



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 72 OF 2016**

**JORAM WANJE ..... APPELLANT**

**VERSUS**

**PETER KAMWANI WAITI ..... 1<sup>ST</sup> RESPONDENT**

**BUTALI SUGAR MILLS CO. LTD.....2<sup>ND</sup> RESPONDENT**

*(from the judgment and the decree of Hon. M. L. Nabibya, SRM, in Butali SRMC Civil Suit No. 40 of 2013 dated 15/9/2016)*

**JUDGMENT**

1. The appellant had filed suit at the lower court seeking for:-

1. Restraining orders against the defendant with respect to proceeds of sugar cane harvested from parcel No. S/Kabras/Chesero/974 and delivered to 2<sup>nd</sup> defendant vide permit No. 69974.
2. Payment of sugar cane proceeds held by 2<sup>nd</sup> defendant.
3. Costs of the case.

2. After a full trial the learned trial magistrate dismissed the appellant's case by holding that he had failed to provide evidence that he was entitled to the proceeds of the sugar cane. The appellant was aggrieved by the decision of the trial court and filed the instant appeal through the firm of **Momanyi Manyoni & Co. Advocates**.

3. The grounds of appeal are that:-

- (1) The learned magistrate erred in law and fact in holding that the appellant had not proved his case on a balance of probability*
- (2) The learned magistrate erred in law and fact in holding that the respondent had proved his claim*
- (3) The learned magistrate erred in law and fact in analyzing the evidence before herself hence arriving at the wrong finding.*

4. The appeal was opposed by the 1<sup>st</sup> respondent through written submissions of his advocates, **Rauto & Co. Advocates**.

**Case for the Appellant –**

5. The case for the appellant was that his late father had bought land parcel number South Kabras/Chesero/974 in the year 1983 from the grandmother of the 1<sup>st</sup> respondent. That his father had been in occupation of the whole of the land since then. That before his late father died he had a case with the grandmother of the 1<sup>st</sup> respondent over ownership of the land. That in the year 2008 he, the appellant, planted sugar cane on the land. He made his first harvest in the year 2012. On the 14/3/2013 the 1<sup>st</sup> defendant harvested his cane that was growing on the land and delivered it to the 2<sup>nd</sup> respondent. It was his contention that the 1<sup>st</sup> respondent had not planted any cane on the land. He then filed the suit against the respondents. During the hearing he produced previous payment statements and weighbridge tickets from the 2<sup>nd</sup> respondent issued to him in the harvests of August, 2011, January, 2012 and July, 2012, P.Ex1-6. He produced his letter of report of the incident to the chief as exhibit, D.Ex.7.

**Case for 1<sup>st</sup> Respondent –**

6. The 1<sup>st</sup> respondent does not seem to have filed a defence but only filed a statement of defence in which he denied the appellant's claim. His case was that the late appellant's father had a dispute with his grandmother over the ownership of land parcel No. South Kabras/Chesero/974. That in the year he had planted sugar cane on part of the disputed land on an area measuring 2 acres which he harvested in the year 2012. That the late appellant's father did not raise any objection when he harvested the cane in that year. That on 6/2/2013 he was issued with harvest permit for the crop that was growing on the parcel of land. He harvested the crop and delivered it to the 2<sup>nd</sup> respondent. The appellant then raised an objection to him being paid for the crop.

7. The 1<sup>st</sup> respondent further said that the appellant and his family members had filed various cases against him and his (1<sup>st</sup> respondent's) family members all of which have been dismissed by courts. During the hearing he produced the harvest permit that was issued to him to harvest the crop of 2013 as exhibit, D.Ex.1. He produced proceedings in Butali Criminal Case No. 277 of 2007 as exhibit, D.Ex.2. He produced judgment in Kakamega High Court Civil application No. 90 of 2007, D.Ex.3, that was between the appellant's father and his (1<sup>st</sup> respondent's) grandmother over the ownership of the subject parcel of land.

