Transmara Sugar Company Limited v Ogake (Civil Appeal 56 of 2021)
[2023] KEHC 27508 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEHC 27508 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 56 OF 2021

RPV WENDOH, J

JANUARY 19, 2023

BETWEEN

TRANSMARA SUGAR COMPANY LIMITED ..... APPELLANT

AND

SAMUEL ACHUTI OGAKE ..... RESPONDENT

(An Appeal from the judgement and decree of Hon. Obiero, Senior Principal Magistrate - Migori dated and delivered on 22nd day of June 2021 in Migori CMCC No. 1338 of 2016)

JUDGMENT

1. This is an appeal by Transmara Sugar Company Limited against the judgement and decree of Hon. Obiero (SPM) dated and delivered on 22/6/2021 in Migori CMCC No. 1338 of 2016. The memorandum of appeal is dated 30/6/2021. The appellant is represented by the firm of Oyagi, Ong'uti, Magiya & Co. Advocates. The respondent is represented by the firm of Odingo & Co. Advocates.

2. By a plaint dated 6/5/2016 and filed in court on 28/10/2016, the respondent (formerly the plaintiff) filed a suit claiming general damages for the 3 cycles of sugar cane in 0.2 hectares, costs of the suit, interest and any other relief. It was pleaded that on the 19/7/2011, the parties entered into a written agreement for the harvest and purchase of the sugar cane existing in the respondents' plot no. 974 measuring 0.4 hecatres situated at Getono Area, Bomonyama sub - Getono Location, South Gucha District within Kisii County. The respondent pleaded that without any reasons advanced to him, the appellant refused to harvest the plant crop which at the time of filing the suit, had dried up in the shamba thus affecting the preparation of the ratoons. Further, it was pleaded that the sugar cane could weigh an average of 38.4 tonnes and the price per tonne at that time was Kshs. 4,300/=.

3. The appellant (formerly the defendant) entered appearance and filed a statement of defence dated 16/5/2016 which was later amended on 12/11/2020. The appellant generally denied the contents of

the plaint. The appellant averred that if at all there exists a duly executed agreement as averred by the respondent, then the same has a legally binding effect upon the parties thereto. It was averred that it was the respondent's duty to harvest and deliver the cane. The appellant tabulated the dues due to the respondent less the statutory deductions had the respondent delivered the harvested cane. It was further averred that the appellant has never been invited for arbitration proceedings for the purposes of resolving this dispute. The appellant further denied being issued with a demand notice in respect of the alleged breach of contract. The appellant asked the trial court to dismiss the respondent's suit with costs.

4. After the hearing, the trial court entered judgement in favour of the respondent in the sum of Kshs. 360,000/= being compensation for the three cycles, cost of the suit and interest.

5. Being aggrieved by the decision of the learned Magistrate, the appellant preferred the instant appeal on 13 grounds which can be summarised in the following 6 grounds as follows:-

    i. The learned Magistrate failed to acknowledge that the appellant has several weighbridges and that it was the duty of the respondent to deliver the cane at the weighbridge for it to be weighed and tonnage taken;

    ii. The learned Magistrate assumed and presumed that cane production for the plant crop, ratoons one and two yield equal proceeds in a straight line when there is evidence that the crop ages and there is steady reduction in crop yields;

    iii. The trial Magistrate erred in awarding damages of Kshs. 360,000/= while the same had neither been pleaded nor proved in accordance with the law;

    iv. That the trial Magistrate erred in using a pricing range that was not applicable at the relevant time when the crop could have matured and harvested;

    v. That the trial Magistrate erred in awarding compensation that was above the actual yields per acre by relying on Kenya Sugar Research Foundation report that was not on record as the report on record indicated lower expected yields from the outgrowers' fields;

    vi. That the trial Magistrate erred in failing to deduct transport and harvesting charges from the decretal amount yet he had arrived at the conclusion that it was the duty of the appellant to transport and harvest sugarcane from the plaintiff's farm.

6. The appellant prayed as follows:-

    a. That the appeal be allowed and the entire judgement and decree of the trial court dated 22/6/2021 be set aside or varied.

    b. That this court be pleased to substitute the decision and/or decree dated 22/6/2021 with one setting aside the entire compensation of Kshs. 360,200 for the alleged cane crop which was in any case not harvested nor delivered to the defendant/appellant's mill by the plaintiff/respondent in terms of the contract.

    c. Costs of the appeal and those incurred in the subordinate court be borne by the respondent.

    d. Such other further orders be granted as this court may deem fit.

7. The appeal was canvassed by way of written submissions. The appellant filed its undated submissions on 24/10/2022. The appellant made lengthy submissions on the several findings made by different courts on the principle that courts cannot rewrite contracts between parties. The appellant also

submitted that in this case, it is the respondent who breached the contract and not the appellant and therefore it cannot be held liable for the respondent's own breach.

