REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 124 OF 2018

JAFRED JUMA MUTSWENJE.....APPELLANT

VERSUS

ISAAC M. CHEMA.....1ST RESPONDENT

JONATHAN WAFUBWA .....2ND RESPONDENT

(from the Judgment and decree of Hon. T.K. Kwambai, R.M, In Butali SRMC Civil Case No. 152 of 2016 delivered on 6/9/2018)

JUDGMENT

1. The appellant had sued the 1st and 2nd respondents at the lower court claiming proceeds of cane harvested from land parcel number S/Kabras/Samitsi/494 and delivered for sale to the 3rd defendant, Butali Sugar Co. Ltd. The appellant claimed that the cane belonged to him and that the 1st and 2nd respondents had unlawfully harvested the cane. On hearing the case the learned trial magistrate came to a conclusion that the appellant had not proved his case and accordingly dismissed it. The appellant was aggrieved by the decision and filed this appeal. The grounds of appeal are in summary that:-

1 The learned trial magistrate erred in law and in fact in making a finding that the cane did not belong to the appellant.

2. The learned trial magistrate erred in fact and in law in relying on inadmissible evidence to dismiss the case.

3. The learned trial magistrate erred in fact and in law in failing to consider the evidence on record.

2. The appeal was opposed by the 1st and 2nd respondents through the written submissions of their advocates, **D.S.G Mango & Co. Advocates**.

3. The case for the appellant was that the 1st and 2nd respondents are his co-villagers. That in the year 2012 he had planted cane on a land parcel No. S/Kabras/Samitsi/294 belonging to his deceased father. He harvested the first plant. He took care of the first ratoon. When it was 16 months old, the 1st and 2nd respondents went and harvested it. They delivered it to the 3rd defendant. He reported to the OCS, Kabras Police Station. He and the 1st and 2nd respondents were taken to the police Station. The OCS ruled that the case was a civil matter and referred the appellant to court. The appellant sued. He obtained an injunction on for the 3rd defendant not to release the proceeds to the 1st and 2nd respondents.

4. The evidence for the appellant was supported by his brother PW2 and a co- villager PW3. Both witnesses stated that the cane belonged to the appellant. PW3 added that he is the one who planted the cane for the appellant. That the appellant took care of the ratoons. That later on the 2nd respondent uprooted part of the cane and constructed a house thereon while saying that he had bought the land. That thereafter the 1st and 2nd respondents harvested the cane.

5. The appellant further said that there is a succession cause pending at Kakamega High Court over his father's parcel of land.

6. The defence for the 1st respondent was that the appellant's step- mother called Erica DW4 approached him and asked him to lease her cane that was then aged 11 months. That she told him that the cane had been planted by somebody else but that it had reverted to her. He made enquiries from her family members and confirmed that the cane belonged to her. He leased the cane and paid her Kshs. 17,000/-. They wrote an agreement D.Exh 1. When he went to work on the cane he met the appellant who told him that the cane belonged to Erica. He worked on the cane. When it was ready for harvesting the appellant lodged a complainant with the OCS Kabras police station. He and the

2nd respondent were taken to the police station. They were later released. He harvested the cane and delivered it to the 3rd defendant only for the court to stop payment. He later learnt that it is the appellant who had planted the cane.

7. The 2nd respondent's defence was that the lady called Erica, DW4, approached him with a view to selling him ¼ acre of her land. She showed him some minutes D.Ex2 of a family meeting held on 22/4/2015 and a letter from the chief authorizing her to file a succession cause. He then purchased a portion of her land and entered into an agreement with her. He went and occupied the land and started building thereon. There was cane of about 2 months old when he bought the land. He bought trees from the appellant to build a house. He constructed the house in the presence of the appellant only for the appellant to report to the police that he had uprooted his cane on the land. He produced the agreement to the OCS. He was released. He harvested his cane and took it to the factory. Payment of the cane was stopped. He stated that the cane was his. He said that the 1st respondent had separate cane on the land.

8. Erica DW4 told the court that she was married by the owner of the subject land after his first wife died. She got 3 children with him. Her deceased husband gave her a parcel of land through a letter DEX5. After the death of her husband the appellant chased her away. She was later allowed back and given back her land. There was cane on the land when the land was given back to her. She was given the cane that was less than 11 months old. She then sold a portion of the land to the 2nd respondent to enable her file a succession cause. She also leased out her cane to him. She filed a succession cause that is still pending.

