Transmara Sugar Company v Mbaka (Civil Appeal 123 of 2019)
[2023] KEHC 27504 (KLR) (23 January 2023) (Judgment)

Neutral citation: [2023] KEHC 27504 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 123 OF 2019

RPV WENDOH, J

JANUARY 23, 2023

BETWEEN

TRANSMARA SUGAR COMPANY ..... APPELLANT

AND

CHARLES O MBAKA ..... RESPONDENT

(An appeal from the Judgement and Decree of the Rongo Senior Principal Magistrate's Court in SPMCC No. 171 of 2017 Charles O. Mbaka vs Transmara Sugar Company Limited delivered on 27/8/2019)

JUDGMENT

1. Transmara Sugar Company Limited, the appellant herein, commenced the instant appeal by an amended memorandum of appeal dated 7/10/2020. It is against the judgement and decree dated and delivered on 27/8/2019 in Rongo SMPCC 171 of 2017 by Hon. R.K. Langat (PM). The appellant is represented by the firm of Wachira, Wekhomba, Aim & Associates Advocates while the respondent is represented by the firm of Kerario Marwa & Co. Advocates.

2. This is the lead file in a series of appeals being Civil Appeals Nos. 119, 120, 121, 122, 124, 125 and 126 all of 2019.

3. The factual background which gave rise to this appeal is a plaint dated 3/7/2017 and filed in court on 10/7/2017. The respondent (formerly the plaintiff) pleaded that on or about 4/8/2011, the respondent and the appellant entered into an agreement whereby the respondent was to cultivate/ develop sugarcane on Plot No. 835 vide Account No. 008045. Pursuant to the terms of the agreement, the respondent developed the sugarcane on the plot measuring approximately 0.40 Ha and upon maturity, the appellant failed to harvest the plant crop thereby compromising the growth of the 1st and 2nd ratoon crops.

4. The respondent particularized the breach by the appellant as failure or neglect to harvest the plant crop thereby compromising the development of the 1st and 2nd ratoons and deliberately and recklessly refusing to give consent to the respondent to dispose of the sugar cane to 3rd parties in open market.

5. The respondent further pleaded that as a result of the said breach, he lost approximately 40 tonnes of the plant crop and 40 tonnes for each ratoon with the cane price being Kshs. 4,300 per ton at the time. The respondent pleaded that he suffered loss which he prayed for compensation for the three (3) unharvested cycles, costs of the suit and interest at court rates.

6. The appellant entered appearance and filed a statement of defence dated 30/1/2018 through the firm of Kuyioni, Seriani & Associates. In the brief defence, the appellant generally denied the contents of paragraphs 3-11 of the plaint.

7. The suit was set down for hearing and the respondent testified as PW1. He adopted his witness statement dated 3/7/2017 and produced his documents as exhibits. The appellant presented its case through Stephen Mosoiko, DW1 and David Bosuba, DW2. Both witnesses adopted their respective witness statements dated 8/7/2019.

8. The trial Magistrate rendered his judgement on 28/2/2019 in favour of the respondent, awarding damages of Kshs. 380,160/= together with costs and interest from the date of filing suit.

9. The aforementioned decision gave rise to the instant appeal. The grounds of appeal in the amended memorandum of appeal dated 7/10/20202 are as follows:-

    1. The learned Magistrate erred in law by awarding damages in the nature of special damages to the plaintiff the same having not been specifically pleaded and specifically proved;

    2. The trial court erred in law and in fact when it held that the plaintiff 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 the parties in Sugar Industry made pursuant to Section 29 of the Sugar Act No. 10 of 2001 (Repealed) in that:-

        i. He did not offer his crop for harvest to the appellant.

        ii. 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.

        iii. His sugar cane was ready for harvesting at between 18 - 24 months after the execution of the contract as per his allegations in the plaint.

        iv. His variety of cane was of the quality approved by the defendant and KESREF.

        v. Prove to court by sampling the harvest of the sugar cane had first expressed juice with apparent purity of 80% and above.

        vi. That the sugar cane harvest had not been burnt at the time of offering them for delivery to the defendant, appellant herein.

    3. That the trial court erred in law by admitting the report by KARLO as evidence without first satisfying itself with the conditions appurtenant to Section 35 of the *Evidence Act* Cap 80 Law of Kenya.

4. That the trial court erred in law in giving the report by KARLO the heavy weight/probative value without regard to the conditions as per Section 36 of the *Evidence Act* Cap 80 Laws of Kenya.

