IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 56 OF 2015

BETWEEN

DIRIE & SONS COMPANY LIMITED……………APPELLANT

AND

TAITA RANCHING COMPANY LIMITED …….. RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Mombasa (Mukunya, J.) dated 6th November, 2014 In H.C.C.C. No. 281 of 2010

JUDGMENT OF THE COURT

The respondent is the registered proprietor as a lessee of all that piece or parcel of land known as **land reference No. 12264** situate west of Macknon Road in Taita Taveta County measuring 38,040.4 hectares or thereabouts, hereinafter referred to as "*the ranch*"

By an agreement dated 1st March, 2007, the respondent granted the appellant a licence to graze his livestock in the ranch for a period of three years from 1st April, 2007 at Kshs.75/- per head of cattle. The appellant whereupon paid upfront Kshs.450,000/- grazing fee for the first three months. The grazing licence expired on 31st March, 2010. However the appellant refused to vacate and hand over to the respondent vacant possession, of the ranch. When the respondent attempted to forcefully evict the appellant therefrom, it was met with violent resistance by goons hired by the appellant. It took the intervention of the then provincial administration for the appellant to agree to move out of the ranch. However, this was not to be as on the eve of the D-day, the appellant moved to the Principal Magistrate's Court at Voi for orders to restrain the respondent from evicting it from the ranch. The court declined to grant the orders on account of want of jurisdiction. The appellant however continued with its occupation of the ranch which the respondent deemed illegal, unlawful and unwarranted.

In the meantime and acting on the advice from the Ministry of Livestock, the respondent decided to let the ranch remain fallow for about two years to enable it recover from the after effects of the devastating drought over the years. In this regard, the respondent granted conservation easement to Wildlife Works Carbon Ltd for a period of 20 years at Kshs.2,000,000/- per month. By yet another agreement the respondent granted Wildlife Works Inc. eco-tourism rights vide an agreement executed on 27th February, 2010 at an initial consideration of Kshs.350,000/- per month and a minimum of Kshs.4,000,000/- in respect of goodwill.

As a result of the appellant's failure to move out of the ranch, the agreements were frustrated forcing

the respondent to lodge a claim with the Environment and Land Court at Mombasa, seeking a declaration that the appellant's continued occupation of the ranch after expiry of the licence was illegal, unlawful and an affront to sanctity of title; a mandatory injunction compelling the appellant to vacate the ranch and deliver up to the respondent with vacant possession the ranch; special damages of Kshs.10,100,000/-; loss of income at the rate of Kshs.2,000,000/- per month until vacant possession; exemplary damages; costs and interest.

In defending itself, the appellant mounted a defence and counterclaim in which it took the view that prior to the termination of the licence, by effluxion of time, parties had negotiated and agreed on an extension of the same for a further period of 3 years. Pursuant to that extension, the appellant had continued to pay the agreed rent pending the formalization of a written agreement on the extension. Accordingly, the respondent having agreed in principle to the extension of the licence and having received rent due pursuant thereto, it was estopped from denying the same and seeking to evict the appellant from the ranch. By way of counterclaim, the appellant prayed that the respondent be restrained from evicting it from the ranch and also a declaration that it was entitled to peaceful and quiet enjoyment of the ranch.

In due course, the suit was heard by **Mukunya, J** with each party calling one witness. The witnesses merely reiterated and elaborated on the above pleadings. In a reserved judgment delivered on 6th November, 2014, Mukunya, J. found for the respondent holding thus:

> **"7. All receipts for the defendant produced were payments into**
>
> **his accounts. They were not for payment of rents. The prayers (a) and (b) in para 16 of the plaint are spent as the defendant has moved out of the premises. The defendant was supposed to pay Kshs.75/- per head of cattle when he entered the plaintiff's land. He paid an upfront deposit of Kshs.450,000/- so the monthly payment was Kshs.150,000/- If that figure is divided by Kshs.75/- per head of cattle he was therefore paying for 2000 head of cattle. This is the figure the court considers the defendant to have maintained at the firm (sic). In regard to the rent in arrears, I assess it as follows:-**
>
> **150,000x8 months =1,200,000**
>
> **…..I will grant the plaintiff six months of Eco-tourism fee at Kshs.2,100,00.00/- from, April to October, 2010 as per agreement…..**
>
> **(9) In the final analysis the plaintiffs' suit is allowed in the following terms:**
>
> **(a) Grazing rent 8 months 1,200,000.00**
>
> **(b) Six months Eco-tourism fee 2,100,000.00**
>
> **3,300,000.00**
>
> **I also grant the plaintiffs costs of the suit……"**

