



REPUBLIC OF KENYA



**Ashioya v Atonya (Civil Appeal 73 of 2022) [2023] KEHC 20028 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20028 (KLR)

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

**CIVIL APPEAL 73 OF 2022**

**SC CHIRCHIR, J**

**JULY 6, 2023**

**BETWEEN**

**ROBERT BARASA ASHIOYA ..... APPELLANT**

**AND**

**EZEKIEL ATONYA ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. C. Cheruiyot RM delivered on 7.9.2022 in Kakamega Small Claim Court Case No. E020 of 2022)*

## **JUDGMENT**

1. The Respondent filed civil suit No. E020 of 2022 in the Small claims Court in Kakamega against the Appellant seeking for damages the loss allegedly suffered as a result of the destruction of his sugarcane crop ( the crop) on land parcel No. S/kabras/ Chemuche/764 ( the suit property) by the Appellant. The trial court returned a verdict in favour of the Respondent and ordered the Appellant to pay damages of Kshs. 64,416 being the value of destroyed crop.
2. Aggrieved by the finding, the Appellant proffered this appeal.

### **Grounds of Appeal**

3. In his memorandum of appeal, the Appellant has set out the following grounds:
  - a). The learned trial Magistrate erred in law and fact in entering judgment in favour of the respondent for Kshs. 64,416/= being alleged compensation for a sugarcane crop when the respondent had not proved his claim to the standard required in law or at all.
  - b). The learned trial Magistrate erred in law and or fact in allowing the respondent's claim when it was evident and/ or admitted that he was an illegal trespasser on land parcel No. south Kabras/ Chemuche/764 whereon he had planted sugarcane unlawfully and without the consent or



knowledge of and or against the express instructions of the owner and or beneficiary and allowing his claim amounted to rewarding a trespasser for his illegal and improper actions.

- c). The learned trial Magistrate erred in law and or fact in entering judgment against the appellant in the absence of any evidence or proof that he was the one who uprooted or damaged the respondent's alleged sugarcane crop.
  - d). The learned trial Magistrate erred in law and or fact in entering judgment in favour of the respondent as against the appellant in the absence of and or against the evidence on record and by ignoring the facts and or evidence on record and or by considering irrelevant factors.
  - e). The trial Magistrate failed to identify and or determine the correct issues appropriately and dispassionately and the judgment was arrived at in a cursory and perfunctory manner and was biased, erroneous, indefensible and ran afoul of the law and facts on record and has occasioned a miscarriage of justice.
4. The Appeal proceeded by way of submissions

#### **Appellant's submissions: -**

5. It is the Appellant's submission that there was no evidence showing that the appellant is the one who destroyed the crop. It is further contended that the respondent was a trespasser in the suit property, and the judgment was tantamount to recording his illegal actions.
6. The Appellant further points out that the respondent was a witness to a sale agreement between the Appellant and the previous owner in which he was required to remove his crop and therefore he cannot plead ignorance about the fact that he was required to remove the crop.
7. The Appellant further argues that the respondent had no license to till the land either from the previous owner or from the Appellant

#### **Respondent's submissions**

8. It is the respondent's submission that the claim of kshs. 64,416/- was proved by way of the Agricultural officer's report which report was not challenged.
9. It is further submitted that the respondent's use of land was with the consent of the previous owner, one Jesica Musimbi (DW2) a fact which was admitted by the said Jesica. The respondent refutes the allegation that he was a trespasser therefore.
10. On the question of who destroyed the crops, the respondent submits that there was sufficient proof as the Appellant admitted as much.

#### **Review of the evidence**

11. This being the first appellate court, its role is to review the evidence of the trial court, evaluate it and arrive at its own conclusion.

#### **The claimant's case**

12. CW1, was the Respondent herein. He told the court that Jesica Musembi (DW2) was his in-law. That he had lived on the suit property for 30 years. He admits that the Appellant bought the land but insist that , they did not come to an agreement on what was to happen to his crop. The Respondent further told the court that when he was given 30 days by the Appellant to remove the crop, he reported to the Chief. On the same day he made the report however, Appellant came and destroyed the crop.



13. In cross examination he admitted that he was not the owner of the property. That he had occupied the land with the permission of Jessica, and that he had been in the land for more than 30 years. He did not have any document to show he was authorized to occupy the land.
14. The respondent admitted that he got a notice from the Appellant to move out, however, he denies having agreed to the 30 days' notice. He further admits that he was a witness to the sale between Jessica and the Appellant but he did not know that the agreement required him to remove the sugarcane. He told the court that the crop was destroyed on 9.3.2022. and that he did not see the Appellant carrying out the destruction. In re-examination he stated that the crop was destroyed on 9.4.2022.

