South Nyanza Sugar Co. Ltd v Oluoch (Civil Appeal 31 of 2022)
[2023] KEHC 26500 (KLR) (18 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26500 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 31 OF 2022

RPV WENDOH, J

DECEMBER 18, 2023

BETWEEN

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

AND

JOHN OULE OLUOCH ..... RESPONDENT

((An Appeal from the Judgement and Decree of Hon. R.K. Langat Senior Resident Magistrate (SRM) dated and delivered on 31/3/2021 in Rongo PMCC No. 721 of 2017)

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 31/3/2021. The appellant is represented by the firm of Okong'o Wandago & Co. Advocates while John Oule Oluoch (the respondent) is represented by the firm of Veronica Migai & Co. Advocates.

2. By a Plaint dated 27/12/2017, the respondent filed a suit in the lower court seeking compensation and/or payment for the expected tonnes of cane for 2 cycles, costs of the suit, interest an any other relief the court may deem just and expedient to grant. The respondent pleaded that he entered into a written agreement with the appellant to grow sugarcane on Plot No. 310 measuring 0.71 HA in Field No. 121 situated at Wasweta 1 Sub Location within Migori County and he was provided with Account Number 530390 by the appellant.

3. It was pleaded that the respondent developed the sugarcane as agreed but it is only the plant crop which was harvested; that the appellant failed to harvest the 1st ratoon despite frequent visits by the respondent to the appellant's offices; that it was a term of the agreement that the respective cycles of the cane would be harvested at the age of not less than 24 months for the plant crop and 22 months for the ratoons. The respondent pleaded that the plot could yield an average of 71 tonnes per hectare

and 1 tonne was valued at Kshs. 4,300/=. The respondent further pleaded the particular of negligence and breach of contract by the appellant.

4. In its defence dated 21/3/2018, the appellant denied each and every particulars of the claim as pleaded by the respondent in his plaint and put him to strict proof thereof. The appellant averred that it is the respondent who neglected to develop the 1st ratoon and as such, the 2nd ratoon could not be developed and he is setopped from making claims as against the appellant after breaching the terms of the contract. The appellant further particularized the breach of contract by the respondent and asked the trial court to dismiss the suit with costs.

5. After the hearing, the Learned Trial Magistrate delivered his judgement on 31/3/2022 and in favour of the respondent in the sum of Kshs. 197,436.80/= for the 1st and 2nd ratoon cycles, plus 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 12th April 2022 and preferred 6 grounds of appeal which can be summarized as follows: -

    1. The Learned Magistrate erred in law and in fact when he entered judgment for the respondent against the appellant for the sum of Kshs. 197,436.80/= whilst the amount was neither pleaded specifically with sufficiently particularity, nor proven strictly.

    2. The trial court erred in fact and in law in 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.

    3. The trial court erred in law and in fact when it ordered that interest on the principal award be computed from the date of filing the suit, as opposed to the interest being computed from the date of judgement and therefore, he exercised his discretion wrongly.

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. It is only the respondent who complied.

9. The respondent condensed the issues for determination into two; i.e whether the trial court erred in entering judgment for a sum of Kshs. 197, 436.80/=. It was submitted that it was not in dispute that the respondent had entered into a contract with the appellant for growing cane on 4/3/3012. The acreage on which the cane was developed was 0.71 hectares and the trial court adopted the cane price of Kshs. 3,200/=. The trial court adopted a figure of 43.45 tons per hectare while a different figure was pleaded by the respondent. From the foregone, the trial Magistrate exercised his judicial independence in entering the judgement.

10. On the issue of interest, it was submitted that the trial Magistrate acted judiciously when he ordered that interest on the principal award be computed from the date of filing suit. The respondent relied on the case of *Michael S. Odingo v South Nyanza Sugar Company Ltd* (2018) eKLR where the appellate court allowed an appeal on calculation of interest and allowed interest on special damages to start running from the date of filing suit.

11. I have considered the appeal, the respondent's submission and the trial court's record. The following are the issues for determination: -

    i. Whether the respondent was entitled to damages awarded.

ii. When should interest start running.

12. 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.

13. It is not in dispute that the parties entered into a contract which commenced on 4/3/2012. It was also admitted that the plant crop was harvested and the respondent was paid.

14. The appellant contended that the award of Kshs. 197, 436.80/= was neither pleaded nor strictly proved. In paragraph 4 of the Plaint, the respondent pleaded the particulars of the size of the plot where the sugar cane was to be grown and harvested. In paragraph 10 of the plaint, the respondent pleaded that the plot could give an average yield of 71 tonnes per hectare and each tone was valued at Kshs. 4,300/=. This in my view, is a specific pleading. The trial court rightly observed and relied on the cane yield report and the price per tonne to reach its finding on the price payable per tonne.

15. On the award of the 2nd ratoon, the Court of Appeal in *South Nyanza Sugar Company Limited v Owino Oreko* (Civil Appeal 138 of 2017) (2022) KECA 570 (KLR) (24 June 2022) (Judgment) 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."

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

17. On the issue of interest, the Court of Appeal in the case of *South Nyanza Sugar Company Limited v Owino Oreko* (supra) settled the issue by holding that since the award in sugar contracts are in the nature of special damages, they run from the date of filing the suit. The Court held as follows: -

> The objective for awarding interest is to ameliorate the loss suffered by a party who has been kept out of use of money that would otherwise be due to him. Although, by dint of the words of Section 26, the grant of interest is discretionary, it is a discretion to be exercised judiciously. One way of proper exercise of this discretion is to make an award that is in consonance with the underlying objective for which an order of interest is made. The indubitable outcome is that interest on special damages will be from the date of filing of suit as the money would have been due to the claimant at the very least on that date. General damages, which is the product of an assessment process by the court, is due on the date when the assessment is made which is in the judgment date. I have found that the damages due to the respondent are special in nature and I see no reason to depart from what is almost conventional that 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 that material time. The contract was then subject to the provisions of the

repealed Sugar Act (repealed on 1st August 2014 by the *Crops 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."

18. On the issue of deduction of the applicable statutory charges, this court has taken the position that it is a matter of fact which must be proved. The appellant did not plead in its defence the applicable statutory deductions or at the very least, lead evidence on the same. The appellant introduced the applicable statutory charges in its submissions. It is trite law that submissions are not a means of introducing evidence. The trial Magistrate did not err by failing to consider the applicable statutory charges.

19. In the end, I find that the trial Magistrate did not err and rightly exercised his discretion in making an award of Kshs. 197,436.80/= as damages for breach of contract by the appellant. The trial court also made a correct finding on the issue of interest on the damages. This appeal is therefore devoid of merit. It is hereby dismissed with costs to the respondent.

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

No appearance for the Respondent.

Emma & Phelix Court Assistants.