Transmara Sugar Company Limited v Nyambere (Civil Appeal 41 of 2021) [2024] KEHC 15211 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15211 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 41 OF 2021

A ONG'INJO, J

NOVEMBER 28, 2024

BETWEEN

TRANSMARA SUGAR COMPANY LIMITED ..... APPELLANT

AND

ZACHARY OBARA NYAMBERE ..... RESPONDENT

JUDGMENT

1. Zachary Obare Nyambere was awarded Kshs. 300,240/= plus costs and interest from the date of Judgment in Migori Chief Magistrate Court Civil Case 1637 of 2016 together with interest from the date of judgment. The trial Magistrate found that the Appellant had the duty to harvest and transport cane to the factory and having failed to do so breached the contract between it and the Respondent. That failure to harvest the plant crop at all compromised the development of both 1st and 2nd ratoon crops.

2. The Appellant was aggrieved by the judgment of the trial court and he filed the Appeal herein vide Amended Memorandum of appeal dated 2.11.22 on the following grounds: -

    i. "That the suit as filed was fatally defective and incompetent as the verifying affidavit had not be shown in line with the provisions of Section 4 of the *Oaths and Statutory declarations Act* Cap 15 Laws of Kenya.

    ii. That the learned trial magistrate erred in law when he gave probative value to reports on Sugarcane yield and production the same having been produced contrary to Section 35 and 36 of the *Evidence Act* Cap 80 Laws of Kenya

    iii. That the learned trial magistrate in law and in fact by giving probative value to sugarcane yield report produced by the Plaintiff as evidence without taking into consideration that:

a. A report specifically made for South Nyanza Sugar Co Ltd and its sugarcane growing belt;

b. That the report had listed different varieties of sugarcane crop, and which varieties the plaintiff never planted;

c. That the report was commissioned / made in 2008 while the

d. plaintiff's crop was cultivated in 2011

iv. That the learned trial magistrate erred in law when he awarded the plaintiff awards in the nature of specific damages when the plaintiff had expressly pleaded for general damages arising from breach of contract between himself and the defendant

v. That the learned trial magistrate erred in law when he awarded specific damages to the plaintiff despite the fact that:-

a. The plaintiff had not specifically pleaded nor specifically proved the damages owed to him despite the fact that the alleged damages incurred could be ascertained at the time of trial;

b. That the plaintiff in his prayer as per his plaint filed on the 28 February 2017 expressly asked / prayed to the grant him general damages

vi. The learned Hon. Magistrate erred in law and in fact when he held that the plaintiff had proved his case on a balance of probability vis a vis the facts surrounding the case despite the fact that the plaint failed to prove (on a balance of probabilities) in line with the conditional terms of the contract and RULE 12 (F) OF THE GUIDELINES FOR AGREEMENT BETWEEN PARTIES IN SUGAR INDUSTRY made pursuant to Section 29 of the SUGAR ACT NO. 10 of 2001 (Repealed) that:-

a) He did offer his crop for harvest to the appellant;

b) He notified the defendant that his cane/crop was ready for harvest and or delivery in writing as per the terms of the contract Para 3A

c) That his sugarcane was ready for harvesting at between 18 – 24 months after the execution of the contract as per his allegations I the plaint;

d) That his variety of cane was of the quality approved bythe Defendant and KESREF.

vii. That the learned trial magistrate erred in law when he failed to consider the contractual principal of Pari-Delicto when it was evidently clear that the plaintiff was in breach of his duties under contract and also his duties as provided for under the regulations made pursuant to the Sugar Act, of 2001 (Repealed).

viii. That the learned trial magistrate erred in law in fact when he totally disregarded the evidence of DW1 especially the fact that the defence denied that the plaintiff had not proved on the required standards that he had cultivated sugar crop on 0.8Ha of land

3. The Appeal was canvassed by way of written submission.

4. The Appellant submissions dated 31.1.23 are to the effect that th;e Respondent commenced his plaint without complying with Section 4 (1) of Cap 15 Laws of Kenya and Order 4 of Civil Procedure Rules as the deponent of the verifying affidavit is indicated to have signed the Affidavit in Migori but the

affidavit was commissioned in Rongo. It was argued that the suit in the trial court was defective for having offended the mandatory provision of *Oaths and Statutory Declarations Act* and the suit before the trial court was thus incompetent as the plaint could not stand on its own. The Appellant relied on holdings in Mary Gathoni and Another vs, Frida Ariri Otolo & Another 2020 EKLR Kakamega Civil Appeal 66 of 2019 and the holding in Regina Munyiva Ndunge vs. K. C. B Bank 2005 EKLR. The court was argued to allow the appeal. The Appellants Advocate acknowledge that the issue of defect in replying affidavit has not been raised by the previous Advocate but argued that the same to be determined at this stage.

5. On the issue of whether the magistrate erred in giving the probative value to the Sugarcane yield report the Appellants submitted that the report used to value sugarcane yield was commissioned in 2008 and was specifically made for South Nyanza Sugar Company Limited and its Sugarcane growing belt. It was not therefore not applicable to the Appellant. It was contended that the Respondent did not plead or provide evidence on which mean yield to use and the court assumed figures to use and assumed that the Respondent fell on the Sony Growing belt which is not.

6. The Appellant further submitted that the Respondent failed to plead the variety of sugarcane he had planted and it was wrong for the magistrate to give probative value to the sugarcane yield without establishing the variety of sugarcane planted by the Respondent. The trial magistrate was faulted for relying on scientific sugarcane yield report when it was not produced by the maker contrary to Section 35 and 36 of the *Evidence Act*. It was argued that this deprived the Appellant the opportunity to test the veracity of the said document.

7. To support his position the Appellant relied on the holding case of Wanjiru Kungu vs. Elijah Macharia Githinji and Another 2014 eKLR where Justice Odunga quoted the Court of appeal case of Mohamed *Musa and Another vs. Peter Mailanyi and Another Civil Appeal 243 of 1998* and *Theodore Otieno Kambogo vs, Norwegian People's Aid Nairobi Milimani HCCC NO 774 of 2000* and held as follows:

> "....it follows that without the defence calling witnesses who could be cross examined on the documents produced by the defence rendered the same of very little if any weight at in light of the contents of the certificate of official search produced herein is the only reasonable conclusion is that the suit motor vehicle was owned by the 2nd defendant"

8. Counsel for the Appellant acknowledged that there was a previous counsel on record who did not object to production of scientific report by the Respondent and argued that the trial magistrate should not have relied on it as its veracity was not tested. That it was erroneous for the trial magistrate to give the probative value to sugarcane yield while using the report as his basis of assessment when the Respondent did not adduce any testimony as to the variety of sugarcane he planted on the farm.

9. On whether the trial magistrate erred in awarding special damages to the Respondent the Appellant submitted that general damages are not awardable in a claim founded on breach of contract and that the award is unfounded in law. That in the alternative if the award was in nature of special damages it ought not also not to have been made because the same was not pleaded specifically.

10. Whether the Respondent proved his case on a balance of probability the Appellant urged that it was upon the Respondent who alleged breach of contract to prove pursuant to Section 107 to 109 of the *Evidence Act* that the Appellant had indeed breached the contract between them. The Appellant contended that the Respondent failed to perform his part of contract and pursuant to Section 29 of the Sugar *Act No. 10 of 2001* now (repelled) as he was supposed to notify the Appellant in writing according to Clause 3 A that his cane was mature and ready for milling but he did not do that. That even the demand letter that the Respondent relied on was silent on the question of notice to harvest

having been given to the Appellant. That the Appellant demonstrated that to the court that its failure to perform its duties to harvest was occasioned by the Respondent failure to perform his duties in the contract especially the duty to notify the Appellant of the maturity of the cane and offer the same for harvesting.

11. Additionally, the Appellant argued that the Respondent did not prove the ownership of the alleged 0.8Ha of land where the sugarcane was allegedly developed and that there was no evidence to prove that the Respondent actually grew the sugarcane on the whole of the land.

12. The Appellant urged the court to find that the Respondent had failed to prove his case on a balance of probabilities that the Appellant breached the contract. The Appellant's counsel urged that the parties were blaming each other for breach and the probabilities for the parties were equal as each party was at fault and they should have been left at their positions of fault and the court ought to have found that the burden of proof was not discharged.

13. The Respondents Advocate filed submission dated 14.2.23 and filed on 17.2.23. The Respondents argued that the Appellant had failed to include a certified copy of the decree in its Record of Appeal and therefore the Appeal is defective and incompetent. The court was urged to dismiss the Appeal with costs to the Respondent.