9. A son to the deceased owner of the land DW3 testified that his deceased father had given him and his brothers, the appellant and PW2, their parcels of land on his land parcel S/Kabras/Samitsi/495. Their father remained with 5½ acres. That their mother passed on. Their father married Erica DW4 and gave her the 5 ½ acres. After the death of their father their step-mother, DW4, was chased away by the appellant and PW2. The two of them were using her land when she was away. DW4 came back and she was given back her land. They agreed that the cane that was less than 11 months old would belong to Erica and that the one over 12 months would be harvested. His step-mother then leased out ¾ of the cane to the 1st respondent and later sold 0.1 acres to the 2nd respondent. The respondents started to work on the cane only for the appellant to stop payments. He said that the cane and the proceeds belong to the respondents.

10. In cross–examination DW3 stated that it is the appellant and PW2 who planted and harvested the plant. That the ratoon was given to Erica. Erica on her part stated in cross–examination that it is the appellant who plated the cane but that it was given to her in compensation as the appellant had used her land without paying her. That when she was married the sons of the first wife had already been given their own parcels of land.

11. The appellant on his part stated in cross-examination that the 1st respondent did not work on his parcel of land. He admitted that Erica is his step-mother. He said that he was not aware of any family meeting held on 21/4/2015. That the 2nd respondent has built on his father's land but he does not know whether the 2nd respondent bought the land. He said that the 2nd respondent is unlawfully occupying the land.

12. PW2 stated in cross- examination that their father had children with Erica. That the said children are entitled to a share of the land. That they have been using the said parcel of land but stopped doing so after several court cases. He said that the 2nd respondent bought a portion of their land. That the cane that was harvested was on the portion that he bought. That he never saw the 1st respondent weeding cane on their land.

Submissions -

13. The advocates for the appellant, **Onsando Getanda & Co. Advocates** submitted that it was admitted by both sides that it is the appellant who planted the cane in issue. That his ownership of the cane could not be defeated by sale of the land to another person.

14. The advocates submitted that the minutes, D.Ex2, that the trial magistrate relied on to dismiss the case were unsigned. That it was wrong for the learned trial magistrate to rely on such a document to dismiss the case. The advocates urged the court to allow the appeal.

15. The advocates for the respondents on the other hand submitted that the trial magistrate considered all the evidence tendered and arrived at the correct decision. He urged the court to dismiss the appeal.

Analysis and determination -

16. This being a first appeal, the duty of the court is to analysis and re-evaluate a fresh the evidence adduced at the lower court and reach an independent conclusion while bearing in mind that it neither heard or saw the witnesses testify - See **Siele –Vs- Associated Motor Boat Co Ltd (1968) E.A 123**.

17. In considering the standard of proof applicable in the case the trial magistrate held that:-

> **"I have carefully analysed all the evidence on record and I am now required to determine if the plaintiff has proved his case beyond any reasonable doubts.**
>
> **…. In summary I find that the plaintiffs have failed to prove this case beyond any reasonable doubts and the upshot therefore is that I proceed to dismiss the plaintiff's suit."**

18. In his judgment the trial magistrate found that the appellant was not a credible witness. That there was contradictory evidence as to the age of the cane when it was harvested. That the unsigned minutes DEx2 proved that the cane that was 11 months old belonged to DW4. That the sale agreement dated 16/6/2015 proved that the 2nd respondent had purchased a portion measuring ¼ of an acre from DW4. That the

evidence showed that the 1st respondent had leased a portion of ¾ of an acre from DW4. That the evidence tendered by the respondents and their witnesses was cogent enough.

19. The questions for determination are -

i. What was the standard of proof in the case.

ii. Whether the trial magistrate was correct in holding that the harvested crop did not belong to the appellant.

20. The standard of proof that the learned trial magistrate applied in the case was that of beyond reasonable doubt. The matter involved a civil dispute. The standard of proof in civil cases is that of a balance of probabilities. In **Kanyangu Njogu –Vs- Daniel Kimani Maingi (2001) eKLR** it was held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. In **Siraj Din –Vs- Ali Mohamed Khan (1957) EA 25**, it was held that:-

> **"The quantum of proof required in civil litigations is not such as resolves all doubt whatsoever but such as establishes a preponderance of probability in favour of one party or the other ….." (as cited in BWK –VS- EK & Ano. (2017) eKLR).**

In the premises, the trial magistrate erred in law in applying a higher standard of proof than is applicable in civil cases. In the case of **Philip Mulupi Chiteshi –Vs- Timothy Lucheli Mukhoiya (2016) eKLR** where C. Kariuki J. was faced with a similar claim as in this case set out the standard of proof in the case as follows:-

> **"The issue arising is that whether the plaintiff proved his case on balance of probabilities? It is cardinal principle of law of evidence that he who avers must prove. See provisions of sections 107,108 and 109 of the Cap 80.E A.**
>
> **7. It is incumbent upon the appellant to prove that he owned S/Kabras/Bushu/2720 that he cultivated and natured sugar cane crop therein and that defendant unlawfully and without his permission or consent harvested cane therein and delivered to the Western Kenya Sugar Co. Ltd."**

21. It was admitted by both sides that it is the appellant who planted the cane. It was also admitted that the registered owner of the land where the crop was growing is the late father to the appellant and who was husband to Erica, DW4. It was admitted that there is a succession cause pending at kakamega High Court over the deceased's parcel of land. There was no evidence that the decease left behind a will. The document produced by Erica claiming that the deceased gave her the disputed land does not amount to a will. Among the documents that were filed in the case is a grant of letters of representation issued to the appellant. This means that the deceased died intestate without leaving any will. The purported will is therefore dismissed.

22. The estate of a person who dies intestate is supposed to be administered in accordance with the provisions of the Law of Succession Act Cap 160 of the Laws of Kenya. The appellant was a beneficiary to the estate of his father. Erica was similarly a beneficiary to the estate. Since the estate was yet to be distributed, Erica did not have an exclusive right to any portion of the estate. Therefore it cannot be true that the appellant was cultivating Erica's land. The appellant was cultivating his father's parcel of land.

23. Section 45 of the Law of succession Act bars a person not possessed of a grant of representation in intermeddling with the free property of a deceased person. Erica DW4 claimed that she was given the appellant's cane by clan elders. She then proceeded to lease part of the appellant's ratoon cane to the 1st respondent and sold part of the land together with the appellant's cane to the 2nd respondent.

24. Clan elders have no role to play in the administration of an estate of a deceased person. That is the role of an administrator of the estate appointed by the court. It was misguided for the clan elders to interfere in the estate of the appellant's father and purport to give the deceased's land and the appellant's cane that was growing there on to Erica. Furthermore, the so called minutes produced in court are not signed by anybody. There was no basis for the trial court to rely on such a document to hold that the cane was given to Erica by clan elders. Erica could not claim the cane on the ground that the cane was growing on her parcel of land as distribution of the estate of the deceased was yet to be done.

25. The appellant is the one who planted the cane. He lawfully planted the cane on his father's land. There was no evidence that Erica consulted him when she took the cane from him. Even if Erica had lawful claim to the land she could not have unilaterally taken away the cane from the appellant and lease it to the 1st respondent without his consent. Even if she had lawfully sold the land to the 2nd respondent, it was illegal for her to have given the appellant's cane to the 2nd respondent without his consent. The respondents failed to do due diligence to ascertain whether the cane actually belonged to Erica when they leased or bought the land. The appellant was a beneficiary to the land. His ownership of the cane could not be defeated by any purported sale of the land to the 2nd respondent. There was no credible evidence that the respondents had worked on the cane.

26. On my own analysis of the evidence I have come to the conclusion that the appellant had proved on a balance of probabilities that the cane belonged to him. The learned trial magistrate erred in making a finding that the cane did not belong to the appellant. The decision of the trial court is therefore set aside.

27. The upshot is that the appeal is upheld. I enter judgment for the appellant as prayed with costs. I do order the 3rd defendant in the case to release the proceeds of the cane to the appellant. The appellant to have the costs of this appeal.

Delivered, dated and signed at Kakamega this 22nd day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

No appearance for Respondents

Appellant - absent

1st Respondent - absent

2nd Respondent - absent

Court Assistant – Polycap

30 days right of appeal.