

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 149 OF 2010

(Appeal arising from the ruling of [H. Wandera, SRM] dated 15.10.2010 in the Senior Resident Magistrate's Court Mumias Civil Case No. 267 of 2008)

SEBASTIAN AMEYO DARAJA APPELLANT

V E R S U S

RUDOLD SHIBANDI DARAJA 1ST RESPONDENT

MUMIAS SUGAR CO. LTD. 2ND RESPONDENT

J U D G M E N T

The appellant herein filed civil suit number 267 of 2008 before the Mumias Senior Resident Magistrate's Court. The prayers in that suit were that the appellant was to be enjoined in a cane contract Account Number **14787** between the 1st and 2nd respondents. On 26.2.2010 the plaintiff's suit was dismissed with costs as a result of an application by the 1st respondent that had sought to have the suit struck out and dismissed. The appellant filed an application dated 14.4.2010 seeking to have the order dismissing his suit reviewed on the grounds that he has discovered new evidence. That application was also dismissed in a ruling delivered on 15.10.2010. That decision led to the filing of this appeal.

Basically the grounds of appeal as per the memorandum dated 9.11.2010 are that the appellant was condemned unheard, the appellant's suit raised triable issues, the appellant is the registered owner of the land where the cane was grown and that the High Court had nullified subsequent subdivisions of the land. Parties filed written submissions. Counsel for the appellant in his submissions dated 30.11.2012 contends that the application for review was merited as the appellant had obtained the decree in Kakamega High Court Civil Appeal No. 55 of 2004 which proved that the suit property had since been reinstated to its former position. It is further submitted that the appellant is the registered proprietor of the suit land and that the 1st respondent's parcel number **EAST WANGA/ISONGO/662** did not exist as the High Court restored the land to its former position.

Mr. Amasakha, counsel for the 1st respondent submitted that the High Court in Civil Appeal No. 55 of 2004 issued a restriction on the suit land. There is also Succession Cause No. 352 of 2001 touching on the same suit land which is still pending before the Kakamega High Court. Even if the appeal was to be allowed the lower court will not be in a position to deal with the matter as it involves land.

In his suit before the Mumias Court the appellant wanted to be enjoined in a cane contract on the ground that the cane was being grown on his land. From the record it appears that there was Kakamega CMCC No. 542 of 1997. The 1st respondent seems to have obtained his title through that suit. There was an appeal this being Kakamega Civil Appeal No. 55 of 2004 and a decree was issued on the 6.5.2009 whereby the appeal was allowed and the decision in CMCC No.542 of 1997 was reversed. In the ruling of the subordinate court of 25.2.2010 dismissing the appellant's case the court noted as follows:-

“That one such fact is the judgment of Judge Kariuki Kakamega High Court No. 55 of 2004 which is alleged to have cancelled that title and given this land to the plaintiff herein....the plaintiff did not file a replying affidavit to his grounds of application neither did he provide to the court the judgment from Kakamega high Court which is alleged to have annexures...”

The reason as to why the application for review was dismissed is because the High Court had issued a restriction on the suit land. my understanding of the dispute is that the appellant claims to be the registered owner of land parcel number **EAST WANGA/ISONGO/2192** and the cane which was contracted to the 2nd respondent was grown on that land. In his defence before the magistrate's court, the 1st respondent in paragraph 8 thereof stated that land parcel number **E/WANGA/ISONGO/2192** does not exist as it is a subdivision comprised in the original title number **E/WANGA/ISONGO/662** which was cancelled and reverted back to the original title. The magistrate dismissed the appellant's suit because the High Court judgment which had upheld the appeal from Kakamega CMCC 542 of 1997 was not supplied to the court. In his application for review, the appellant contended that he had now found the decree issued by the High Court and therefore the situation had changed. I do find that the discovery of the decision in Kakamega Civil Appeal No. 55 of 2004 was new evidence which ought to have been taken into account by the court. The contention that the court placed a restriction on the land was not ground enough not to allow the appellant's case to be reopened and heard. The 1st respondent has to prove that plot Number **E/WANGA/ISONGO/2192** does not exist despite the decision in Kakamega Civil Appeal No. 55 of 2004.

In the end, I do find that the magistrate made the wrong decision by dismissing the application for review. I do agree with the contentions by counsel for the 1st respondent that the issue involves land. However, parties before the magistrate's court as per the plaint filed were only dealing with the issue of having the appellant enjoined in a cane contract. Parties should consider settling the issue of ownership of the land in the pending succession cause that will settle the dispute once and for all. In the meantime I do allow the appeal and set aside the ruling of the Magistrate's court delivered on **15.10.2010** and order that the appellant's suit number **267** of **2008** before the magistrate's Court at Mumias be heard in full by a different magistrate. The cost awarded by the magistrate's court to the respondents is hereby set aside. Each party shall meet his own costs in this appeal.

Delivered, dated and signed at Kakamega this 23rd day of October 2013

SAID J. CHITEMBWE

J U D G E