8. On the duty to harvest the cane, the appellant submitted that the duty fell on the farmer and not the miller; that even if the duty fell on the miller, the transport, harvest and other charges should be deducted from the total charges. The appellant further submitted that the farmer ought to have ideally used other options to deliver the cane or dispute resolution which it did not. Further, the appellant submitted that placing reliance on the Sugar Act 2001 would not help the respondent since statutes do not create contracts. The appellant also submitted that general damages are not applicable in contractual disputes. The appellant concluded by urging that there was no breach of contract on its part, and it would be against public policy to allow the respondent to benefit from his own breach.

9. The respondent filed submissions dated 28/10/2022 on even date. On the duty of the court to interpret contracts and not to rewrite them, it was submitted that the lower court did not rewrite the contract but interpreted it as its provided in the defunct Sugarcane Act 2001. On the breach of contract, it was submitted that it was the appellant who failed to harvest the sugarcane thereby breaching the terms of the agreement as stipulated under Section 6 (a) of the then Sugar Act. The respondent further submitted that it proved its case against the defendant on a balance of probabilities through the evidence produced. On the statutory deductions, it was submitted that the appellant's witness gave evidence that he had no report on the yields and there was no evidence that the fertilizer or any input was supplied to the respondent. Therefore, they cannot be deducted. Lastly, the respondent submitted that the contract was entered into on 19/7/2021, hence the Sugar Act, 2001 is applicable. The respondent asked this court to dismiss the appeal with costs and uphold the trial court's decision.

10. 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.

11. It is also settled that an appellate court will not ordinarily interfere with 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."

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

    Who has the duty to harvest, weigh and transport the cane?

    Whether the respondent was entitled to the damages.

13. There is no dispute that the parties herein entered into an agreement dated 19/7/2011. Clause 10 (c) outlines the obligations of the Sugarcane Farmer. There is no ambiguity on who was responsible to

harvest and transport the cane as it solely fell on the farmer (respondent). Clause 10 (c) provides that the Sugarcane Farmer shall: -

> " Offer for delivery on maturity and deliver to the Miller all such cane as derived from his contracted cane field and no other using the Miller's transport or the Cane Farmer's appointed transporter approved in advance by the Miller."

14. The parties signed the contract on 19/7/2011 when the Sugar Act, 2001 was in force. The Sugar Act was operational as from 1/4/2002 and it was specifically enacted by Parliament to provide for the development, regulation and promotion of the sugar industry in Kenya. However, it was repealed by the enactment of the *Crops Act* No. 16 of 2013 and became operational as from 1/8/2014.

15. The question then becomes what is the place of statutes where parties enter into a contract which contravenes the statute? Are parties still bound by the contracts by virtue of the doctrine of privity of contract? In Patel v Singh (1987) eKLR the parties appealed to the Court of Appeal against the decision of Aganyaga J (as he was then) in which he held that the agreement for the advance of Kenyan money on the Indian Currency in India was contrary to Section 3 (1) of the Exchange Act was illegal and unenforceable in Kenya. The three-judge bench upheld the decision of the learned Judge of the Superior Court. Nyarangi JA quoting with approval the findings in Archbolds (Freightage) Ltd v S Spanglett Ltd (1961) 1 QB 374, at page 388 Devlin L.J (as he then was) in which the issue of illegality, was held as follows:-

> " The effect of illegality upon a contract may be threefold. If at the time of making the contract there is and intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab inito and that arises if the making of the contract is expressly or impliedly prohibited by statue or is otherwise contrary to public policy."

16. Further, a different bench of the Court of Appeal in Njogu & Company Advocates v National Bank of Kenya Limited (2016) eKLR held: -

> "...any contract that contravenes a statute is illegal and the same is void, ab initio and is therefore unenforceable. The logical conclusion of this finding would be that the contract between the appellant and the respondent regarding the payment of legal fees is unenforceable."

17. It is clear that contracts which are founded upon illegality and contravene public policy, are void ab initio. The court cannot aid parties to enforce illegalities. I also associate myself with the views of Mrima J in Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR in relation to the Sugar Act, he held as follows: -

> " The Act being an Act of Parliament went through all the stages of law-making until it became law in Kenya. The Act can only be subordinate to *the Constitution* and/or may in specific and clear instances be ousted by an express provision of another Act of Parliament. In this case there is an attempt by the contract to oust the provision of the Act. The contract

is an agreement between the parties herein whereas the Act is an expression of the will of the people of Kenya through Parliament. The contract is hence subordinate to the statutory legislation. Any attempt by parties to an agreement to otherwise oust the provisions of an Act of Parliament can only be void and severable as far the attempt is concerned. The contract therefore offends the express provisions of the Act in respect to the duty to harvest the cane and as such it cannot stand in the face of the Act; it must give way to the Act."