These holdings provoked this appeal on five grounds; that the impugned judgment was delivered without notification to the appellants as required by law thereby rendering the same invalid and a nullity; that the trial court failed to evaluate and consider all the documentary and oral evidence tendered by the appellant; that the trial court erred in taking into consideration the agreement dated 27th February, 2010, which was not produced or admitted in evidence during the trial; that the award of Kshs.3,300,000/- was based on pure speculation; and finally, that the trial court erred in failing to make a finding on the issue of estoppel raised in the defence and counterclaim.

With our permission, parties argued the appeal by way of written submissions with limited oral highlights. The appellant's submissions were to the effect that in the plaint filed by the respondent, the

claim was specific and liquidated. It was for a total sum of Kshs.10,000,000.00/-. That it was trite law that special damages must not only be specifically claimed and or pleaded but also strictly proved. For this proposition, the appellant relied on the case of **Hahn v. Singh [1985] KLR 716** and **Section 107** of the Evidence Act. However, it was submitted, this burden was not discharged in this case. With regard to the agreement executed on 27th February, 2010 for Eco-tourism rights, the same was never tendered in evidence. It was merely marked for identification. The trial court, according to the appellant therefore, ought not to have taken it into consideration in its judgment.

It was further submitted that from the plaint, it was clear that the respondent was not claiming any rent arrears from the appellant. That infact there were undisputed grazing rent payments made to the respondent on behalf of the appellant long after the expiry of the agreement. To the appellant, it was quite apparent that the trial court failed to analyse, evaluate and consider the said payments leading to the erroneous conclusion that the appellant had not paid any rent for the period it stayed on after the expiry of the agreement.

On estoppel, the appellant submitted that the trial court completely failed to address the applicability of the doctrine of estoppel raised in the defence and counterclaim which was supported by undisputed documentary evidence. The failure by the trial court to consider the concept of estoppel led the trial court to arrive at a wrong and erroneous decision.

Finally, with regard to the delay in the delivery of the judgment, it was argued that the judgment having been delivered outside the 60 days stipulated period, it was invalid, null and void. For this proposition, counsel relied on the cases of **Benjamin Macfoy v United Africa Company Limited [1961] 3 ALL ER 1169**.

Countering the appellant's submissions, the respondent was of the view that a judgment was not invalidated merely because it was delivered without notice to both parties or was delivered after the statutory period of 60 days. That in any event, the appellant had not demonstrated the prejudice it had suffered as a consequence. It was further submitted that there was no dispute that the licence granted to the appellant was terminated by effluxion of time on 31st March 2010 and there was no extension. That the letter addressed to the appellant by the respondent's chairman of the board could not be construed as extending the licence. That it was fallacious for the appellant to claim that the licence rent payments were made to the respondent when under cross-examination, it had admitted making no payments to the respondent. In any event the respondent submitted, the appellant produced the bundle of documents including the receipts evidencing payment of licence fee after the expiry of the lease long after the close of the respondent's case when there was no chance to examine, cross- examine or re-examine the appellant on the veracity of the documents. On the question of estoppel, the respondent submitted that it must be pleaded and proved by the party raising it. This the appellant had failed to do.

The jurisdictional power of this Court on first appeals is well settled. See the cases of **Selle & Another v Associated Motor Boat Ltd & others [1968] E.A. 123** and **Seascapes Limited vs Development Finance Company of Kenya Ltd [2009] KLR 389.** The principles are that this Court is duty bound to re-visit the evidence tendered in the trial court afresh, analyse, re-evaluate it and review the same so as to arrive at its own independent conclusion. It is also entitled to interfere and set aside the judgment of the trial court if it is shown that the trial court failed to appreciate the evidence properly, thereby leading to an erroneous decision. While embarking on the task, this Court must appreciate and respect the findings of fact by the trial court as well as its impression regarding the witnesses as it does not have the benefit which the trial court had in seeing and hearing the witnesses as they testified.

