



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 61 OF 2017

JOSEPH ANDANJE ABUYEKA.....APPELLANT

VERSUS

FLOMENA MUKAISI1ST RESPONDENT

BUTALI SUGAR CO. LTD.....2ND RESPONDENT

JUDGEMENT

This Appeal is from the judgement of Honourable T.K. Kwambai RM delivered in Butali PMC Civil Case No. 171 of 2014 on the 8th June 2017 on the following grounds;

1. That the Honourable Court erred in law and fact in holding that the Appellant had not proved his case to the required standards.
2. That the learned magistrate's took into account facts which were neither pleaded nor canvassed by the parties to the case.
3. That the learned magistrate failed to analyze the evidence before him before him hence arrived at wrong decision.

The Appellant prays that this Appeal be allowed with costs to the Appellant.

The Appellant submitted that the case in the lower court was briefly that, the Appellant bought land from the mother of the defendant which had crops being maintained by one Selina Kakai. Selina harvested the cane twice and went away leaving the crops to be taken over by the plaintiff. When the crops was due for harvest, Selina came and objected. The Appellant produced documentary evidence from the local administration to proof that he indeed repulsed Selina from harvesting the cane. Meanwhile, the Respondent harvested the cane and had it delivered to the 2nd defendants' place and after following, the Appellant was given the particulars of the crop and its net weight plus its value. It is that value which the Appellant was looking for in the lower court. In dismissing the Appellants' case, the court said as follows:

Page 102 of the proceedings are as:

“He maintained that on delivering the 1st defendant was paid Ksh. 36,400/= after delivering of 12,940 kgs to the defendant. He produced exhibit 1. It shows that it was only typed and not printed.

It does not have any stamp or signature to show that indeed it came from the defendants and that the alleged 12,940 kgs actually fetch a sum of Ksh. 36,400/=. To me it was incumbent upon the plaintiff to demonstrate that indeed a sum of Ksh. 30,400/= was paid out to the defendant by at least calling on a representative of the defendant. Further, he said Pexh 1 does not show that the said canes were harvested from any land parcel. It only shows the name of the defendants”.

The veracity of Pexh 1 cannot be vouched as it does not show where it emanates from without any stamp or any authenticity of its source. This is the main document the plaintiff was using in as for as his claim of Ksh. 36,400/= is concerned”.

From the extract, of the judgment, the appellant submits that, the magistrate took into account of matters which the parties never raised as contentious. Looking at the statement of the defendant and her testimony in court, she does not contest the authenticity of Pexh.1. She does not say anywhere that she was doubting its authenticity. Hence it was not an issue to be proved by the plaintiff. In both the statement of the defendant and in her testimony, even in cross- examining the plaintiff the issue of the source of Pexh 1 did not feature. It was therefore wrong for the court to craft its own issues and use them to dismiss the plaintiff's case. The 1st respondent opposed all the grounds of Appeal as set out in the Memorandum of Appeal on behalf of the 2nd respondent, on the grounds that, the court erred in law and fact in holding that the Appellant had not proved his case to the required standards. The Appellant sued the respondent for an order of permanent injunction restraining the 2nd defendant from paying the 1st defendant sugarcane proceeds. Secondly the appellant further sued for special damages at

Ksh.36, 000/= .That the prayers sought by the appellant were not specific as where the sugarcane proceeds were planted and or on what parcel of land, it was the duty of the court to speculate. It was the plaintiff's duty to prove that he was indeed entitled to the sugarcane proceeds, a fact he did not prove. It was further the duty of the plaintiff to prove that the land where the sugarcane was grown belonged to the plaintiff which fact he did not prove. The Appellant instead produced a sale of land agreement made in December 2009 as PEX2 (a) which agreement was between the Appellant and one Jelida Naliaka Mukaisi who was never party to the suit. Further on PEX2 the agreement did not expressly state whether the cane was also a subject of the said sale. The subject matter of the suit was cane that was grown on parcel of land registration number North /Kabras/Malava/845 which was registered in the names of Joram Mukaisi who is deceased.

The plaintiff admitted to be staying on parcel number North/Kabras/Malava/3708. The Appellant failed to prove that the cane belonged to him and that he was entitled to proceeds thereon the plaintiff never adduced evidence to the effect that he was a registered farmer with the 2nd respondent on that respective land. He only testified that the harvest permit was issued in favour of PW2 on behalf of the Appellant and from the documents produced the permit was issued on 20/06/14 to PW2 and if the said permit was indeed issued on behalf of the Appellant at least the account could have borne the names of PW2 a clear indication that the cane was of a totally different person and different cane.

Secondly the receipt produced as Exhibit 3(b) does not disclose the source of the information whether it was authorized by the 2nd respondent because it does not bear the signature of the author or the logo or even the stamp of the company, it's not a document that this court can rely upon.

The Appellant was seeking injunctive orders or remedy which is an equitable remedy. The Appellant's suit attained the maxim of equity that states that whoever comes to equity must come with clean hands. The Appellant knew too well that he bought land parcel registration number NORTH/KABRAS/MALAVA/3252 and not parcel number NORTH/KABRAS/MALAVA/845 where the subject matter of the case was. Secondly the agreement that gave rise to this suit was silent on cane.

The rules for grant of an injunction as provided by order 40 rule 1 and 2 of the Civil Procedure Rules were not met neither did the Appellant's case meet the requirements for grant of an injunction. They relied on the following authorities in support of their arguments.1) Mrao Limited Vs First American Bank of Kenya Limited and 2 others where the court set down the principles for grant of a temporary Injunction. The applicant must show a prima facie case with probability of success. The Appellant did not establish a prima facie case neither did he prove ownership of the said cane. He further did not prove that he was entitled to cane proceeds as the only evidence adduced to that effect was a document that did not have an origin.

This court has carefully considered the appeal and the submissions therein. On perusal of the record of appeal I find that, the Magistrate considered all facts and law required. It is always the duty of a judicial officer to peruse and or assess the evidence presented before it and make a conclusive decision in the interests of law and Justice.

I further find that, the trial Magistrate properly analysed the evidence both oral and documentary evidence and there was no wrong decision arrived at. On the ownership of the cane and the agreement made on 2/12/2009, the learned Magistrate found that, the documents as produced were not conclusive proof that indeed the cane belonged to the Appellant. I agree with him the receipt produced as PEXhibit 3(b) does not disclose the source of the information whether it was authorized by the 2nd respondent because it does not bear the signature of the author or the logo or even the stamp of the company, it's not a document that this court can rely upon. I find that the appellant did not prove his case on a balance of probabilities.

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 12TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE