

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL CASE NO. 185 OF 2018

BETWEEN

ALLY ABDALLAH ALLY PLAINTIFF

VERSUS

MAPODA KITABAKA & 2 OTHERS DEFENDANTS

JUDGMENT

MRUMA J,

The plaintiff Ally Abdallah Ally instituted a suit against three Defendants namely Mapoda Kitabaka, Daudi Aepoda and Beka Kitaraweka claiming against them jointly and severally for the following orders:-

- i. That the defendants be ordered to pay him T.shs 323,050,000/= being specific damages for the loss he suffered;
- ii. The Defendants be ordered to pay him T.shs. 150,000,000/= being damages for loss of earning;

- iii. That the Defendants be ordered to pay him T.shs 100,000,000/= being punitive damages;
- iv. That the Defendants be ordered to pay him T.shs 50,000,000/= being general damages suffered;
- v. Interest at commercial rate of 7% per month on the amount in (i) above from the date of the cause of action until final judgment;
- vi. Interest at the rate of 12% per month on (i) (b), (c), (d) and (e) above from the date of judgment to the date of final payment, costs of the suit and the traditional prayer of;
- vii. Any other relief this court may seem fit and just.

In these proceedings the plaintiff enjoyed the service of Mr. Abdulfattah A. Abubakar learned advocate, while, the 1st defendant enjoyed the service of Mr. Nyamhanga David Nyamhanga learned advocate. The 2nd and 3rd defendants were unrepresented and though duly served they didn't enter appearance and hence the case against them proceeded ex-parte.

This case was initially assigned to my brother in bench his Lordship Rwizile J, and upon his transfer to another working station it was re-

assigned to. His Lordship Rwizile J took the testimony of the plaintiff Ally Abdallah Ally who testified as PW1.

In his testimony PW1 told the court that he was a director of his company which deals with farming activities at Ugezi village of Bumba ward of Mtawanya in Kibiti District of Coast Region. He stated he owned a farm of about 250 acres at Ugezi, which he brought in 2013 and he grew therein mango trees, coconuts and jackfruits (Mafenesi). The Plaintiff testified further that he developed interest in agriculture after visiting and exhibition (show) in South Africa where he learned about crops that have high market values such as high bridge mangoes and jackfruits. He further stated that during the said exhibition which was conducted in 2014 contacted some South African firms which were dealing with seeds in Tanzania with agents in Nairobi Kenya. In 2016 he ordered some seeds and planted them in his farm under the supervision of a consultant and in accordance with procedures on how to plant them. He further stated that in September, 2018 two years after he planted the crops and during the dry season the defendants started grazing their cattle in his farm. He said that with the aid of his workers in the farm and village leaders they drove the cattle away but two days later the farm was once

again invaded and they drove them off again. When the Defendants rode their cattle to the farm for the third time he could not manage them himself because it was a big herd of cattle. He therefore reported the incident to sub village leader and to the Ward Executive Officer (commonly known as WEO) of Mtawanya Ward one Stella Manyaja. He said that the WEO with her team visited his farm for purposes of evaluating the damages caused. According to the Plaintiff evaluation was conducted. He tendered in evidence two letters (Exhibit P1), addressed to the Ward Executive Officer of Mtawanya and the OCS of Kibiti Police Station as his exhibits.

It was further testimony of the plaintiff that when the WEO visited his farm with her team they found the cattle in the farm and they had been there for a day as a result of which they had ate and destroyed all crops. He said that the WEO wrote a report and sent it to the police at Kibiti for intervention. His shamba boys apprehended the cattle herders and were sent to Kibiti police station for further investigations and possibly criminal charges. It was the testimony of the Plaintiff that on being interrogated the herders confessed and mentioned the present Defendants as owners of the seized herds of cattle. While at the Police, one of the Defendants went to the police

station and was arrested. PW2 further averred that the 2nd defendant admitted and agreed to drive off his cattle from the farm. The Defendants were released from police on ground that they would not repeat it again.

