

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CIVIL APPEAL NO 3 OF 2020

LUCAS ONGURU AND 29 OTHERS _____ APPELLANTS

VERSUS

1. SAMWEL ALFRED _____ 1st RESPONDENT

2. JOHN MBOGO _____ 2nd RESPONDENT

(Arising from the decision and orders of the resident magistrates' court of Musoma at Musoma, Hon. Mwakihaba RM, in civil case no 2 of 2019 dated 18.12.2019)

JUDGEMENT

Date of last order; 11.06.2020
Date of Judgment; 24.07.2020

GALEBA, J.

In this appeal, thirty (30) appellants are challenging a decision of the Resident Magistrates' Court of Musoma at Musoma in civil case no 2 of 2019 in which they were ordered to hand over to the two (2) respondents thirty five (35) herds of cattle. The appellants were aggrieved by that decision hence the present appeal.

The background to the dispute preceding this appeal is that at Kwigutu village in the district of Butiama, Mara region, on 16.11.2018 either seventy five (75) or forty (40) herds of cattle being the property of the respondents grazed in the maize field of **ZEPHANIA FARES (DW1)** who was also the 2nd defendant in the trial court) and

destroyed the crops. The cattle were apprehended and later in the evening on the same day, forty (40) cattle were handed over to the respondents. Although the respondents received forty (40) cattle, they alleged that the cattle that had been apprehended by the appellants were not forty (40) but seventy five (75). They alleged that thirty five (35) cattle were missing at the time of hand over. It is not clear if there was any formal demand of the missing cattle, but on 07.01.2019 the respondents filed civil case no 2 of 2019 in the resident magistrates' court of Musoma claiming, **not the cattle missing**, but Tshs 31,000,000/= being the value of thirty five (35) thirty five (35) herds of cattle, general damages of Tshs 9,000,000/=, costs, interests and any other reliefs that the court might deem appropriate to grant. The matter was heard and finally a judgment was delivered in favour of the respondents as stated above by ordering the appellants to hand over 35 herds of cattle to the respondents. This is the judgment that the appellants are now challenging before this court.

In this appeal, although the appellants filed five (5) grounds of appeal, but this court will first deal with the 5th ground of appeal, because the ground could have an overriding effect on the entire appeal by disposing of it if it will succeed; but if it will not, the court will proceed to determine the merits and demerits of the other grounds. Ground five is to the following effect;

"5. That the trial court erred in law and fact by failure to consider the strong evidence adduced by the appellants and their witnesses to wit they proved their case on the balance of probability."

To adequately deal with that ground, I will start with the pleadings. **First** the respondents' claims were at paragraph 3 of the plaint. That paragraph reads;

"3. That the Plaintiffs jointly and severally claim against the defendants a sum of Thirty One Million Shillings (Tshs. 31,000,000/=) as special damages and Nine Million Shillings (Tshs. 9,000,000/=) as general damages being compensation for the Thirty Five Cattle (35) that were illegally and unlawfully taken by the Defendants while grazing in the meadow, interest at the Court's rate and Costs of the suit."

Those claims are repeated at paragraph 8 of the plaint as well as at the prayer clause immediately after paragraph 9 of the plaint. To put the point clearer and more intelligible, the respondents' claim before the trial court was not to be handed over with any cattle they alleged to be missing; the claim was a monetary claim as per the pleadings. I will come to this matter a while later.

Secondly, at paragraph 3 of the written statement of defense, the appellants pleaded that they apprehended thirty four (34) cattle which were found in the maize field of the 2nd respondent one **ZEPHANIA FARES (DW1)** which cattle were abandoned to nobody's care or supervision. **Thirdly**, at paragraph 6 of the written statement of defense, the appellants pleaded that if the number of cattle was seventy five (75) then the missing cattle could have been lost by the respondents themselves because at the maize field there was no

one and the cattle found there were thirty four (34). In respect of these two points, the respondents did not file any reply to the written statement of defense to dispute the allegations. Thus far are the pleadings as for the reliefs sought and also what happened in relation to the numbers of the cattle.

