South Nyanza Sugar Co. Ltd v Okuku (Civil Appeal 68 of 2021)
[2023] KEHC 26501 (KLR) (18 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26501 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 68 OF 2021

RPV WENDOH, J

DECEMBER 18, 2023

BETWEEN

SOUTH NYANZA SUGAR CO. LTD ..... APPELLANT

AND

LUCAS ONYANGO OKUKU ..... RESPONDENT

(An Appeal from the Judgement and Decree of Hon. R.K. Langat Senior Resident Magistrate (SRM) dated and delivered on 29/6/2021 in Rongo PMCC No. 107 of 2018)

JUDGMENT

1. South Nyanza Sugar Co. Ltd (the appellant) commenced this appeal against the judgement and decree of the Hon. R.K. Langat (SRM) dated and delivered on 29/6/2021. The appellant is represented by the firm of Okong'o Wandago & Co. Advocates while Lucas Onyango Okuku (the respondent) is represented by the firm of Oduk & Co. Advocates.

2. By a Plaint dated 10/10/2017, the respondent filed a suit against the Respondent in which he pleaded that on 20/8/2013, he entered into a written agreement with the appellant to grow sugarcane on Plot No. 553A measuring 0.25Ha, Field 383 in Kakmasia Sub Location; that he was assigned account number 265788; that the appellant failed to harvest the plant crop and the subsequent ratoon crops when the same were mature and ready for harvesting.

3. The respondent particularized the loss and damage incurred for each of the three yield crops at Kshs. 432, 375/=. The respondent prayed for judgement against the appellant for damages of breach of contract, costs of the suit, interest and any other relief the court may deem just and expedient to grant.

4. In its defence dated 27/3/2018, the appellant denied the claim and put the Plaintiff to strict proof thereof. The appellant averred that since the alleged plot was located in Kakmasia Sub Location, the plant crop could only yield a maximum of 16.64 tonnes and the ratoon crops could only yield a maximum of 12.19 tonnes of sugarcane. The appellant further stated that it was paying sugarcane

farmers Kshs. 1,730/= per tonne. The appellant averred that the only relief available to the respondent was compensation of the plant crop if the claim were to be proven. The appellant prayed that the respondent's suit be dismissed with costs.

5. After the hearing, the Learned Trial Magistrate delivered his judgement on 29/6/2021. The trial court entered judgement in favour of the respondent in the sum of Kshs. 131,264/= for the plant crop and the 2 ratoon cycles, together with costs and interest from the date of filing the suit.

6. Being aggrieved by the said decision, the appellant commenced this appeal by a Memorandum of Appeal dated 28/7/2021 and preferred 5 grounds of appeal which can be summarized as follows: -

    1. The Learned Magistrate erred when he failed to find that the evidence led by the respondent was fundamentally and fatally at variance with the material aspect of the evidence on record;

    2. The Learned Magistrate erred in law and in fact when he entered judgment for the respondent against the appellant for the sum of Kshs. 131,264/= whilst the amount was neither specifically pleaded with sufficient particularity, nor proven strictly;

    3. The trial court erred in fact and in law by failing to make provision for transport and harvesting charges, when, in the circumstances, the trial Magistrate had the discretion and was duty bound to make provision for such charges.

7. The appellant prayed that the appeal be allowed and the judgement of the lower court be set aside and in its place, an order be made dismissing the respondent's suit with costs.

8. Directions on the appeal were taken that the appeal be canvassed by way of written submissions. Both parties complied.

9. The appellant filed its written submissions dated 7/11/1023 on even date and submitted that the trial Magistrate found that the contract was self-developed and the implication is that at the time when the contract was entered into, the respondent had already grown sugarcane on the plot of the subject contract; that this finding is contrary to the evidence which was availed before the court in the form of debit advice notes and job completion certificates.

10. It was also submitted that the contract commenced on 20/8/2013 but there was no proof of when the respondent's plant crop was planted. This was fundamental to determine the timelines for maturity and harvesting of the respective cane cycles. Hence, there was no basis for the trial court to find that there was any breach.

11. The appellant contended that the respondent's claim was that his loss arose because he cultivated three cycles to maturity but none was harvested. There was no allegation, pleading or evidence that the appellant's failure to harvest the plant crop compromised the development of and resulted in the loss of the two subsequent cycles; that the inference is that the respondent exposed himself to losses which he could have easily mitigated by terminating the contract in issue, which stood terminated by that breach.

12. The appellant submitted that the principal sum of Kshs. 131, 264/= was neither pleaded nor strictly proven; that the sum was beyond the scope of the pleadings and in excess of the sum the respondent would otherwise been entitled to as compensation. The appellant faulted the trial Magistrate for failing to make provision for transport, harvesting charges when he had the discretion and was duty bound to do so. It was submitted that had the contract been performed, the respondent would not have been paid gross proceeds of the sugarcane but the net proceeds thereof. The appellant submitted that it led evidence to show that it supported the respondent in the development of the cane but the court did not make allowance for such expenses which would ordinarily be deducted from the cane proceeds.

