South Nyanza Sugar Co Limited v Okello (Civil Appeal 21 of 2019)
[2023] KEHC 22770 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22770 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 21 OF 2019

RPV WENDOH, J

SEPTEMBER 26, 2023

BETWEEN

SOUTH NYANZA SUGAR CO LIMITED ..... APPELLANT

AND

ROBERT OMOLLO OKELLO ..... RESPONDENT

(An Appeal arising from the Judgement and Decree of Hon. M.M. Wachira Senior Resident Magistrate dated and delivered on 20/12/2018 in Migori CMCC No. 45 of 2005 Robert Omolo Okello vs South Nyanza Sugar Co. Ltd)

JUDGMENT

1. The appellant, South Nyanza Sugar Company Limited, preferred the instant appeal dated 18/1/2019, against the judgement and decree of Hon. M.M. Wachira (SRM) dated and delivered on 20/12/2018. The appellant is represented by the firm of Okong'o Wandago & Co. Advocates while the respondent is represented by the firm of Kerario Marwa & Co. Advocates.

2. By a plaint dated 21/1/2005 and filed in court on 26/1/2005, and later amended on 26/7/2005, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for (1) a declaration that the appellant was in breach of the cane contract with the respondent; (2) compensation for the unharvested sugarcane at the rate of Kshs. 1, 730/= per tonne; (3) costs of the suit, interest and any other relief the court deems fit to grant.

3. It was pleaded that on or about the year 1996, the parties entered into an agreement to cultivate and develop sugarcane on the respondent's plot number 1045 field no. 305 vide account no. 442580; that the appellant was to purchase/harvest and transport the sugarcane upon maturity and pay the respondent the value thereof; that the respondent grew the sugarcane on a plot measuring approximately 0.3 Ha; that upon maturity, the appellant failed to harvest the plant crop, 1st and 2nd ratoons which dried up on the farm causing loss to the respondent.

4. The respondent also particularized the negligence on the part of the appellant and pleaded that as a result of the breach of contract, the appellant failed to harvest the plant crop, the 1st and 2nd ratoon crops which all weighed 34 tonnes per harvest at the rate of Kshs. 1,730/= per tonne.

5. The appellant entered appearance and filed a statement of defence dated 25/2/2005. The appellant denied the contents of the plaint and shifted the blame to 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 25 tonnes of the sugarcane and further averred that in any event, the price would have been Kshs. 1,553/= gross which price was subject to deductions. The appellant contended that the suit was filed out of time and general damages cannot be awarded for breach of contract and the claim being one of special damages does not lie.

6. The suit proceeded to hearing with the respondent testifying in support of his case as PW1 and Paul Munari Simo as PW2. 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 being a total sum of Kshs. 102,342/=.

7. Being aggrieved by the said decision, the appellant disputed the findings of the trial court on twelve (12) grounds of appeal which can be condensed into the following four (4) grounds: -

    1. The learned Magistrate erred in law and in fact in failing to find that the claim in the suit was not proven, in law and in failing to dismiss the suit for bad pleadings;

    2. The trial court erred in finding that the respondent was entitled to three lost sugarcane cycles despite there being evidence to the contrary and awarding a sum of Kshs. 102, 342/= which was not specifically pleaded;

    3. That the trial court erred in finding that each of the three crop cycles would yield 24 tonnes of sugarcane by relying on yields assessment report which was not produced in evidence;

    4. The trial court erred when he awarded the respondent interest from the date of filing suit as opposed from the date of judgement.

8. 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.

9. The court directed that the appeal be canvassed by way of written submissions but only the appellant complied.

10. The appellant submitted that there was a variance between the pleadings and evidence; that the respondent pleaded that the contract between the parties was made in the year 1996 while PW1 testified that the contract was made in the year 1997 and therefore the evidence on oath was at variance with the plaint; that the trial court entered judgement for an unpleaded claim and on that basis, it was submitted that the pleaded contract and its breach was not proven in law.

11. It was further submitted that the respondent testified that he planted the plant crop but it was not harvested, neither were the 1st and 2nd ratoons and therefore, it would not have been possible to award the respondent the three (3) crop cycles.

12. On the issue of interest, it was submitted that in a breach of contract, damages cannot be awarded but they are special damages which must be specifically pleaded and proved; that the respondent neither

pleaded nor proved the specific damages. The appellant urged the court to find that the award on interest was unjust and disproportionate.

13. 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 v Associated Motorboat Co. Ltd* (1968) EA 123.

14. It is also settled law 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. Guided by the above decisions, I have carefully considered the memorandum of appeal, record of appeal and the appellant's 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. From when should interest start running.

16. On the first issue, from the amended plaint, the respondent pleaded that the contract was entered into in the year 1996. The contract which was filed in court indicates the contract date as 10/6/1997. At paragraph 3 of the defence, the appellant admitted that the parties had entered into a contract The variance is in the year of the contract.

17. 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."

18. 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."

19. 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 10/6/1997 and it put up a comprehensive defence hinged on that contract. The properly dated contract was produced as an exhibit in court for consideration.

20. 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. It was a typographical and/or 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. I find that there was no variance in the pleadings which was of such great magnitude as to affect the substance of the issue before the trial court, which is, breach of contract.

21. Looking at the original plaint filed on 26/1/2005, the respondent had pleaded correctly that the contract was entered into in the year 1997. It is not clear why Counsel amended this. Even at the point of prosecuting the case, 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, the above notwithstanding.

22. On whether the appellant was in breach of the contract, it is not in dispute that the appellant did not harvest the plant crop. The appellant's witness testified that they did not harvest the plant crop because it was not maintained to maturity. PW2, Paul Simo a retired Civil Servant from the Ministry of Agriculture, produced a crop yield assessment report dated 9/3/2005 (PEXH3). The report indicates that the plant crop had overmatured and the estimated yield loss was 35 tonnes. The contract was to last for 5 years or until one plant crop and two ratoon crops of sugar cane are harvested whichever period was less. The appellant did not lead evidence through a yield assessment report to justify why they did not harvest the plant crop. Hence, the appellant was the one in breach of the contract.

23. On the entitlement of the respondent for the breach of contract, the Court of Appeal in Kisumu Civil Appeal No. 138 of 2017 *South Nyanza Sugar Company v 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."

24. Guided by the decision in *South Nyanza Sugar Company v Awino Oreko* (supra) this court finds that the respondent is entitled to damages for the plant crop and the 1st and 2nd ratoon crops. The trial court adopted the 34 tonnes pleaded by the respondent as the average yields expected. Both parties agreed that the price per tonne was Kshs. 1,730/=. In computing the damages to be awarded, the trial court took into account the transport and harvest charges applicable for all the crop cycles. This court finds no reason to upset the decision of the trial court.

25. On the issue of interest, it has been settled by the Court of Appeal in *South Nyanza Sugar Company v Awino Oreko* (supra). The Court 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."

26. The foregone conclusion is that the appeal is devoid of merit. The judgement and decree of the trial court dated 20/12/2018 by Hon. M. Maina Wachira is upheld. The appeal is hereby dismissed with costs to the respondent.

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

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Mr. Odero for the Appellant.

No appearance for the Respondent.