THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – CA – 002 OF 2022

(ARISING FROM KYENJOJO CIVIL SUIT NO. 001 OF 2022)

BYAMUGISHA DAVID :: APPELLANT

VERSUS

KEBIRUNGI VENNY :: DEFENDANT

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

The appellant being aggrieved by the judgment of His Worship Babu Waiswa, Magistrate Grade One, Kyenjojo Chief Magistrate's Court in Civil Suit No. 0001 of 2022 delivered on 13th December 2022 lodged an appeal against the said judgment and the orders therein asking court to have the same set aside with costs.

Background:

The Respondent filed Civil Suit No. 001 of 2022 in the Chief Magistrate's Court of Kyenjojo seeking recovery of shs 1,837500/= as compensation for her crops which were eaten or destroyed by the defendant's cattle in the early month of June 2022 and costs of the suit. It was contended by the Respondent that in the early month of June 2022, the defendant's cows strayed and entered the plaintiff's garden destroying her maize, bananas, sweet potatoes and Irish Potatoes. That the appellant was approached to solve the issue amicably which he refused and the plaintiff was forwarded to the local authorities and later police. That the plaintiff later was forwarded to the agricultural officer who did an assessment of the destroyed crops

and he returned a sum of shs 1,837500/=. That the defendant was summoned by the authorities and refused to reply and the plaintiff/respondent was forwarded to the authorities thus leading to filing the suit. That the defendant/appellant's cows were responsible for the destruction of the plaintiff's crops and asked for judgment in her favour.

The defendant/appellant denied the allegations and contended that his cows never strayed to the defendant's garden. That the plaintiff came to the defendant's farm together with other people and proposed that the two reconcile however since the defendant's animals had not strayed to the plaintiff's garden and had not destroyed her crops, he did not enter into the reconciliatory talks. That the plaintiff reported him to police and he explained what had happened. That the defendant's cows did not destroy the plaintiff's garden of maize, irish potatoes, sweet potatoes and bananas and thus asked for the suit to be dismissed with costs.

The trial magistrate after hearing the case, gave made judgment in favour of the plaintiff/respondent which aggrieved the appellant hence the appeal.

Grounds:

The Appellant framed fours grounds of appeal thus:

1. **The learned trial Magistrate erred in law and fact when he held that the appellant is supposed to pay the value of crops of shs 1,837,500/= when there was no sufficient evidence causing a miscarriage of justice to the appellant.**

2. **That the learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record regarding the case hence causing a miscarriage of justice.**
3. **That the trial magistrate erred in law and fact when he failed to consider the appellant's strong defense on record.**

Representation and Hearing:

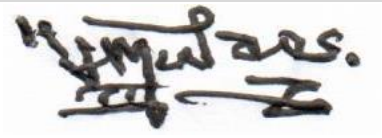
Both parties were not represented by counsel. I thus considered the memorandum of appeal and the record of the lower court.

Duty of this Court:

As the first appellate court, the duty of this court is to rehear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. ***(See: Father NanensioBegumisa& 3 others vs Eric Tiberaga SCCA 17 OF 2000 [2004] KALR 236)***. The first appellate court does re-evaluation on record of the trial court as a whole weighing each party's evidence, keeping in mind that an appellate court, unlike the trial Magistrate had no chance of seeing and hearing the witnesses while they testified, therefore this court had no benefit of assessing the demeanor of the witnesses. ***(See: Uganda Breweries v Uganda Railways Corporation 2002 E.A)***

Consideration of the grounds:

Ground 1: The learned trial Magistrate erred in law and fact when he held that the appellant is supposed to pay the value of crops of shs 1,837,500 when there was no sufficient evidence causing a miscarriage of justice to the appellant.



