



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 27 OF 2015**

**FRANCIS MISIKO.....APPELLANT**

**VERSUS**

**TIMOTHY MISIKO.....1<sup>ST</sup> RESPONDENT**

**MUMIAS SUGAR CO. LTD...2<sup>ND</sup> RESPONDENT**

*(from the judgment and decree of G.N. Sitati, R.M. in Mumias PMC Civil case No. 398 of 2012 dated 10/3/2015)*

**J U D G M E N T**

1. The 1<sup>st</sup> respondent who was the plaintiff in the lower court had sued the appellant ( the 1<sup>st</sup> defendant) and Mumias Sugar Company Limited (the 2<sup>nd</sup> defendant) seeking for orders that:-

- 1) He be paid half of sugar cane proceeds from account No. 40211 without deduction of Kshs.30,388 debited to the said account due to the fertilizer supplied to the 1<sup>st</sup> defendant.
- 2) Costs of the suit.
- 3) Interest.

2. On the 10<sup>th</sup> March 2015, the trial court entered judgment for the plaintiff/1<sup>st</sup> respondent to the effect that:

- 1) The 2<sup>nd</sup> defendant do pay both parties their respective proceeds out of account No. 40211 with the 1<sup>st</sup> defendant shouldering the fertilizer costs of Kshs.3,388.00.
- 2) The costs of the suit be borne by the 1<sup>st</sup> defendant.

1. The 1<sup>st</sup> defendant was aggrieved by the said judgment and filed this appeal. The grounds of appeal are that:

- 1) Having found that there was no contract between the appellant and the 1<sup>st</sup> respondent, the learned trial magistrate erred in law by making judgment in favour of the 1<sup>st</sup> respondent and to the detriment of the appellant.
- 2) Having found that one Khadija was a key player in the subject matter yet she was not made a party to the suit, the learned trial magistrate erred in law by making judgment in favour of the 1<sup>st</sup> respondent and to the detriment of the appellant.
- 3) The learned trial magistrate erred in fact and in law by finding that the appellant and the 1<sup>st</sup> respondent were joint contract holders on account number 40211 without any evidence on the part of the 1<sup>st</sup> respondent establishing a contract between himself and the 2<sup>nd</sup> respondent, on the one hand, and in the wake of testimony to the contrary from the appellant.
- 4) Having found that the 1<sup>st</sup> respondent joined the contract at the time of harvesting and in the absence of proof of planting the sugarcane so harvested, the learned trial magistrate erred in law by making judgment in favour of the 1<sup>st</sup> respondent.
- 5) The trial magistrate erred in law and in fact by shifting the burden of proof to the appellant to disprove the plaintiff's case rather than to purely let the plaintiff establish his case on a balance of probabilities.

3. The appeal was strenuously opposed by the 1<sup>st</sup> respondent through the submissions of his advocates, **Marisio Luchivya & Co. Advocates**. The 2<sup>nd</sup> defendant/2<sup>nd</sup> respondent did not enter appearance either in the lower court nor in this court.

#### **Case for the plaintiff/ 1<sup>st</sup> respondent:**

4. The plaintiff's case was that he had by an agreement, Pex 1 dated 31/6/2011 leased a parcel of land measuring 0.04 Ha from one Khadija Rapando. That the appellant had also leased an adjacent parcel of land from the same person also measuring 0.4 Ha. The plaintiff planted sugar cane on his parcel of land. He tendered it. When the cane was ready for harvesting he discovered that the appellant had entered into a sugarcane farming contract with Mumias Sugar Company for the entire field encompassing the plaintiff's 0.4 Ha. The contract account with the company was No. 40211. The plaintiff thereupon complained to the company who then caused the said agreement to be registered in the joint names of the plaintiff and the appellant. The plaintiff learnt that the appellant had been supplied with fertilizer by the company worth Ksh.30,388.00 that the company was to debit from him on the appellant selling cane to the company.

6. The company then harvested the crop from the two parcels of land. A dispute arose between the plaintiff and the appellant as to who was to pay for the fertilizer loan of Ksh 30,388.00. The plaintiff contended that the fertilizer was not utilized on his parcel of land and that the appellant should singly shoulder the cost of Ksh 30,388.00 to the company. The two parties could not agree on the issue. The plaintiff then sued.

#### **Case for the 1<sup>st</sup> Defendant/appellant**

7. The appellant denied the plaintiff's claim. He said in his evidence in court that he had entered into a lease agreement with Khadija Rapando in the year 2005 to grow sugar cane on a parcel of land measuring one acre for a period of three harvests. He planted cane on the land. He and a partner called Ishmael Onyango then entered into a cane farming agreement with Mumias Sugar Company. The plot No. was 416B and the account No. with the company was 40211. Mr. Onyango later pulled out of the contract. He completed his three harvests. Later by a letter dated 29/8/2011, D ex 4, the company extended the farming contract for the 3<sup>rd</sup> and 4<sup>th</sup> ratoon harvests. On 2/11/2011, the company supplied him with fertilizer as per the document, D ex 4. However that at the time of the harvest the company introduced the name of the plaintiff into the 3<sup>rd</sup> and 4<sup>th</sup> ratoon agreement, D ex 4. The company harvested the cane. Delivery notes were issued in the joint names of both parties.

The appellant contended that the plaintiff/ 1st respondent gained entry into the contract fraudulently. He contended that he was the sole contract holder.

#### **Judgment of the court**

8. The trial court found that there was no privity of contract between the appellant and the 1<sup>st</sup> respondent. That Khadija Rapando who was a key player was not enjoined in the proceedings. That though the appellant alleged in his evidence that the 1<sup>st</sup> respondent was enjoined in the contract at the time of harvesting and contended that this was done fraudulently and forcefully, this was not pleaded in the defence of the appellant. He accordingly dismissed the appellant's defence.

The court found that the appellant conceded during the hearing that he solely received the fertilizer for the whole portion. The court found that the plaintiff had proved his case against the appellant and entered judgment for the plaintiff as prayed.

#### **Submissions**

9. The advocates for the appellant **Mukhooli & Associates** submitted that there was no privity of contract between the appellant and the 1<sup>st</sup> respondent. Therefore that there was no cause of action against the appellant. That the burden of proof rested on the 1<sup>st</sup> respondent who should have called the relevant witnesses. That his failure to do so meant that his case ought to have failed. That the documents produced by the appellant indicated that he was the sole account holder with Mumias Sugar Company. That a handwriting by hand on top of the agreement dated 29<sup>th</sup> August 2011 cannot purport to alter the terms of the agreement. That the trial magistrate thereby erred by finding that the 1<sup>st</sup> respondent and appellant were joint account holders.

10. That having found that the 1<sup>st</sup> respondent joined the contract at the time of harvesting and in the absence of evidence of planting the cane so harvested, the learned trial magistrate erred in law by finding for the 1st respondent. That a contract cannot be entered into at the conclusion of the subject matter but at the beginning and therefore that the magistrate should have found that the 1<sup>st</sup> respondent was not a party to the agreement.

11. The advocates submitted that the trial magistrate misdirected herself when she assumed that by not amending the defence, the appellant had concurred with the allegations contained in the amended plaint. That a party can only amend his pleadings if need be. That in this case the appellant's defence was to be deemed to be the one in record in opposition to the amended plaint.

12. The advocates for the 1<sup>st</sup> respondent on the other hand argued that the appellant and the 1st respondent were in an implied contract with respect to account number 40211 on how to share sugar cane proceeds proportional to their contribution of the said cane proceeds as the account was registered in their joint names with the 2<sup>nd</sup> respondent.

13. That Khadija Rapando had no role to play in respect to this suit as her name was not registered with the 2<sup>nd</sup> respondent in respect to account No. 40211. That the 1<sup>st</sup> respondent was not seeking for any relief from the said Khadija so as to make her a party to the suit.

14. Further that the appellant upon complaints by 1<sup>st</sup> respondent wrote a letter to the 2<sup>nd</sup> respondent to include the 1<sup>st</sup> respondent as a joint holder of the account in issue. That the two were therefore joint account holders.

