enjoin the said Mosses Konchellah as a Third Party to the suit or to seek indemnity from him. A court cannot find liability for or against a person who is not a party in the suit.

On the issue of vicarious liability, I have examined the record and am satisfied that the *Kilgoris Criminal Case No. 154 of 2011* settled the issue that the accused person (Samwel Ntalamia Olonana) was an agent for the appellant company. The fact that no appeal was preferred against the conviction and sentence in the criminal case means that the finding of the criminal court remains as the true factual position.

In totality, I have considered all the grounds of appeal and find that they have no merit. I am satisfied that the two courts below properly evaluated the evidence on record and arrived at conclusions supported by the evidence. The contestation that the two courts below ignored the appellant's evidence has no merit. For instance, in arriving at the value of the damaged crops, the two courts below considered the opinion of the expert witnesses called by both the appellant and the respondent. The upshot is that this appeal has no merit and I would dismiss it with costs.

As Kiage J.A concurs, orders accordingly.

This Judgment is delivered pursuant to rule 32 (3) of the court of appeal rules since Odek, J.A passed on before the Judgment could be delivered.

Dated and delivered at Nairobi this 19th day of June, 2020.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 110 OF 2015

BETWEEN

TRANSMARA SUGAR COMPANY.....APPELLANT

AND

OTIENO, RAGOT & COMPANY ADVOCATES....RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Kisumu (E. Maina, J.) dated 16th February, 2017

in

HC Misc. Civil Appln. No. 18 of 2016)

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JUDGMENT OF KIAGE, JA

I concur with the Judgment of my learned brother

Makhandia JA, which I considered in draft, and have nothing useful to add.

Dated and delivered at Kisumu this 19th day of June, 2020.

P.O. KIAGE

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JUDGE OF APPEAL