### **The respondent's case**

15. DW1 was the Appellant. He denied that he uprooted the crop. That the respondent had been given 30 days to vacate the land. That there was no crop on 9.4.2022 when he took possession. That the respondent had no authorization to use the land. That he has not been summoned over malicious damage to property.
16. On cross examination, he stated that he inspected the land and did not see any sugarcane. That he only saw seedlings and he was informed by the previous owner that the person who planted the seedlings was in the land illegally. That he ploughed the land with the sugarcane seedlings. He did not know that he damaged someone's property.
17. DW2, was the previous owner of the suit property, one Jessica Musembi. She told the court that the respondent was her in-law. He told the court that the Appellant had purchased the suit property and that there was a sugar plantation on the land when she sold it. That when she sold the land the respondent was given 30 days to remove the crop. That admitted that the respondent used the land between 2019 and 2022.
18. In cross examination she stated that she had no objection with the respondent using her land.
19. DW3 was a witness to the sale agreement. He told the court that he was a neighbour to both the parties herein. He told the court that, there were sugarcane plants on the land and that the respondent had been given 35 days to remove it.
20. On cross examination he confirmed that there the crop was about 4- 5 months in maturity.
21. DW4 was also a witness to the agreement. He testified that there was sugarcane on the land at the time of sale and that the respondent failed to remove the crop even after being given notice.

### **Issues**

22. The following issues arise for determination:
  1. Was the respondent a trespasser in the suit property
  2. Was there a sugarcane crop on the land at the time of sale
  3. Who was responsible for the destruction of the property?
  4. Was the loss proved?

### **Was the respondent a trespasser**

23. It is an undisputed fact that the suit property initially belonged to one Jessica Musimbi (PW2) and that on or about March 2022, the land was sold to the Appellant herein. It is also admitted by all the



witnesses that the respondent was then in occupation. Although the appellant argues that there was no evidence of authorization or licence to occupy the land, by the Respondent, DW2, admitted that the respondent had been in occupation since 2019 and she did not mind him occupying the land. There is common ground that after the sale, the Respondent was given 30 days to vacate.

24. Therefore, up to the point that the 30 days' Notice expired, the Respondent was not a trespasser. Any claim to the contrary is not true.

#### **Was there a sugarcane crop on the suit property?**

25. The Appellant denied that, there was a crop on the land. But his allegation flies on the face of his own admission that he gave out 30 days' notice to the Respondent to vacate the land. If there was no crop, why was the notice necessary? There was no indication that the Respondent was residing or doing anything else on the land apart from sugarcane growing. Further the Respondent admitted during cross-examination that there were sugarcane seedlings in the land.
26. His assertion that there was no crop on the land is also contradicted by all the other witnesses who admitted that there was sugarcane plantation on the land and that the respondent had been given 30 days to remove it.
27. The evidence of the Agricultural Officer also confirms that indeed there had been a sugarcane crop on the land which had recently been destroyed. As for the ownership of the crop the evidence of the respondent, DW2, 3 and 4. All admit that the crop belonged to the respondent.

#### **Who was responsible for destruction?**

28. The respondent admitted that he did not see the Appellant destroy his crop. However, by the Appellant's own admission, he went and ploughed the land. Again, by his own admission there were what he called seedling. Thus, he was the one who destroyed the crop, and for the purpose of this claim, it matters not whether he considered the crop as seedlings or mature crop. It is my finding that there was sufficient evidence to establish that the Appellant was the one who destroyed the crop and hence caused the damage.

#### **Was the loss proved**

29. The respondent produced a report by the Agricultural Officer, who valued the lost crop at Kshs. 64,416, The claim was specifically pleaded and strictly, proved. The appellant has argued that, the respondent should not be allowed to benefit from acts of trespass. As earlier stated, any acts of trespass could have only taken effect from upon expiry of 30 days' notice to vacate.
30. The pertinent question then is, was the Appellant entitled to enforce the notice through the destruction of property? The answer is No. The Appellant ought to have moved to court to seek an order of eviction. That is the lawful way of getting rid of tenants or licencees whose period of occupation has ended, or any other illegal occupiers of land. In the case of *Moi Educational centre vs William Musembi & others* (2017)eKLR, the court of Appeal while citing with approval its earlier decision on *Gusii mwalimu investment co ltd vs Mwalimu Hotel Kisii ltd* (CA NO.160 OF 1995-unreported) held: "It is trite law that unless the tenant consents to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal ( as appropriate ) to obtain an order of eviction". For failing to follow the law in evicting the Respondent, the Appellant brought this liability on himself.



31. I am satisfied that based on the evidence presented in the trial court, the respondent proved ownership of the crop, the fact of destruction of the said crop, the perpetrator, and the fact of loss or damage as a result.
32. I have no reason therefore to fault the judgment of the lower court. The Appeal is completely without merit. The same is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 6<sup>TH</sup> DAY OF JULY, 2023**

**S. CHIRCHIR**

**JUDGE**

**In the presence of**