It was further testimony of the Plaintiff that the defendants did not stop grazing their cattle in his farm and they brought it again on the second day and the destruction was much worse and he was forced to call the police for help. When police went there he informed them that his field boys were in danger because this time the cattle owners were violent. Further to that the Plaintiff told the trial court that this time the cattle were driven off his farm slowly. He decided to institute a suit to claim damages for the destruction caused. He said that the WEO assessed and approved the crops destroyed as 1000 mango trees, 200 coconuts trees and 50 jackfruits (Exhibit P2). According to exhibit P2, it shows that the plaintiff's is claiming for the following;

(i) Costs for clearing the farm TZS 19,000,000/=

(ii) Costs for cultivating and planting TZS 50,000,000/=

(iii) Costs to spray pests TZS 57,000,000/=

(iv) Costs for transportation of seeds from Nairobi TZS 7,000,000/=

(v) Consultant fees TZS 103,000,000/=

(vi) Costs for keeping the crops TZS 91,000,000/=

In cross-examination with the consultation services procured the Plaintiff told the court that he procured a specialist in agronomy and on the dates the crops were grazed, he said that it was between 10th and 20th September 2018. On how long would it take from planting to harvesting PW1 told the court that mangoes are harvested after 3 years, jackfruits 4 years and coconuts after 8 years. He further stated that, when grazing started in his farm mangoes, coconut and jackfruits were in an average of 1 metre high.

Regarding the herds of cattle PW1 told the court that he personally saw the herds destroying crops in his farm. He mentioned others who also saw them as the Ward Executive Officer and the Live Stock Officer. Neither of the two persons was called to testify in this case. The Plaintiff's case was closed.

On 2nd June 2022, court was informed that the 1st Defendant had passed away since February 2022 and as there was no application made to make his legal representative a party to the proceedings as required by rule 4 (1) of Order XXII of the Civil Procedure Code, it

follows that in terms of the provisions of sub-rule (3) of Rule 4 of the same Order, suit against the 1st Defendant abated. As suit against the rest of the Defendants proceeded ex-parte, this court will proceed to evaluate the evidence available and see whether the Plaintiff has been able to prove his claims against them.

At the final pre-trial conference the following issues were framed by the court for determination. The issue are:-

(1) Whether defendant's cattle trespassed into the plaintiffs farm and destroyed crops therein.

(2) Whether the plaintiff suffered any damages.

(3) To what reliefs are the parties entitled.

As the record would show, the plaintiff (PW1) was the only witness who gave his testimony in support of his case. Now as regards the first issue which is whether the Defendant's cattle entered onto the Plaintiff's farm and destroyed crops therein, it is trite law that he who alleges must prove. This principle is embodied in the provisions of section 110 (1) of the Evidence Act [Cap. 6 R.E. 2019] and was well demonstrated in the case of **Abdul Karim Haji v Raymond**

Nchimbi Alois and Another, Civil Appeal No. 99 of 2004

(unreported) where the Court of Appeal stated that:

*"...it is an elementary principle that
he who alleges is the one responsible
to prove his allegations."*

The above established principle of law requires the plaintiff to prove his allegation with supportive evidence within the scope of the meaning of balance of probability. The Plaintiff testified that he personally saw the Defendant's herds of cattle destroying crops in his farm. He told the court that the incident was also witnessed by the Ward Executive Officer, his farm workers and the Live Stock officer. However, no witness among the mentioned persons or any other person was called to substantiate his claims. Despite the fact that there is no specific number of witnesses required to prove a claim, but where the Plaintiff mentions other persons whom he alleges witnessed the alleged cause of action it is imperative that those persons have to be called to court to confirm the Plaintiff's allegations that the alleged incident actually occurred. If they are not called and no reason is given to explain why they have not been called the logical inferences that could be drawn will be that either they were not in the scene or they didn't see the act complained. This may

different where the Plaintiff claims that he was alone. His details of the incident can be believed. In this case the Plaintiff's failure to call any of those persons whom he claims to have witnessed the herds in his farm without giving any reason tends to reduce the weight of his own testimony regarding seeing the herds destroying his crops to below the balance of probability required by law. The law also requires wherever possible evidence to come from the person who alleges to have seen the incident (see Section 62 (1) of the evidence Act). As the Plaintiff is the beneficiary of any positive result of this case and because he testified that the alleged trespass was witnessed by some persons who would not have direct benefit or interest from the result of the case, failure to call them without any explanation create doubts in the mind of this court on the validity of his claims.

That said, it is my conclusion that, the plaintiff has failed to prove his case on the balance of probability as required by law as I have demonstrated above and consequently, I proceed to dismiss the suit with no order as to costs.



A.R. MRUMA,

Judge



Dated at Dar Es Salaam this 24th Day of August 2022.