South Nyanza Sugar Company Limited v Bitengo (Civil Appeal 42 of 2019) [2022] KEHC 11440 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11440 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 42 OF 2019

RPV WENDOH, J

MAY 26, 2022

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED ..... APPELLANT

AND

NYAKWAMA MARSELA BITENGO ..... RESPONDENT

(An Appeal arising from the Judgement and Decree of Hon. R.K. Langat Senior Resident Magistrate (SRM) dated and delivered on 12/2/2019 at Rongo in Rongo PMCC No. 379 of 2017)

JUDGMENT

1. This is an appeal by South Nyanza Sugar Company Limited against the judgement and decree of the Hon. R.K. Langat (SRM) dated and delivered on 12/2/2019.

2. The appellant is represented by the firm of Otieno, Yogo Ojuro & Co. Advocates whilst the respondent is represented by the firm of Gembe Capis Omolo & Co. Advocates.

3. By a plaint dated November 17, 2017, filed evenly, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for damages in breach of the agreement, costs of the suit and interest.

4. It was the respondent's case that on or about 28/5/2014, the appellant and the respondent entered into an agreement for the appellant to, among others, inspect to maturity the respondent's 2.0 Ha sugar cane grown on Plot No. 171, in Nyataro and to programme the same for harvesting before authorizing the respondent to harvest and deliver the same to the appellant (plant crop, ratoon I and II).

5. The respondent pleaded that the appellant did not at the due date or at all, inspect and/or programme the said sugarcane and the appellant did not harvest the same and the sugarcane dried up thereby subjecting the respondent to loss and/or suffer damages.

6. The respondent further pleaded that the plot was expected to yield 90 tonnes and the price per tonne was Kshs. 4,300 and she claimed damages on that basis.

7. The appellant filed a statement of defence dated 15/1/2018 on 17/1/2018 in which liability was denied and the respondent was put to strict proof thereof. The appellant denied the existence of a contract between it and the respondent and therefore it did not owe the respondent loss of crop the on 2.0 Ha of land at the rate of 90 tonnes per hectare and payment of Kshs. 4,300/= per tonne for the expected 3 cycles.

8. It was pleaded that the plant crop having not been harvested, there could not have been any ratoon to grow and be available for harvest. Further, it was averred that it was the appellant's policy not to cut or harvest poorly maintained cane. The respondent failed to employ the recommended husbandry to the extent that the cane was overshadowed and dwarfed by weeds and totally destroyed, the appellant was entitled contractually not to harvest.

9. After the hearing, the trial court entered judgement in favour of the respondent for Kshs. 1,840,400/ = being the value of the plant crop and the ratoon cycles. Costs and interest were also awarded to the respondent and interest was to run from the date of filing the suit.

10. Being dissatisfied with the judgement and decree, the appellant filed a Memorandum of Appeal dated 24/2/2019 and preferred six (6) grounds of appeal which can be summarized into the following five (5) grounds as follows:

    a. That the learned trial magistrate erred in law and in fact by wrongly evaluating the evidence on record hence coming to a wrong conclusion;

    b. That the trial court erred in entering judgement on interest from date of filing suit when the same was not a liquidated claim as the amount could only be ascertained after trial;

    c. That the trial court erred in law and in fact in failing to evaluate the contract between the parties and to determine the obligations of the parties before entering judgement and also failing to consider the documents relied on in court by the appellants especially the contract book produced of 0.2 Ha plot areas;

    d. That the learned Magistrate misinterpreted the contract between the parties and the evidence that he arrived at was a wrong conclusion as to the import and effect of the evidence placed before him;

    e. The learned Magistrate erred in law and in fact to award the plaintiff three cycles yet the suit was prematurely filed in 2017 before the expiry of the contract in 2019; and no notice of termination of contract signed in 2014 was ever served by the respondent to the appellant before institution of the suit.

11. The appellant prayed that this 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.

12. The appeal was canvassed by way of written submissions and both parties complied.

13. The appellant filed its submissions dated November 24, 2021 on 8/12/2021. It submitted and analyzed six different issues.

14. On burden of proof, the appellant submitted that the respondent failed to tender evidence that the 1st and 2nd ratoons were nurtured and they were well taken care of through weeding and fertilizer application at the appropriate time. The respondent, failed to attach evidence in form of phots of the

matured cane or any report showing that the same was reported to the appellant. It is the appellant's submission that the respondent failed to discharge the burden of proof on the allegations as provided for under Section 107 of the *Evidence Act*.

15. On the ratoons, it was submitted that since the respondent did not adhere to the terms of the contract, she was not entitled to the compensation for all the cycles. The appellant relied on the case of Pancras Onyango v South Nyanza Sugar Company where the plaintiff's claim for the 1st and 2nd ratoons was denied. The court only made an award for the 1st ratoon he had developed and nurtured.

16. On the contractual duties of the parties, it was submitted that clause 3.1.2 outlined the duties of the appellants and by implication, the duty of the appellant was to authorize the harvesting and not do the harvesting. The appellant contended that harvesting is done by the grower/farmer and relied on the case of *Philip O. Matunga v South Nyanza Sugar Company* [202] eKLR. The appellant further submitted that the respondent failed to take reasonable steps to mitigate the loss and relied on the case of *African Highland Produce Limited v John Kisorio* [2001] eKLR.

17. It was also submitted that the respondent filed the suit prematurely. The parties entered into a contract in 2014 for a period of 5 years. By effluxion of time, the contract was to end in 2019 but the suit was filed in 2017. Further, the respondent did not issue any notice of termination before she filed the suit. On the plot area, the appellant relied on the contract book which averred that the plot area is 2.0 Ha. However, the contract book and the defendant's statement indicated that it was 0.2 Ha and not 2.0 Ha. The respondent did not produce a surveyor's certificate in that respect.

18. The respondent filed submissions dated December 29, 2021 on 3/1/2022. She submitted that the appeal is incompetent, incurable and fatally defective. The respondent submitted that the appeal contravenes the mandatory provisions of Order 42 Rule 13 (4) of the *Civil Procedure Rules*. Reliance was further placed in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR and the Court of Appeal Case in *IEBC & Another v Stephen Mutinda Mule & 3 Others* [2014] eKLR. The respondent's position is that the record of appeal omitted the defendant's statement and exhibits respectively adopted and relied on in the lower court.

19. From the foregone, the respondent submitted that the court is divested of jurisdiction to consider the appeal and the same should be struck out with costs to the respondent.

20. I have considered the record of appeal, rival submissions and the lower court proceedings. The issues which arise therefrom are:-

    i. Whether the appeal as filed is competent.

    ii. Whether the respondent proved his claim.

    iii. Whether the respondent is entitled to the damages awarded.

21. 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. See the decision in *Selle & Another v Associated Motorboat Co. Ltd* (1968) EA 123.

22. 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."

23. On whether the appeal filed is competent, the respondent submitted that the appeal is incompetent as the defendant failed to include its statement and exhibits which it relied in the trial court.

Order 42 Rule 4 of the *Civil Procedure Rules* provides:-

> " Before allowing the appeal to go for hearing, the Judge shall be satisfied that the following documents are on the court record, and that such of them as are as not in the possession of either party have been served on that party, that is to say:-
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> the memorandum of appeal;
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> the pleadings;
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> (c) the notes of the trial magistrate made at the hearing;
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> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
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> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
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> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal..."

24. The wordings of the above provision use the word **'shall'** that is to mean, it is couched in mandatory terms that the inclusion of the above documents are necessary to form part of the record of appeal for it to be a competent record.

25. The Supreme Court in Bwana Mohamed Bwana (*supra*) the learned Judges observed that:-

> " Without a record of appeal a Court cannot determine the appeal before it.Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A court cannot exercise its adjudicatory powers conferred by the law, or the *Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. In the Nigerian Supreme Court Case, *Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 others*, SC. 11/2012, Judge Bode Rhodes-Vivour JSC highlighted the pertinent issues of jurisdiction:
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> 'A court is competent, that is to say, it has jurisdiction when –
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> 1. It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

2. The subject matter of the case is within its jurisdiction, and no feature in the case prevents the court from exercising its jurisdiction; and

3. The case comes before the court initiated by the due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction"

26. I have carefully considered the record of appeal prepared by the appellant dated 2/10/2020 and filed in court on 8/10/2020. In its index of documents, there is no indication of the page where witness statement, defence and the documents which it relied upon . Even in the documents themselves which form part of the record of appeal, assuming that the statements and the documents are not indicated in the index, yet they do not form part of the Record of Appeal.

27. I have also taken time to peruse the lower court file. The appellant filed a witness statement of one Geroge Ochieng its Senior Field Supervisor on 3/12/2018 and the list of documents were filed on 3/3/2018. They are however omitted from the Records of Appeal.

28. Order 42 Rule 4 of the *Civil Procedure Rules* (*supra*) is particular on the documents mandatorily required to form part of the record of appeal. Part of the documents include pleadings and the documents put before the magistrate as evidence. The defence, witness statements and the documents which the appellant relied up on, form the pleadings of the appellant.

29. Order 11 Rule 2 of the Rules provides for pre-trial questionnaires. The order states "after close of pleadings...". This means that the respondent and the appellant's documents are collectively pleadings. Hence, the appellant's documents which were relied on in the trial court, should be pleadings which must form part of the record of appeal for it to be complete.

30. Can this omission be cured by Article 159 (2) (d) of the *Constitution* as a technicality? In *Raila Odinga v IEBC & Others* [2013] eKLR, The Supreme Court held:-

> " Article 159 (2) (d) of the *Constitution* simply means that a court of law should not pay undue attention to procedural requirements as the expens of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural requirements as they seek justice from court."

31. In *Law Society of Kenya v Centre for Human Rights and Democracy & 12 Others* the court said:

> " The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower court, without which the appellate Court would not be able to determine the appeal before it."

32. Guided by the above binding decision of the Supreme Court, this court finds no reason to deviate from the above findings.

33. If at all the appellant had noticed the anormaly even after filing submissions, and before this matter was reserved for judgement, there was still room for the counsel to seek leave to file a supplementary record of appeal to correct the anormaly. The court would have considered the application with a view to doing substantive justice to the parties.

34. There is no other step that this court can take since, in the absence of a complete and proper record of appeal, it is devoid of jurisdiction.

35. I therefore strike out the appeal with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 26TH DAY OF MAY, 2022.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Odhiambo for the Appellant.

N appearance the Respondent.

Nyauke Court Assistant.