The above ground though not very specific, in my view, it challenges the decision of the trial Magistrate to award compensation to the Respondent of shs 1,837,500/=. The said sum appears to have been awarded as special damages since it represented the value of the Respondent's crops which were destroyed by the appellant's cattle. It is settled law that special damages must be specifically pleaded and proved but such proof need not necessarily always be by documentary evidence. Special damages can be proved by direct evidence***;*** for example, by evidence of a person who received or paid or testimonies of experts conversant with the matters". ***(****See* ***Gapco (U) Ltd Vs A.S. Transporters (U) Ltd CACA No. 18/2004 and Haji Asuman Mutekanga Vs Equator Growers (U) Ltd, SCCA No.7/1995).***

The trial Magistrate awarded the Respondent the sum contested by the appellant as special damages relying on the valuation report made by the agricultural officer. In the order issued, he stated thus:

> ***'An order that the defendant shall pay shs 1,837,500 to the plaintiff as compensation for the destroyed crops per the valuation report authored by the Agricultural Officer of Kifuka Town Council in Kyenjojo District dated 15th June 2022."***

Therefore, the said sum was awarded as special damages per the report of the Agricultural Officer. I have perused the record of the trial Magistrate and found that the report by the Agricultural Officer was not tendered in as evidence for the Respondent. The question would be whether or not a document not tendered in by parties as an exhibit can be relied upon by court.

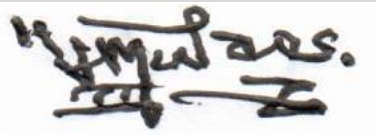
This question is exhaustively answered by the dicta in ***Kenneth Nyaga Mwige v Austin Kiguta& 2 others (2015) eKLR*** which position was cited with approval in ***Sofie Feis Caroline Lwangu v Benson Wafula Ndote [2022] eKLR*** thus***:***

> **"The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved or not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.**

The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document isnot marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

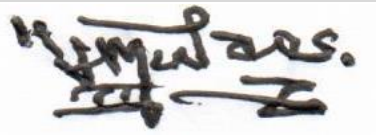
In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ144, it was held that if a document is not admitted in evidence but is marked for



identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they have simply been marked for identification and they have no evidential weight. The record shows that the trial court relied onthe document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.



In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification……' (emphasis added).

Therefore, a document only forms part of the evidence of the parties if the same is tendered in and received by court as an exhibit. This is so because once such a document is exhibited, it can be tested through cross examination. Therefore, documentary evidence only forms part of the evidence before court after the same is exhibited.

In the present case, the trial magistrate did not exhibit the report of the Agricultural Officer and such it did not form part of the evidence presented by the Respondent to Court. Therefore, the trial magistrate could not rely on the same. This renders the award by the trial magistrate which was pegged on the report erroneous and I consequently set it aside. This ground therefore succeeds.

Grounds 2 and 3:

2. **That the learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record regarding the case hence causing a miscarriage of justice.**
3. **That the trial magistrate erred in law and fact when he failed to consider the appellant's strong defense on record.**

I will consider grounds 2 and three concurrently since they relate to the manner in which the trial magistrate evaluated the evidence.

The plaintiff who testified as PW1 informed court that on 4th June 2022 at 10:00am, the defendants cows entered into her garden and destroyed her bananas, irish potatoes, maize, sweet potatoes and she reported to the community head (Sabataka). That when the defendant was informed, he refused to compensate her and she thus reported the matter to L.C1 chairperson and paid fees and when the defendant was summoned, he refused to attend. PW1 stated that the chairperson L.C1 Mr. Musinguzi Charles referred her to the Agricultural Officer to assess the damage. That the assessment was made and when the defendant was asked to pay he refused. That in the same year July 2022, the defendant's cattle again trespassed into her gardens at around 7:30pm. That she called the defendant who drove off his cattle without talking to him although they were photographed and that the defendant refused to compensate her. In cross examination, PW1 stated that she did not take the defendant's cows back to the farm. The witness further stated that when the cows caused the damage, she decided to report the matter to the LC.1. PW1 said that the cows Trespassed on the garden on 4th June 2022 at around 9:00am. The witness told court that that the chairperson and Johnson chased them and that the distance between her home and that of the chairperson was about a kilometer. That she saw many cows but when she chased them, one remained. In re-exam, she stated that when the defendant's cows trespassed into her garden, she reported to the chairman L.C.1 and for the second time, she called the chairperson on phone and he responded with a one Kisembo Richard, the Youth Representative on the L.C1 committee and

requested a one Peter the photographer to take a photograph of the cow that had remained in her garden.