The agreed issues the trial court were as follows;

"1. Whether the plaintiffs' cattle were unlawfully taken/attached by the defendant

2. Whether the plaintiff owns 75 cattle.

3. If the first issue is answered in the affirmative, to what reliefs are the parties entitled."

With the above information in mind, I will now proceed to the evidence that was presented and because of the importance of the evidence of **PW1, JAMES ALFREDY** this court takes liberty to reproduce its substance relevant to the ground of appeal subject of discussion. At page 16 of the typed proceedings the evidence of **PW1** was as follows;

"My father do keep cattle and has the shops. On 16.11.2018 at 11.00 hours am while feeding my father's herds of cattle being 75 herds of cattle which was armed (sic) by Samwel Alfred and John Mbogo. Your honour there than (sic) 30 people appeared and took the said herds of cattle and chased me. I decided to ran any and I told the arresting for such unlawful act (sic). They brought 40 herds of cattle out of 75 herds of cattle and demanded for the remaining 35 herds of cattle, the owner when looking

for them they were beaten and assaulted by the village members. I recognized their face of who took the said herds of cattle. That is all."

Note in this evidence, **PW1** does not mention the place where the cattle were seized (whether it was in the pasture or in the maize field) and he does not mention any name of any person who seized the cattle.

PW2, SAMWEL ALFREDY, testified that **PW1** had gone to the pastures with seventy five (75) herds of cattle but at around 16.00 hours, "**the defendant**" handed to them forty (40) cattle. Amongst the seventy five (75) herds, fifty two (52) were his and twenty three (23) were **JOHN MBOGO's**. They were beaten and assaulted and were given **PF3** at the police and they were attended at Butiama Hospital. In proving the pleaded financial claim, **PW** testified that of the thirty five (35) herds of cattle missing, thirty (30) were big and fat each was valued at Tshs 900,000/=. The total amount for these cattle was Tshs 27,000,000/=. As for the remaining five (5) which were medium and the cost for each was Tshs 800,000/= with a total value of Tshs 4,000,000/=. The witness prayed also for Tshs 9,000,000/= for disturbance and interests.

The substance of the evidence of **PW3 JOHN MBOGO**, was the same as that of **PW2, SAMWEL ALFREDY**. The plaintiffs' case was closed with the above evidence.

In this case although the 1st issue was resolved in the affirmative, but that was only possible if **PW1, JAMES ALFREDY** disclosed the location or the place at which he was grazing the cattle at the time the animals were being seized. If the animals were seized in the open grassland pasture, then the seizure or the attachment would be illegal, but if the cattle were apprehended destroying the crops of **ZEPHANIA FARES (DW1)**, no court properly directing itself to facts can hold that the cattle were apprehended unlawfully. In this case, the only evidence we have on record as for the location where the animals were attached is from the defense, see the evidence of **ZEPHANIA FARES DW1, MWIGELA JOHN DW2** and **LUCAS ONGURU DW3** at pages 23, 26, 28 respectively all testifying that thirty four (34) herds of cattle were found in the farm of **PW1** and were thereafter seized. By any standards, a person's act of seizing or apprehending domestic animals while grazing on his crops cannot be an unlawful attachment. In other words, if the above witnesses found the crops of **DW1** being destroyed by thirty four (34) herds of cattle, it was unlawful to hold that such seizure was illegal. It is different if the plaintiffs proved that the animals were attached in the public pasture, which proof was missing. This court therefore holds that the respondents' side failed to prove that the seizure of the animals was illegal hence the seizure of thirty four (34) cattle was justified.

The issue of the respondents owning seventy five (75) herds of cattle was not a material point if proved would assist any of the party win

or lose a case, although if it was framed as an issue. Indeed the respondents could be owning seventy five (75) cattle or even more, but was there an issue as to how many animals were the property of the respondents before the trial court? For getting the glimpse of what an issue is, this court reproduces the provisions of **Order XIV rules 1, 2 and 3 of the Civil Procedure Code [Cap 33 RE 2019]**. Those rules are to the effect that;

"XIV (1) Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.

