Ondoro v South Nyanza Sugar Co. Ltd (Civil Appeal 20 of 2022)
[2023] KEHC 22756 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22756 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 20 OF 2022

RPV WENDOH, J

SEPTEMBER 29, 2023

BETWEEN

MICHAEL LUOMO ONDORO ..... APPELLANT

AND

SOUTH NYANZA SUGAR CO. LTD ..... RESPONDENT

(An Appeal from the Judgement and Decree of Hon. C.M. Kamau Resident Magistrate (RM) dated and delivered on 30/10/2019 in Rongo PMCC No. 150 of 2014)

JUDGMENT

1. Michale Luomo Ochieng (the appellant) filed this appeal against the judgement and decree of the Hon. C.M. Kamau dated and delivered on 30/10/2019. The appellant is represented by the firm of Oduk & Co. Advocates while the respondent is represented by the firm of Otieno, Yogo, Ojuro & Co. Advocates.

2. By a plaint dated 7/6/2014, the appellant sued the respondent for damages for breach of contract, costs of the suit, interest from 19/2/2008 until payment in full and any other relief.

3. The appellant pleaded that by an agreement dated 19/2/2008, the respondent contracted him to grow and sell to it sugarcane on his land parcel being plot number 1454 field no. 28B in Kakmasia sub - location measuring 0.4 hectares; that the appellant duly signed the agreement and was assigned account number 264134 and he planted the cane as agreed.

4. It was further pleaded that it was a term of the contract that the contract would commence on 19/2/2008 and remain in force for a period of 5 years, or until one plant crop and two ratoon crops of the sugarcane are harvested; that within the 5 years period, the plant and ratoon crops would be harvested at 12 - 18 months and 22 - 24 months respectively. The appellant contended that in breach of the agreement, the respondent failed, refused and/or neglected to harvest the plant and ratoon crops. The appellant particularized the loss of damages which totalled Kshs. 405,000/=.

5. The respondent filed a defence dated 16/7/2014. The respondent denied the allegations in the plaint and put the respondent to strict proof thereof. The respondent averred that it performed its part of the contract by supplying the appellant with seed cane, fertilizer and providing services like harrowing and planting; that however, the appellant harvested the same without the knowledge of the respondent leading to a breach of contract. Further, the respondent particularized the breach of contract by the appellant and prayed that the suit be dismissed with costs.

6. After the hearing, the trial court entered judgement in favour of the respondent and dismissed the appellant's suit with costs.

7. Being dissatisfied with the judgement and decree, the appellant filed a Memorandum of Appeal dated 24/2/2021 on the following four (4) grounds: -

    i. That the learned trial magistrate erred in law in disregarding the evidence tendered in court by the plaintiff's witness;

    ii. That the trial court erred in law by failing to consider the evidence of PW1 Paul Owour Luomo, yet the said witness was a competent and compellable witness;

    iii. That the trial court erred in law in failing to notice that the evidence of PW1 was in law cogent and credible and want to proof of the suit, being that the said witness was an agent employed pursuant to the contract and did sign and execute the contract;

    iv. That the trial court erred in law in failing to appreciate the duration and expiry of the contract and therefore wrongfully computed the running of time.

8. The appellant prayed: -

    i. That the judgement and the decision in PMCC No. 150 of 2014 dated 30/10/2019 be set aside.

    ii. There be judgement for the appellant.

    iii. The court do assess and award the appellant damages for breach of contract.

    iv. The appellant do bear the costs of the suit in the subordinate court and the costs of this appeal.

    v. Interest.

9. Directions were taken that the appeal be canvassed by way of written submissions. It is only the appellant who complied.

10. The appellant submitted on grounds 1, 2 and 3. It was submitted that the respondent failed to adduce evidence in the trial court and therefore the appellant's case remained uncontroverted. The appellant relied on the case of *South Nyanza Sugar Company Limited v Donald Mideny* (2018) eKLR where the effect of failing to call evidence in rebuttal was discussed.

11. The appellant submitted that Clause 3.8. placed an obligation on the plaintiff to appoint a manager and agent to perform certain functions of the contract; that PW1 was best suited to testify in evidence as a witness of fact. The appellant relied on the provisions of Order 18 (2) (1) of the *Civil Procedure Rules* and how the Court of Appeal in *Juliane Ukrine Stamm v Tiwi Beach Hotel Ltd* (1998) eKLR discussed this provision. The appellant submitted that the appellant used Paul Luomo Ondoro as a witness to prove his case and it was coincidental that his witness was also his agent.