We wish to commence our determination of this appeal with the ground regarding the nullity or otherwise of the judgment. From the ground of appeal, the complaint is that the trial court delivered the impugned judgment without notice to the appellant as required by law thus rendering it invalid and a nullity. There is no complaint in the memorandum of appeal that the judgment was delivered late and after the expiry of the stipulated timelines. A party is only allowed to canvass the grounds of appeal as raised in its memorandum of appeal. Should a party wish to raise fresh grounds later, there is a procedure to be followed as per the rules of this Court. This was not done. We think that the broadening of the ground to

include the question of delay in the delivery of the judgment without taking the necessary measures to bring it on board properly as provided for under our rules can only pass for an afterthought and we will as a result ignore it and address only the complaint regarding delivery of the judgment without notice to the appellant. It is instructive though that the appellant has made no submissions at all on this aspect.

From the record, the hearing of the suit was concluded on 24th April 2014, with the filing of written submissions by the respective parties. Judgment was then scheduled for 1st September, 2014. However, it was not until 6th November, 2014, that the judgment was delivered. The coram of the court on the date the judgment was delivered is reflected thus:-

"On 6th November, 2014

Hon. Mukunya, J

CC: Barongo

Obara for the plaintiff

Hassan Abdi for the defendant

Judgment read in open court

Signed: Mukunya, J. 06/11/2014"

This being the record before us, the submissions by the appellant that only the respondent was served with the notice for judgment and only the respondent attended court to receive the judgment cannot stand scrutiny. It is erroneous, mischievious and not supported by the record. We are court of record and the record speaks for itself.

In any event, a judgment is not invalidated merely because the same was delivered without notice to parties or any party. It is validated or invalidated by the content and procedural acts of omission or commission during the hearing. Further a party affected by such an omission, if at all, is not without remedy. He may recall, review or even appeal the judgment. In any case, we may ask has the appellant demonstrated the prejudice, if at all, it suffered as a result? None is forthcoming from the appellant. Finally, **Section 1A** and **1B** of the Civil Procedure Act, commonly known as the Oxygen principle, provides a cushion for such eventualities. On the whole this ground of appeal has no merit at all and we reject it. The case of **Benjamin Macfoy** (supra) referred to us has no application whatsoever to the circumstances obtaining in this case.

The essence of this appeal is the awards of Kshs.1,200,000/- as grazing rent for 8 months and Kshs.2,100,000/- as 6 months Eco-tourism fee by the trial court in its judgment. Since there is no cross - appeal or grounds affirming the trial court's judgment filed by the respondent, we take the above as the main contestation in the appeal. Were those awards justified? To the appellant they were not whereas to the respondent they were wholly justified.

At the risk of repeating ourselves, in the plaint lodged in the trial court, the respondent sought a declaration, a mandatory injunction, special damages of Kshs.10,100,000/-, loss of income at the rate of Kshs.2,000,000/- per month until vacant possession, exemplary damages, costs and interest. In determining the dispute before it, the trial court held that:-

(i) The declaration and injunction could not be granted as they were spent, the appellant having moved out of the ranch.

(ii) The licence had expired on 31st March, 2010 but the appellant held on until the year 2013; hence the award of Kshs.1,200,000/- as rent arrears.

(iii) It was illogical for the respondent to claim losses for month of January, February and March, 2007 when the appellant was a licencee. Consequently, the deal regarding conservation of easement was incapable of taking effect on 1st January, 2010. It was a voidable deal and on that basis the court declined to make an award in that regard.

(iv)It granted the appellant 6 months of Eco-tourism fee being Kshs.2,100,000/- from April to October, 2010.

(v) Exemplary damages were denied.

(vi) Costs of the suit were awarded to the respondent.

(vi) Damages were awarded without interest though.

Definitely, there are problems with the awards by the trial court. In the plaint, a specific liquidated claim of Kshs.10,100,000/- was made on the basis of a deed of Conservation Easement dated 28th January, 2010, Kshs.2,100,000/- based on Eco-tourism rights agreement and Kshs.4,000,000/- for goodwill. These claims were specifically pleaded in the plaint. They are therefore in the nature of special damages.