5. That the learned Magistrate erred in law and in fact when he used the report by KARLO as a basis of assessment of quantum without first being alive to and/or the plaintiff proving the following factors:-

    i. The variety of the seed/crop planted by the grower was the required variety and/or was the variety indicated on the report.

    ii. The farming best practices used to achieve maximum yield by the farmer and those recommended e.g.

        a. Whether the farmer removed all weeds and/or crops from the cane each moth for the period of 7 months of the cane cycle.

        b. Whether the farmer applied at recommended times, the recommended amounts of all fertilizers.

        c. Whether the farmer at the time of planting allowed the recommended gaping for the cane area so as to yield and/or ensure high plant population.

        d. Whether the farmer periodically inspected for pests and/or diseases and removed diseased and/or infected cane and dispose the infected cane off in a manner prescribed.

6. The trial Magistrate erred in exercise of his discretion when he awarded interest to the plaintiff from the date of filing suit when the plaintiff had not specifically pleaded and prayed for the sums owed;

7. The learned Magistrate erred in law when he misinterpreted the contractual rule/principle of pari delicto.

10. The appellant prayed:-

    a. That the appeal be allowed.

    b. That the judgement and decree of the Hon. Magistrate together with all consequential orders be set aside.

    c. That costs of this appeal be provided for.

11. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.

12. In the appellant's submissions dated 8/11/2020 and filed in court on 19/11/2020 five (5) issues were taken up. The first issue was whether the special damages were specifically pleaded and proved. The appellant submitted that it is a principle in law that in contractual disputes where parties are aware of their claims/damages, the same should always be specifically and strictly proved. In support of this point, the appellant relied on the decision of the Court of Appeal in Gilgil Telecoms Industries Limited vs Duncan Nderitu & 57 Others (2016) eKLR where the Court of Appeal re-affirmed its earlier decision in Douglas Odhiambo Apel & Emanuel Omolo Khasin vs Telkom Kenya Ltd on the duty of the plaintiff to present evidence to prove his claims.

13. It was further submitted that the plaintiffs stated that they lost 3 harvesting cycles but they did not prove that the crop was ready for harvest by producing evidence and they also failed to provide proof of the amount of money that they lost, by the company not harvesting the crop as alleged. It was also submitted that the respondent failed to provide receipts of the farm inputs they used to grow the crop on behalf of the appellant. To support this position, the appellant relied on the Court of Appeal decision in the case of Jogoo Kimaika Bus Service Ltd vs Electrocom International Ltd (1992) eKLR where the court distinguished the difference between special and general damages.

14. Further to the foregoing, it was submitted that in quantifying the alleged special damages, the court relied on the KARLO report which was not produced by anyone but it appears that parties consented to its production; that the court therefore, did not have the benefit of testing the veracity of the recommendations and/or conclusions of the report; that the use of the report by the court was a discretion of the court and in awarding damages in breach of the contract, the court cannot exercise its discretion in awarding damages. The appellant further questioned which loss was suffered by the farmer? The loss of cost of labour incurred and the seedlings for the 1st crop or the 1st and 2nd ratoons.

15. The appellant further submitted that the plaintiff cannot claim to have lost what they did not have to begin with; that the 1st and 2nd ratoons do not grow automatically but there must have been work put into it just as the 1st crop to ensure that it grows. Therefore, the trial court erred in awarding damages for the 1st and 2nd ratoons as if the same would have grown after harvesting of the initial crop.

16. The appellant further submitted that the Court of Appeal case which the respondent relied on *John Richard Okuku vs South Nyanza Sugar Company Limited CA No. 278 of 2010*, that the lack of precision in the amount claimed was no justification for rejecting granting special damages in a case which was delivered in the year 2010. This is because the Court of Appeal has departed from that position in subsequent decisions in the Gilgil Telecoms Institution and Farah Awad Gullet vs CMC Motor Group (2018) eKLR cases delivered in 2017 and 2018 respectively. The appellant submitted that the only remedy available to the plaintiff since he did not specifically plead and prove special damages were nominal damages.

17. The second issue was whether the plaintiff proved his case on a balance of probabilities. It was submitted that the Section 107 of the *Evidence Act* places the duty to prove its case on the plaintiffs; that the onus was placed on the respondents to prove that they indeed grew the sugar cane; that this duty also has its foundation in statute specifically Rule 12 (F) of the Guidelines for Agreement between parties in the Sugar Industry pursuant to Section 29 of the Sugar Act No. 10 of 2001 which regulation mandates the famer/respondent to offer for harvesting and transportation his cane crop; that in this instant case, the plaintiff had a duty to prove that not only did they enter the contracts but they indeed grew the sugarcane; that the trial Magistrate erred when he held that the plaintiff proved their case on a balance of probability.