12. The appellant faulted the trial court for misconstruing not only the person who filed the suit but also the witness who was described as Richard A. Obonyo. The appellant further faulted the trial

Magistrate on his treatise on an agent and holder of power attorney as erroneous and based on wrong consideration. The appellant urged that the finding to be set aside and this court to award him Kshs. 405,000/= as prayed in his plaint.

13. I have considered the appeal, the record of appeal, its supplementary and the submissions of the appellant. The issue for determination is: -

    i. Whether the trial court considered the correct legal principles in dismissing the appellant's suit.

14. This being the first appellate court, the court has a duty to re-evaluate and analyze all the evidence tendered in the lower court and arrive at its own conclusion 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. The court is guided by the decision in *Selle & another v Associated Motor Boat Co. Ltd* (1968) EA 123.

15. A similar holding was held in the Court of Appeal for East Africa which took the same position in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows: -

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

16. The uncontroverted evidence which is also reflected in the trial court record is that the respondent did not adduce evidence in support of its case. It is also not in dispute that Michael Luomo Omburo and South Nyanza Sugar Company Limited entered into a contract dated 19/2/2008. On the witnessing page of the agreement, Paul O. Luomo signed as the agent of Michael Luomo Omburo the appellant herein.

17 After considering the evidence on record, the trial Magistrate addressed himself on the principles of principal - agent relationship. The trial court acknowledged that the appellant appointed an agent. Of particular interest, the trial court noted that the agent is one "Richard A. Obonyo of ID No. 13297522." However, the agreement shows that the name of the agent is Paul O. Luomo of ID No. 25014452. The trial Magistrate was of the view that the question for determination was whether it was proper for the agent to testify on behalf of the plaintiff. The trial court held: -

> " It is trite law that an agent is not a party to a contract. Only parties to a contract can sue or be sued on it. Likewise, an agent cannot prosecute a claim on behalf of a disclosed principal. Had it been a person with power of attorney, it would be different. A person acting under authority of power of attorney has legal authority to sue and to be sued. Therefore, in this case where no one has power of attorney, it has to be principal to prosecute the claim and in so doing may call the agent as a witness...the plaintiff failed to attend the trial to adduce evidence or otherwise prosecute his case. Therefore, the position is that no evidence has been called in support of this claim. I find that he was unable to prove his case on a balance of probabilities."

18. To the extent that where there is a disclosed principal, an agent cannot sue or be sued in a claim, the trial Magistrate properly applied the common law legal principal on a disclosed principal. The Court

of Appeal in *Anthony Francis Wareheim T/a Wareham & 2 others v Kenya Post Office Savings Bank* (2004) eKLR held:-

> "It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued."

19. The appellant properly sued the respondent in his own right as the principal. Therefore, there is no dispute arising as to whether there was a disclosed principal or not. On the relationship arising out of the agency, literary works in Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001, defines such a relationship to be: -

> "... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts."

20. Paragraph 3.8 of the agreement states: -

> "During the duration of this agreement to employ a full time manager or agent for purposes of managing the cane development and coordination with the Miller and at all times to allow the Millers's representatives' access onto the plot for purposes of but not limited to inspection of the plot and cane, sampling of the crop, compulsory weeding and maintenance, harvesting, necessary operations and construction of by - passes and access tracks of other fields."

21. Paul O. Luomo is the agent. During the subsistence of the contract, he was required to carry out his duties in relation to the growth and harvesting of the plant crop and ratoons. At the point where a dispute arises and the principal sues or is sued in his own capacity, it makes no sense to continue referring the agent as one unless there is a specific claim being brought against the agent. The agent becomes a witness to the dispute just like any other witness since he/she has the facts of the dispute by dint of his capacity as the person who witnessed first-hand the issues central to the dispute. It is not a requirement that the agent should have a power of attorney to testify on behalf of the principal in the event of a dispute. Suffice to say, all that is required by any party in a dispute, is to prove his/her claim through the witness (es) it deems fit.