It is trite law that special damages must not only be specifically pleaded but also strictly proved. See **Hahn v Singh** (supra) wherein it was emphatically stated by this Court that:-

> **"…special damages must not only be specifically claimed but also strictly proved. The decree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves….."**

Again pursuant to **Section 107** of the Evidence Act, the burden of proof as to the damages or loss pleaded in the plaint lay on the respondent who wished the court to believe its version of the case.

From the evidence on record, the agreement executed on 27th February, 2010, regarding Eco-tourism rights was never tendered in evidence. When the respondent's sole witness testified and was about to get to the said agreement which had been marked MFI- 7, counsel for the respondent is recorded as saying:

> **"I wish to stand the witness to avail the original MFI -7". Miss Ochola: I have no objection. Court: Case stood over to 12th June, 2013……"**

Come 12th June, 2013 and what transpired was simply the cross-examination and re-examination of the very witness, followed by the closure of the respondent's case. It is thus clear that the witness never tendered in evidence MFI- 7. That being the case, that agreement could not have formed the basis of the award of Kshs.2,100,000/- by the trial court. The award in the circumstances was erroneous and is set aside. It is instructive that the respondent did not deal with this issue at all in its written submissions.

With respect again, the award of Kshs.1,200,000/- for arrears of grazing rent has no basis at all either in law or fact. There was no claim for rent arrears in the plaint in the first place. Two, there is undisputed evidence in documentary form showing that grazing rent payments were made to the respondent by the appellant and or on its behalf long after the licence agreement had come to an end by effluxion of time. The receipts issued by the respondent and Swift/RTGS transfers to the respondent as evidence of such payments were tendered in evidence. The respondent's feeble response to that evidence is that:-

> **"As pointed in our submissions in the Superior Court, the defendant produced the bundle of documents including the receipts, after the close of the plaintiff's case when there was no chance to examine, cross -examine or re-examine the plaintiff on the veracity of the documents and we asked the court to expunge the same from the records…."**

From these submissions, it is quite apparent that the documentary evidence in support of the appellant's

payment of the grazing fee long after the expiry of the agreement was tendered in court by the appellant. We are not aware of the procedure that requires the defendant to tender his evidence before the plaintiff closes his case. Indeed, the proper procedure is as captured in the proceedings. The defendant can only take the stand and tender his evidence once the plaintiff has closed his case. The record also shows that the appellant's only witness also adverted to the fact. This is what he stated:-

> **"I paid the money in advance. I used to deposit the money in their account. The receipts amount to Kshs.3,502,254/- the receipts all marked DEXH. No.2…… I want the court to know that I do not owe the plaintiff anything and the plaintiff owes me nothing….."**

Under cross-examination, the respondent only adverted to receipt No.00200 and the appellant's response was:

> "**Kshs. Receipt 52,000/- is a voucher deposited <u>on his own</u> <u>account</u> up to 30th March, 2010. My time was up…."** (emphasis added)

It appears too that the court also put some question to the appellant regarding the payments and was given this answer; *"I put all the amount in the account…."* Having been given this answer, how can the trial court turn around and claim that the appellant paid the amount in its own account? How could the appellant be depositing the money meant for the respondent in its own account in payment thereof? It is not sensible at all and is not logical.

In light of all the above, we doubt whether, on a balance of probabilities, the respondent's contention of non-payment of grazing fee after the expiry of the agreement is correct. In any event even if its understanding of the trial procedure was that the appellant should have tendered its evidence before the respondent did so, nothing stopped it after that realization to recall the appellant's witness for purposes of "*examination, cross-examination and re-examination" o*n that aspect. Again nothing stopped it from re-opening its case for that purpose only.

Given all that we have stated in this regard, we are satisfied that the trial court failed to analyse, evaluate and review properly all the documentary evidence tendered by the appellant and as a consequence arrived at a wrong finding in making the award of Kshs.1,200,000/- on account of grazing rent for 8 months. In any event, what was the justification of limiting the award to 8 months and yet the respondent had claimed that the appellant had overstayed its welcome for a period in excess of 3 years? Who can then fault the appellant's complaint that the award was purely speculative?

What we have dealt with is sufficient to dispose of this appeal. We need not delve in the question of estoppel. In the premises the appeal is allowed with costs. The judgment and decree of the trial court is set aside. In lieu thereof we make the order dismissing the suit with costs.

Made and dated at Mombasa this 27th day of May, 2016.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR