Kiplimo & 2 others v Amdany & another (Civil Appeal E004 of 2020)
[2024] KEHC 496 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 496 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E004 OF 2020

RB NGETICH, J

JANUARY 25, 2024

BETWEEN

ROSA KIPLIMO ..... 1ST APPELLANT

COLLINS LIMO ..... 2ND APPELLANT

ROY KIPCHIRCHIR ..... 3RD APPELLANT

AND

ESTHER AMDANY ..... 1ST RESPONDENT

MICHAEL AMDANY KARANI ..... 2ND RESPONDENT

(Being an appeal from the judgement and decree of Hon J. Tamar-Principal Magistrate delivered on 24thSeptember, 2020 in Eldama Ravine PMCC No. 34 of 2015)

JUDGMENT

Background

1. The Respondents herein filed a suit vide a Plaint dated 27th January,2012 claiming that the 1st, 2nd and the 3rd defendants/Appellants were sometimes in the year 2009 the registered owners of the land known as Baringo/ Perkerra/101/835 situated at Eldama Ravine area measuring approximately area 8.5 Hectares.

2. The Plaintiffs/Respondents aver that on the 6th November, 2009 or thereabout, the 1st, 2nd and 3rd defendants/Appellants jointly and severally approached the 1st and 2nd plaintiffs to lease them 3 acres of the aforesaid land. That the 1st and 2nd plaintiffs/Respondents agreed and entered into an agreement to lease the said land for a period of 7 years with an agreed leased price of Kshs.63,000/= and the parties executed an agreement in the presence of the area chief. That the 1st and 2nd plaintiffs proceeded

to develop the said land by ploughing twice, purchased farm input, planting, which costed them the amount of Kshs. 30,300/= or thereabout.

3. The Plaintiffs/Respondents aver in the plaint that the 4th defendant purchased the aforesaid land knowing very well that the said land had already been leased at the detriments of the plaintiffs. The 1st, 2nd, 3rd and 4th defendants breached the contract by destroying all the crops within the said leased land. The plaintiffs reported the matter to the chief Perkerra location who addressed the letter to the Ministry of Livestock to carry out the assessment of RHODE GRASS production which were planted by 1st and 2nd plaintiffs.

4. That thereafter assessment was carried out by the expert within the Ministry of Livestock and found that all the expenses being labour, weeding, harvesting and expected profit for seven years loss and damage was totaling to Kshs. 3.957M, 300.00 which the 1st and the 2nd plaintiffs expected to get and the 4th defendant accepted the damage and apologized and promised to compensate the same since he had bought the said 3 Acres of the leased land but he failed to do so necessitating filing of this suit.

5. That consequently the 1st and the 2nd plaintiffs suffered special and general damage and now seeking for compensation against the 1st, 2nd, 3rd and 4th defendants jointly and severally arising out of their action.

6. The plaintiff prays for judgment against the defendants for:

    a. Kshs. 3,957,300/= as per Ministry of Livestock assessment report.

    b. Special damage.

    c. Cost of this suit and interest of (a) and (b) above at the court rates.

    d. Any other relief that this honorable court may deem just and fit to grant.

7. The 1st, 2nd and 3rd Defendants filed their written statement of defence dated 10th March,2016 where they aver that they are strangers to the lease agreement referred to in the plaint and as such they cannot be a party to its performance or breach since they have never entered into any lease agreement whatsoever.

8. The 1st, 2nd and 3rd defendants insist that they are strangers to the contents enumerated in paragraphs 5 and 6 of the plaint and states that they have never met the plaintiffs whatsoever, and if there was a lease agreement and crop destruction by the defendants which is denied then the plaintiffs could have made a formal report to the police officers for a case of malicious damage to property and criminal proceedings instituted against the defendants.

9. They aver that no demand and notice has been made of intention to sue and thus the plaintiffs are put to strict proof thereof. The 1st, 2nd and 3rd defendants pray that the plaintiff's suit be dismissed with costs to the defendants.

10. The 4th Defendant filed his statement of defence dated 4th February,2012 where he avers that before it purchased the suit land Title Number BARINGO/PERKERRA/101/835, a search was conducted and no encumbrance whatsoever was noted against the land.

11. That further and without prejudice to the foregoing, the 4th defendant avers that the certificate of search did not reveal any encumbrances against the title and that its purchase of the suit land was above bode.

12. The 4th defendant avers that he is a stranger to the contents of paragraph 6 of the plaint and has never admitted any liability as contended in paragraph 6 of the plaint. The 4th defendant further denies having

made any apology or promised any compensation to the plaintiffs as alleged in paragraph 6 of the plaint and the plaintiff.

13. The 4th defendant states that he is the registered owner of the parcel of land registered as Baringo/ Perkerra/101/835 situated at Eldama Ravine area and measuring approximately 8.5 Hectares all registered in the name of Karen Roses Limited and that in view of the foregoing, the remedies claimed by the plaintiffs therein are not obtainable against it and no demand notice has been made and notice of intention to sue is denied and the plaintiff.

14. Upon the matter being heard to its logical conclusion, the trial Court delivered its judgement in favour of the Respondents as against the Appellants whereby the trial Court entered judgment for the Plaintiffs against the 1st, 2nd and 3rd Defendants jointly and severally for special damages of Kshs 3,957,300.00 Plus interests and costs of the suit. The trial court dismissed the suit against the 4th Defendants with no order as to costs.

15. The above-named Appellants being dissatisfied with the Judgement of the trial court appeals against the said judgement on the following grounds:-

    a. That the Honourable Magistrate erred in fact and in law in his finding that there was a valid contract between the Appellants and Respondents.

    b. That the learned trial Magistrate erred in fact and in law by finding that the appellants destroyed the Respondents crops contrary to the evidence on record.

    c. That the learned trial Magistrate erred in law and in fact by awarding the Respondents a sum of Kshs.3,957,300.00/= which was highly exaggerated.

    d. That the learned Magistrate erred in law and in fact by awarding the Respondents Kshs.3,957,300.00/= without the evidence of receipts.

    e. That the learned trial Magistrate erred in law and fact by holding that there was breach of contract between the Appellants and the Respondents.

16. This Honourable Court directed that this appeal be canvassed by way of written submissions.

Appellant's Submissions

17. The Appellants submit that they rely on the grounds of appeal and argue that the trial Magistrate erred in fact and law in his finding that there was a valid contract between the Appellants and the Respondents whereas from the evidence on record, it is very clear that there was no valid lease agreement produced by the Respondents. That in the alleged Lease Agreement, there were six independent parties who are listed as witnesses but the Respondents only called one party and left the others who were to corroborate that evidence and it is very clear that the Respondent did not prove their case to the required standards.

18. Further that the learned trial Magistrate erred in law and fact by finding that the appellants destroyed the Respondent's crop contrary to the evidence on record. That from the evidence on record and particularly by pw1, the destruction was done by the 4th Defendant who even agreed to compensate them with Ksh1.545M and yet the trial Magistrate did not find the 4th Defendant liable but only the Appellants.

19. On ground that the trial magistrate erred in law and fact by awarding the Respondents a sum of Ksh 3,957,300, the Appellant submit that from the evidence on record, the Respondent claimed to have leased land for Ksh 63,000 yet the amount awarded is almost Ksh 4m and even the value of the 3 acres

of the land is less than Kshs. 1m making it clear that the trial Magistrate relied on an exaggerated figure and hence came to a wrong conclusion.

20. Further that the Ksh 3,957,300 was awarded without the evidence of receipt and argue that it is trite law that special damages must be specifically pleaded and proved. Further that the report of Divisional Livestock Extension Officer is not based on any documentary evidence. That the report is just anticipatory and it does not take into consideration the issue of draught or other natural disasters which could have affected the production and harvest. That it is very clear that the said report did not take into consideration the above issues and as a result it came into a wrong conclusion. That in any case, if there was a valid contract between the parties, then the consideration as indicated by the Respondent was Ksh 63,000 and any breach of contract was to be based on that figure.

21. The Appellants submits that their Appeal is merited and pray that the same be allowed, judgment be set aside and the Appellant he awarded cost of the appeal.

Analysis and Determination

22. I have considered the issues raised in this appeal. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has 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."

23. Further, on power to interfere with factual findings of the trial court, it was therefore held by the then East African Court of Appeal in Ramjibhai v Rattan Singh S/O Nagina Singh [1953] 1 EACA 71 that:

> " This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."