PW2 (Musinguzi Charles) the area chairperson of Kihuura Village stated in chief that he received a phone call from Bright Johnson, the Sabataka who informed him that the defendants animals had entered into the plaintiff's garden. That the matter was officially reported to the L.C1 and when the defendant was summoned, he refused to come but told him that the cows that trespassed on the plaintiff's garden were not his. That they forwarded the plaintiff to the agricultural officer who assessed the damage caused. PW2 further testified that when he was at the funeral, he received a phone call to go and see the defendant's animals eating the plaintiff's crops. That he saw one cow eating the plaintiff's maize and he was told that others were chased from the garden. That he told the defendant to put a strong fence so that his animals do not cross onto the plaintiff's garden again but he did not mind. That he called a young man called Peter who had a smart phone to take a picture of the cow with white black spots which was still in the garden eating the maize. In cross examination he stated that they chased the defendant's cows from the garden. That when he reached the garden, he found one cow and he was told the other had left. That the plaintiff was referred to the agricultural officer since he was the one responsible for matters relating to destruction of gardens by animals. That it was the defendant who took the cows which were found in the plaintiff's garden and this happened twice and he was involved in their dispute and they handed the cows to the defendant twice. In re-examination, he stated that the cows they found in the plaintiff's garden had made a way through the fence the defendant constructed where they passed.

PW3 (Bright Johnson), the head of the community (Sabataka) testified that one day at around 6:00am, someone called Ahebwa, the plaintiff's husband went to his place and told him that the defendant's cattle had destroyed his garden of maize. That he requested him to go and see the destruction caused by the cows. That he went to the garden and on reaching there, he saw the destruction of the maize. That he realized he could not handle the matter and he called the L.C.1 chairman on mobile and informed him about what he had seen. That again in June, the plaintiff called him and informed him that the cows had invaded his garden of maize and on reaching the garden, he saw a cow belonging to the defendant eating maize and he asked a one Peter to Photograph the cow which has white and black spots. That the crops destroyed included irish potatoes, sweet potatoes. In cross examination the witness said that the first time a report was made by the plaintiff's husband, he did not see the cows but saw the destruction made. The witness stated that on the 2nd occasion, he found the defendant's cow grazing in the maize plantation. That he saw a fence separating the defendant and the plaintiff. That he saw one cow and he was told the others had left. That the remaining cow followed the path the other had left through the broken fence. That he could identify the cow he saw.

PW4 (Kisembo Richard), the youth chairperson of Kihuura Village testified that in the last season, at around 7:30pm while in the trading center, he was informed by the area chairperson that the cows of the defendant were in the garden of Venny (plaintiff) and he was requested to go to the garden and see what to do because the defendant had been denying trespass and destroying of the plaintiff's garden. That they reached there at 8;00pm and saw one cow eating the maize. That they told the defendant to come and pick his cow and he told them to chase it back to the farm

and they helped to do so through a hole along the farm fence. PW4 said that when they helped, the defendant took them to the trading centre and bought for them sodas. That the plaintiff reported a case and the defendant refused to respond to the summons and that the chairperson referred the plaintiff to the agricultural officer. In cross examination, he stated that he only saw one cow since the other had left. That he witnessed the part where the cows would pass and enter the plaintiff's garden. The witness told court that when they found that one cow, it was evidence that it was the defendant's cows which had been eating from the plaintiff's garden and the defendant had been denying knowledge. That he could identify the cow they helped to drive back to the defendant's farm.

The defendant who testified as DW1 stated in chief that in the month he did not recall, the plaintiff called him and informed him that his cows had trespassed onto her garden and he asked her why she did not drive them to him to prove that it were his cows. That other people had cows in the garden and the plaintiff insisted they were for the defendant. That he was later summonsed for mediation by the L.C.1 & II and he told them that his cows had never trespassed on the plaintiff's garden because he did not see any. That when he refused to admit, the plaintiff went to Kyenjojo Police and when he was summonsed, he responded and explained to them that the cows had never trespassed into the plaintiff's garden and police advised her to file a civil suit. In cross examination, he stated that near his land and that of the plaintiff was Kamuganda who also owns cows bordering the plaintiff's garden. That there was also late Ruhunga who had a small farm and gardens near the plaintiff's garden. That if the plaintiff has brought the cows to him, he would have accepted that she found them destroying her gardens. That his cows were catered for by

herdsmen and had a gate and people who won't allow them cross. That if the defendant found cows, he should always bring them to him to confirm.