13. The respondent filed in court his written submissions dated 3/8/2023 on 14/8/2023. The respondent condensed the issues to be determined. On grounds 1, 3 and 4 the respondent submitted that his claim was for Kshs. 435,375/= and he provided the particulars thereof at paragraph 8 of the plaint; that he adduced evidence proving acreage, yields expected, pricing and the number of crop cycles; that he was not cross examined on it and his evidence was not challenged nor controverted. The trial court considered and adopted the price of the yields as proposed by the appellant at Kshs. 3,200/=, yields of 66.56 and 48.76 tonnes.

14. On ground 2, on the allegations that the evidence was at variance with the pleadings, it was submitted that the trial Magistrate considered the respondent's evidence alongside that of the appellant and where the evidence differed, the trial court admitted the evidence of the defence. The trial Magistrate therefore arrived at a decision on the totality of the evidence adduced by the parties.

15. On ground 4, it was submitted that the trial Magistrate considered the proved deductibles in his assessment of damages and discounted them from the award; that no harvest took place and no transport was undertaken; that there was no proof placed before the court of the expenses incurred but only an allegation by the party in breach. The respondent asked this court to uphold the decision of the trial Magistrate and dismiss the appeal with costs.

16. I have considered the appeal, both parties' submissions and the trial court's record. The following are the issues for determination: -

    i. Whether the respondent proved breach of contract.

    ii. Whether the respondent was entitled to damages awarded.

17. This being the first appellate court, 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. The court is guided by the decision in *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123.

18. On 14/11/2019, the suit came up for hearing in the lower court. The appellant's counsel was not present despite being duly served. The respondent testified as PW1. He produced his witness statements and the documents he intended to rely on as exhibits. Thus, the respondent's testimony was not challenged on cross examination.

19. The contract date is 20/8/2013. The survey certificate dated 1/5/2021, confirms the acreage of plot no. 533A to be 0.25 Ha. The job completion certificate confirm that the appellant planted, supplied the seed cane and fertilizer. The appellant is the one who did the planting. Therefore, it cannot now claim that it is unaware of when the plant crop was planted.

20. The front page of the appellant's office copy contract shows that the type of contract was to be self-developed cane. The respondent's copy on the other hand is not specific on the type of contract. However, the cane is initialized as "ND" - New Development. The appellant assisted the respondent to develop the cane by providing the initial requirements of fertilizer and seed cane. Since the respondent admitted to getting the assistance and this was proved by way of the job completion certificates, The trial court erred by finding that the cane was self-developed by the respondent.

21. Be that as it may, the appellant claims that there was no plant crop to be harvested since the respondent did not develop the same. The job completion certificate which shows when the planting was done is dated 29/9/2013. Clause 1 (f) of the contract provides that the plant crop was to be harvested not later than 24 months after planting. The plant crop should have been harvested on or before 29/9/2015. The warning letter which alleged that the respondent was poaching the cane without the company

recovering the outstanding bill is dated 4/2/2016. This shows that the appellant only took interest in the plant crop after the time for harvesting had lapsed. In the circumstances, it is the finding of this court that the appellant was the one in breach of the contract.

22. The appellant also claimed that the respondent did not plead with particularity his claim. In Paragraph 8 of the plaint, the respondent did particularize his loss and damages. This is a pleading of special damages.

23. On damages, the Court of Appeal pronounced itself as follows in *South Nyanza Sugar Company Limited v Owino Oreko* (Civil Appeal 138 of 2017) (2022) KECA 570 (KLR) (24 June 2022) (Judgment):-

> " 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...It seems to me, therefore, that the correct conclusion to draw from the circumstances of this case is that reached by the trial court that the respondent would be entitled to recover the loss in respect to the plant crop and the two (2) ratoons"

24. Therefore, if the appellant fails to harvest either of the crops in the cycle, it leads to a failure of the development of the other crop cycles and this constitutes a breach of contract. It is my finding that the respondent was entitled to damages for plant crop, the 1st and 2nd ratoon crops.

25. In considering the damages the Respondent was entitled to, the trial Magistrate relied on the acreage as per the survey certificate i.e 0.25 Ha. The trial court further relied on the cane yield report produced by the appellant which projected the average yields on the plant crop and ratoons to be 66.56 tonnes and 48.76 tonnes respectively. The trial court further relied on the price per yield produced by the appellant which showed that the plant crop would have been Kshs. 3,200/= at the time of harvest. The trial court further took into account the expenses the appellant already put into place when it supplied the respondent with fertilizer and seedlings.

26. On the harvesting and transport charges, this court is inclined to agree with the trial court that no evidence on the applicability of those charges was adduced. In any event, the actual harvesting and transportation did not take place so the court could not have speculated on the same.

27. In the end, I find that the trial Magistrate properly exercised his discretion and arrived at the correct findings. The appeal is devoid of merit and it is hereby dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 18TH DAY OF DECEMBER, 2023.

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Mr. Odero for the Appellant.

Mr. Oduk for the Respondent.

Emma & Phelix Court Assistants.