#### **Submissions -**

8. The advocates for the appellant submitted that the appellant had produced sufficient evidence vide exhibits 1-7 that proved that he was a sugarcane farmer. That on the other hand the 1<sup>st</sup> respondent did not produce any documents to prove that he was growing sugar cane or that he had been paid any sugar cane proceeds. That he only produced documents relating to a land dispute. That the case before the court was in respect of sugar cane proceeds and not to ownership of the land. That the trial court considered irrelevant factors to reach its findings. Therefore that the appellant had proved his case against the 1<sup>st</sup> respondent.

9. The advocates for the 1<sup>st</sup> respondent on the other hand submitted that the burden of proof was on the appellant to prove his claim to establish his relationship with land parcel No. South Kabras/Chesero/974 and proof that the cane harvested from therein was his. That he did not explain how he was using land that does not belong to him. That the statements and the weighbridge tickets that he produced did not indicate that the parcel of land upon which they were generated. That the 1<sup>st</sup> respondent on the other hand confirmed that the land in question belonged to his grandmother and that he was using it as a beneficiary to the estate of his grandmother. That the appellant had failed to prove that the cane belonged to him.

#### **Analysis and determination -**

10. This is a first appeal. It is the duty of a first appellate court to reconsider the evidence adduced at the lower court, evaluate it itself and draw its own conclusions though always bearing in mind that it has neither seen nor heard the witnesses testify and should make due allowance in that respect – See **Selle & Another –Vs- Associated Motor Boat Company Limited & Others (1968) EA 123**.

11. The standard of proof in civil cases is on a balance of probabilities. It is the duty of a plaintiff in a civil case to prove his case against the defendant on a balance of probabilities. This is illustrated in the case of **Philip Mulupi Chiteshi –Vs- Timothy Lucheli Mukhoiya (2016) eKLR** where C. Kariuki J. held that:-

*“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.”*

12. The question for determination in this appeal is whether the appellant had proved his case against the 1<sup>st</sup> respondent on a balance of probability. The trial court held that since both parties were claiming to have tethered the crop in dispute, the burden of prove was in the appellant to adduce evidence of working on the land by weeding and application of fertilizer. That he could have called workers who helped him work on the land. That the payment statements and the weighbridge tickets produced by the appellant were insufficient to prove the case and only proved that he was a sugar cane farmer but did not prove on which land his crop was growing. That the respondent produced a permit allowing him to harvest a crop. That the appellant did not thus prove that he was entitled to the proceeds in dispute.

13. The 1<sup>st</sup> respondent produced documents to show that there has been a long standing dispute between his family and the family of the appellant over ownership of land parcel No. South Kabras/Chesero/974. The suit by the appellant's father in Kakamega Civil Application No. 90 of 2007 in which the appellant's father was claiming the land was dismissed by this court (Chitembwe J.) on the 15/7/2015.

14. Both the appellant and the 1<sup>st</sup> respondent claimed to have tethered and worked on the crop in dispute. None of the parties produced evidence that he had tethered that particular crop. The appellant's evidence, as held by the trial court, only proved that he had been paid for sugarcane proceeds in some previous years but he did not adduce evidence as to the portion of land where he was growing the said crop. It is surprising that the appellant did not have a single witness who could adduce evidence that the crop was growing on the land in dispute.

15. The 1<sup>st</sup> respondent on the other hand contended to have harvested his crop of cane on the disputed land. Section 107 (1) of the Evidence Act provides that:-

*“Whoever deserves any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”*

16. Section 108 of the said Act provides that:-

***“The burden of proof in a suit or proceeding lies on the person who would fail if not evidence at all were given on either side.”***

The 1<sup>st</sup> respondent proved that the land on which the crop was growing belongs to his late grandmother. It is therefore possible that he was growing cane on the land.

17. The appellant did not prove that he is the one who tethered the crop in dispute. It is his case which should have failed if he failed to prove that he had planted cane on the land in dispute. It is thus my finding that the trial court did not err in dismissing the suit against the 1<sup>st</sup> respondent.

18. The upshot is that the appeal lacks merit and is dismissed in its entirety with costs to the 1<sup>st</sup> respondent.

**Delivered, dated and signed in open court at Kakamega this 20<sup>th</sup> day of June, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

No appearance for appellant

No appearance for 1<sup>st</sup> respondent

Appellant - absent

1<sup>st</sup> respondent - absent

Court Assistant - Ruto

30 days right of appeal.