14. On the issue of defective verifying affidavit, it was submitted that the Commissioner for Oaths Mr. Ojala commissioned the Affidavit in Migori but his rubber stamp bears the postal address of his office in Rongo and it does not mean that is where the Affidavit was sworn. He relied on the authority of Narok Transit Hotel Ltd & Another High Court Nairobi Civil Case No. 120 of 2001 where it was held that the fact the rubber stamp of the Commissioner of Oaths indicates his postal address does not indicate the place of swearing.

15. On grounds 2 and 3 the Respondents Advocate submitted that the report produced by the Respondent was based on 2 regions that is nuclear region and out grower regions of South Nyanza Sugar Company Limited which included areas covered by the Transmara Sugar Company Limited. It was contended that Nyamaramba is one of the Sony Out growers fields and the award given by the trial court was an average.

16. On whether the magistrate erred on awarding special damages to the Respondent the Respondent counsel relied on the case of *John Richards Okuku vs. South Nyanza Company Limited Kisumu Civil Appeal No. 278 of 2010* where it was held that being that the acreage of the plot, price of sugarcane per tonne and the expected yield per acre having been specified the damages suffered by the Respondent was clear and sufficient for the court to quantify damages.

17. On whether the Respondent had proved his case on balance of probability it was argued that there was no rebuttal from the Appellant in the trial court and the Respondent's case remains unchallenged.

18. On whether the trial magistrate erred in failing to consider the contractual doctrine of Pari Delicto the Respondent said that the demand notice was served before filing the suit in the lower court and the same was produced by consent. The Respondent prayed that the case be dismissed.

19. Having considered the grounds of Appeal the Record of Appeal and re-valuated and analysed the evidence tendered in the lower court as well as the judgment of the trial court together with the rival submissions of the parties the issues for determination are:-

    a) Whether the suit in lower court was defective for failure to conform to the requirements of Section 4 (1) Oaths and Declaratory Act Order 4 of Civil Procedure Rules

    b) Whether the Respondent proved his case on a balance of probabilities

c) Whether the Respondent was entitled to damages.

20. It is instructive to note that some of the appeals that formed part of the series herein were settled by the parties vide consent letter dated 26.5.23 including some of which judgments had already been written and delivered by Hon. T. A. Odera – J on 5.6.23.

21. On the 1st issue this court finds that the Act does not require the address of Commissioner of Oaths to indicate the place where the oath was taken but rather the address of the office. The Appellant did not challenge the issue as to whether the verifying Affidavit sworn by the Respondent was commissioned in the trial court and its too late in the day to raise the issue on appeal as the Respondent will not have the opportunity to call the commissioner for oaths to confirm the allegations by the Appellant. This court therefore finds that the ground that the verifying affidavit was defective cannot stand.

22. On the issue that the Respondent ought to have called the maker of the scientific report on yields to produce it this court has noted that during the hearing of the suit in the trial court the Appellant did not object to the production of the said documents and is therefore estopped from doing so at this stage. This is an issue that ought to have been decided during pre trial conference whether or not the makers of the documents being relied on would be required to attend and produce them during hearing.

23. On whether the Respondent had proved his case on a balance of probabilities. There is no dispute that there was a contract between the parties herein which spelt out the terms and conditions of the agreement including proof of ownership of the parcel of land in question, the area of the said land the period of the contract the cost of the sugarcane per tonne etc. The trial magistrate found as per the Sugar Act of 2001 that it is was the duty of the Appellant to harvest and transport the cane to factory for milling and having failed to do so they are the ones who breached the terms and conditions of the contract. In the circumstances they were liable to compensate the Respondent for the breach to harvest the plant crop which compromised the development of both 1st and 2nd ratoon crops.

24. Whether the Respondent was entitled to compensation an assessment report by an expert was produced to help the court assess the damages suffered by the Respondent by failure of the Appellant to harvest his sugarcane and the Appellant not having controverted the said evidence and this court not having the advantage of hearing the witnesses testify would be reluctant to unsettle the decision of the trial magistrate in exercise of his discretion powers.

25. In the circumstances, this court finds that the Appeal has no merit and is dismissed with costs to the Respondent.

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

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A. ONG'INJO

JUDGE

Judgment delivered in the presence of