(2) Material propositions are those propositions of law or fact which plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defense.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue."

The appellants were disputing the number of cattle they attached and not the number of cattle the respondents owned. The appellants testified that the animals were thirty four (34) and not seventy five (75). This is what was supposed to be the issue, but unfortunately, it was not framed. This means resolving the issue as to the number of cattle that the respondents owned in their lives, was a waste of time. Unless a fact is disputed by the defendant, the same can never be treated as an issue.

To make some headway, let me say this on the first two issues; **first**, this court has already demonstrated, based on what is on record, that because the plaintiffs (respondents) did not bring any evidence to prove that the cattle were seized while grazing in open grass land and not in one of the appellant's maize field, then the respondent failed to prove that attachment of the animals was illegal. **Secondly**, framing the second issue (in the proceedings because the trial court rearranged the issues in the judgment interchanging the 1st issue for the 2nd and vice versa) on the number of animals owned by the respondents was inconsequential as it cannot lead to resolution of any misunderstanding or dispute between the parties as there was no misunderstanding. That discussion leaves this court with only the issue of reliefs.

The evidence on the issue of reliefs was from **PW2, SAMWEL ALFREDY** and **PW3 JOHN MBOGO**. Their claim in the case was the value of the cattle. They testified that thirty (30) cattle were fat and each was valued at Tshs 900,000/= which made a total of Tshs 27,000,000/= and that the remaining five (5) were medium and that their value was Tshs 800,000/= each with a total value of Tshs 4,000,000/=. They also demanded Tshs 9,000,000/= for disturbance and interests.

There are a few points that ought to come to the court's mind when such evidence was tendered. **First** were all the thirty (30) cattle; cows, bulls, calves or a mixture of them, secondly how is it possible that all thirty (30) cattle could fetch the same price? **Thirdly**, the basis

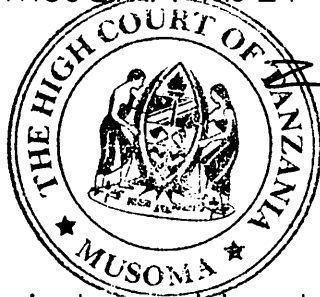
of determining the prices was the size of the animals because were fat and big, but how much fat and how big were the cattle? This question is relevant because a calf could be big and fat but remain a calf. **Fourthly** what was the actual difference between the thirty (30) cows and the 5 which were "**medium**"? From the evidence answers to these questions are hazy and vague and difficult to infer therefrom, leading to only one irresistible conclusion namely that the values attached on the alleged cattle are a fruit of guesswork. This could be the reason why the trial court even ignored them.

Ignoring claims of the respondents, without dismissing them or upholding them was yet another illegality. The court granted reliefs that were not pleaded anywhere in the plaint. The court ordered handing over of the cattle which was never a prayer in the pleadings. A court cannot grant reliefs which are not pleaded or prayed, see **CIVIL APPLICATION NO 7 OF 2009 THE MANAGING DIRECTOR KENYA COMMERCIAL BANK (T) LTD VERSUS SHADRACK J NDEGE CA** and **CIVIL APPLICATION NO 107 OF 2000 SEBASTIAN MINJA VERSUS TANZANIA HARBOURS AUTHORITY CA** both unreported. In other words, whereas the respondents failed to prove the case on the balance of probabilities, even the reliefs prayed were neither dismissed nor granted, instead some other relief alien to the plaint was granted. In the premises, the 5th ground of appeal is allowed.

As the disposal of the 5th ground of appeal is sufficient to dispose of the whole appeal, there does not seem to be any useful point to seek to determine the other 4 grounds raised.

In the circumstances, this appeal is allowed with no orders as to costs.

DATED at MUSOMA this 24th July 2020



Z. N. Galeba
JUDGE
24.07.2020

Court; This judgment has been delivered today on 24th July 2020 in the absence of parties but with leave not to enter appearance.



Z. N. Galeba
JUDGE
24.07.2020