



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA Civil Appeal 25 of 2007

FRANCIS M.M. ACHIYENZA1ST APPELLANT

BENETA ACHIYENZA2ND APPELLANT

V E R S U S

RAPHAEL SHIKUNDI

RESPONDENT

J U D G E M E N T

This is an appeal against the judgement of the Kakamega Resident Magistrate delivered on 12th February 2007 in Kakamega Chief Magistrate Civil Case No.55 of 2006. The appellants were the defendants before the lower court. Being dissatisfied with the decision of the lower court the appellant filed this appeal and listed five grounds of Appeal namely-

- 1. The Learned Trial Magistrate erred in law and in fact in allowing a back door and unprocedural amendment of the Plaintiff.*
- 2. The Trial Magistrate erred in law and in fact in issuing orders against persons who were not parties to the suit.*
- 3. The Trial Magistrate erred in law and in fact in making a finding in favour of the Respondent who did not prove his case on a balance of probabilities or at all.*
- 4. The Trial Magistrate erred in law and in fact in issuing orders, which were not pleaded by the respondent.*
- 5. The trial Magistrate erred in law and in fact in failing to note that the Respondent's case was ambiguous and did not disclose any reasonable cause of action against the Appellants.*

Mr. Musiega counsel for the appellant contended that there were two complaints both dated 6/2/2006. One of the complaint added another prayer for eviction. The trial magistrate based its decision on the complaint with a prayer for eviction. This was not proper as the rules relating to amendment of pleadings were not followed. This was a serious error which can only be rectified by this court.

On ground two of the grounds of Appeal, counsel submitted that the decision to replace the appellants name with that of the respondent in the Mumias Sugar Contract Account No.72762 was erroneous as Mumias Sugar Company was not a party to the suit.

Counsel for the appellant contended that the respondent did not prove his case on a balance of probabilities. The respondent did not prove that the appellants were staying on his land and that they were utilizing that land. The respondent's suit was a boundary dispute and before that dispute was resolved the trial court could not have held that the respondent had proved his case. The respondent wanted a boundary to be determined but the trial court granted eviction orders.

Counsel submitted that the 1st appellant is the registered proprietor of plot No. IDAKHO/SHISESO/1351 and sugar cane was planted on that plot. The agreement with Mumias Sugar Company Ltd. is for this plot and not for Plot No. IDAKHO/SHISESO/1352.

Mr. Kiveu for the respondent opposed the appeal. Counsel submitted that section 100 of the Civil Procedure Act allows this court to determine the issue between the parties. Both parties knew their case before the trial court and the fact that there were two complaints before the lower court did not prejudice the appellants. Counsel further contended that the respondent had no cause of action against Mumias Sugar Company Ltd. and that is why the company was not enjoined in the suit.

Counsel for the respondent submitted that the respondent proved his case beyond reasonable doubt. The appellants admitted having planted sugar cane on the respondent's land. Counsel urged the court to dismiss the Appeal.

The record of Appeal shows that there were two complaints for the same case No. CMCC NO.55 of 2006. The pleadings are the same in both complaints save that in one of the complaints the following words were added in prayer 6(b) "*and issue eviction order.*"

Both complaints are dated 6th February 2006. The original lower court file shows that the complaint with the prayer for eviction order is the one that was used to assess the court filing fees and it is the same complaint that bears the official court stamp of 7th February 2006. Counsel for the appellant contends that the trial court based its decision on the amended complaint which included a prayer for eviction. This contravened *Order 6 A rule (7)* on amendment of pleadings.

The two complaints in the record of Appeal do not bear the official court stamp. They also do not indicate when they were filed. I have perused the original lower court file and found the complaint filed on 7th February 2006 is the one with the prayer for eviction and it is used to assess court filing fees. I do not find that the respondent filed one complaint that was later amended. I do find that the complaint with a prayer for eviction was the original complaint.

However, should it be that there were two complaints before the court, did this prejudice the appellants' case. The record shows that the appellants were initially represented by Mr. Nandwa Advocate before the lower court. He withdrew from acting after the appellants filed an application on their own without consulting him. The appellants filed their defence on 27th February, 2006 and denied the averments in the complaint. I do find that no prejudice was occasioned to the appellants in defending the suit before the lower court. I see no substance in ground one of the appellants' grounds of Appeal.

On the 2nd ground, the appellants contended that orders were issued against Mumias Sugar Company Limited that was not a party to the suit. The basis for those orders was to ensure that the Sugar cane proceeds for cane contract Account No.72762 were paid to the respondent. The issue of sugar cane contract was raised in paragraph 4 of the complaint. I do not find anything erroneous in the finding by the trial magistrate as Mumias Sugar Company Limited was simply expected to pay the proceeds of the cane contract to the respondent. There was no need to enjoin Mumias Sugar Company Ltd.

The appellants on their grounds 3 and 5 contend that the respondent did not prove his case beyond reasonable doubt. The respondent's case was ambiguous and did not disclose any cause of action against the appellants.

The respondent in his pleadings as indicated in the complaint alleged that he was the registered owner of

plot No. IDAKHO/SHISESO/1352 and that the appellants had opened a cane contract with Mumias Sugar Company Ltd. using Plot No.1351 yet the sugar cane was being cultivated on plot 1352. He prayed for restraining orders against the appellants from utilizing plot 1352 and to have their names deleted from the cane contract Account No.72762 and have their names replaced with his.

Five witnesses testified for the respondent including the respondent himself. The evidence and the documents produced indicate that the respondent is the registered owner of plot No. IDAKHO/SHISESO/1352 measuring 1.56 HA. The extract from the Kakamega Land Registry dated 13th July 2006 indicate that the said plot was on 11th November 1998 registered in the name of FESTUS MANIANI ACHIYENZA. On 10th January 2006 the registered owner transferred the property to the respondent at a consideration of KShs.270,000/=. The respondent was issued with a title deed on the same day.

The respondent testified that he bought the land from the original owner who is deceased. He was the 1st appellant's brother and the 2nd appellant's son. The respondent produced before the trial court a Sale Agreement stating that he bought the land from the owner at an agreed price of KShs.265,000/=. PW3, ESTHER MANIANI was the wife of the original owner, FESTUS MANIANI ACHIYENZA. She did confirm that her husband sold the plot to the respondent and used the proceeds to buy another plot elsewhere. The other three witnesses for the respondent also confirmed that the respondent bought the land.

Similarly, the 2nd appellant, BENETA ACHIYENZA testified that after the death of her husband, she had their land sub-divided and registered in the names of her six sons. Festus Maniani Achiyenza was her last born and was registered as proprietor of plot 1352. She registered a caution but later found that it had been removed.

Given the above background, it is evident that Festus Maniani was the registered owner of plot No. IDAKHO/SHISESO/1352 and he sold the property to the respondent. The respondent testified that the appellants were cultivating the plot. The 1st appellant's contention in his testimony is that he was not informed about the sale transaction. The appellant's contention that the respondent did not prove his case on a balance of probabilities and that the respondent's case did not disclose any reasonable cause of action is misplaced. The trial magistrate found in favour of the respondent and I am satisfied that the trial court arrived at the correct decision taking into account the evidence on record.

The appellants contend that they are the ones who cultivated the sugarcane and that this was done on plot No.1351. On the other hand the respondent claims that the sugar cane was planted on his plot and that although the cane contract with Mumias Sugar Company Ltd. indicates that the sugar cane is on plot 1351 that is not correct. For purposes of fairness to both parties, I do find that the proceeds for the cane contract Account No.72762 be shared equally, i.e. 50:50 between the appellants and the respondents. This is to the extent of any money already existing in the account. Upon payment of the proceeds the account should be closed with each party being at liberty to open his own account with respect to his own plot.

I do find that the respondent purchased plot NO. IDAKHO/SHISESO/1352 lawfully and he is the rightful owner of that property. The Appellants should vacate the Plot and stop occupying and/or cultivating the plot forthwith.

In the end, I find that other than the above finding on the sugar cane contract Account, No.72762, this appeal has no merit and the same is dismissed. Each party shall meet its own costs.

Delivered, Dated and Signed at Kakamega this 1st day of October, 2009

SAID J. CHITEMBWE

J U D G E