18. On whether the trial Magistrate erred in giving probative value to evidence that had been produced contrary to Section 35 and 36 of the *Evidence Act*; that from the proceedings it appears that the KARLO report was admitted without calling its maker and therefore the findings could not be tested on cross examination; that the court erred in giving the report the probative value it gave it therefore used it as a base for calculation of quantum. The appellant relied on the findings in Rosemary Wanjiru Kungu vs Elijah Macharia Githinji & Anor (2014) eKLR and Theodore Otieno Kambogo vs Norwegian People's Aid Nairobi Milimani HCCC No. 774 of 2000.

19. On whether the trial Magistrate erred in misinterpreting the contractual principle of pari - delicto, the appellant submitted that the court ought to have found that both parties to the contract were at fault;

that the appellant could only have harvested the plant crop after receipt of communication from the farmer but this did not happen. The appellant relied on the case of Nicodemus Osoro & G4S Kenya Limited vs Jane Gatwiri & Others (2020) eKLR and submitted that the trial court should have found that both parties were in breach and left the parties in the situation they were in before they approached the court for any remedies.

20. The respondent filed his submissions dated 27/11/2020. On the issue of the pleadings, the respondent submitted that the form of pleadings in sugar cane cases as the one before the trial court has been settled in the Court of Appeal case of Civil Appeal No. 278 of 2010 John Richard Okuku vs South Nyanza Sugar Co. Limited; that the plaintiff pleaded at paragraph 6 of the plaint that he expected a yield of 40 tons for the plant crop and 40 tons for the ratoons at the price of Kshs. 4,300/=.

21. On whether the respondent had proved its case on a balance of probabilities, the respondent asked this court to refer to his evidence at page 33 of the record of appeal. The appellant also referred the court to Migori High Court Civil Appeal No. 96 of 2018 South Nyanza Sugar Co. Ltd vs Philip Omondi Oyugi, Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs Joseph O. Onyango, Migori High Court Civil Appeal No. 88 of 2017 Millicent Adhiambo Ondingo vs Sony Ltd and Kisii High Court Civil Appeal No. 161 of 2005 South Nyanza Sugar Company Ltd vs Paul N. Lila.

22. On whether the trial magistrate erred by giving probative value on the report by KARLO contrary to Section 35 and 36 of the *Evidence Act*, it was submitted that in the appellant's submissions, it was admitted that the Advocates representing the appellants at that time did not object to the production of the document; that it is trite law that if documents produced during trial are not objected to, they form part of the record and are admitted in evidence; that there is a pre-trial questionnaire which parties have an opportunity to fill and file in court and it is an avenue which a party in a suit can object to any document; that Counsel for the appellant did not object to the production of the documents or call for its author for cross-examination despite having the said avenue; that Counsel for the appellant did not attend court for the hearing of the respondent's case even after it was re-opened; that Counsel should be estopped from raising this ground as he had a chance to object but he did not. The respondent relied on the case of Nyahururu ELC Case No. 227 of 2017 The Church Commission of Kenya & Another vs B.O.M of Oljororok Primary School (2019) eKLR where the court held one cannot raise an objection to the production of documents when the trial has passed pretrial stage and hearing when they had an opportunity to do so.

23. On whether the trial Magistrate erred in misinterpreting the contractual principle of pari delicto, it was submitted that Counsel was misguided on what the principle entails; that parties are bound by the contract and the appellant has not shown a specific clause in the contract which provides for the duty of the respondent to notify the appellant that the crop was ready for harvesting; that this issue was not pleaded by the appellant in the trial court and therefore it cannot be raised at this stage; that the Sugar Act 2001 does not also place the duty on the respondent to notify the appellant that his crop was ready for harvesting; that the Act places the said responsibility on the appellant at the Second Schedule of the Sugar Act, 2001. The respondent urged the court to also consider Migori HCCA No. 10 of 2019 Transmara Sugar Company Limited vs Nelson Dedege Mbai, Migori HCCA No. 86 of 2016 Elena Olola vs South Nyanza Sugar Company (2018) eKLR and Migori HCCA No. 41 of 2016 Jane Atinda vs South Nyanza Sugar Co. Ltd (2017) eKLR.

24. The respondent asked the court to find that the appellant failed to adduce enough evidence to challenge the evidence in the trial court and the appeal be dismissed.

25. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the

witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123.

26. It is also settled that an appellate court will not ordinarily interfere with the findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in Mbugua Kiruga v Mugecha Kiruga & another [1988] eKLR where the Court of Appeal held: -

> An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."

27. Guided by the above decisions, I have considered the grounds of appeal, the record of appeal and the rival submissions by both parties. The issues which arise therefrom are:-

a. Whether the respondent proved its case on a balance of probabilities.

b. Whether the respondent was entitled to the damages.

