REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 35 OF 2016

BETWEEN

JENIFA AOKO ADERA (suing as the Legal

Administrator of the Estate

of **ROBINSON ADERA ADUONG) …….APPELLANT**

AND

EUNICE AKINYI MBOYA ……..….RESPONDENT

(An appeal from the judgment and decree of Hon. Kamau C.M. (RM) in Rongo SRMCC No.22 of 2014 dated 27th May, 2016)

JUDGMENT

1. This appeal is filed by **JENIFA AOKO ADERA** (appellant) who is the legal administratrix of the estate of **ROBINSON ADERA ADUONG** (Deceased), against the decision made dismissing the claim she had filed in the lower court against **EUNICE AKINYI MBOYA** (the Respondent).

2. The background to the claim was that the deceased who was the registered owner of parcel **NO. NORTH SAKWA/ KANYAMGONY/ 1148** had cultivated sugarcane thereon, and the same had grown and attained the age of 16 months thus nearly due for harvest.

3. However on 23rd October 2013, the appellant alleged that the defendant entered into the land, without any colour of right and cut down the sugarcane. This denied the appellant the attendant benefit to the cultivation of the cane and loss was suffered which was particularized as loss of 24 tonnes of sugar cane at Kshs.3000/= to give a figure of Kshs.91,0200/= which the appellant claimed.

4. It was this sum that the appellant sought to be paid by the respondent as compensation plus interest at the rate of 14% p.a. and costs.

5. The respondent had denied liability contending that she never entered onto the said portion of land, and was only aware of sugarcane harvested from parcel **NO. SAKWA/KANYAMGONY/489** – which was distinct from the appellant's parcel.

6. The appellant informed the trial court that she had been tending to the sugar cane which her late husband (deceased) had cultivated on **parcel NO. NORTH SAKWA/KANYAMGONY/1148**. She had harvested the first and second crops without incidences and was on the third crop. She expected to

harvest 24 tonnes at a cost of Kshs.3000/= per ton when suddenly the cane was allegedly harvested by the respondents.

7. The appellant made a report to the area chief and also the Agricultural Officer who preferred a crop valuation report after visiting the land.

8. She also got a surveyor to ascertain the boundaries as per the surveyor's report which as produced as **Exhibit 7**.

9. The appellant stated on cross examination that she had been cultivating the said parcel for 20 years and upon harvesting the first and second crops, the same were delivered to **SONY** Company which had contracted them. She also confirmed that parcel No.1148 and 489 did not border each other nor did she have any document showing that it was the respondent who was paid for the harvested cane. She was adamant that SONY harvested the sugar cane for the respondent although she did not personally see anyone harvesting the cane. However on re-examination she stated:-

"I saw Eunice on the shamba on the date of harvesting."

10. The respondent explained that their parcels shared boundaries but the appellant's cane was harvested on 20/10/2013 by SONY and taken away on the same day when her cane was harvested on 25th and 26th October 2013 and taken to the factory on 27th October. She realized 19 - 50 tonnes of cane which was delivered to the factory and she was paid a sum of Kshs.53,914/74 cents as per the statement dated 27/10/2013. She denied interfering with the appellant's cane and was not aware of a possibility that **SONY** erroneously harvested the appellant's cane.

11. The respondent insisted that the plot her husband purchased was No.489 measuring 0.2 Hectares from one Mama Consolata Awino Dede at Kshs.26,000/= and at the time of purchase it had cane which was 1 year 5 months old and it was contracted to SONY.

12. The trial magistrate noted that the appellant admitted the cane on her land was harvested by **SOUTH NYANZA SUGAR COMPANY** (SONY) yet she did not see them. The trial magistrate found that this omission was fatal as it is the personnel at **SONY** who could have shed light on who contracted them to harvest the cane. The trial magistrate also noted that no documentary evidence was presented by the appellant to prove that **SONY** mistakenly credited the respondent's account with proceeds from the harvest of her cane.

13. Consequently the trial magistrate held that the appellant had failed to establish on a balance of probability that the respondent harvested her cane.

14. In contesting these findings, the appellant contends that the trial magistrate erred in finding that **SONY** ought to have been sued because the company could only have been misled by the respondent, and to this extent the trial magistrate misunderstood the crux of the appellant's claim.

