REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL CASE NO. 147 OF 2009

JAMESON M. KIMAKWA..... APPELLANT

VERSUS

MARTIN P. NAPWORA.....RESPONDENT

JUDGMENT

This appeal arises from the judgment and decision of the Principal Magistrate in Bungoma CMCC No. 411 of 2007 delivered on 12th November 2009. The Appellant has listed 6 grounds on his memorandum of appeal. The appeal was initially filed by Bulimo & Co. Advocates before the appellant filed a notice to act in person. The Respondent is represented by Ms. Kituyi & Co. advocates.

The appellant was the defendant in the case before the lower court. He is not happy that the trial magistrate found in favour of the Respondent. The Respondent's claim was for an order to be issued against the 2nd defendant restraining them from paying out any proceeds specifically from ½ acre portion of land on L.R. No. E. Bukusu/N. Sangalo/06 and out-growers No. 1330600068 to the 1st defendant (Appellant) and instead he be paid as he was the owner of the said cane and he had a contract with the 2nd defendant. He also prayed for costs of the suit.

The 2nd defendant did not file any papers. I have also looked at the proceedings and noted they did not participate in the trial. I will not refer to them since the appeal and dispute is between the 1st defendant (appellant) and the plaintiff (Respondent). The appellant orally argued his appeal in court.

It is the appellant's submission that the learned trial magistrate failed to consider that the sale agreement was invalid as it lacked the signature of PW2. According to the appellant, the magistrate did not consider the evidence of DW3 and that he did not realize the appellant's brother (pw2) only changed his mind.

He further submitted that the trial magistrate misdirected himself that for an out-grower to own cane, you must have a contract. He submitted that the Respondent's contract was forged as it was not prepared at Bukembe Out-bridge, was not drawn on official letter head and had no company address. Finally it is

his argument that PW3 was employed in 2006 yet she signed a contract in 2005. He urged the court to allow the appeal and set aside the lower court's decision.

Mr. Kituyi on behalf of the Respondent opposed the appeal. He submitted that the Respondent is seized with possession of part of the land L.R. E. Bukusu/N. Sangalo/06 measuring ¾ acres. The Respondent had a contract with the 2nd defendant. PW2 denied selling any land to the appellant. Finally it is the Respondent's submission that the appellant's evidence could not change the evidence adduced by the Respondent for this court to set aside the lower court's decision.

I will analyze the evidence on record alongside the submission made by the parties during the hearing of this appeal. One of the issues raised by the appellant was that the trial magistrate erred in holding the view that the evidence of PW2 was unchallenged in terms of the sale of land. He submitted that PW2 did not sign the sale agreement at page 103 – 104 of the record. I have looked at the said two agreements and I find there is a signature of PW2 on both documents. During his testimony, PW2 admitted selling the land to the Respondent (plaintiff) and that the respondent does not owe him any money. PW2 denied selling land to the appellant. None of the appellants witnesses testified on the sale of land between PW2 and the appellant. The sale agreement Dex. 1 did not give size of the land sold. In the absence of contrary evidence, the learned trial magistrate was right in finding the evidence of Pw2 was unchallenged. I find nothing new to make me vary that finding.

Did the trial magistrate erred in failing to appreciate the appellant and his witnesses evidence? According to the appellant, the contract of the Respondent was forged as it did not have company address and was not drawn on company letter head. The issue of forgery was only being raised during the appeal hearing. It was not raised both in his evidence in-chief, evidence of his witnesses nor in the appellants written submissions. This court finds this as mere allegation which has not been proved and cannot be proved at this stage without adducing evidence. He did not seek leave of this court to adduce further evidence.

The key question for this court to answer in the determination of this appeal is who planted the cane? The appellant claims the cane and had it harvested. The Respondent also claimed the cane hence the institution of this suit to challenge the harvest undertaken by appellant.

PW2's evidence is, at the time he sold land to the Respondent, there was no cane on it. This was in February 2004. DW2 who is the area Mkasa allege that he saw the appellant plant sugar cane on 26th May 2005. He knew the cultivation and planting was undertaken privately. According to him, the Respondent bought land with defendant's cane inside the disputed portion. He was a witness when the 1st agreement was drawn between the Respondent and PW2.

The 1st agreement was drawn on 10th February 2004 and the 2nd agreement drawn on 12th February 2004. DW2 cannot be saying the truth when he says during the 2nd sale the appellant's cane was already on this portion of land. He saw the cane being planted on 26th May 2005 and it is confirmed by Dex. 3 CPR receipt which has entries ***"self plough, harrow, furrow & sugar cane"*** and is dated 26.5.2005. The evidence of PW2 is believable in this respect that there was no cane on the land when he sold it since planting of cane was done in May 2005.

The trial Magistrate found that the Respondent demonstrated the cane belongs to him through contract agreement between him and the 2nd defendant (Nzoia Sugar company Ltd.) and produced as Pexh. 4. The Magistrate further said the documentary evidence cannot be dislodged by the oral evidence of DW3 who claimed to be field officer of the company. He therefore concluded the harvest undertaken by the appellant as irregular. DW3 is the one who issued the appellant with the CPR receipt. In his evidence in-chief, it was in respect of cane harvest privately cultivated. He visited and undertook the assessment having passed through the clan elder.

It is not clear from his evidence when he visited the land, whether before or after he issued the CPR. His evidence contradicts the evidence of DW2. If the cane was planted on 26.5.05 then there was nothing for him to asses and issue a contract to harvest cane, as put by DW3, in the CPR receipt issued on

same date. The trial magistrate was right in disbelieving the evidence of these two witnesses, as they were full of contradictions. The contract produced by the plaintiff was witnessed by the Assistant Chief. PW3 clearly stated she first met the Respondent in May 2006 when the cane was 13 months old. DW3 does not give any details of the age/status of the cane when he made his visit. The chief signed and stamped on the contract agreement to confirm the cane belonged to the Respondent.

I find that it is the appellant and his witnesses whose evidence were full of contradictions. As a consequence of the analysis above, i hold that the trial Magistrate reached a correct finding when he found in favour of the Respondent. There is no convincing reason presented to this court for the decision of the trial magistrate to be varied or set aside. The appeal is therefore dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED, READ AND DELIVERED in open court this 29th day of August 2013.

A. OMOLLO

JUDGE.