



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL NO: 30 OF 2013

FREDRICK INGANGA OKIYA.....APPELLANT

VERSUS

GABRIEL HASSAN MANYA.....RESPONDENT

JUDGEMENT

This is an appeal from the Judgment of H. Wandere (PM) in Mumias SPMCC No. 533 of 2007 delivered on 6/8/2012. The grounds of appeal are:-

1. That the suit before the trial court was not competent.
2. The trial court only relied on the respondent's side.
3. The trial court wrongly stated that the appellant had not paid Ksh 8000/=
4. That there was an affidavit from the Butere court that was a forgery.
5. That the name of Fredrick Wangari Okuya is not that of the appellant.
6. The suit was prematurely dismissed
7. The proceedings are null and void
8. The appellant was unfairly condemned.

Both parties represented themselves during the hearing of the appeal. The appellant submitted that his cows were attached on 18/5/2013 yet he did not receive any notice or document. He disputes the assessment of costs by the trial court and contends that an affidavit sworn on 13/4/2006 was not sworn by him. The appellant further submitted that he had a debt of Ksh 15,000 but paid Ksh 8000 leaving a balance of Ksh 7000. He had his money with Mumias Sugar Company but the respondent cautioned against its release.

The respondent submitted that he supports the decision of the trial court. The proceedings before the trial court show that it's only the two parties who testified. The respondent was the plaintiff. His case was that the appellant is his cousin. On 18/8/2004 he loaned the appellant Ksh 15,000 to assist him pay a hospital bill incurred at Bukura Hospital. Parties entered into an agreement whereby the respondent was to harvest cane from half an acre of land that had been planted by the appellant. A letter was written to Mumias Sugar Company to enjoin the respondent in the appellant's Account Number 52171 with Mumias Sugar Company.

The respondent testified that there was a balance of Ksh 7000/= and he registered a caution on the land so that he could be paid his balance.

On his part, the appellant testified that he agreed with the respondents. He paid Ksh 8000/= on 16/7/2006

leaving a balance of Ksh 7000/=. He denied that he had refused to pay the balance.

From the pleadings, it is established that the two parties entered into an agreement whereby the respondent loaned the appellant Ksh 15,000. The appellant was to repay the loan by allowing the respondent to harvest sugar cane from ½ acre of his land three times. It appears that that arrangement was not fulfilled. Although the respondent testified that he was claiming Ksh 15,000/= It is clear from his evidence during cross examination that the sum of Ksh 8000/= had been paid to him leaving a balance of Ksh 7000. The appellant concedes that he took a loan from the respondent and he had a balance of Ksh 7000 to pay. The trial court correctly held that the appellant was indebted to the respondent to the extent of Ksh 7000/=.

The proceedings show that the respondent's counsel filed a bill of costs that was taxed at Ksh 47,235. The appellant does not agree with that assessment. Although the appellant was expected to file a reference in relation to the assessment of costs, I do find that his objection to it can be taken as a complaint against the taxed costs.

The appellant has raised issues with an affidavit sworn on 13/4/2006 before the Butere court. I have seen the affidavit and all what is stated in it is that the appellant took a loan of Ksh 15,000/= from the respondent and leased ½ acre of cane to the respondent. The trial court did not base its decision on the affidavit and there is nothing serious about it even if the appellant's claim that he did not sign the said affidavit.

The suit was fully heard and the appellant's contention that it was prematurely dismissed is not proved. There was a plaint that was later amended and the appellant filed his defence. The trial court found that Ksh 8000/= had been paid leaving a balance of Ksh 7000/= thus the ground of appeal indicating that court held that Ksh 8000/= had not been paid is disproved.

The appellant was represented by an advocate but on 4th November 2011 filed a notice of intention to act in person. The appellant has himself to blame as it is clear that had he allowed his counsel to continue representing him, the matter could have been effectively handled at all stages.

I do find that the trial court properly concluded that the appellant was indebted to the respondent to the extent of Ksh 7000/= with regard to the costs, though not the subject of the appeal, I do find that it will be unnecessary to subject parties to another litigation. I will review the assessed cost to Ksh 23,000/= taking into account the fact that the claim was held to have been for Ksh 23,000/= only and the circumstances of the case. The appellant was loaned the money in 2004. The case was filed in 2007, a period of about three (3) years later. The hearing of the case was in June 2012. All along the appellant could have settled the dispute since he knew that a balance of Ksh 7000/= was due to the respondent.

In the end, I do find that the appeal lacks merit and the same is dismissed. Each party to meet his own costs of the appeal. The costs for the lower court case is assessed at Ksh 23,000/= in favour of the respondent making a total award of Ksh 30,000/- that is including the sum of Ksh 7000/= due from the appellant.

On 13/6/2013, this court issued an order stopping an execution. I do order that Eshikhoni Auctioneer do appear in court to explain the status of the purported execution. The appellant contends that the respondent cautioned against the release of his money from Mumias Sugar Company Limited. I do order that Mumias Sugar Company Limited do release any money it is holding for the benefit of the appellant in relation to Account number 52171, plot Number 64C Field 60. It is so ordered.

Dated, signed and Delivered at Kakamega this 26th day of February 2014.

SAID J. CHITEMBWE

JUDGE

