



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 85 OF 2018

SOLOMON MULIGA ISIGI.....APPELLANT

VERSUS

WYCLIFFE SENGENCE.....1ST RESPONDENT

WEST KENYA SUGAR CO. LIMITED.....2ND RESPONDENT

(from the judgment and decree of M. L. Nabibya, SRM in Butali SRMC Civil Case No. 46 of 2015 dated 18/6/2016)

JUDGMENT

1. The appellant had sued the respondents at Butali Law Courts seeking for orders of:-

(a) An injunction restraining the 2nd defendant from paying the 1st sugarcane proceeds in respect to the sugarcane harvested from land parcel No. S/Kabras/Shamberere/2046 delivered under permit No. 245502 to the 2nd defendant.

(b) Payment of the sugarcane proceeds in respect of the sugarcane crop harvests from land parcel No. S/Kabras/Shamberere/2046 and delivered under permit No. 245502 to 2nd defendant.

(c) Costs of the case.

2. The trial magistrate dismissed the suit on reaching a conclusion that the appellant had not proved the claim against the respondents. The appellant was aggrieved by the holding of the learned trial magistrate and filed the instant appeal raising the following grounds:-

1. That the learned magistrate erred both in fact and law by holding that the plaintiff failed to proof his case on a balance of probability.

2. That the learned magistrate erred both in law and fact by admitting the respondent's defence.

3. That the learned magistrate erred both in law and fact in analyzing the evidence before her and hence arrived at a wrong finding.

4. That the learned magistrate erred both in fact and law by admitting in admissible evidence.

3. The appeal was opposed by the 1st respondent through the submissions of his advocates, **Shitsama & Co. Advocates.**

The case for appellant –

4. The case for the appellant at the lower court was that he, the appellant, has a boundary dispute with the father of the 1st respondent over his land parcel No. S/Kabras/Shamberere/2046 and the 1st respondent's father land parcel No. S/Kabras/Shamberere/1022. That he has had several cases with the 1st respondent's father over the boundary dispute.

5. That on the 2nd May, 2015 the 1st respondent entered into his land and harvested the sugarcane that was growing thereon. The 1st respondent delivered the cane for processing to the 2nd respondent, West Kenya Sugar Company. He thereupon filed suit seeking that the proceeds be paid to him. During the hearing he produced the title deed to his land as exhibit, P.Ex.1.

1st Respondent's Defence –

6. The 1st respondent stated in his defence that he is a son to Thomas S. Shirabu who is the registered owner of land parcel No. Kabras/Shamberere/1022. That the land borders that of the appellant land parcel No. S/Kabras/Shamberere/2046. That his father allocated him part of his land measuring 2.5 acres for growing of sugarcane. That by the time of filing suit by the appellant he had grown sugarcane on the same portion of land for three years without any objection by the appellant. That he is the one who planted and weeded the crop in dispute and he should therefore be paid the proceeds. That his father has had numerous cases with the appellant over the said parcel of land relating to a boundary dispute being Kakamega CMCC No. 78 of 2005, Kakamega High Court E&L No. 292 of 2013 and Butali SRMCC No. 149 of 2011. That Kakamega CMCC 78 of 2005 was dismissed by the trial court while the other cases were yet to be determined by the time of hearing of this case. During the hearing the 1st respondent produced the decree in Kakamega CMCC 78 of 2005, D.Ex.1. He also produced documents to show that he had been delivering cane to the 2nd respondent, D.Ex.2 and 3 (1-10) respectively.

7. The evidence for the 1st respondent was supported by the evidence of his father DW2.

Submissions –

8. The parties in the case made written submissions through their respective advocates. The advocates for the appellant, **Momanyi, Manyoni & Co. Advocates** submitted that the appellant had proved that he was the registered owner of land parcel No. S/Kabras/Shamberere/2046 wherein the disputed crop was harvested from. That the trial court erred in holding that the disputed crop was harvested on land parcel S/Kabras/Shamberere/1022.

9. The advocates for the appellant further submitted that the trial court erred in admitting documents of a dispute with the 1st respondent's father to which the 1st respondent was not a party to. That the documents could not be relied on to dismiss the appellant's case. That the dispute herein was in relation to sugarcane proceeds and not to land dispute. Further that the statements produced by the 1st respondent did not relate to any sugarcane harvested from land parcel No. 2046. That there was no evidence to prove that the cane was harvested from land parcel No. 1022. That the records from the 2nd respondent indicated that the cane was harvested from land parcel No. 2046.