15. That the 1<sup>st</sup> respondent proved in the lower court that he planted the sugar cane that was harvested by production of the lease agreement, delivery notes and farmers referral chits which documents would not have been issued by the 2<sup>nd</sup> respondent in the 1<sup>st</sup> respondent's name if it found that he had not nurtured the sugar cane. That the appellant did not rebut the evidence that the 1<sup>st</sup> respondent had tendered his crop.

16. That the appellant admitted that he received the fertilizer from the 2<sup>nd</sup> respondent and that it was delivered in his own name. The trial court did not therefore err in making an order for the appellant to shoulder the cost of the fertilizer.

17. The advocate submitted that the 2<sup>nd</sup> respondent has no interest in the matter. That order 1 Rule 5 of the Civil Procedure Rules provides that it is not necessary that every defendant shall be interested as to all the reliefs claimed in a suit against him. That order 34 rule 2(c) provides that in an interpleader suit the applicant is willing to pay or transfer the subject matter into court or to dispose of it as the court may direct. That the 2<sup>nd</sup> respondent was properly sued so as to effect the order of the court as to what amount of money to pay to the appellant and the 1<sup>st</sup> respondent.

### **Duty of a first appellate Court-**

18. This is a first appeal. It is the duty of a first appellate court to analyse and re-assess the evidence adduced in the lower court and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses testify- *Selle Vs Associated Motor Boat Company (1968) E.A 123*.

### **Questions for Determination**

19. The questions for determination are:

- 1) Who between the appellant and the 1<sup>st</sup> respondent had a valid lease agreement with Khadija Rapado.
- 2) Who between the parties had the burden of proof in the case.
- 3) Whether the appellant and the 1<sup>st</sup> respondent were joint holders of account No. 40211.
- 4) Who between the parties worked on the land in dispute.
- 5) Whether the 1<sup>st</sup> respondent had proved his case against the appellant.

### **DETERMINATION**

20. The appellant produced an undated agreement, Dex 1 between him and Khadija Rapando that indicated that he had leased cane land from the said Khadija measuring one acre. The 1<sup>st</sup> respondent on the other hand produced an agreement dated 31/6/2011 that indicated that he had leased one acre of cane land from the said Khadija. He said that the cane was due for ratoon 4 when he leased the land. That Khadija showed him 2 parcels of land that had a boundary between them. He was leased the upper portion. He learnt that the 2<sup>nd</sup> portion measuring one acre was occupied by the appellant. He said in cross examination that previously the appellant had leased the parcel of land but that his contract had expired. However that he had no evidence to prove that the contract had expired.

21. Though the appellant's lease agreement is undated, he stated that he entered into lease agreement with Khadija in the year 2005. The agreement indicated that the lease period was for 3 harvests -the plant, the 1<sup>st</sup> ratoon and the 2<sup>nd</sup> ratoon. In his evidence in court he stated that by the year 2010 he had already done his three harvests. However that he renewed the contract with Mumias Sugar Company for the 3<sup>rd</sup> and 4<sup>th</sup> ratoons. He however did not produce any evidence that Khadija had extended his contract for the 3<sup>rd</sup> and 4<sup>th</sup> ratoons. He said that he was not aware that the 1<sup>st</sup> respondent had leased one acre from Khadija.

22. In his written statement of defence the appellant had indicated that he would enjoin a third party with whom he had contracted but he never did so.

Section 108 of the Evidence Act states that:

***“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all is given on either side”.***

The appellant in his statement of defence stated that his contract with Khadija was subsisting at the time of filing the defence. The appellant did not produce any evidence to show that Khadija extended his contract after he completed the agreed period of 3 harvests. He did not call the said Khadija to explain whether the contract was still subsisting in June 2011 when the 1<sup>st</sup> respondent leased the land from Khadija. The burden of proof was on the appellant to call Khadija as a witness in his case. In the absence of any subsisting agreement with Khadija, the trial court had no option than to go by the agreement of the 1<sup>st</sup> respondent that the 1<sup>st</sup> respondent had leased the one acre parcel of land from Khadija. It was apparent that the appellant's lease period had expired and Khadija had not renewed the lease agreement. The 1<sup>st</sup> respondent

is therefore the one who had proved that he had a valid lease agreement with Khadija. The appellant could not legally extend his cane agreement with the 2<sup>nd</sup> respondent before extending the lease agreement with Khadija.

