

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – CS- 0016 OF 2003
(ARISING FROM HCT-01-CV-CS- 0001 OF 2000)

EMMANUEL BASALIZA APPELLANT

VERSUS

MUJWISA CHRIS RESPONDENT

BEFORE: HON. JUSTICE LAMECK N. MUKASA

JUDGMENT:

The Appellant, Emmanuel Basaliza was the plaintiff in Fort Portal Chief Magistrates Court Civil Suit No. MFP 1 of 2000. The Appellant brought the said original suit against the Respondent, Chris Mujwisa, to recover general damages, compensation of shs3,300,000/= interest and costs.

The appellant's cause of action was founded in trespass. The parties had neighbouring farms separated by a barbed wire fence. The appellant's claim was that in the month of July 1998 the Respondent's cows strayed into the Appellant's banana plantation trespassing thereon and destroyed banana plants valued by a field extension officer at shs1,200,000/= Also in the month of November 1999, the respondent's cows trespassed upon the appellant's farm and pasture, destroying thereon pasture and banana plants and broke a wooden bridge causing damage all valued at shs1,200,000/= On a third occasion, also around November 1999 the Respondent's animals trespassed and destroyed the Appellant's banana plants valued at shs600,000. Also on 10th December 1999 the Respondent's animals

trespassed into the Appellant's property and on this occasion the Respondent's bull illegally mounted the Appellant's pregnant heifer which aborted as a result. The value of the would be calf was put at Shs300,000/=.

In his defence the Respondent denied that his cows had ever strayed onto the Appellant's banana plantation, denied that his bull had illegally mounted the Appellant's pregnant heifer and contended that no heifer of the Appellant had aborted and further that the Appellant had sent his workers to the Respondent's farm who drove out his cows and took them to the Appellant's farm and detained them until the area L.C. I chairman intervened and they were released.

In his judgment the learned Chief Magistrate found that there was no proved trespass on all occasions and dismissed the Appellant's claim with costs. The Appellant was dissatisfied with the judgment thus this appeal on the ground that:-

“The learned trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence before him and came to the wrong conclusion.”

The Memorandum of Appeal in respect to this appeal was filed together with an uncertified photocopy of the proceedings of the lower court. On 13th November 2003 when the appeal came up for hearing Mr. Nyamutale appearing for the Respondent, communicated to court that he had agreed with Mr. Birungi counsel for the Appellant, that they be allowed to file written submissions, he further requested to be served with a certified copy of the proceedings of the lower court. The application to file written submission was granted. A certified copy to the proceedings was filed and is on court record.

In his submissions Mr. Nyamutale raised a preliminary point of law which I will deal with first. He contended that the record of Appeal was defective because it was not certified and that there was no certificate of correctness duly given by the Chief Magistrate as he had not signed and sealed it with the Court Seal. He referred to Yoana Yakuze V/S Victoria Nakalembe (1988 – 1990) HCB 138.

In that case the memorandum of appeal did not bear any court seal. Court held that it could not therefore be ascertained when it was presented to court. Consequently Court held that it did not appear as a court document. I have carefully studied the papers filed in the instant appeal. The memorandum of Appeal was filed on 24th September 2003. It was stamped with the stamp of the “Deputy Registrar High Court of Uganda Western Circuit”. The Memorandum of Appeal was filed together with a photocopy of the proceedings of the lower court. The proceedings had not been certified by the lower court however, another copy of the proceedings of the lower Court and judgment were filed duly certified on 13th November 2003 by the Chief Magistrate under the court stamp. I therefore find no merit in the preliminary point of law raised by the Respondent. It is accordingly overruled and I now proceed to handle the appeal on its merit.

In his submissions Counsel for the Appellant stated that the trial Magistrate did not properly address the issue of trespass, the subject of the main suit raised by the Appellant. He pointed out that PW1 John Kasaija had directly witnessed the trespass of the respondent’s cattle on the appellant’s banana plantation as per the July 1998 incident. That as to the November 1999 incident PW3 Johnson Kaganda had recognized the invading cows as those of the respondent. That the cows first destroyed the appellant’s banana plantations, drunk water in the water trough and

ate salt. That a bull had mounted the Appellant's cow which was pregnant. Counsel contended that had the learned Chief Magistrate properly considered and evaluated the above evidence he would have found that the appellant had proved his case on the balance of probabilities.