10. The advocates for the 1st respondent on the other hand submitted that the appellant admitted in his testimony that he never planted any sugarcane and that he merely wanted to be paid the proceeds of the cane. That the appellant was not aware of the amount of money that he was seeking to be paid by the 2nd respondent. That he did not plead the amount of money he was claiming which is not in conformity with trite law that special damages must be specifically pleaded and strictly proved.

11. The advocates further submitted that the appellant only produced a title deed to prove ownership of land parcel No. 2046. That he did not adduce evidence to show that he had planted any cane or harvested the same and delivered it to the 2nd respondent. That to the contrary the 1st respondent produced documentary evidence, D.Ex.1-8, showing that he had been growing sugarcane. That the sugarcane permit D.Ex.2 showed that the crop in dispute was harvested from land parcel No. 1022. That the 1st respondent had proved that he was the one entitled to the cane proceeds.

12. The advocates further submitted that the appellant did not object to the production of the 1st respondent's documentary exhibits D.Ex.1-8. Therefore that the evidence on the documents was admissible. The advocates urged the court to dismiss the appeal.

Analysis and Determination –

13. This being a first appeal the duty of the court is to analyse the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of hearing and seeing the witnesses testify – See **Selle & Another –Vs- Associated Motor Boat Co. Ltd & Another (1968) EA 123**.

14. The appeal is based on the grounds that the trial court erred in holding that the appellant did not prove his claim and also on grounds that the trial court admitted inadmissible evidence.

15. In dismissing the claim the trial court held that the appellant had not proved that he was a sugarcane farmer. That to the contrary the 1st respondent had proved that he was a sugarcane farmer and that he had been delivering cane to the 2nd respondent. That the 1st respondent had proved that his cane was from land parcel No. 1022.

16. The appellant stated that he has had a boundary dispute with the 1st respondent's father since 1990. He said that the land dispute has not been determined though he conceded that Kakamega Civil Case No. 78 of 2005 was struck out by the court.

17. Whereas the appellant contended in his pleadings that he is the one who weeded for the sugarcane and applied fertilizer, he conceded in cross-examination that he did not plant the cane. He conceded that the 1st respondent's family is the one that planted the cane but said that he could not remember the year that they planted the cane. He however stated that the cane was mistakenly planted on his land. He said that he was only claiming the cane proceeds.

18. The appellant conceded that he has been having a boundary dispute with the 1st respondent's father since 1990. The documents produced by the 1st respondent to prove the existence of the dispute were therefore admissible evidence in the case. The submission by the advocate for the appellant that the evidence was not admissible does not stand.

19. I have keenly analysed the evidence adduced at the lower court and the decision of the trial magistrate. The appellant conceded that he is not the one who planted the cane in dispute. He conceded that it is the 1st respondent's family who planted the cane on the disputed portion of land in a year he cannot remember. There was no evidence to prove that he weeded for the sugarcane and that he applied fertilizer to the same. No documents were produced to prove the same. There was thereby no basis to hold that the appellant was the owner of the cane. It is not believable that the appellant would have weeded on cane that he had not planted himself. It is most likely that if he had gone ahead to weed on cane that had been planted by the 1st respondent, the case with 1st respondent would have started at that time and not after the harvest. It is clear that it is the 1st respondent who planted the case and worked on it till harvest. The appellant seems to have waited till after the cane was harvested to lay claim on the proceeds.

18. The 1st respondent adduced evidence that he was a cane farmer and that he had been delivering cane to the 2nd respondent. He produced documents to prove so. His cane harvesting permit, D.Ex.2, showed that the cane in dispute was harvested from land parcel 1022. I concur with the trial court that the appellant had failed to prove that he was the owner of the cane in dispute.

19. In the foregoing there is no merit in the appeal. The same is thereby dismissed with costs to the 1st respondent.

Delivered, dated and signed in open court at Kakamega this 8th day of October, 2019.

J. NJAGI

JUDGE

In the presence of:

No appearance for appellant

Miss Ashitsa for respondents

Parties: Appellant - absent

1st respondent - present

Court Assistant - George

30 days right of appeal.