DW2 (Byamugisha James), the L.C.II chairperson informed court that he was aware of the dispute between the parties before Court. That when the compliant was made, he visited the farm of the defendant and found it properly fenced and that he was in the company of the chairman L.C 1 and the Mayor of Kifuka Town Council and PW4. The witness stated that the crops were not destroyed as alleged by the plaintiff. That there was also a foot path and small gate made of poles. That the footpath crosses into the defendant's farm. That he did not go through the fence. DW2 said that the defendant had about 80 cows. In cross examination he stated that he did not see the damage to the crops because he did not visit garden. That he saw the gate at a distance and it was firm.

ANALYSIS OF THE EVIDENCE:

The Plaintiff's claim against defendant as pleaded in the plaint was for recovery of compensation for her crops which were eaten or destroyed by the defendant's animals and costs. It was stated under paragraph 5(a) of the plaintiff that the alleged damage happened in the month of June 2022. I will thus not consider evidence of events that happened after the filing of the case alluded to by the plaintiff and her witnesses since those facts are not supported by the pleadings filed by the parties in Court.

To support the said claim, the plaintiff stated in her evidence that on 4th June 2022 at 10:00am, the defendant's cows entered into her garden and destroyed her crops to

wit; bananas, irish potatoes, maize, sweet potatoes and she reported to the community lead (Sabataka) (PW3). In cross examination he stated that the cows trespassed on her garden at 9:00am on 4th June 2022. Her testimony was supported by PW2, the area chairperson who stated that he received a report from the Sabataka (PW3) about the destruction of the plaintiff's. That he invited the defendant for mediation and the defendant failed to appear. PW3 and PW4 testified that they found one of the defendant's cows in the plaintiff's garden and could identify the same. The defendant did not deny owning the cow alluded to by the plaintiff and her witnesses. I therefore find that the trial magistrate rightly found that the defendant's cow escaped into the plaintiff's garden. The defense by the appellant in my view had no merit. Therefore, on a balance of probabilities the plaintiff's claim of damage of his crops by the defendant's cow rightly succeeded. Therefore, the trial magistrate properly evaluated the evidence on record. Grounds 2 and 3 fail.

Since the basis upon which the trial magistrate pegged his grant of damages was erroneous, I will proceed under Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act to consider the issue of damages.

In ***Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55*** court set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> ***"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The***

appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) <u>or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate." (emphasis is mine).</u>

Similarly, in ***Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47***, the Court of Appeal held that:

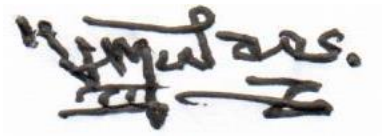
*"**In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."***

In this case, the trial magistrate relied on a report by the agricultural officer which was not admitted in evidence. Therefore, the award is erroneous and thus I set it aside. That being the case, after due consideration of the evidence on record and to avoid multiplicity of suits, I find an award of shs ***800,000/= (Eight Hundred Thousand Shillings)*** fair and adequate since from the evidence, the Respondent did not adduce cogent materials to prove that the crops were all destroyed and she got nothing from the garden.

Therefore, this appeal partially succeeds and I hereby set aside the judgment and orders of the trial magistrate and replace them with the following orders;

1. **That the appellant shall pay to the Respondent shs 800,000/= (Eight Hundred Thousand Shillings) as compensation for the damage caused by the defendant's cows to the plaintiff's crops.**
2. **That since the parties herein are immediate neighbors and in a bid to promote harmony, I order that each party shall bear their own costs of this appeal and in the Court below.**

I so order.



Vincent Wagona

High Court Judge

FORTPORTAL

DATE: 30/11/2023