South Nyanza Sugar Co Limited v Oracha (Civil Appeal E055 of 2022) [2023] KEHC 22786 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22786 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E055 OF 2022

RPV WENDOH, J

SEPTEMBER 29, 2023

BETWEEN

SOUTH NYANZA SUGAR CO LIMITED .... APPELLANT

AND

FRANCIS ONJIKO ORACHA .... RESPONDENT

(An appeal from the Judgement and Decree of Hon. J. Munguti (SPM) dated and delivered on 13th day of April, 2022 in Migori CMCC No. 211 of 2018)

JUDGMENT

1. This is an appeal by South Nyanza Sugar Company Limited against the judgement and decree of the Hon. J. Munguti (SPM) dated and delivered on 13/4/2022. The appellant is represented by the firm of Moronge & Co. Advocates whilst the respondent is represented by the firm of Ochillo & Company Advocates.

2. By a plaint dated 12/4/2018 and filed in court on 16/4/2018, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for damages for the value of unharvested sugarcane, cost of the suit, interest and any other relief.

3. It was the respondent's case that by an agreement dated 24/10/2012, the appellant entered into an agreement with the respondent to grow and sell to it sugarcane on his land being on Plot No. 162 in Wasweta Sub Location measuring 1.9 hectares; that the respondent was assigned account number xxxx and planted the cane as agreed.

4. It was further pleaded that it was a term of the agreement that it would be in force for a period of five years or until one plant crop and two ratoon crops of the cane were harvested whichever period was less; that it was a further term of the contract that within five years or less, the plant crop or ratoon cane would be harvested at the ages of 22 - 24 months and 16 - 18 months after planting and subsequent

harvest respectively; that in breach of the aforesaid, the appellant failed to harvest the crop when the same was matured leading to wastage and loss.

5. The respondent further pleaded that the plot was capable of producing 260 tonnes per acre at the rate of Kshs. 4,300/= per tonne and the respondent claimed damages.

6. The appellant filed a statement of defence dated 31/5/2018. Liability, loss and damages suffered by the respondent was denied and the respondent was put to strict proof thereof. The appellant stated that it was the respondent who failed to notify the appellant when the cane was matured for harvesting hence visiting this misfortune on himself. The appellant further averred that in the event the court found in favour of the respondent, it should take into account the costs of transport and harvest charges.

7. After the hearing, the trial court entered judgement in favour of the respondent for Kshs. 120,093/= in damages for breach of contract, costs of the suit and interest at court rates from the date of filing.

8. Being dissatisfied with the judgement and decree, the appellant filed a memorandum of appeal dated 10/4/2022 on 12/5/2022 and preferred four (4) grounds of appeal as follows: -

   i. That the learned magistrate erred in law and in fact when he awarded damages for breach of contract in the sum of Kshs. 120,093/= plus costs and interest which amount had neither been pleaded in the plaint nor proved at the trial as required;

   ii. That the trial court erred when it failed to appreciate and to give due regard to the appellant's submissions and evidence therefore resulting in a finding prejudicial to the appellant;

   iii. That the trial court erred in law and in fact when it failed to address itself on the issue that the respondent admitted having cut or removed the ratoon 1 by himself;

   iv. That the trial court exercised its discretion wrongly when it failed to dismiss the respondent's case against the weight of evidence.

9. The appellant prayed: -

   i. This appeal be allowed with costs.

   ii. The judgement in Migori PMCC No. 211 of 2018 be set aside and an order be made that the respondent's suit in the lower court be dismissed with costs both in the high court and lower court.

   iii. This court do re-evaluate the evidence and arrive at its own independent findings and allow the appeal as sought.

10. Directions were taken that the appeal be canvassed by way of written submissions. Both parties complied. In support of its appeal, the appellant filed its submissions dated 18/1/2023. Briefly, the appellant submitted that the trial court erred in not finding that the respondent was in breach of the contract, uprooted the 1st ratoon at 18 months. The appellant contended that the respondent diverted the ratoon to third parties and therefore, he was not entitled to damages for breach of contract.

11. In rebuttal, the respondent filed his submissions dated 4/1/2023. He submitted that on the award of damages, the trial court did not err. He supported this submission by referring to several decisions where Mrima J held *inter alia*, that failure to harvest the 1st ratoon compromises the 2nd ratoon. He urged that the award of damages was proper and this court should uphold the same. However, the respondent faulted the trial court on the award of interest. He stated that the same is in the nature of special damages and interest should start running from the date of filing the suit.

12. I have carefully considered the record of appeal and its supplementary record, the rival submissions and the proceedings in the trial court. The following are the issues for determination: -

i. Whether the court awarded the damages based on proper legal principles.

13. This being a first appeal, this court has the duty to re-evaluate, and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bear 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 Motorboat Co Ltd* (1968) EA 123.

14. 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 *Mbogua 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.

15. It is not disputed that parties entered into a contract dated 24/10/2012 for the respondent to grow and sell to it sugarcane. It is also not disputed that the appellant harvested the plant crop in March 2014.

16. The only contention which this court has to consider is the harvest of the 1st ratoon crop. Clause 1 (f) of the contract provides that the specific maturity date for the ratoon one would be not later than 22 months after harvest of the plant crop. The plant crop was harvested between 22/3/2014 and 28/3/2014. The lapse of 22 months would mean that the 1st ratoon ought to have been harvested in March 2016.

17. In his evidence, the respondent testified that he harvested the 1st ratoon at 18 months. DW1, the appellant's witness testified that the sugarcane ratoons mature between 18 - 22 months. However, it was his further testimony that the respondent harvested the ratoon at 15 months when it was not mature.

18. As to the date when the plant crop was planted, the respondent testified that it was planted after 24/10/2012 while the appellant's position is that the sugarcane was planted on 14/10/2012 and the harvesting was done between 22/3/2014 to 28/3/2014. The appellant testified that the harvesting was done 15 months after the date of planting the sugarcane. The appellant testified that the harvest was done early since the plant crop was developed poorly. It therefore follows that the plant crop could only have been planted on or about 24/10/2012.

19. On the ratoon crops, the respondent admitted that he slashed the ratoon at 18 months but the appellant's witness testified that the respondent slashed them at 15 months. There is admission from the respondent that he slashed the ratoons. However, he did not tell the court where he took the 1st ratoon crop after slashing the same.

20. In this court's view, since the plant crop was harvested early due to poor management, there was no expectation that the ratoons would also mature to the required standard ready for harvesting.

Therefore, the claim for damages for the 1st and 2nd ratoons had no merit and the trial court should have found so. For the following reasons, I allow the appeal and the following orders do issue: -

i. The Judgement and Decree dated and delivered on 13/4/2022 is hereby set aside.

ii. Costs of this appeal and the main suit awarded to the Appellant.

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

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Mr. Ongeri for the Appellant.

Mr. Bunde for the Respondent.

Emma & Phelix Court Assistants.