18. I would hasten to add, the drafters of the Sugar Act, intended to protect farmers who after investing their resources in planting the sugar cane, are left with it in their plots; and since they would not have the capacity to acquire the heavy machinery and manpower required to harvest the cane, the sole responsibility to harvest the sugarcane was placed on the millers. The sugar cane industry was intended to be mutual and interdependent between the farmers and the millers. Whereas the farmers have the land to plant the crops and the ratoons, in return, the millers were to provide the inputs and eventually harvest the cane produce. A contract which is drafted contrary to the provisions of any statute would be against public policy.

19. Mrima J in Transmara Sugar C. Ltd & Another vs Ben Kangwaya Ayiemba & Another (2020) eKLR held that: -

> " ...courts must protect the public from deceit and help maintain standards of commercial morality. Where a dominant party for instance in a standard form agreement uses its obvious advantage to create a situation where it remains to fully benefit from the agreement in every manner and in total disregard to the weaker recipient party's position whatsoever, public interest demands that the dominant party be estopped from enjoying such benefit."

20. Section 29 of the Act provides for the Sugar Industry Agreements. The agreements under this Section, should conform to the guidelines set out in the Second Schedule of the Act, which provides the general scope of sugar agreements and further outlines the roles of the parties in the sugar industry. Section 6 (a) of the Second Schedule provides among others that the role of the miller is to: -

> " harvest, weigh at the farm gate, transport and mill the sugar-cane supplied from the growers' fields and nucleus estates efficiently and make payments to the sugar-cane growers as specified in the agreement;"

21. Therefore, Clause 10 (c) of the agreement dated 19/7/2011 is null and void ab initio. It contravened the provisions of the Sugar Act, 2001 and it is therefore unenforceable. The duty to harvest, weigh and transport the sugar rested with the appellant.

22. On whether the respondent was entitled to the damages, there is no dispute that there was sugar cane planted in the respondent's land. The respondent testified as PW1. It was his testimony that the cane was 2 years old. On cross examination, the respondent testified that the cane was 6 months old. This position was not clarified by Counsel for the respondent on re-examination. The appellants' witness DW1 and DW2 did not testify on the age of the cane at the time when they signed the contract. The fact that there was already cane on the plot is not in dispute. The assumption therefore is that at the time of signing the agreement, there was plant crop which was to be harvested upon maturity within 18 - 26 months. Taking that the maturity of the plant crop would be after 26 months, the plant crop ought to have been harvested on or before October 2013.

23. In reaching its decision, the trial Magistrate relied on the prevailing sugar prices which were set by the Kenya Sugar Research Foundation (KESREF). The learned Magistrate held:-

> " According to the plaintiff's submissions the plot was 0.4 hectares and he expected 36 tonnes per harvest. According to the plaintiff, in the year 2013 when he expected to harvest the plant crop, the price of sugarcane per tonne was Kshs. 3,800.00. When he expected to harvest the 1st and the 2nd ratoons, the price of the sugarcane per tonne was Kshs. 3,100.00."

24. Guided by the above, the Magistrate computed the expected yields of the plant crop, the 1st and 2nd ratoons and arrived at the sum of Kshs. 360,000/= as the damages due to the respondent for breach of contract. I have also considered the KESREF report and the trial Magistrate did use the prevailing prices to reach the finding. The appellant did not adduce evidence to counter the set prices and neither did it support its argument that the yield reduces from one cycle to another. Indeed, the yield reduces in volume and quality only but the ratoon crops still mature within the same acreage of land where the plant crop was planted. The other aspect of the ratoon crops which reduces, it goes without saying, will be the prices. In this instance, the plant crop would have been sold for Kshs. 3,800 per tonne and the ratoon crops for Kshs. 3,100/= per tonne.

25. On the applicable statutory deductions and other expenses, it is a matter of fact and should be proved by evidence. If at all the plant crop and the ratoons were not harvested, there is no justification in expecting that harvesting charges would apply. The same principle applies to the charges of the farm inputs. Since the plant crop was already in the plot, the respondent developed the plant crop himself and therefore the appellant cannot claim deduction of those expenses.

26. The foregone position is that the appeal dated 30/6/2021 is devoid of merit and it is hereby dismissed. The following orders do issue:-

    a. The judgement and decree of the Hon. Obiero dated and delivered on 22/6/2021 in Migori CMCC No. 1338 of 2016 is hereby upheld.

    b. The Respondent is awarded costs of this appeal.

    c. As per the orders 26/7/2022, this judgement applies to Civil Appeals No. 40, 46, 45, and 42 all of 2021.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 19TH DAY OF JANUARY 2023.

R. WENDOH

JUDGE

Judgement delivered in the presence of;

Ms. Akoya holding brief for Mr. Oyagi for the Appellant.

Mr. Odingo for the Respondent.

Nyauke - Court Assistant.