**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 112 OF 2014**

**BETWEEN**

**MICHAEL AWINO OUMA.....1ST APPELLANT**

**OREGE CO-OPERATIVE SOCIETY.....2ND APPELLANT**

**AND**

**WILSON SUBA ONDAGO.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. A. Odawo, RM dated 14th October 2014 at the Chief Magistrates Court at Kisumu in Civil Case No. 34 of 2014)***

**JUDGMENT**

1. In the subordinate court, the respondent herein was the plaintiff and he sued the appellants as the 1st and 2nd defendants respectively. I shall refer to the parties in their original form before the trial court for ease of reference where the context admits.

2. The plaintiff filed a suit against the defendants on the basis that he was the registered proprietor of KISUMU/SIDHO WEST/408 ("Plot 408"). His cause of action, summarized in paragraph 5 of the plaint, was as follows;

> *That sometime in this year the 1st respondent without any colour of right and or justification entered upon the Plaintiff's parcel of land without the plaintiff's authority and harvested the Plaintiff's sugarcane and later transported it to the KIBOS SUGAR AND ALLIED INDUSTRIES FACTORY of which the money has not been paid to him by the 2nd defendant.*

He sought the following prayers in the plaint against the defendants;

> *a) Permanent injunction restraining the 2nd Defendant himself, his agents, employees and /or any other persons purporting to derive authority from him from advancing any payment to the 1st Defendant.*
>
> *b) That the 2nd Defendant be ordered to stop payments to the 1st defendant pending investigation and identification of the rightful owner who is without doubt the plaintiff herein.*
>
> *c) General damages for trespass.*

*d) Costs of the suit.*

*e) Any other relied of that this Honourable Court may deem fit to grant.*

3. The 1st defendant denied the plaintiff's claim. He claimed that he owned Plot 408 which he had been cultivating for over 30 years as such the respondent could not stop any payments to him from the 2nd defendant as he was the bona fide owner of the sugar cane having cultivated on the property. He also averred that in August 2013, the respondent unlawfully changed the title to the property to his name and the same was challenged in a pending case to wit; ***Kisumu HC JR No. 28 of 2013***.

4. The 2nd appellant did not enter appearance or file defence and as a result, the court entered interlocutory judgment against it on 21st March 2014.

5. After hearing the parties, the trial magistrate found as a fact that the plaintiff was the registered proprietor of Plot 408 as he had produced a copy of the title deed and a certificate of search. She also held that while there was no dispute that the 1st defendant harvested the cane which he took to the factory through the 2nd defendant, he did not produce any document to support his contention that he was entitled to the property. The trial magistrate declined to award damages for trespass and entered judgment against the 2nd defendant. The trial magistrate held that:

> *From the evidence on record, I find that trespass has not been proved by the plaintiff. In my view, this is an offence that needs to be proved beyond reasonable doubt. That notwithstanding, I find that the same was not even proved on a balance of probabilities. The plaintiff apart from alleging that the 1st defendant harvested sugar cane from his farm and producing documents to support his contention that he was the registered owner of the land parcel being KISUMU/SIDHO WEST/408, did not produce any evidence to support his allegation.*

6. The appellants were dissatisfied with the judgment on the grounds set out in the memorandum of appeal dated 23rd October 2014. The thrust of the appeal was that the trial magistrate failed to find that the 1st appellant was in possession of the property and that he had cultivated and harvested the sugarcane. Ms Kyamazima, counsel for the appellants, submitted that the issue of possession was not considered hence the judgment could not stand.

7. The respondent supported the judgment. Mr Achura, counsel for the respondent, submitted that the issue in contention was ownership of the property and that the respondent established his right to the property by producing the certificate of title.

8. I have reviewed the evidence before the trial court as is required by the first appellate court (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**). The trial magistrate rightly found that the plaintiff proved that he was the registered proprietor of Plot 408 and had been in possession of the property since 1984. After finding that the 1st defendant had harvested the sugarcane, the plaintiff wrote to the 2nd defendant not to pay the 1st defendant for the cane delivered to it.

9. Although the 1st defendant admitted that he planted and harvested sugarcane, he did not furnish any evidence of ownership of the property. In cross-examination, he contended that he was the owner of the property because of succession proceedings but he did not provide any documentary evidence of this fact. The 1st defendant's witness, Adolphus Mboya Ogoya (DW 2) did not shed any light on the issue of ownership of the property but admitted in cross-examination that the land belonged to the plaintiff.

10. Plot 408 is registered under the ***Land Registration Act, 2012***. Under the ***Act***, registration of a person as a proprietor of a parcel of land gives him indefeasible title with rights and privileges appurtenant thereto. **Section 24(a)** of the ***Act*** provides that:

> *24(a) the registration of a person as the proprietor of land shall vest in that person the absolute*

*ownership of that land together with all rights and privileges belonging or appurtenant thereto;*

11. As registered proprietor, the plaintiff was entitled to the land and all the rights flowing from the ownership including harvesting the cane he had planted. It was incumbent for the 1st defendant to show that the he was permitted or entitled to be on the plaintiff's property land to plant or harvest cane. He failed to establish this fact. Furthermore, the 2nd defendant did not deny the plaintiff's claim as interlocutory judgment had been entered against it. The trial court was right to grant the orders against the 2nd defendant.

12. I note that the trial magistrate erred in finding that trespass was not proved beyond reasonable doubt. Trespass is both a tort and an offence under the ***Trespass Act (Chapter 294 of the Laws of Kenya)***. In the former, and in a case such as this, the standard of proof is on a balance of probabilities. The fact that the property belonged to the plaintiff and the defendant admitted that he planted and harvested cane was sufficient proof of trespass. As the respondent did not cross-appeal against the dismissal of its claim for damages for trespass, I shall not consider that aspect of the case.

13. I also note that although the 1st and 2nd appellants lodged the appeal, there is no evidence on record that the 2nd appellant instructed the counsel on record to appeal against the interlocutory judgment against it.

14. This appeal is devoid of merit. It is dismissed with costs to the respondent which I assess at Kshs. 20,000/-.

**DATED** and **DELIVERED** at **KISUMU** this **10th day of April 2017.**

**D.S. MAJANJA**

**JUDGE**

Ms Kyamazima instructed by Madialo and Company Advocates for the appellants.

Mr Achura instructed by Amondi and Company Advocates for the respondent.