This being a first appeal, it's the duty of this Court to review and re-evaluate the record of evidence adduced before the trial Court as a whole giving it fresh and exhaustive scrutiny and then drawn its own conclusion of fact and determine whether on the evidence the decision of the trial court should stand. See D.R. Pandya V/S R (1957) EA 336. The first Appellant Court must do so against the background that if the conclusion of the trial court had been arrived at on conflicting testimony after seeing and hearing witnesses, the appellant court in arriving at a decision should bear in mind that it has not enjoyed this opportunity and that the view of the trial court as to where credibility lies is entitled to greater weight. However, there may be other circumstances quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant an appellant court in deferring from a trial court even on a question of fact turning on the credibility of witnesses whom the appellant court has not seen. See Selle & Anor V/S Associated Motor Boat Company Ltd & Other (1968) EA 123.

In his judgment the learned trial Chief Magistrate first considered the alleged acts of trespass committed in July 1998. He then considered the trespass of 1999 wherein he identified the following acts of trespass:-

- (a) The coming of cows of the defendant to the plaintiff's farm.
- (b) The damaging of the bridge.

- (c) The trespass on the plaintiff banana plantation and eating of the grass/pasture.
- (d) The defendant's bull mounting the plaintiff's cow and the cow's abortion.

While considering the trespass allegedly committed in 1998 the learned trial Chief Magistrate considered contradictions in the evidence of the plaintiff and that of his witness and as result he did not believe their evidence. It was an agreed fact from the evidence adduced by both parties that the two owned farms which at one point shared a common boundary. Further that there was a barbed wire fence between the two farms at that point. They both kept cattle on their respective farms.

Regarding the incident which was alleged to have taken place in July 1998, PW1 John Kasaija stated that while at work in the appellant's farm at around 11:00 a.m. about 20 to 25 cows of the respondent entered into the appellant's farm and destroyed the appellant's banana plantation by eating the banana stems. Both the appellant and this witness stated that the incident was reported to the L.C. I officials who came in to assess the damage. Both named Bernard Rwaheru as being among the L.C. Official who came over. However, there were contradictions as to whether he was the chairman of the area or not at the material time. While being cross-examined Leonard Rwaheru denied going to the appellant's farm in July 1998. John Kasaija also named Kaganda among the people who had come in to see the damage but in his testimony the said Johnson Kaganda did not talk about the July 1998 incident. The Assistant Veterinary Officer, Michael Businge testified that on 27th July 1998 he was called by the appellant to carry out an assessment of the appellant's crops destroyed by animals. This witness came in after the event he therefore did not witness the trespass being committed. That leaves only John

Kasaija who testified that he had actually seen the Respondent's cows trespass on the Appellant's plantation and destroying the banana plantation. However while being cross-examined this witness contradicted himself when he stated:

“We do not say in the farm after leading our cows, we go away. I was not present when the cows trespassed upon the banana plantation.”

Also when being re-examined he stated:

“I was not present when the defendant's cows trespassed on the plaintiff's farm in July 1998.”

The above were contradictions in the evidence of a key witness which should not be disregarded as they went to the root cause of action. I accordingly find that the learned chief Magistrate properly evaluated the evidence before him and came to the right conclusion that the appellant had failed on a balance of probabilities to prove the alleged act of trespass committed by the respondent's cows in July 1998.

With regard to the trespass stated to have been committed in November 1999 the record shows that the evidence adduced by both sides indicated that about 25 to 30 cows of the Respondent including a bull entered the appellant's farm. The issue is how the Respondent's cattle gained entry into the Appellant's farm.

John Kaganda stated that one day in the month of November 1999 at around 9.00 a.m. he met visiting cows mixed with the Appellant's cows drinking water. The appellant's cows were of the exotic Fresian type while the visiting cows were

a mixture of the local breed and cross breed. The visiting cows numbered about 28 to 30. According to him the visiting cows had gained entrance by breaking into the barbed wire fence. He recognized the visiting cows as those of the Respondent because on several occasions the same cows would trespass onto the appellant's farm and the witness would drive them back. The witness reported to the herdsman Kasaija and to the appellant. This witness did not see the cows enter the farm. He found the cows while they had already trespassed the banana plantation and crossed the bridge.

John Kasaija testified that on the material day after milking the cows he went home. Shortly after he was called by Tadeo who informed the witness that strange cows had entered the appellant's farm. The witness saw the cows which had mixed with the appellant's cows. He separated the two herds. Took the appellants herd home and left the invading herd in the farm. This witness also did not see how the invading herd had entered the farm. However, he stated that the cows had broken through the Respondent's fence and entered the appellant's farm.

The defence version is that it was the appellant's workmen who had cut his fence and drove his cattle from his farm into the appellant's farm. The witness Irene Kabanyaha stated that she would occasionally visit the Respondent at his farm and stay for about two or three months. That at the material time on 26th November 1999 while cutting trees for a broom in the defendant's farm at around 9.00 a.m. or 10.00 a.m. she was attracted by noise coming from the side of the Respondent's farm where cattle was grazing. She moved towards the noise and saw strange people driving the Respondent's cattle and crossing into the Appellant's farm. That he over heard the appellant thanking those people for having brought in the cattle. This witness informed Yakobo Kasaija, the

Respondent's herdsman, who went after the cattle. Yakobo Kasaija testified that he was called by his mother and when he came he found that cattle had been taken away. That he followed the cattle which he found in the appellants farm. The witness stated that he had found that the Respondent's barbed wire had been broken. The witness contradicted himself when said he had not seen the appellant's workers taking the cattle to the appellant's farm, but later stated that he had seen he appellant, Lakwena, Kalinda and Kaganda and other people driving the Respondents cows from the Respondent's farm and he followed them.

Yakobo Kasaija stated that when he followed the cows onto the appellant's home, the appellant arrested, tied and assaulted him. Irene Kabanyaka stated that after waiting for Yakobo Kasaija return in vain, she also went to the Appellant's farm. The witness found Yakobo Kasaija beaten and tied on a tree in the compound she untied him.

Irene Kabanyaka testified that at around 7.00 p.m. she together with Rwaheru went to the appellant's home to seek the release of the cattle. The appellant released to them the cows but retained the bull which he released after three days.

The learned Chief Magistrate believed Irene Kabanyaka's evidence that the cows were driven from the respondent's farm to the appellant's farm. His worship had an advantage over me in that he had the opportunity to see and hear the witness testify, which opportunity I lack. However, there may be circumstances which may warrant an appellate court in differing from a trial court even on a question of facts turning on the credibility of witnesses whom the appellate court has not seen.

The evidence of the appellant and his witnesses is that this incident was reported to the chairman L.C.I by then Bernard Rwaheru. This was confirmed by Bernard Rwaheru who testified that on 26th November 1999 the appellant reported to him that the Respondent's cattle had trespassed on his farm. At around 5.30 p.m. the witness went to the appellant's farm where they counted 29 cows. The 30th was at the home of the Appellant. I believe that must have been the bull. After the cows had been counted, the 29 cows were released to the Respondent's workers who had gone to the appellant's farm to collect the cattle. The report was made to the witness by the appellant and not any of the Respondent's workers. If Irene Kabanyaka's testimony was to be believed then the acts of the people who has entered the Respondent's farm cut the barbed wire fence, driven the respondent's cattle out of his farm onto another farm without the Respondent's consent were doing nothing short of stealing. Such conduct was criminal which called for immediate reporting to the relevant authorities and arrest. There was no evidence of any report made by the Respondent's workers. Instead the Respondent's workers went to the appellant to seek the release of the cattle. Further such conduct was unexpected in the hostile circumstances shown by the evidence to have been existing at the material time between the parties. The conduct shows the Respondent's workers trying to plead with the appellant for the release of the cattle which they had allowed to stray into his farm. In the circumstances I find that had the learned Chief Magistrate given the evidence before him sufficient scrutiny he would have believed the appellant and his witnesses and found that the Respondent's cattle did in the month of November 1999 trespass onto the Appellant's farm, and I so find.

In his plaint, the appellant claimed for 3,300,000/= as compensation for the property damaged. This claim is comprised of:-

- (i) Banana plants destroyed in the course of July 1998 – Shs1,200,000/= trespass.
- (ii) Broken wooden bridge, banana plants and pasture damaged during – shs1,200,000/= the November 1999 trespass.
- (iii) Banana plants damaged during another trespass also – shs600,000/= during another trespass also during November 1999.
- (iv) Value of would be calf – Shs330,000/=.

In essence this is a claim for special damages and as such must not only be specifically pleaded but must also be strictly proved. See Kyambadde V/S Mpigi District Administration (1983) HCB 44, Asuman Mutekanga V/S Equator Growers (U) Ltd S.C.C. A No: 7 of 1995.

As for the trespass allegedly communicated in July 1998 I have already upheld the learned Chief Magistrate's finding that the appellant failed on the a balance of probabilities to prove the alleged acts of trespass. Consequently, the appellant could not recover any damages, special or general, alleged to have resulted therefrom.

In his testimony the appellant stated that during the November 1999 trespass the Respondent's cows destroyed his banana plantation, broke a bridge on his farm, consumed his improved pasture which had special legumes for exotic cattle. Both John Kasaija and Johnson Kasanda testified that the Respondent's cows broke the fence passed through the appellant's banana plantation and entered the farm. Johnson Kaganda stated in his evidence that the cows destroyed the banana plantation, drunk water in the water troughs and ate salt. John Kasaija only talked about the bridge during cross-examination when the stated:

“Normally the plaintiff’s cows pass the bridge, which was broken
When the worker came he found the cows had broken the bridge.”

