



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA
ELC APPEAL NO. 34 OF 2017

GILBERT MUTAKI SIKUKU.....APPELLANT

VERSUS

BONFACE SIFUNA SIGANGA.....RESPONDENT

JUDGEMENT

This is an appeal from the judgement of Hon Dennis Ogal RM delivered on 13th October 2014 in Kakamega Civil Suit number 200 of 2013 on the following grounds;

1. That the court's decision was against the weight of the evidence taking into account that the appellant was supposed to prove his case on a balance of probability.
2. That the court failed to order for refunds of the ½ acre contract even after the defendant did not prove that he had refunded the money.
3. That the court was biased as it did not declare the defendant a perjurer when he lied to have refunded the appellant Ksh. 11000. That the false and forged agreement of the refund the defendant produced before court was enough proof of perjury.
4. That the court was prejudiced as it did not consider the kindness and profit – intention, the appellant showed when he enabled the defendant to secure all that Faulu Fund had auctioned from the defendant on 11th April, 2012.
5. That the court lacked impartiality when it failed to consider the nature of agreement on 11th April, 2012. That the appellant leased the ½ acre contract of standing sugarcane due for harvesting on field No. Sidikho 75 – Plot No. 21-A/C no. 50711.
6. That the written agreement dated 11th April, 2012 between appellant and defendant was enough proof to enable the court make a fair judgment. That the court was biased to uphold the ultra motive of the defendant when he tricked and lied to the appellant that it was ratoon No. 4 instead of ratoon No. 3, on the MSC contract. That the court denied the appellant a fair hearing and judgment.
7. That the court was further biased to ignore the evidence adduced by the appellant and witnesses. That the court should have considered the emphasis on the lease of standing cane from PW3 one Thomson Makokha and PW2 one Isaac Gregory Andati.

8. That the court further favoured the defendant when he lied to court that the 11th April, 2012 lease agreement was written by the appellant himself. That the agreement dated 11th April, 2012 was drafted by PW2 Isaac Gregory Andati and he himself (PW2) still admitted before courts. That PW3 confirmed the same.

9. That the court failed to order either the defendant or MSC to table before court the MSC statement of A/c. No. 50711, which could show the actual amount the appellant should have earned from the two deliveries (stakes).

10. That the court favoured the defendant when he denied summon services yet a licensed process server, one Zablon Ochieng Senge swore an oath dated 12th July, 2013. That the court should have ordered the server to appear in person and clear the air before court over the same. That the defendant is a perjurer the court should have tamed.

11. That the court should have judged the defendant was all to blame for the auctioning pain and loss. That the appellant is yet to be paid the two-delivery due less Ksh. 14,000/= paid to him by Eshikhoni auctioneers. That the appellant relied on court lawyer Osodo and Eshikhoni auctioneers to procedurally recover the first repay (Ksh. 14,000/=). That the appellant erred nowhere.

12. That the court's judgment unjustly enriched the respondent as he was allowed to keep the contract money even after sugarcane 3rd ratoon and 4th ratoon had been harvested.

13. That it was clear that the respondent did not keep his part of the bargain after the (3rd and 4th) ratoon were harvested. That justice require that through the case filed prematurely the respondent could not explain why he did not give the appellant the two deliveries of the 3rd ratoon.

14. That the court erred in law and truth in applying the law as to how the MSC contracts are interpreted.

15. That the court mis-applied the law as found in Diana Property's case.

16. That the court erred in ordering the appellant to pay costs of the suit.

17. That the court mis-applied the law as found in Goss V. Lord Nugent case. That PW1, PW2 and PW3 were not verbal but fully relied on the written lease agreement and the verbal committal with defendant. That the said law should have been applied against the defendant who relied mostly on verbal tricks and lies both on 11th April, 2012 and before court.

18. That the court mis-applied the law as found in Rabin vs. Gerson Berger case. That during leasing, not everything discussed and agreed upon is put in writing. That the court risked perpetrating a breach of contract – a recipe for chaos. That the urgency on 11th April, 2012 (rescuing the defendant's property) didn't allow consulting with the distant Mumias Sugar Company (MSC) for clarity over the rounds already harvested on that farm.

Reasons wherefore the appeal prays for the following;

1. That the court allows the appeal and orders for a refund.
2. The court orders for payment of accrued interest.
3. The court orders for the payment of costs to the appellant both in this appeal and lower courts.
4. Any other appropriate order.

The respondent submitted that, the appellant's appeal lacks merits and it be dismissed. The appeal

contains a total of 18 grounds of appeal but they will argue all of them as one. The learned trial magistrate arrived at a proper decision to dismiss the appellant's case that was before him. He properly analyzed the evidence that was present before him and dismissed the appellant's case. At paragraph 3 of the plaint that was filed in court, the appellant indicated that on 11th day of April, 2012, he entered into a contract with the respondent who leased him ½ an acre of sugarcane at a consideration of Ksh. 11,000/= . He produced the written agreement as PEx 1. This agreement is the one indicated as item No. 5 of the index in the record of appeal – page 2 thereof. A closer look of the agreement clearly shows that the appellant was to harvest ratoon No. 4 of the sugarcane. This fact was admitted by the appellant himself who gave evidence as P.W. 1. This is clear at page 32 of the record of appeal line 21. He, at page 33 line 21 and 22 also expressly admitted so on cross examination.

The court has carefully considered the appellant's and the respondent's submissions in this appeal. The appellant submitted that, the court should have judged the defendant was all to blame for the auctioning pain and loss. That the appellant is yet to be paid the two-delivery due less Ksh. 14,000/= paid to him by Eshikhoni Auctioneers. That the appellant relied on court lawyer Osodo and Eshikhoni Auctioneers to procedurally recover the first repay (Ksh. 14,000/=). That the appellant erred nowhere. That the court's judgment unjustly enriched the respondent as he was allowed to keep the contract money even after sugarcane 3rd ratoon and 4th ratoon had been harvested. That it was clear that the respondent did not keep his part of the bargain after the (3rd and 4th) ratoon were harvested. That justice require that through the case filed prematurely the respondent could not explain why he did not give the appellant the two deliveries of the 3rd ratoon. From the evidence on record the appellant was to harvest the 4th ratoon. The sugarcane in the farm at the time of executing the agreement was the 3rd ratoon. The appellant sought to give oral evidence to dispute the terms of the written and signed agreement. I find that the judgment delivered by the honourable trial magistrate is well reasoned and balanced and he arrived at a correct decision based on the evidence that was adduced before him. It is very clear that the sugarcane that was harvested was the 3rd ratoon which was not the subject of the written contract between the parties. The appellant expressly admitted on cross examination that the sugarcane that was harvested and for which the respondent refused to give him deliveries was for the 3rd ratoon. He further admitted that at the time he filed the case in the lower court, the 4th ratoon of the sugarcane had not been harvested. Given this evidence, the trial magistrate rightly held that the appellant is the one who breached the agreement by filing the case prematurely before the 4th ratoon of the sugarcane had been harvested. He stated in his judgment that;

“From the evidence availed and more importantly defence exhibit 2, the plaintiff suit was brought to court prematurely since the 4th ratoon was harvested way after this suit had been filed in court. It is therefore impossible to say that the defendant breached any term of the contract in question and I so find”.

In **Mwanasokoni v Kenya bus Service (1982 - 88) 1 KAR 870**, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the award as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 15TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE