



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL APPEAL NO. 1 OF 2014.

PHILIP MULUPI CHITESHI.....APPELLANT.

VERSUS

TIMOTHY LUCHELI MUKHONJE.....RESPONDENT.

J U D G M E N T.

1. By a plaint dated 2nd December, 2010, the plaintiff seeks the following reliefs:-

(a) Payment of sugar proceeds by Western Sugar Co. Ltd. in respect of the cane crop harvested from plaintiff's land S/Kabras/Bushu/2720 be stopped and same be paid to him plus costs.

2. The defendant filed defence dated 14th December, 2010 and denied plaintiff's claim. The plaintiff avers that he was registered owner of S/Kabras/Bushu/2720 at all material times. He cultivated sugar cane crop on same land. However, the defendant trespassed therein and harvested the cane and delivered to Western Kenya Sugar Company which act he terms as unlawful act by the defendant. He thus claims same proceeds to be released to him.

3. On his side, the defendant avers that the title of suit land was obtained fraudulently as the seller had died before transfer and no succession had been processed to enable issuance of title to the plaintiff. He avers that he cultivated and natured the cane and thus entitled to the proceeds thereof.

4. The parties tendered their evidence before trial court who after hearing the parties found that the plaintiff never proved his case on balance of probabilities and thus dismissed same with costs.

5. Being aggrieved by the aforesaid decision, the appellant lodged an appeal setting out 4 grounds to impugn the decision. The 4 grounds amounts to one that the trial court erred in finding that case was not proved on balance of probabilities. The parties' advocates agreed to canvass appeal by way of submissions which they filed and exchanged.

6. The court has gone through the evidence on record and the pleadings and parties advocate submissions. 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.

8. The appellant testified that he works and lives in Nairobi. He bought suit land and obtained title deed and started cultivating same. He contracted Western Kenya Sugar Co in the name of his mother who stays near the place. He testified that the defendant/respondent removed boundaries and started ploughing it thus a dispute at Land Disputes Tribunals, Kakamega which reinstated the border. The defendant was using $\frac{3}{4}$ of the plaintiff's land. The defendant harvested $\frac{3}{4}$ of land cane planted by the plaintiff in 2011. He did not know the amount the defendant was to receive.

9. The defendant testified and admitted that the plaintiff bought 2 acres from his father now deceased. However, the title held by plaintiff is of $2\frac{1}{2}$ acres. The defendant contracted Western Kenya Sugar Co. Ltd vide contract No. 67669 and used to deliver and paid cane via same contract. He testified that the plaintiff planted sugar on his parcel of land and harvested.

10. Him (defendant) was given $2\frac{1}{2}$ acre by his late father and he planted sugar on 1 acre and harvested and paid for the same. Only his harvest for 2nd ratio was not harvested as plaintiff had obtained order to stop the same payment. He emphasized that he is entitled to sugar proceeds as he planted and harvested from his parcel of land.

11. After analyzing the evidence before court, the trial court found that the defendant planted sugar cane on his land (1 acre) harvested and did prove the same via statement. He also had contract with Western Kenya Sugar Co. vide exhibit 6. He was allowed to harvest cane on his own parcel of land. The plaintiff parcel with cane $\frac{3}{4}$ of acre is not same as 1 acre planted sugar and harvested by the defendant.

12. The court thus found that the plaintiff never proved his case on balance of probabilities. This court finds no fault on trial magistrate conclusion. The plaintiff never witnessed defendant harvest his cane in $\frac{3}{4}$ of acre of parcel 2720 nor called a witness to testify to that effect. There is nowhere he launched complaint of the harvest of sugar cane by the defendant save in the instant suit. The harvest by defendant from his parcel of land would amount to a criminal offence of theft.

13. The court thus finds that the defendant/appellant never proved his case filed and thus no merit in his appeal. The same is dismissed with costs to the respondent.

SIGNED, DATED and DELIVERED this 13TH day of DECEMBER, 2016.

C. KARIUKI.

JUDGE.

In the presence of:-

.....**Manyonyi****for the Appellant.**

.....**Getanda** **for the Respondent.**

.....**Anunda** **Court Assistant.**