Similarly John Kaganda only talked about the bridge during cross-examination when he stated:-

“ The cows used to use a bridge for a long time. The cows of Mujwisa damaged Basaliza’s bridge. The cows broke the bridge because they came mating while passing the bridge. I found when the cows had passed the bridge, they had just passed you could tell by the hoof marks”

Michael Busingye testified that he was an Assistant Veterinary Officer holding a Diploma in Animal Husbandry from Bukalasa Agricultural College, 1995, an attendant certificate from Tororo DFI covering crop Husbandry 1995 and a Certificate in Artificial Insemination from Entebbe Veterinary Institute 1998. I was in charge of overseeing animal husbandry and fish farming in Hakibale sub-county. That on 27th November 1999 in the presence of the LCI Chairman he visited the appellant’s farm with instructions to assess the damage caused on the farm by straying animals. The witness tendered in evidence two reports both dated 27th November 1999. In his report three acres of banana plantation had been damaged and he put the damage at Shs 600,000/= There was a broken bridge but no value was put on it. In the other report the witness indicated that 4.0 acres of paddock with improved pasture had been over grazed. The area was explained as the area where the appellant had held the straying cattle for between eight to twelve hours. The damage caused by the overgrazing was put at shs.1,200,000/=. In both reports the witness stated that he had estimated the value on the basis of the Area Compensation Committee Meeting of 27th February 1996. The resolution or

minutes of this meeting were not produced in evidence so as to guide court on how the estimates were arrived at by the witness. Though this witness stated that the L.C. I chairman, Leonard Rwaheru was present when he was carrying out the valuation. All that Leonard stated in his testimony about the grass and banana plantation was:

“--- The farm is covered with grass, I saw grass.----

The following morning I was called after the Veterinary Officer had come

-- I met them in the banana plantation when they were coming back. -----

On the 1st day when I was called, we briefly went around, the cows had excreted in the farm. ---“

This witness does not talk about any damaged bridge, banana plantation or pasture. In Yosefu Kashongoize V/S China Sickman Corporation (1995) IKALR 64 the plaintiff claimed compensation for soil excavated from his land as murram Justice AN Karohora held:-

“As regards soil which was removed, I must state that this item was not proved on the balance of probabilities. It was not enough to write down particulars and so to speak, to throw them at the head of court, saying this is what I have lost. I ask you to give these damages. They have to be proved. See Boham Carter V/S Hyde Park Hotel (1994) 64 TLR 178. The onus of proof was on the plaintiff to prove by calling quantity surveyors to tell how much soil in cubic meters had been removed and costs of each cubic meters but there was no such evidence. In the circumstances this head of claim for damages would fail.”

In the instant case the formula used to assess the lost was not availed to court. The evidence of the Assistant Veterinary Officer contradicted that of the other plaintiffs witness, particularly that of the L.C. I. Chairman who never testified about the damage to a bridge, banana plantation or pasture. I find that the learned Chief Magistrate came to the right conclusion when he found that the appellant had on the balance probabilities failed to prove his claim on the above three items.

Before I take leave of the claim relating to the banana plantation and the pasture I must point out that though the learned Chief Magistrate came to the right conclusion considering the evidence on record, his Worship largely based his conclusion on his findings at the locus. The court record shows that Court visited the locus on 1st August 2002 and the proceedings were recorded as follows:

“A Locus

1.8. 2002

Both parties present

Both Advocates present

Mr. Kihumuro – interpreter

Court: We were shown the plaintiffs farm land. – The pasture can not be said to be improved when it is covered with ‘Teete’ grass which is very old. The plaintiff is clearing it now. We did not see salt troughs. There is a water trough and not damaged. The wooden bridge is intact. Plaintiff says he repaired it after the damage.”

The learned Chief Magistrate drew two sketch plans.

The purpose of visiting the locus in quo is for each party to indicate what he is claiming Each party must testify on oath and be cross examined by the opposite

party. The purpose is for the witness who have already testified in court to clarify what they were stating in court and to indicate features and boundary marks, if any to the court. Any observation made or noted by the court at the locus in quo must be noted and recorded and must form part of the record. See J. W. Ononge V/S Okallang (1986) HCB 63, Erukana Jawangara V/S Anderea Obbo – Ogolla (1976) HCB 31. Save for observations of court the record does not show any testimony by any of the witnesses at the locus in quo. In Badiru Kabalega V/S Sepiriano Mugangu (1992) 11 KALR 110 it was held that if the trial Court fails to follow the accepted procedure at the locus in quo and bases its judgment on the trial at the locus in quo, that omission is fatal to the whole trial.

