IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 313 OF 2012

consolidated with

CIVIL APPEAL NO. 315 OF 2012

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT

AND

PAMELA AWINO OGUNYO..... RESPONDENT

(Appeal from a Judgment and Decree of the High Court of Kenya at Kisii (R. L. Korir, J) dated 21st May, 2005

in

KISII HCCA No. 168 OF 2009

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JUDGEMENT OF THE COURT

The respondent, **Pamela Achieng Ogunyo**, filed suit against the appellant, Kenya Power & Lighting Company Limited at the Senior Principal Magistrates Court, Migori, as a result of a sugar cane crop that had been destroyed by fire. A similar suit was instituted by the respondents' co-wife, **Diana Achieng Ogunyo,** against the appellant on the same cause of action. It was agreed in that court that evidence taken in the one suit would apply to the other and the same position was adopted in the two resultant appeals that were filed at the High Court of Kenya, Kisii.

When this appeal came up for hearing before us we ordered the same to be consolidated with Civil Appeal No. 315 of 2012 and both appeals were heard in this appeal.

What is the genesis of the issues that led to the said suits filed in the Migori court and the resultant appeals?

It was alleged in the respective plaints that the respondents (Pamela and Diana) were sugar cane farmers contracted by South Nyanza Sugar Company Limited (Sony) and that on 29th May, 2008 electric cables on the Gogo-Kisii power line owned by the appellant fell on the respondents' sugar cane crop causing fire which burnt the sugar cane crop that was then ready awaiting harvesting and that, as a result, the respondents had suffered damage. Particulars of damages were given in the respective plaints as follows:

> **"PARTICULARS OF DAMAGES**
>
> **1Ha of plant crop = 150 tons yield**
>
> **0. 2Ha crop destroyed = 30 tones**
>
> **Cost of 1 ton of sugar cane = 2,500.00**
>
> **Thus damage and loss suffered = 30 X 2,500.00 = 75,000.00"**

The appellant filed respective statements of defence where it denied owning the power line at all and in any event attributed negligence to the respondents who according to the appellant, had planted the said crop on a way – leave contrary to provisions of law. The suits were heard by the learned Resident Magistrate (Kibet Sambu) who, in the judgment delivered on 7th September, 2009 allowed the claims entering judgment for the respondents accordingly. The appellant being dissatisfied with those findings filed High Court Civil Appeal Nos. 167 and 168 of 2009 at the High Court of Kenya, Kisii but those appeals were dismissed on 21st September, 2012 by R. Lagat – Korir, J, who found them not to have merit. Those orders provoked these appeals which we are reminded can only raise issues of law but not questions of fact which the two courts below have tried and analysed on first appeal unless it can be shown that findings thereof were on no evidence or were such that a reasonable tribunal properly exercising its mind could not reach or, in the first appeal, that the High Court failed in its duty of analysing and re-evaluating the evidence to reach its own conclusions on the same. See for example **Maina v Mugiria [1983] KLR 79** where this court considering that issue of jurisdiction held that on a second appeal only matters of law may be taken.

The grounds raised in the Memorandum of Appeal are similar. The complaint in the first ground is that the learned judge erred in failing to hold that what was before the court was a special damage claim which required specific pleading and proof. The second ground states that the High Court erred in failing to correct an error in the trial magistrates court while in the third ground the High Court on first appeal is faulted for allegedly not stating by what amount special damages should have been reduced. It is also stated that the court erred in shifting the burden of proof. The issue raised in the fourth ground is not dissimilar to the third ground and in the last ground the learned judge is said to have erred in awarding the respondents costs when there were alleged concerns on the manner the trial magistrates judgement was rendered.

To our mind the grounds of appeal that raise legal issues calling for our consideration are whether the claim before the trial court was a special damage claim and whether the same was pleaded and proved as required in law. The other would be whether the standard of proof was shifted contrary to law where the position is that the burden of proof is on the party making the allegation.

Mr. O. M. Otieno, the learned counsel for the appellant consolidated all grounds of appeal and took them together. Counsel submitted that the claim was in the nature of a special damage claim which in his view had neither been specifically pleaded nor strictly proved. According to counsel the cumulative claim (in both suits before the trial court) of Kshs. 150,000/= was subject to deductions of farming inputs by Sony and the respondent could not be awarded the whole claim. In any event, wondered counsel, how could the learned judge in the first appeal blame the appellant for not providing guidance on what was due to Sony – when it was the respondent who should have provided such proof. Counsel blamed the High Court which to him did not re-evaluate the evidence to reach its own conclusions and for all these the appeals should succeed.

