

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL APPEAL NO. E053 OF 2022**

**ELPHAS NASHIALI IMBUSI .....APPELLANT**  
**VERSUS**  
**HUDSON MWACHI NASHIALI ..... RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment of the Senior Principal Magistrate in Butali SPMCC No. 22 of 2020, where the trial court entered judgment in favour of the Respondent, finding that he was entitled to proceeds from sugarcane delivered to West Kenya Sugar Co. Ltd, which the court held had been unlawfully harvested by the Appellant.
2. The Appellant, being dissatisfied with that decision, filed the present appeal raising nine (9) grounds, largely challenging:
  - I. The sufficiency of evidence,
  - II. Alleged contradictions in the Respondent’s case,
  - III. The attribution of ownership of the harvested cane, and
  - IV. The legal validity of the Respondent’s pleadings.
3. This being a first appeal, this Court is obligated to re-evaluate, reassess, and reanalyze the evidence on record and arrive at its own independent conclusions.
4. This duty was succinctly stated in **Selle v Associated Motor Boat Co. Ltd (1968) EA 123**, where the Court held that:

‘An appeal to this court..is by way **of retrial and the court must reconsider the evidence, evaluate it itself and draw its own conclusion...**’

5. Similarly, in ***Peters v Sunday Post Ltd (1958) EA 424***, it was held that:

‘An appellate court should not interfere with the findings of fact unless they are based on no evidence or on a misapprehension of the evidence.’

6. This principle is further elaborated in **Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where the Court emphasized the duty to reconsider evidence while bearing in mind the trial court’s advantage in seeing witnesses.

### **Issues for Determination**

7. From the record and submissions, the following issues arise:
- a. Whether the Respondent proved ownership of the sugarcane.
  - b. Whether the Respondent proved destruction of the cane and liability of the Appellant.
  - c. Whether the harvested cane delivered in 2020 belonged to the Respondent.
  - d. Whether contradictions in the Respondent’s case were fatal.

- e. Whether the suit was defective due to an un-commissioned verifying affidavit.
- f. Whether the trial court erred in law and fact.

## **Analysis**

### **a) Burden and Standard of Proof**

8. The legal burden of proof is governed by Sections 107-109 of the Evidence Act dictating that the person asserting a fact or initiating a claim must prove it. It requires that whoever wants the court to decide in their favor must prove their asserted facts.
9. In **Kirugi & another v Kabiya & 3 others [1987] KLR 347**, the Court held:  
  
***'The burden was always on the plaintiff to prove his case on a balance of probabilities..'***
10. Similarly, in **Palace Investment Ltd v Geoffrey Kariuki Mwenda & another [2015] eKLR**, ***the Court explained that proof on a balance of probabilities means that a court must find that a fact is more probable than not.***
11. The Respondent was therefore required to prove that he planted the sugarcane, it was destroyed, the Appellant was responsible, and the harvested cane originated from his crop.

## **b) Whether the Respondent Proved Ownership of the Cane**

12. The Respondent testified that he planted sugarcane in December 2018. His testimony was corroborated by witnesses and supported by the assistant chief's letter and the agricultural officer's report.
13. The Appellant disputes this and argues that there was no proof of planting and there was no documentary evidence tied the cane to the Respondent.
14. However, courts have held that ownership of crops may be proved through oral evidence and surrounding circumstances as was held **in Mbutia Macharia v Annah Mutua Ndwiga & another [2017] eKLR**, where the Court held that ***possession and control can be sufficient indicators of ownership***.
15. **Further, in Wambugu v Njuguna [1983] KLR 172, it** was emphasized that ***occupation and use of land are strong indicators of proprietary rights***.
16. From the evidence the Respondent was in possession of the portion of land and there was credible testimony that he had planted cane. This Court therefore finds that ownership was sufficiently proved.

## **c) Whether Destruction Was Proved and Attributable to the Appellant**

17. The Appellant argues that no one saw him destroy the cane and that the case lacked direct evidence. However, civil liability does not require direct evidence.
18. **In Kiarie v Attorney General [2019] eKLR**, the Court held: ***‘Circumstantial evidence can prove a case where it leads to one irresistible conclusion.***
19. **Similarly, in Hahn v Singh [1985] KLR 716**, the Court emphasized that proof in civil cases is on a balance of probabilities, not beyond reasonable doubt.
20. The evidence shows that the cane was destroyed on or about 31/5/2019 the appellant took control shortly thereafter and he later harvested cane from the same land. The chain of events strongly links the Appellant to the destruction and subsequent benefit.

#### **d) Effect of Contradictions in Evidence**

21. The Appellant highlighted inconsistencies regarding the age of cane (4.5 months, 7 months, 8 months), and the date of destruction. Courts have consistently held that not all contradictions are fatal.
22. **In Twehangane Alfred v Uganda Criminal Appeal No. 139 of 2001**, it was held that minor inconsistencies are expected and do not invalidate evidence.

23. The inconsistencies here relate to the exact age of cane and the exact date of destruction this does not negate the core facts that the cane existed, it was destroyed and the appellant benefitted thereafter.

**e) Ownership of Harvested Cane (Ratoon Crop)**

24. The trial court found that the harvested cane was ratoon crop from the destroyed cane. This Court agrees with the trial court that the harvested cane most likely originated from the Respondent's initial crop.

**f) Whether the Suit Was Fatally Defective**

25. The Appellant argues that the verifying affidavit was not commissioned.

26. In **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR**, *the Supreme Court held that an uncommissioned affidavit is defective.*

27. However, courts have moved towards substantive justice as seen in the case of **Galaxy Paints Compang Limited Versus Falcon Guards Limited(2019)Eklr**, *the High court held that defects in a verifying affidavit, including failure to properly commission it, are not fatal and are curable, and that the court may allow the filing of a compliant affidavit*

28. Further, Article 159(2)(d) of the Constitution mandates courts to administer justice without undue regard to procedural technicalities.

29. **In Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR, the Supreme Court emphasized that rules of procedure should not defeat substantive justice.**

30. This Court finds that the defect did not prejudice the Appellant as the matter was fully heard on merit.

#### **g) Whether the Trial Court Erred**

31. An appellate court will not interfere unless findings are perverse or bad in law as was held in **Kyalo Mwangangi & 2 Others Versus Republic{2019}Eklr**, the court of Appeal reaffirmed that ***interference only arises where findings are based on no evidence, misapprehension of evidence, or application of wrong principles.***

32. No such error has been demonstrated in the current case.

#### **Conclusion.**

33. Having independently re-evaluated the evidence, this Court finds that the Respondent proved his case on a balance of probabilities, the trial court properly evaluated the evidence.

34. In view of the foregoing:

- i. The appeal is dismissed in its entirety.

- ii. The judgment of the lower court is upheld.
- iii. The Appellant shall bear the costs of the appeal.
- iv. Right of Appeal 30 days explained.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA 23<sup>RD</sup> DAY OF APRIL, 2026**

**S.N.MBUNGI**

**JUDGE**

**In the presence of:-**

Mr. Wamalwa for the Appellant present online.

Mr. Munyendo for the Respondent absent.

MR WAMALWA: I seek for 45 days stay pending filling in the court of appeal and admission.

COURT: I doubt whether stay can issue on a negative order, but since the counsel says he has authorities in his position. I shall grant the stay pending filling of a formal application for stay. Stay is for 45 days.

**S. N MBUNGI-JUDGE**