In Yaseri Waibi V/S Edisa Lusi Byandala (1982) HCB 28 Justice Manyindo held that the usual practice of visiting the locus in quo is to check on the evidence given by witnesses and not to fill gaps for then the trial magistrate may run the risk of making himself a witness in the case. Such situation must be avoided.

That being the position of the law as regards evidence at the locus in quo, in the instant case the alleged acts of trespass were committed in July 1998 and November 1999. The locus was visited on 1st August 2002. With lapse of time a lot must have changed at the locus. There was no dispute over boundaries. The visit to the locus was in the circumstances a useless exercise. This case could have been decided without visiting the locus. Without basing himself on his findings at the locus, the learned Chief Magistrate would have properly come to the same decisions on a proper evaluation and security of the evidence which was already available to him on record.

The appellant also claimed for Shs330,000/= being the value of an would be calf. In his report of 27th November, 1999 the Assistant Veterinary Officer stated that when he visited the appellants farm that day he saw one cross breed bull of breeding age tethered by a rope to a tree, that he also looked over several cows belonging to the appellant and observed that one had dried mucal discharge as from natural breeding. In his report of 10th December 1999 the officer stated that on that day he had checked the appellants cow for a retained placenta. That he found the cow had aborted on 6th December 1999, the foetus was between 4 to 5 months old and the cause could have been due to forced mounting of a bull. In cross examination the witness explained that by “natural breeding” in his report he meant a bull mounting a cow. The witness said that he did not see all of the appellant’s cows that day and that he did not see the appellant’s bull. The witness stated that he did not know when the bull mounted the appellant’s cow.

The issue is whether on the material day of the trespass this cow had been mounted by the Respondent’s bull. Did any witness see the mounting and identify the bull? John Kasaija stated that the Respondents bull also mounted the appellant’s cows which had a miscarriage. He said that he saw the Respondent’s bull mounting the appellant’s cow. However, this witness while being cross examined contradicted himself when he said that he did not bother to keep looking at the cows and when he said that he saw the bull after it had mounted the cow. This puts doubt to his testimony on whether he actually saw the appellant’s cow being mounted by the respondent’s bull.

John Kaganda stated that there was a bull which mounted the appellant’s cows which were pregnant. In cross examination he stated that the cows broke the bridge because they came mating while passing the bridge. Yet he goes on to say

that he had found when the cows had passed the bridge. Therefore this witness could not have seen the cows mating as they passed the bridge.

There was no evidence to show that the appellant did not have a bull on his farm so as to exclude any other bull from being responsible for the mating which could have resulted into the abortion. The appellant failed on a balance of probabilities to prove that the abortion was a result of his cow having been mounted by the respondent's bull. That put aside, the appellant did not adduce any evidence to show how he had arrived at the value of the would have been calf. It is trite that special damages must be strictly proved. Therefore the learned Chief Magistrate came to the right conclusion when he dismissed the appellant's claim under this item.

In his final judgment the learned Chief Magistrate found that there was no proved trespass on both occasions and dismissed the appellant's claim. I have already upheld the learned Chief Magistrate finding with regard to the alleged trespass of July 1998. I have however found that the Respondent's cattle in November 1999 trespassed onto the appellant's farm. In his pleadings the appellant had prayed for general damages and interest thereon at 60% from the date of cause of action until payment in full.

As a general principle damages in tort are compensatory in nature. A party who suffers damages due to the wrongful act of the other must be put in the position he would have been had he not suffered the wrong. The appellant was entitled to the exclusive use of his farm and pasture thereat by his cattle. His right was interfered with when the Respondent's cattle was left un attended which enabled it to break the barbed wire fence between the appellant's farm and that of

the respondent, and while on the appellant's farm intermingle with his cows and inevitably feed on pasture intended for only the appellants herd. The appellant was in the circumstance entitled to reasonable compensation for the damage and inconvenience suffered. At the court below the appellant had prayed for general damages of Shs6,000,000/=. However this was in respect of trespass on the two incidents. This Court's finding is that the appellant adduced evidence to prove only one incident that is of November 1999. In the circumstances I find that general damages of Shs2,500,000/= is reasonable and the appellant is awarded the same. The appellant's entitlement to that money has only arisen upon the pronouncement of this judgment. The appellant is therefore awarded interest at the rate 25% per annum from the date of this judgment until payment is full.

The appellant is awarded costs for the proceedings before this court and the court below. I so order.

Lameck N. Mukasa
Judge