Mr. R. Abisai, the learned counsel for the respondent countered the appellants' submissions by pointing out that there was a specific pleading in the plaint and proof was provided by the oral and documentary evidence of an Agricultural Officer who visited the relevant farms and assessed the value of the damaged crop and wrote a report which he duly produced in court as part of the evidence. That, to counsel, satisfied the principle of specific pleading and strict proof on a claim for special damages which he readily conceded the claims were. On inputs due to Sony it was counsels' submission that the respondent had a contractual duty to pay Sony what was due to it and that was not dependent on the success or otherwise of the suit against the appellant. Counsel further submitted that the appellant had a duty to prove that the sugar crop had been planted on a wayleave contrary to law which to counsel had not been done through any evidence by the appellant.

On whether there was specific pleading and strict proof as required in law we have already set out in this judgement the pleading which gave particulars of damage in specific details stating production of sugar cane crop per hectare; the acreage of crop damaged; the cost of a tonne of sugar cane crop and finally the loss suffered being Kshs. 75,000/= of damaged crop for each of the two respondents in the suits before the trial court. The respondent called an expert witness who was the Divisional Agribusiness & Development Officer, Awendo Division, who testified that she had visited the relevant farms and assessed the damaged crop reaching a conclusion that each claimant had suffered loss of Kshs. 75,000/= for the damaged cane. She produced that report in court as part of the evidence and confirmed that it was through her training and expertise that she was able to reach those conclusions. She also confirmed that the damaged crop had been carted away and could not have been harvested to be of any good to Sony. The trial magistrate found that the respondent's crop had indeed been damaged by fire and that the appellant had not rebutted this evidence at all. The High Court, on first appeal, held as much.

On our part, and having considered the pleadings, evidence and the material that was placed before the trial court, we agree that the two courts below were entitled to hold, as they did, that the claim which was a special damage claim was specifically pleaded and strictly proved as was required in law. At no time was the burden shifted as alleged by the appellant at all. And the complaint that the respondents were being overcompensated had no basis in law at all. As properly held by the first appellate court the appellant had not provided any guidance on the amount to be deducted and payable to Sony which it claimed to be the case and, in any event, the relationship between the respondents and Sony was a contractual one and payments due to the latter were not at all dependent on the suits that were before the trial court.

We note, in any event, that the appellant made various allegations in its statement of defence against the respondents. These included, inter alia, that the appellant was not the supplier of electricity in the stated region where fire damage took place; that the damaged crop was illegally planted in an area reserved for the appellant as a way-leave for its power lines and electric cables and that the respondents had failed to leave adequate space between the crops and electric poles so as to prevent the possibility of the crop being burnt in the event that a fire broke out.

A party who asserts or alleges that certain facts exist has a legal burden to prove those claims – Sections 107 – 109 of the Evidence Act which place a legal burden of proof or what may be called evidential burden of proof on the party making the assertion . In **Janet Kaphiphe Ouma & Another v Marie Stopes International Kenya (Kisumu) HCCC No. 68 of 2007 Ali-Aroni, J citing Edward Muriga through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 199**7 had this to say of the said provisions of the Evidence Act:

> **"In this matter; apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."**

A similar issue arose in **Margaret Njeri Muiruri (Being the Administratrix of the Estate of the late Joseph Muiruri Gachoka (deceased)) v Bank of Baroda (Kenya) Limited [2014] e KLR** where

this court found as follows:

> **"The trial court held that the appellant, because she is the one who claimed that the bank acted without the minister's approval, was the one to adduce evidence to prove this assertion.With respect, this is not the correct position. It is generally true he who asserts must prove. That much is contained in Section 108 of the Evidence Act.**

However, Section 112 of the Evidence Act further provides that:

> **"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."**

And in **Munyu Maina v Hiram Gathiha Maina [2013] e KLR** it was held of Section 112 of the said Act:

> **"Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."**

The respondents were able to show through evidence that the cables that damaged their crop were owned by the appellant. The appellants' own witness stated in evidence that:

> **"..I cannot confirm that the power lines shown for certain belong to Kenya Power & Lighting Co. Ltd. The lines are same with those Private enterprises like Sony Sugar who have their own lines..."**

The witness was therefore not categorically stating that the cables which he confirmed witnessing on a visit to the farms as having damaged the crop were not owned or managed by the appellant.This was a fact within the knowledge of the appellant and it therefore was under an obligation to discharge the evidential burden of proof but it did not.

Upon our own consideration of the legal issues raised we are of the respectful opinion that the appeals have no merit and we accordingly dismiss them with costs to the respondents.

Dated and delivered at Kisumu this 23rd day of April, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR