South Nyanza Sugar Co Limited v Ojwang (Civil Appeal 108 of 2021)
[2024] KEHC 15327 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15327 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 108 OF 2021

A. ONG'INJO, J

NOVEMBER 28, 2024

BETWEEN

SOUTH NYANZA SUGAR CO LIMITED ..... APPELLANT

AND

KIBIBA ZACHARY OJWANG ..... RESPONDENT

(Being an Appeal against the whole Judgment of the Chief Magistrate's Court at Migori (Hon. M. O. Obiero (PM) dated 19th October, 2021 in CMCC No. 305 of 2017)

JUDGMENT

1. The Respondent Kibiba Zachary Zachary sued the Appellant in Migori CMCC No. 305 of 2017 seeking to be compensated for expected tonnes in all cycles, costs of the suit and interest at Court rates. The Respondent had entered into a contract with the Appellant on 17.1.2014 to grow and harvest Sugarcane on plot No. 772 A measuring 2.0Ha in filed No. 25XXXX00 situated in Wasweta II and provided an Account No. 25XXXX00/2

2. The Plaintiff's case was that he proceeded to develop and prepare Plant crop well but the Appellant failed to harvest the plant crop despite frequent visits to confirm the status of the cane crop. The plaintiff said the agreement was to remain in force for a period of 5 years until the 2 ratoons after plant crop were harvested.

3. The Plaintiff claimed that eth expected yield on his farm was 190 tons per acre at Kshs. 3,200/= per ton and that as a result of failure by the Appellant he suffered loss.

4. The trial Magistrate considered the evidence on record and found that there was no dispute that there was a grower cane farming contract between the parties which was executed on 22nd February 2022. The trial Magistrate found that eth Respondent had proved that the Appellant had breached the contract between it and the Respondent and found it liable to compensate the Respondent for the loss of the

unharvested cane and the 2 ratoons which could not be developed because of the breach on the part of the Appellant.

5. For the plant crop the trial court awarded Kshs. 512,000. For the 1st and 2nd Ratoons the Respondent was awarded Kshs. 512,000 each respectively less services offered by the Appellant leaving a balance of Kshs. 1,398,079.05 with interest from date of filing and costs of the suit.

6. The Appellant was aggrieved by the judgment of the trial court and brought the appeal herein vide the Memorandum of Appeal dated 10th November 2021 on the following grounds: -

    i. That the learned trial magistrate erred in both law and fact in failing to find and hold that the evidence which the Respondent led in an attempt at proving his claim before the trial court was fundamentally and failing at variance with and departed from the Respondent's Plaint unmaterial aspects of the particulars of breach and in failing to give due allowance for such variance and departure, in the Respondent's evidence, from the Respondents pleadings failed to find and hold that the Respondent did not prove his claim.

    ii. That the learned trial magistrate erred in law and fact when he entered judgment for the Respondent, against the Appellant for the principal sum of Kshs. 1,398,079.05 which amount was neither pleaded specifically with sufficient particularly, not proved strictly as required by law and which sum at any rate was beyond the scope of the pleadings and in excess of the sum the Respondent would otherwise have been entitled was a compensation.

    iii. That the learned magistrate erred in law and fact in deciding, the case on the whole against the evidence that was before him and thus arrived at a decision which was wholly erroneous.

    iv. That the learned trial magistrate erred in law and fact in failing to take into account relevant and credible evidence led by the Appellant on realistic average sugarcane yields from plots in the locality where the Respondents plot was located and notwithstanding that the Appellant as a sugar manufacturing who also grows sugarcane a lot has the realistic estimates.

    v. That the learned trial magistrate erred in both Law and fact when he awarded the Respondent interest on the sum of Kshs. 1,398,079.05 without specifying the date from which interest was to run, thus exposing the Appellant and the Respondent to conflicting views thereon.

7. The Appellant prayed that the appeal be allowed;

    a. that the judgment and decree of the trial magistrate dated 19.10. 2021 be set aside;

    b. That the Respondents suit in the subordinate court be dismissed;

    c. That costs of the Respondents suit in the subordinate court be awarded to the Appellant.

8. This appeal was canvassed by way of written submissions. The Appellants counsel M/s Okongo Wandago & Co Advocate filed their submissions dated 18.12.2023 and argued that the trial magistrate had no basis to find that the contract between the parties herein had been breached when it was not established when the plant crop was planted.

9. The Appellants further submitted that there was no allegation, pleading or evidence that the Appellant's failure to harvest the plant crop compromised the development of and resulted in the two subsequent cycles of the Respondents sugarcane.

10. The Appellant argued that the Respondent exposed himself to losses which he could have easily mitigated by terminating the contract in issue which stood terminated by breach. The Appellant cited the holding in B. Mathayo Obonyo vs. South Nyanza Sugar Co Ltd (2019) eKLR where Majanja J held;

> " Lastly even if the agreement is for five years and is performed in cycles, like any other contract, it is terminated by breach. It is the breach that gives rise to the cause of action."

11. The Appellant contended that the amount of Kshs. 1,398,079.05 had not been pleaded specifically and it was erroneous to award it as it was not proved strictly as required by law. That the said amount was beyond the scope of the pleadings and in excess of the sum the Respondent would otherwise have been entitled to, as compensation.

12. The Appellant also submitted that the trial magistrate failed to make provision for transport and harvesting charges when he had power and discretion to do so. It was argued that had he contract been performed the Respondent would not have been paid the gross proceeds of the sugarcane but only net proceeds. To support this contention the Appellant cited Ezekiel Omambia Omoke vs. South Nyanza Sugar Co Ltd (2019) eKLR;

> " There is no dispute that the expected yields for the ratoons was 40:36 tons per hectare. Likewise, there is no contention on the size of the land and the ten prevailing cane prices. The Appellant was hence entitled to judgment for the two ratoon crops at Kshs. 1,291,520/ = thereby bringing the total compensation to Kshs. 2,312,640/=. The figure must however be subjected to the transport and harvesting charges. I have noted from the record that there was no evidence rendered to that effect, but this Court takes judicial notice of the fact that such charges are standardized in accordance to zones within the Respondent's operational areas.

In South Nyanza Sugar Co Limited vs. David Odongo Odoyo in Migori HCCA No. 172 of 2018 where Chitembwe J held;-

> " In computing damages, the trial court was guided by the assessment report, which gives an estimate of 54 tons per hectare in the area. This works out to 10.8 tons for one cycle of the 0.2 Ha plot. It is common knowledge that the ratoons cannot produce the equivalent as the plant crop. The respondent in his written witness statement indicate that he has no objection to the harvesting and transport costs deducted, although submissions before the trial court gives a contrary position. It is quite obvious that the cane would have been harvested and transported to the factory. This would have made the Respondent incur costs.
>
> The trial court did not make any deductions. I do find that the income from the 2nd ratoon can cater for the expected costs. The Respondent is entitled to compensation for the plant crop in view of the exclusion of the 2nd ratoon from the computation of damages.
>
> The appeal party succeeds. The Respondent cannot reap the entire three cycles of what could have been produced and sold without the expenses being deducted. The sum of Kshs. 46,440/= that has been deducted represents one complete cycle. The appellant was entitled to deduct the cost of seed cane and fertilizer."

13. The Appellant submitted that the Respondent was supported in developing the cane but the trial magistrate did not make allowance for such expenses which would have been deducted from the cane proceeds.

14. The Respondent was granted 14 days from 28.10.2024 to file submissions and serve but there is none in the CTS or in the file.

15. This appeal shall therefore be considered based on the records in the trial court, the judgment of the trial magistrate, the grounds of Appeal and the Appellants submissions.

16. The issues that arise for determination are

    a. Whether the trial magistrate relied on evidence that was materially at variance with Respondent claim;

    b. Whether the Respondent specifically pleaded for the principal sum of Kshs. 1,398,079.05 in the Plaint and whether the said amount was proved strictly;

    c. Whether the Respondent was entitled to the sum of Kshs.1,398,079.05 in entirety

    d. Whether the trial magistrate took in account the Appellant evidence as to the sugarcane yields from the plots in the locality of the Respondents plot;

    e. Whether the trial magistrate specified the date from which the interest was to run.

17. The trial magistrate said that the Judgment is entered for the Plaintiff against the Defendant for Kshs. 1.398,079.05 with interest thereon at court rate but did not specify the date from which the interest was to accrue and it is true that this could have led to confusion and conflicting views. In consideration of the circumstances and nature of the claim herein this court finds that interest should be charged from date of filing of the suit.

18. The contract between the Appellant and the Respondent was entered into on 17.1.2014. The said agreement was to last for a period of 5 years or until plant crop and 2 ratoons are harvested and the Appellant witness George Ochieng Senior Field Supervisor in his statement dated 17.5.2021 gave details of how the Respondent was supported by the Appellant in developing the said plot. The said witness appears to know when the plant crop was planted because he alleged that the Respondent poached the sugarcane when it was 19 months old. The submissions by the Appellant that the trial magistrate had no basis to find that the contract between the parties had been breached because it was not established when the plant crop was planted is therefore misleading as their witness has given indication as to when the plant crop was planted.

19. On the issue whether the Respondent was entitled to sum of Kshs. 1, 398,079.05. The parcel of land upon which the sugarcane was to be developed plot No. 772 'A' was specified to be 2.0 Ha. The period of contract is specific 5 years the expected tonnage per acre is specific and the prevailing cane prices per tonne is very clear. In the case of *John Richards Okuku Oloo vs. South Nyanza Sugar Company Ltd Kisumu Civil Appeal No. 278 of 2010* the court of Appeal in a similar case held that although special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of. They went on to say that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract. Like in the instant case the court of Appeal found that the pleadings on special damages suffered by the Appellant were clear and sufficient enough for the court to apply in assessing damages. This court therefore finds that the Respondents proved his case to the required standards of balance of probabilities and was entitle to damages for breach of contract.

21. As to whether the trial magistrate failed to deduct expenses incurred by the Appellant in the development of the sugarcane on the respondent farm the trial magistrate used the expenses indicated

in the Appellants witness statement dated 17.5.2021 which shows the costs of services offered to the Respondent was 45,972.65 x 3. This amounts were deducted from gross total leaving the net total of 1,398.079.05. It is therefore clear that the award made to the Respondent was not excessive. In the circumstances this court finds that the Appeal lacks merit and the same is dismissed with costs to the Respondent.

DELIVERED DATED AND SIGNED AT MIGORI THIS 28TH DAY OF NOVEMBER, 2024.

.....

A. ONG'INJO

JUDGE

Judgment delivered in the presence of