15. It was also the appellant's position that the oral and documentary evidence sufficiently proved her case exhaustively. The judgment was criticized as not capturing the issues which were for determination as contemplated by **Order 21 Rule 4 of the Civil Procedure Rules**. The court is urged to set aside the trial magistrate's finding and substitute it with an order allowing the appellant's claim. The appeal was canvassed by way of written submissions.

16. The appellant's counsel submitted that there was nothing fatal in failing to join **SONY** in the suit, because obviously the company harvested the cane under the instructions of the respondent. The basis for saying this is because the respondent said she knew the day of harvest and even witnessed the company harvesting the appellant's cane, and that she even knew they shared a common boundary with the appellant.

17. Counsel also faulted the trial magistrate for failing to take into account the chief's letter where the

respondent was summoned over the matter. Counsel argues that the chief knew both parties very well and could not have summoned the respondent to her office for no reason.

18. Counsel also submitted that despite the report prepared by the Agricultural Officer indicating the value of the cane which had been harvested from the appellant's plot, no consideration of this was given by the trial magistrate.

19. It was counsel's contention that the respondent did not prove she owned parcel No.1148 from which the sugar cane was harvested, saying the only cane harvested and whose proceeds were paid to the respondent actually belonged to the appellant.

20. The respondent's counsel submitted that since evidence presented both by the appellant and respondent pointed at SONY as the harvester, it was incumbent on the appellant to sue **SONY** so as to secure interest at the conclusions of the case.

21. He referred to Surveyor's report which stated that sugarcane had been harvested from both parcel NO.489 and 1148 and pointed out that no evidence had been led suggesting that one field was erroneously harvested instead of the other. He also urged the court to consider the statement of accounts produced by the respondent which showed that only 0.2 hectares belonging to her family was harvested and not 0.4 hectares which is the size of appellant's land and it is not possible that the area could include appellant's portion.

22. As for the chief's letter, it is submitted that the subject matter in that letter is parcel No.162 which is totally different from the parcel the appellant refers to in this suit.

23. There is no dispute that the appellant or her husband had planted sugar cane on her parcel **NO. NORTH SAKWA/KANYAMGONY/1148**, and that the cane was eventually harvested by SONY. What evidence is there that the respondent is the one who gave SONY instructions to harvest the cane standing on the appellant's land? None whatsoever. The mere fact that respondent saw the cane being harvested does not prove that she was the one who gave instructions. There was also no evidence that the cane harvested from the appellant's land was the one whose proceeds were paid out by SONY to the respondent. This is because the acreage of the field harvested by SONY is shown in the statement of account as 0.2 hectares whereas the appellant stated her field measured 0.4 hectares. There was no evidence or was suggestion that SONY harvested only half her field.

24. Further, the agreement of sale of sugarcane planted between the respondent's harvest and Mama Consolata in respect of field parcel No.489 was with regard to the 3rd ratoon which correspondents with the information contained in the finance statement from SONY.

25. Since evidence showed that SONY harvested the cane and even made out payments, I am in complete concurrence with the trial magistrate that joining SONY as a co-defendant in the matter was crucial because the company could then have stated who authorized harvesting of field No.1148.

26. The appellant's counsel cannot now cry wolf over the sale agreement yet he did not object to its production during trial before the magistrate's court.

27. Did the fact about the chief summoning the respondent prove that she was the culprit? I think not – that summons was an administrative action exercised pursuant to a complaint made by the appellant. It proved nothing other than that the appellant had lodged a complaint infact the letter dated 23/10/2013 and 24/10/2013 refers to field 162 and there is no evidence confirming that field and parcel NO.1148 are one and the same.

28. The crop valuation report dated 28/10/13 merely confirmed that sugarcane aged about 16 months had been harvested and the value of the damaged crop – it did not state who was the culprit.

29. The surveyor's report dated 18th November 2013 shows survey carried out in parcel **NORTH**

SAKWA/KANYAMGONY/1148 measuring 0.8 hectares and **NORTH SAKWA/KANYAMGONY/489** measuring 0.8 hectares and his finding were that sugar cane had been planted on both parcels – there was nothing to prove that the respondent harvested cane from both parcel and I do not detect any aspect of weakness in the trial court's assessment of the evidence presented and the criticism.

30. Consequently I find no merit in this appeal and it is dismissed with costs to respondent.

Written and dated this 21st day of February, 2017 at Homa Bay

H.A. OMONDI

JUDGE

Delivered and dated this 21st day of February, 2017 at Migori

A.C. MRIMA

JUDGE