Kaura v Kenya Wildlife Service (Civil Appeal E180 of 2023)
[2025] KEHC 6388 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 6388 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E180 OF 2023

JM OMIDO, J

MARCH 27, 2025

BETWEEN

ELIJAH MUNORU KAURA ..... APPELLANT

AND

KENYA WILDLIFE SERVICE ..... RESPONDENT

(Appeal emanates from the judgement and decree of Hon. M.A. Odhiambo, Senior Resident Magistrate, delivered on 29th September, 2023 in Meru CMCC No. E178 of 2022.)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. M.A. Odhiambo, Senior Resident Magistrate, delivered on 29th September, 2023 in Meru CMCC No. E178 of 2022.
2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 26th October, 2023, upon which he seeks to upset the judgement and decree of the lower court, are as follows:
    i. The Honourable learned Magistrate erred both in law and in fact by determining the issue of ownership, which was not in contention.
    ii. The Honourable learned Magistrate erred both in law and in fact by determining and apportioning 100% liability in favour of the Appellant, yet in her final finding, declining to awrd a benefit in the form of damages, to the same Appellant.
    iii. The Honourable learned Magistrate erred both in law and in fact by apportioning blame on the Appellant for the destruction of his own crops, by the Respondent's elephants, which action was out of his control when the available evidence on record clearly absolves him.

iv. The Honourable learned Magistrate erred both in law and in fact by disregarding the context and express provisions on compensation as outlined in Sections 18, 19, 24 and 25(4) of the *Wildlife Conservation and Management Act* No. 47 of 2013.

v. The Honourable learned Magistrate erred both in law and in fact by failing to consider the applicable principles, authorities and the submissions filed by the Appellant.

vi. The Honourable learned Magistrate erred both in law and in fact by failing to consider any of the compelling evidence adduced by the Appellant at the trial court.

vii. All in all, the Honourable learned Magistrate so misdirected herself on matters of both law and fact as to occasion a miscarriage of justice against the Appellant.

viii. That in light of the foregoing, the learned Magistrate failed to do justice before her in the case at hand.

3. The Appellant proposes that the Appeal be allowed with costs to the Appellant and that the decision of the lower court be set aside and judgement be entered in favour of the Appellant for Ksh.622,289- for destruction of the Appellant's crops by the elephants in the Respondent's custody.

4. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Sielle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

5. In Sielle, Sir Clement De Lestang observed that:

> " This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

6. The suit before the lower court was one based on alleged negligence on the part of the Respondent, whereby the Appellant asserted a claim under the rule in Rylands v Fletcher, [1866] L.R. 1.

7. The claim was commenced by way of an amended plaint dated 27th March, 2023. The Appellant (the Plaintiff in the lower court) pleaded that on 2nd, 28th and 29th July, 2019, owing to the Respondent's negligence andor breach of duty, elephants strayed from a forest reserve andor national park and invaded a farm on parcel no. KiiruaNkando5999 that the Appellant had leased from another party through a "gentleman's agreement", causing massive destruction to his crops which included tomatoes, beans, bananas, sugarcane and maize. The Appellant averred that the crops were a mature stage of growth and had been cultivated for commercial sale and domestic consumption.

8. The Appellant held the Respondent liable for the resulting damage and loss and stated that the Respondent was negligent and breached its statutory duties. He quantified the loss at Ksh.182,900-.

9. The Respondent resisted the Appellant's claim and to that end filed a statement of defence dated 16th March, 2022 and sought for the dismissal of the same with costs.

10. Turning to the evidence before the trial court, the Respondent testified as PW1 and adopted the contents of his statements recorded on 21st January, 2022 and as his evidence in chief.

11. In precis, the Appellant stated in his statements that a herd of elephants invaded his leased farm on Land Reference Number KiiruaNkando5999 on 2nd, 28th and 29th July, 2019 and destroyed his crops. He reported the matter to Subuiga police Station and to the Respondent. The latter instructed an Agricultural Extension Officer to visit the area and assess the damage, which was done and a report prepared, quantifying the loss at Ksh.182,900-. The Appellant stated that he completed the compensatory forms that the Respondent's provided.

12. The Appellant blamed the Respondent for the loss for letting the wild animals get out of their confines.

13. The Appellant produced the following documents in support of his case:Demand letter dated 21st July, 2020.Demand letter dated 7th December, 2020.KWS Compensation Claim Form.Chief's letter.

14. The Appellant called Joyce Wambugu, an Agricultural Extension Officer as PW2. The witness told the trial court that the loss and damage was assessed and estimated to be at Ksh.182,900-. The witness produced verification form which was prepared upon assessment as an exhibit.

15. The Respondent did not call any witnesses.

16. After hearing the parties, the learned trial Magistrate set out the following issues for determination:

    a. Whether the land in question belonged to the Appellant.

    b. Whether liability was proved in the circumstances.

    c. Quantum of damages payable, if any.

17. With regard to the first issue, the learned trial Magistrate reached the determination that the Appellant failed to prove that he had an interest in the parcel of land as the lessor of the same was not called as a witness.

18. In respect of the second issue, the trial court observed that although the Appellant's land was close to a national park, the he did not demonstrate that he took precautions to ward off the wild animals and safeguard against the invasion and therefore reached a finding that the Appellant was 20% to blame for the damage and loss that resulted.

19. With regard to the third issue, the learned trial Magistrate in returning a negative verdict stated as follows:

> "
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> "15. It is trite law that he who alleges must prove. The onus was on the Plaintiff to prove that he suffered loss of Ksh.622,289- as claimed. I expected that an Agricultural Officer's report capturing the damage and the exact value of crops damaged would have been filed. Instead the Plaintiff relied on the compensation form which did not give an exact value of which crop was damaged. Further looking at the verification produced (sic) the parcel number of the alleged land damaged was captured. The Plaintiff also stated that the value of the crops damaged was Ksh.182,900-, but looking at the verification form, what is shown is Ksh.15,000- being the value of bananas.
>
> There are workings shown at section 6, but the court was not told how the figures shown were arrived at.

16. In Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] eKLR, the Court of Appeal reiterated the fact that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit. Further, the court held that apart from listing the alleged loss and damage, no evidence was led in support of the alleged loss and damage. As it were, the Appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. There was no credible documentary evidence in support of the alleged special damages.

17. The burden was on the Plaintiff to prove his case on a balance of probabilities. There is no doubt that crops were damaged and a report of the loss was made. However, the Plaintiff did (sic) tender sufficient evidence to warrant the court to award his special damages of Ksh.182,900-. The court is of the view that damages have not been strictly proven. Therefore, the claim must fail."

20. With that, the learned trial Magistrate proceeded to dismiss the Appellant's suit with costs to the Respondent.

21. Now to the present matter, this court directed that the appeal proceeds by way of written submissions and gave the parties herein timelines for filing their submissions. Both parties filed their respective submissions.

22. It is noteworthy from the submissions filed by the Appellant that what the he is challenging is the trial court's finding on quantum – that the Appellant did not prove his claim for Ksh.182,900- as was required of him. The trial court's finding on liability is not challenged.

23. The single issue for determination, as discernible from the submissions is whether the learned trial Magistrate fell into error in reaching the finding that the Appellant's claim for special damages to the tune of Ksh.182,900- was not proved as he did not present evidence on the interest that he had on land parcel no. KiiruaNkando5999 and further that the loss was not proved.

24. In determining these issues, it is important for this court to look into the issue whether acted on a wrong principle of law in dismissing the Appellant's claim.

25. From the Appellant's evidence, it is the Respondent that instructed the Agricultural Extension Officer to conduct an assessment of the loss on the Appellant's farm and prepare a report. The Respondent did not deny the contention by the Appellant that it is the former that instructed the officer. Indeed, the Appellant's contention was supported by the fact that the report that PW2 prepared was in fact a form that belonged to the Respondent and had the Respondent's letterhead. This was therefore the Respondent's own document and there was no denial by the Respondent that it issued to PW2 to complete.

26. It is instructive from a perusal of the document that the same required that the person filling it gives definite answers to the questions that were posed therein. For instance, at the bottom, it had the following questions that were structured in a way that only direct responses were required, and that PW2 completed it in a satisfactory manner, in my view:

> Crop name:Tomatoes, beans, bananas, sugarcane and maize.
>
> Animal responsible: Elephants.
>
> Approximate acreage destroyed: ¾ acres.

Stage of growth: Mature.

Estimated value: Ksh.182,900-.

27. It is to be noted from the record of the trial court that PW2 told the court that the document was completed by another Agricultural Extension Officer by the name Lucy Mwarania. As we have seen above, the document belonged to the Respondent and the quantification of the loss at Ksh.182,900- was therefore made by the Respondent, which in effect was then a document admitting the Appellant's claim of the loss at Ksh.182,900-.

28. Section 18(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that statements made by a party to the proceedings, or by an agent to any such party, whom the court regards in the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions.

29. The evidence bears it clear in the case before the trial court that the document in which the loss or damage was quantified at Ksh.182,900-was prepared at the behest of the Respondent and the maker was in the circumstances an agent of the Respondent. In line with Section 18(1) of the *Evidence Act*, the contents thereof amounted to admissions by the Respondent.

30. In Express Automobile Kenya Limited v Kenya Farmers Association Limited & another [2020] eKLR, the court stated that in law, an admission should reflect a conscious and deliberate act of the person making it, showing an intention to be bound by it.

31. In Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others [2021] eKLR, it was held that:

> "A clear and unequivocable admission of fact is conclusive, rendering it unnecessary for the one party (in whose favour the admission was made) to adduce evidence to prove the admitted fact, and incompetent for the other party, making the admission to adduce evidence to contradict it. The rational for this principle is confirmed by Order 13 Rule (2) of the Civil Procedure Rules."

32. From the foregoing, I reach the conclusion that as the claim for Ksh.182,900- was not disputed and was as a matter of fact admitted by the Respondent, the same being the Respondent's own assessment of the loss and damage on the Appellant's farm, the Appellant was not required to prove the same. The trial court therefore erred in principle in dismissing the claim on the basis that the Appellant did not prove it to the required standard.

33. With regard to the trial court's finding that the Respondent did not prove that he leased land parcel number KiiruaNkando5999 as he did not call the lessor, I note that although the Plaintiff's position was denied in the defence, no evidence was tendered by the Defendant to provide any other position. This being a civil case, the issue must be determined on a balance of probabilities.

34. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance

of probabilities. He has established that it is probable than not that the allegations that he made occurred."

35. The Appellant presented oral evidence that the crop on the land parcel no. KiiruaNkando5999 belonged to him as he had leased the said property. While the Respondent denied that such an arrangement existed, it did not call any evidence on the same. The evidence available is that the Respondent proceeded to process the Appellant's report by sending an Agricultural Extension Officer to the land. The Respondent did not explain why the process went on if indeed the ownership of the crop was in doubt. It is to be noted that the Respondent referred to the Appellant in its compensation form as the "affected person" and further indicated that the Appellant resided on that farm. In my view then, the Appellant adduced sufficient evidence to prove on a balance of probabilities that the crop on the parcel belonged to him as the lessee of the land.

36. Compensatory damages are awarded to a wronged party in exercise of the court's discretion. The Latin maxim ubi jus ibi remedium postulates that where the law has established a right, there is a corresponding remedy for the breach of that right. Put in another way, for every wrong, the law provides a remedy.

37. Being of the foregoing persuasion, I reach the result that the appeal herein is meritorious. I proceed to allow it only to the extent that I set aside the trial court's order dismissing the Appellant's suit and enter judgement on liability in favour of the Appellant against the Respondent as was assessed by the trial court.

38. In respect of Judgement is entered for the Appellant against the Respondent for Ksh.182,900- being special damages for loss of and damage to crops. The said amount is to be subjected to the trial court's finding on liability. Interest on the said amount shall accrue from the date of filing the lower court suit.

39. All the other findings of the trial court remain intact.

40. Section 27 of the *Civil Procedure Act* dictates that costs ought to follow the event. To that end then, the costs of this appeal shall be borne by the Respondent.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 27TH DAY OF MARCH, 2025.

JOE M. OMIDO

JUDGE

For Appellant: Mr. Ashaba.

For Respondent: No appearance.

Court Assistant: Mr. Juma & Mr. Ngoge.