28,. In determining the first issue, the court will also address the issues raised on the nature of the pleadings and the production of documents. The court record shows that the suit was first set down for hearing on 14/9/2018. Counsel for the appellant was not present. The respondent proceeded with his case. He adopted his statement as evidence and produced the documents in his list as exhibits. The respondent closed his case and the matter was to be mentioned on 28/6/2018 for submissions. On 28/6/2018, Counsel for the appellant appeared in court and by consent, it was agreed that the respondent's case be re-opened for cross-examination of the respondent. A hearing date of 20/9/2018 was taken. On the said date, Counsel for the appellant was engaged in a matter before the Narok High Court and the matter was adjourned to 15/1/2019. On 15/1/2019, Counsel for the appellant did not appear neither did he communicate his absence to Counsel for the respondent. As a result, the court closed both the appellant's and the respondent's case.

29. I found it necessary to highlight the unfolding events in the trial court in order to address the various issues raised by the appellant in this appeal. It is clear that the appellant was not keen and/or intent to cross examine the respondent even after being given the opportunity to do so. Order 12 Rule 2 of the Civil Procedure Rules permits the trial court to proceed with the hearing of the plaintiff's case ex-parte if the defendant does not appear during the hearing. The trial Magistrate was correct in proceeding with the respondent's case. The consequence thereof is that the plaintiff's case remained uncontested to the extent that his testimony was not controverted through cross examination and the documents produced were not objected to.

30. Counsel for the appellant was afforded a good opportunity but he wasted the opportunity. It is not conscionable at this stage to raise objections on the trial court relying on a document which its maker was not called when there was no objection to its production. This being an adversarial system, a party is expected to present its case without expecting aid from the court to litigate on its behalf. The appellate stage is not an avenue for the appellant to now attempt to argue or reopen its case like it would in the trial court. The appellate court is limited to re-evaluating the evidence presented at the trial court and make a finding whether correct principles were followed in arriving at the said decision. This court cannot come to the appellant's aid at this stage.

31. Be that as it may, the respondent is required to properly adduce evidence in support of his case. Sections 109 and 112 of the *Evidence Act* provides as follows: -

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."

32. The case of Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another (2004) eKLR dealt with the aforementioned provisions and held that:-

> As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

33. In the case of Evans Nyakwana -vs- Cleophas Bwana Ongaro (2015) eKLR the court held that:-

> As a general preposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given by either side."

34. The sugar cane contract dated 4/8/2011 is not denied. From my understanding the contention of the appellant is that the farmer did not inform it of the matured plant crop. The duties and responsibilities of the farmer are outlined in clause 10 (a) - (v) of the contract. There is no particular clause which requires the farmer to notify the miller of the maturity of the sugarcane. The appellant being the miller, should be in a position to make periodical visits through its field agents in the various farms they have signed contracts with the farmers across the sugar belt zone to keep abreast on the development of its sugar cane.

35. On the claims that the respondent did not plead special damages, at paragraph 6 of the plaint, the respondent pleaded with particularity that it had lost 40 tonnes of the plant crop and the ratoons each costing at the then prevailing price of Kshs. 4,300/=. I find that these are pleadings of special damages. On the award of the 1st and 2nd ratoons, the same were prevented to grow as a result of the negligence of the appellant failing to harvest the plant crop. Therefore, it is correct for the respondent to claim loss of the 1st and 2nd ratoons as a result of breach of contract on the part of the appellant.

36. On the document used by the trial Magistrate to compute the damages, as I have already held, there being no objection to its production, the trial Magistrate was correct in relying on it. The prevailing sugar prices during the period of contracts with sugar cane farmers show what each sugar company offered per tonne. In its defence, the appellant did not object to the prices.

37. I find that the respondent did prove its case on a balance of probabilities and the trial Magistrate applied the correct principles in reaching his findings and the appeal lacks merit.

38. In the end, the following orders do issue:-

i. The appeal has no merit and it is hereby dismissed with costs to the respondent.

ii. The Judgement and Decree of Hon. R.K. Langat (PM) dated and delivered on 26/2/2019 is hereby upheld.

iii. These orders applies to Civil Appeals Nos. 119, 120, 121, 122, 124, 125 and 126 all of 2019.

iv. Costs to the Respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 23RD DAY OF JANUARY, 2023

R. WENDOH

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgement delivered in the presence of;

Mr. Oduor holding brief for Mr. Aim for the Appellant

Mr. Achola holding brief for Kerario Marwa for the Respondent

Evelyne Nyauke Court Assistant