22. Paul O. Luomo testified on 9/5/2018 and adopted his witness statement. He further produced and marked as exhibits the agreement (PEXH1), Demand Letter (PEXH2) and Cane Productivity (PEXH3). There was no objection from the respondent on the capacity of Paul O. Luomo to testify and produce the documents. Therefore, I am of the view that the trial Magistrate erred in finding that the appellant did not prove its case on the required standard on a preponderance of probability on the basis that he did not testify.

23. The appellant led evidence to show that he entered into an agreement with the respondent for the cultivation of the plant crop and the subsequent ratoon crops. The contract was to commence on 19/2/2008 and last for a period of 5 years or until one plant crop and two ratoon crops are harvested. The assumption therefore is that the plant crop was planted on 19/2/2008 and it was to be harvested not later than 24 months that is on 19/2/2010. The first ratoon crop was to be harvested not later than 22 months after harvest of the plant crop that is on 19/12/2011. The second ratoon crop was to be harvested not later than 22 months after harvest of the second ratoon crop that is on 19/10/2013.

24. On what the appellant is entitled to, the Court of Appeal in the case of Kisumu Civil Appeal No. 138 of 2017 South Nyanza Sugar Company vs Awino Oreko held: -

> " The contract itself was for a period of five years or until one plant crop and two ratoons were harvested on the plot, whichever period would be less. The evidence accepted by both courts below, and which has not been challenged before us, is that Sony was guilty of breach by failing to harvest the plant crop. Once the plant crop was not harvested, it dried and the ratoon crops could not grow. This was a natural consequence of the breach. It is therefore reasonably foreseeable that failure to harvest the plant crop would imperil the subsequent ratoon crop and naturally, so too, the 2nd ratoon crop. In this way a loss of the plant crop was also a loss of the two ratoon crops."

25. The cane productivity report shows the expected yields of the cane which was being produced between the years 1995/1996 and 1996/1997. The report does not indicate the price range for each tonne of plant crop and the ratoons. The contract was entered into in the year 2008. The appellant ought to have provided an updated cane productivity yield report and a price list indicating the prices being offered in the year 2008 or the very least guide the court on how it arrived at the tabulation of the expected plant crop and ratoons of 135 tonnes and the price of Kshs. 2,500/= per tonne.

> The claim of the respondent was in the nature of special damages. The Court of Appeal in *Douglas Odhiambo Apel & another v Telkom Kenya Limited* NRB CA Civil Appeal No. 115 of 2006 (2014) eKLR, the Court of Appeal expressed the view that; [W]e find that the learned judge was entirely correct in holding that at a formal proof requiring assessment of damages, a plaintiff is under a duty to present evidence to prove his case. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.

26. The need for proof is not lessened by the fact that the claim is for special damages. Unless a consent is entered into for a specific sum, then it behooves the claiming part to produce evidence to prove special damages claims."

27. In *South Nyanza Sugar Company Ltd v Fredrick Ogolla* (2015) eKLR Majanja J held:-

28. It was clear then that the only indicator of the price was the pleading which the court adopted for the plant crop. I find that the price of the sugarcane was an essential element of the respondent's claim and the claim being in the nature of special damages ought to have been pleaded and proved with particularity... Although the respondent pleaded the price of sugarcane per ton, he did not prove the price hence there was no basis for making the award. Likewise, the respondent's submissions on various prices in respect of the plant crop and 1st ratoon were not supported by any evidence. Unless there are admissions or agreed facts, submissions are not a substitute for proof of facts."

29. In as much as the respondent did not rebut the appellant's evidence, the appellant still had the obligation to produce evidence to prove its claim. In *Charterhouse Bank Limited (Under Statutory Management v Frank N. Kamau* (2016) eKLR the Court of Appeal held:-

> "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited,

judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

30. From the foregone, although the trial court's finding on the testimony of Paul O. Luomo was irrelevant, I find that the appeal is devoid of merit on the basis that the appellant failed to adduce proper evidence to prove his claim for compensation of the plant and the ratoons crops.

The appeal is hereby dismissed.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 29TH DAY OF SEPTEMBER 2023.

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Ms. Theuri h/b for Mr. Oduk for the Appellant.

Mr. Otieno for the Respondent.

Emma & Phelix Court Assistants.