24. The Court of Appeal in Ephantus Mwangi and Another v Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 stated as follows:-

> " A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

25. In view of the above, I have perused the lower court record together with submissions filed and wish to consider whether the respondents proved their case on the balance of probabilities. on who has the

burden to prove a claim in civil cases, in the case of Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR the court stated as follows: -

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

26. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 stated that:

> " 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.

27. Further in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the judges of Appeal held that:

> " Denning J. in Miller v Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

28. In arguing whether there was a valid lease agreement, the appellant submit that there were six independent parties who are listed as witnesses but the Respondents only called one party and left the others who were to corroborate and, in their view, the plaintiff's case was not proved on a balance of probabilities. The record however show that the Appellants entered into a Lease Agreement with the 1st,2nd and 3rd Respondents for a period of seven years with effect from 1st January, 2010 to December, 2016 at Kshs.3,000/= per acre totaling Kshs.63,000/= for the 7 years. The agreement was entered into in the office of the Assistant Chief Perkerra Sub-Location one Henry Kitony. In the agreement, the Appellants are indicated as the lessors and the Respondents lessees. There was therefore prove that there existed a valid lease agreement between the Appellants and the 1st to 3rd Respondents.

29. Having found that there existed a valid lease, it was the responsibility of the Appellants to ensure that the Respondents enjoyed quiet possession of the property during the leased period. If they sold the property to a third party, they ought to have sold it subject to the lease agreement. Privity of contract remained between the Respondents and the Appellants – and any injury suffered by the Respondent as a result of the Appellant's breach was directly attributable to the Appellants notwithstanding

change in ownership of the title. Differently put, the Appellant remained contractually bound to the Respondent notwithstanding the Appellant's decision to sell the property.

30. In actual fact, the Appellants understood this fact very well. Their entire defence at the lower Court was to show that they had sold the property to a third party. At trial, their defence was never that the sale and transfer to Karen Roses meant that they were no longer contractually bound; rather, their defence was that neither them nor the transferee damaged the property.

31. Next, the Appellants complaints that the special damages were not proved to the required standard. They dispute the method used by the Agricultural Officer to compute the loss. The Agricultural Officer had been requested to assess the extent of the damage to the crops. He did this by estimating how much the total yield would have been and then he further estimated how much the yield would have costed in the market place. The agricultural officer was asked to do the assessment in view of his expertise and the figures being challenged are from an expert yet no other independent assessment was availed by the appellants to challenge the plaintiff's evidence on assessment of damages by his witness who is an expert in that filed. The Court accepted his evidence as one from an expert and no other independent assessment was availed to court by the appellant for comparison. Section 48 of the *Evidence Act* permits Courts to accept the opinions of science or art if made by persons skilled in such science or art.

32. The court has first to form opinion that he is an expert. Record does not show any challenge on the Agricultural Officer's report. the Court is expected to subject the reasoning behind the Expert's opinion to scrutiny in order to determine how much weight to attach to it. To this extent, the expert is expected to explain how he arrived at his decision and his methodology. In determining how much weight to put on the expert opinion, the Court considers a number of factors including: the circumstances of each case; the standing of the expert; the skill and experience of the expert; the care and discrimination with which he approached the question on which he is expressing his; and, where applicable, the extent to which the expert has used in aid the advances in modern sciences in coming to his expert opinion (See H.A. Charles Perera v M. L. Motha 65 NLR 294.).

33. Record show that the expert laid down the basis of his report being a field visit coupled with his scientific knowledge of the crops and the market conditions. This is what he utilized to come up with the figures of how much yield was expected from the acreage that was under cultivation and how much the yield would fetch in the market. The Appellants did not challenge the figures on cross examination neither did he present alternative theories by an expert to demonstrate that the opinion was irrational or impermissibly speculative as he now claims on appeal. In the circumstances, I am of the opinion that the Learned Trial Magistrate did not err in relying on the expert's assessment on damages. From the foregoing, I see no merit in the appeal herein.

36. Final Orders

1. Appeal is hereby dismissed.

2. Costs to the Respondent.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET

THIS 25TH DAY OF JANUARY 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Elvis - Court Assistant.

No appearance for the Appellant.

Mr. Kosgey H/B for Mr. Ngarngar counsel for the Respondent.