South Nyanza Sugar Co. Limited v Mbogo (Civil Appeal 139 of 2018) [2023] KEHC 22734 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22734 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 139 OF 2018

RPV WENDOH, J

SEPTEMBER 26, 2023

BETWEEN

SOUTH NYANZA SUGAR CO. LIMITED .... APPELLANT

AND

MAURICE ODHIAMBO MBOGO .... RESPONDENT

(An Appeal arising from the Judgement and Decree of Hon. R.K. Langat Principal Magistrate Rongo dated and delivered on 16/8/2018 in Rongo PMCC No. 27 OF 2017)

JUDGMENT

1. The appellant, South Nyanza Sugar Company Limited, preferred the instant appeal dated 15/10/2018 against the judgement and decree of Hon. R.K. Langat (PM) dated and delivered on 16/8/2018. The appellant is represented by the firm of Okong'o Wandago & Co. Advocates while the respondent is represented by the firm of Nelson Jura & Co. Advocates.

2. By a plaint dated 3/2/2017 and filed in court on 13/3/2017, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for compensation of two (2) unharvested cycles, costs of the suit, interest and any other relief. It was pleaded that on or about 25/11/212, the parties entered into an agreement to cultivate and develop sugarcane on the respondent's plot number 82 field no. 355 vide account no. 522951; that the appellant was to purchase/harvest the sugarcane upon maturity and pay the respondent the value thereof; that the respondent developed the sugarcane on a plot measuring approximately 0.88 Ha; that the appellant harvested the plant crop but failed to harvest the 1st ratoon thereby compromising the development of the 2nd ratoon.

3. The respondent particularized the breach on the part of the appellant and pleaded that as a result of the breach of contract, he lost approximately 88 tons for both the 1st and 2nd ratoons and the cane prices at that time was Kshs. 4,500/= per tonne. The respondent claimed that he suffered loss which the appellant has failed and/or neglected to compensate.

4. The appellant entered appearance and filed a statement of defence dated 23/3/2017 and filed in court evenly. The appellant denied the contents of the plaint and shifted the blame on the respondent for having failed to develop the sugarcane and being in breach of the said agreement. The appellant further denied that the respondent lost an estimated yield of 88 tons of sugarcane. The appellant also denied that demand and intention to sue was issued and asked the trial court to dismiss the respondent's suit with costs.

5. The suit proceeded for hearing. The respondent testified in support of his case as PW1. Richard Muok the appellant's Senior Supervisor testified as DW1. The trial court found in favour of the respondent and awarded him damages for the two ratoon crop cycles, costs and interest.

6. Being aggrieved by the decision, the appellant disputed the findings of the trial court on the following five (5) grounds of appeal: -

    1. The learned Magistrate erred in law and in fact after finding that only the respondent's first ratoon was not harvested and that the respondent never developed the second ratoon crop, he proceeded to award the respondent compensation for the second ratoon while the respondent prayed for the unharvested sugarcane;

    2. The learned Magistrate erred in law and in fact after finding that only the respondent's first ratoon was not harvested and that the respondent never developed the second ratoon crop, he proceeded to award the respondent compensation for the second ratoon which the respondent would have been paid Kshs. 4,130/= per tonne and in the circumstances that was altogether speculative and beyond the scope of the pleadings;

    3. The trial court erred in failing to find that the claim in the suit was not proven in law and failing to dismiss the suit for bad pleadings;

    4. The trial court erred in awarding the respondent interest on the principal sum of Kshs. 209, 363.08/= without assigning reasons for awarding such interest thereby exercising his discretion wrongly;

    5. The trial court erred when he awarded the respondent interest from the date of filing suit.

7. The appellant asked this court to allow the appeal with costs, dismiss the suit in the lower court and award interest on any sums awarded from the date of judgment, if this court is to find that compensation was due.

8. The appeal was canvassed by way of written submissions. Both parties complied and filed their respective submissions. The appellant filed in court its submissions dated 23/1/2023 on even date. The appellant filed his submissions dated 23/1/2023 in court evenly.

9. The appellant submitted that the respondent pleaded that the contract between the parties was the one dated 25/11/2012 but the evidence shows that there is no evidence of a contract dated 25/11/2012; that the dealings between the parties were made on 25/11/2011. The appellant further submitted that the respondent filed a contract comprising of four pages of the contract. On that basis, it was submitted that the pleaded contract and its breach was not proven in law.