**Whether the 1<sup>st</sup> respondent and the appellant were joint holders of account No. 40211**

23. The agreement between the appellant and the 2<sup>nd</sup> respondent for ratoon 3 and 4 was a typed one. The name of the 1<sup>st</sup> respondent was inserted into the agreement by hand. The 1<sup>st</sup> respondent contends that that act made him a joint account holder with the appellant. However, the 1<sup>st</sup> respondent did not call witnesses from the 2<sup>nd</sup> respondent to testify as to why they inserted his name into the agreement. I should think that the 2<sup>nd</sup> respondent inserted the name of the 1<sup>st</sup> respondent into the agreement because there was a dispute between the 1<sup>st</sup> respondent and the appellant on the cane harvested by the 2<sup>nd</sup> respondent from their parcels of land. The 2<sup>nd</sup> respondent was thereby protecting themselves from litigation by the two parties until when an independent body ruled as to who to be is paid the outstanding dues. It seems that that is why the 2<sup>nd</sup> defendant did not defend the suit and treated it like an interpleader suit. The fact that the 2<sup>nd</sup> respondent inserted the name of the 1<sup>st</sup> respondent into the agreement does not prove anything against the two protagonists.

**Who worked on the land**

24. The 1<sup>st</sup> respondent stated that on leasing the land he cut the stumps, ploughed and weeded it . That the crop was ready for harvesting in July 2012. The appellant on the other hand stated that the 1<sup>st</sup> respondent came into the scene at the time of harvesting. So, who then between the two parties was telling the truth?

25. The agreement between the 1<sup>st</sup> respondent and Khadija was dated 31/6/2011. The crop was harvested in September 2012 which was 14 months after the said agreement was made. It is therefore possible that the 1<sup>st</sup> respondent had tendered the crop after his agreement with Khadija. There was no evidence on which the trial court could rely on to hold that the 1<sup>st</sup> respondent came in at the time of harvesting.

26. The 1<sup>st</sup> respondent stated in his amended plaint that at the time that he entered into the land lease agreement with Khadija, his parcel of land was clearly demarcated to distinguish it from the appellant's land parcel. That both of them utilized their respective land parcels to grow sugar cane. He said that he never got fertilizer from Mumias Sugar Company.

27. The appellant's agreement with Khadija indicated that he had leased one acre from Khadija. He confirmed the same in cross-examination. Where then did the extra one acre of cane come from if he had only leased one acre? The appellant did not challenge the evidence of the 1<sup>st</sup> respondent that each of them was cultivating separate parcels of land that had a boundary. All he said was that the appellant entered into the agreement at the time of harvest. He did not explain whether the appellant was claiming cane over the one acre that he had leased from Khadija or it was a separate parcel of land. In the premises it was evident that the parties were cultivating separate parcels of land. It was clear that the appellant had registered the two parcels of land with Mumias Sugar Company under his own name. There was no dispute that the appellant had been supplied with fertilizer by Mumias Sugar Company. There was no evidence that part of that fertilizer was utilized on the 1<sup>st</sup> respondent's portion of land. There was no reason for the 1<sup>st</sup> respondent to pay for fertilizer that he never utilized. The appellant should have singly shouldered for the fertilizer loan.

28. In the foregoing, the 1<sup>st</sup> respondent had proved that he had leased the land from Khadija Rapado. He had proved that he worked on the land without utilizing fertilizer from Mumias Sugar Company. The appellant had not established that he had a subsisting contract with Khadija Rapando as his contract with her had expired. The 1<sup>st</sup> respondent had proved his case against the appellant. The trial court did not err in entering judgment for the 1<sup>st</sup> respondent. The appeal is unmerited. The same is dismissed with costs to the 1<sup>st</sup> respondent.

Delivered, dated and signed at Kakamega this 4<sup>th</sup> day of October, 2018.

**J. NJAGI.**

**JUDGE.**

In the presence of:-

No appearance .....for appellant

No appearance ..... for 1<sup>st</sup> respondent.

George ..... Court Assistant.

Parties:

Appellant .....absent

1<sup>st</sup> Respondent .....absent

2<sup>nd</sup> Respondent.....absent