10. It was further submitted that the respondent did not grow the ratoon or mitigate his losses; that the respondent had the option to mitigate his losses which he did not; that the respondent did not seek consent of the appellant to sell the mature 1st ratoon to 3rd parties despite the respondent knowing that he had this option.

11. On the award of Kshs. 209,363.08/=, it was submitted that it is unjustifiable and there was no basis to award the same. On the issue of interest, it was submitted that the respondent did not plead for a specific amount in damages, for interest to be determined when it is to run from. The appellant urged the court to allow the appeal and dismiss the respondent's suit with costs.

12. The respondent submitted that he produced the required documents to prove his case, that is, the copy of the contract book, the yield assessment report and the schedule of prices; that he specifically pleaded and proved the damages as were awarded and the learned Magistrate did not make any error.

13. The respondent further submitted that the trial court was right when it gave probative value to the sugarcane yield and production report and the appellant cannot fault the court for relying on the same, because it did not produce any report to counter the one produced.

14. On whether the trial Magistrate was right in holding that the appellant had a duty to harvest and transport the cane, it was submitted that there was no where in the contract where it was stated that it was the duty of the respondent to harvest and transport the cane to the millers. The respondent also submitted that the trial court was right in awarding damages for all the three cycles.

15. On the issue of interest, the respondent submitted that the special damages were pleaded by the respondent by stating his farm size, expected yield, price per ton and number of harvests or cycles being claimed. It was submitted that it has been settled in various decisions that interest on special damages starts running from the date of filing suit but not the date of judgement.

16. This being the first appellate court, it 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 Motorboat Co. Ltd (1968) EA 123.

17. 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."

18. Guided by the above decisions, I have carefully considered the grounds of appeal, record of appeal, the supplementary record of appeal and the rival submissions. The issues for determination are: -

    a. Whether the respondent proved the pleaded contract.

    b. Whether the appellant was in breach of the contract.

    c. Whether the respondent was entitled to the damages awarded.

    d. When should interest start running.

19. On the first issue, from the plaint filed by the respondent, he did plead that the contract was entered into on 25/11/212. The contract which was filed in court indicates the contract date as 25/11/2011. The variance comes in the year of the contract.

20. The Court of Appeal in Simon Muchemi Atako & Another v Gordon Osore NRB CA No. 180 of 2005 (2013) eKLR, observed thus;

> In our view, the appellants had pleaded their claim with sufficient particularity to enable the respondent understand the case he was to meet. In Esso Petroleum Company Limited v Southport Corporation [1956] AC 218, Lord Normand expressed himself as follows on the object of pleadings:
>
> > "The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them."
>
> In Uganda Breweries Ltd v Uganda Railways Corporation [2002] 2 EA 634, the respondent's evidence concerning the occurrence of an accident was a departure from its pleadings in the statement of defence and counterclaim. The Supreme Court of Uganda held that the departure from pleadings did not cause a failure of justice to the appellant as the appellant had a fair notice of the case it had to meet and the departure was a mere irregularity not fatal to the case of the respondent whose evidence departed from its pleadings."

21. From the above discourse, a court will not automatically dismiss a claim if the opposing party had sufficient notice of the case it was to meet. The appellant was well aware that the contention in issue was the contract signed between the parties dated 25/11/2011 and the appellant put up a comprehensive defence on it. In my view, the variance in the year of the contract, is not enough to conclude that the pleadings were fatal and hence the respondent did not prove his claim. This was a clerical error which did not go to the root of the matter before the trial court. It cannot be said that the pleadings were a departure from the claim.

22. In any event, when the respondent testified in court on 11/9/2017, Counsel for the appellant was not in court to cross examine the respondent on the contents of his pleadings. I find that there was no variance in the pleadings which was of a great magnitude to affect the substance of the issue before the trial court, which is the breach of contract. The properly dated contract was produced as an exhibit in court for consideration. The appellant proved his case to the required standard.

23. However, this court cannot fail to point out that it is not possible that Counsel for the respondent did not take note of the typographical error at the point of prosecuting the suit. Counsel for the respondent should have at least endeavored to make an oral application to correct the error made on the date of the contract.

24. The appellant also submitted that the full contract was not produced. What is in the court file is contrary to what the appellant is alleging. The contract has all the pages from the execution page to the terms of the contract which outlined the parties' obligations.

25. On whether the appellant was in breach of the contract, it is not in denial that the appellant harvested the plant crop. The appellant's witness testified that they did not harvest the 1st ratoon since it was neglected by the respondent. He further stated that he had the inspection report which was unfortunately not produced in court and it did not form part of the list of documents. Part of the documents listed in the appellant's list of documents dated 2/7/2018 is an alleged warning letter dated 6/8/2015 which was not produced in court.

26. The appellants did not lead any evidence to justify why they failed to harvest the 1st and 2nd ratoons as per the terms of the contract. The issue of who is to harvest the 1st and 2nd ratoon crops does not

arise since the appellant already harvested the plant crop hence, it cannot renege on its duty to harvest the ratoon crops.

27. On the entitlement of the damages, the failure to harvest 1st ratoon automatically affects the growth of the 2nd ratoon. In Kisumu Civil Appeal No. 138 of 2017 South Nyanza Sugar Company vs Awino Oreko the Court of Appeal 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."

28. The respondent was therefore entitled to claim compensation for the 1st and 2nd ratoons as a result of the breach of contract on the part of the appellant.

29. On the awarded damages, the respondent produced a report by the Kenya Sugar Research Foundation (KESREF) and the prices of sugar cane being offered by the appellant's company with effect from 1/3/1998. The list gives the sugarcane prices until 15/2/2012 at the price of 4,300 per ton. The updated cane price list by the appellant still indicates prices of the sugarcane but not the ratoon crops. It is not plausible that the 2nd ratoon crop which is of less tonnage and value would fetch a higher price than the plant crop itself. Therefore, the trial court erred in using the figure of Kshs. 4,310 to calculate the price of the 2nd ratoon.

30. According to the appellant's witness, the 1st ratoon would have been harvested in the year 2016. He further testified that the price per ton of the ratoon crop would have been Kshs. 3,200/=. The trial court should have adopted the same price for the 2nd ratoon. This court will only disturb the calculation of the award of damages of the 2nd ratoon crop as follows:-

> 0.88 ha × 43.35 × 3,200 = Kshs. 122,073.60
>
> Less harvesting charges = Kshs. 11, 441.28
>
> Less transport charges = Kshs. 25, 714.92
>
> Net Award Kshs. 84, 917.40
>
> Total award of the 1st and 2nd ratoons - Kshs. 167,018.80/=

31. On the issue of interest, the award of interest is the discretion of the court which should be exercised judiciously. Referring again to the decision of the Court of Appeal in South Nyanza Sugar Company vs Awino Oreko (supra) it had this to say about interest on claims which are special in nature: -

> "...interest on such damages ought to run from the date of filing suit as the money will have been due to the respondent from that date. This result is also in consonance with the spirit of statutory law that governed the contract between the respondent and the appellant at the material time. The contract was then subject to the provisions of the repealed Sugar Act... the effect of paragraph 9 (1) (e) as read together with 9 (2) of the Second Schedule of the Act was that a miller who failed to pay an out grower institution within thirty days of sugar cane delivery was liable to pay interest. The spirit is to compensate the farmer by way of interest

for late payment. I see no reason why the same principle should not be extended to where there is breach by the miller like here."

32. This court is bound by the decision of the Court of Appeal. The foregone conclusion is that the appeal partly succeeds and the following orders do issue:-

    a. The Judgement and Decree of Hon. R.K. Langat (PM) dated and delivered on 20/9/2018 on the damages awarded is hereby set aside.

    b. The respondent is hereby awarded damages of Kshs. 167, 018.80/= for the first and second ratoon.

    c. Interest on the damages to run from the date of filing the suit.

    d. The respondent is awarded half the costs of this appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 26TH DAY OF SEPTEMBER, 2023.

R. WENDOH

…………………………….

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgment delivered in the presence of;

Mr. Odero for the Appellant.

Mr. Singei holding brief Mr. Jura for the Respondent.

Emma & Phelix Court Assistants.