South Nyanza Sugar Company Limited v Ogake (Civil Appeal 149 of 2018) [2022] KEHC 11021 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11021 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 149 OF 2018

RPV WENDOH, J

JULY 29, 2022

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED ..... APPELLANT

AND

DAUDI MAUTI OGAKE ..... RESPONDENT

(An Appeal arising from the Judgement and Decree of Hon. R.O. Odenyo Esq. Senior Principal Magistrate Migori dated and delivered on the 12 th day of September, 2018 in Migori SPMCC No. 935 of 2016)

JUDGMENT

1 The appellant herein, South Nyanza Sugar Company Limited, filed the instant appeal against the judgement and decree of Hon. R.O. Odenyo dated and delivered on 12/9/2018 in Migori SPMCC No. 935 of 2016.

2. The firm of Okong'o Wandago & Co. Advocates is on record for the appellant. The respondent is represented by the firm of Kisia & Co. Advocates.

3. By a plaint dated 6/9/2016, the respondent filed a suit against the appellant for damages for breach of contract. The respondent prayed for a declaration that the appellant is in breach of the cane contract and the value of the unharvested sugarcane, costs of the suit and interests at court rates.

4. The gist the respondent's case was that by a written agreement dated 9/4/2008, the appellant contracted the respondent to sell to it sugarcane on his land parcel being Plot No. 1183, Field No. 84, vide Account No. xxxx; that the plot was measuring approximately 0.2 hectares; that upon maturity, the respondent asked the appellant to harvest the cane but the appellant unreasonably and in breach of the contract refused or failed to harvest the 1st and 2nd ratoon. The respondent particularized the breach on the part of the respondent.

5. It was further pleaded that as a result of the said breach of contract, the respondent suffered loss of approximately 27 tons for the 1st and 2nd ratoons. The respondent pleaded that the price per ton at the time of the contract ranged between Kshs. 2,500 - 3,000/=.

6. The appellant entered appearance and filed a statement of defence dated 1/11/2016. The appellant denied the contents of the respondent's plaint. It was averred that it provided input and other services to the respondent to facilitate sugar cane growing but in breach thereof, the respondent failed to develop the sugarcane on the plot after the plant crop and abandoned the same soon thereafter and never developed the ratoons at all.

7. The suit proceeded to hearing. The appellant presented its case through Richard Muok its Senior Field Supervisor as DW1. The respondent testified as PW1. The trial Magistrate rendered his judgement in favour of the respondent and awarded him Kshs. 81,162/= together with costs and interests for the loss suffered.

8. The resultant judgement and decree of 12/9/2018 gave rise to this appeal. The appellant preferred 9 grounds of appeal. Directions were taken and the appeal proceeded by way of written submissions. The appellant filed its submissions dated 8/11/2021 on even date. The respondent did not file his submissions. The appellant submitted on the following issues: -

    i. The competency of the appeal.

    ii. Merits of the appeal.

    iii. Whether the respondent proved the pleaded breach of contract.

    iv. Whether the principal award of Kshs. 81, 162/= was justifiable, right and lawful.

    v. Whether the order on interest was legal and appropriate in the circumstances of the suit.

9. On the competency of the appeal, it was submitted that the appeal was filed out of time but by an order of Mrima J on 23/10/2018, this appeal was validated and thus it is competent.

10. On the merits of the appeal and whether the respondent proved the pleaded breach of contract, it was submitted that the original contract was not produced in the court record but only a partial copy of it. The copy that was produced had 2 pages namely; Schedule A which contains the particulars of that contract and the execution part thereof. Hence, there was no proof the terms of that contract.

11. On whether the principal award of Kshs. 81,162/= was justified, it was submitted that there was no satisfactory evidence produced to show that the respondent had developed the 1st ratoon to maturity and notified the appellant to harvest the same. To rebut this position, the appellant relied on the findings in Migori HCCA No. 47 of 2019 *South Nyanza Sugar Company Ltd vs Francis Aderi Dedege* (unreported) and *Jael A. Omolo vs South Nyanza Suga Co. Ltd* (2019) eKLR.

12. On the award of interest, it was submitted that it was vague on when it was to start running. The learned trial Magistrate did not specify in his judgement the date on which the interest on the principal award would run. The appellant urged this court to find that interest should accrue from the date of the subordinate judgement.

13. It is well settled that the role of an appellate court, is to revisit the evidence on record, evaluate it and reach its own findings. The court also appreciates that it 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. See

the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123) and the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* (1988) eKLR.

14. I have read and understood the record of appeal as a whole and the written submissions of the appellant. The issues for determination which arise therefrom are: -

    a. Whether the record of appeal is competent.

    b. Whether the respondent proved his case.

    c. Whether the respondent is entitled to damages.

    d. When should interest start running?

15. On the first issue, I noted an anomaly in the record of appeal. Although the issue has not been taken up any either of the parties, especially the respondent, I will address it as it goes to the root and competency of this court to determine the appeal.

16. 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:-
>
> a. the memorandum of appeal;
>
> b. the pleadings;
>
> (c) the notes of the trial magistrate made at the hearing;
>
> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
>
> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
>
> (emphasis)
>
> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal..."

17. The wording 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.

18. The appellant submitted that the contract produced by the respondent was not complete. It only contained Schedule A and the witness part at page 58 line 1 - 20 of the record of appeal. I believe the contract which the appellant is referring to is the one at pages 44 and 45 of the record of appeal. It was further submitted that the contract in question is dated 20/9/2006. The contract document which was filed as part of the record of appeal bears the name of one 'Lilian Achieng Owounda.' The payments made in respect to the filed contract also show that it was done to 'Lilian Achieng Owounda.' The suit and the appeal in question is in relation to 'Daudi Mauti Ogake.'

19. In the trial court, the contract which was produced by the respondent as "Exhibit 1" is dated 9/4/2008 between South Nyanza Sugar Company Limited and Daudi Mauti Ogake. There is no evidence in the court record that a contract for 'Lilian Achieng Owounda' was produced. Order 42 Rule 4 (supra)

provides that the only documents which should form part of the record of appeal are those which were produced in evidence before the Magistrate. The contract of 'Lilian Achieng Owounda' and the documents relating to payment in her account never formed part of the evidence before the trial court. The contract that should have formed part of the record of appeal is the contract which was produced in the trial court.

20. In the absence of requisite documents which are omitted, the record of appeal cannot be said to be complete. This was the finding by the Supreme Court in *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others* (2015) eKLR that where documents are omitted from the bundle, the appeal is incomplete, defective for failing to meet the requirements of the law. It is the finding of this court that there is no competent appeal before it for consideration for failure to properly adduce the documents relied on in the trial court and introducing strange documents at the appellate stage. It is incompetent, defective for failure to comply with the law.

21. Another rather interesting observation which I have made is in the difference of the contents of paragraph 3 of the plaint filed in the trial court and the one which forms part of the record of appeal. In the plaint filed in the trial court, at paragraph 3 it was pleaded:-

> "On or about the April 9, 2008 the plaintiff and the defendant entered into an agreement. Contract whereby the plaintiff was to cultivate/develop sugarcane on Plot No. 1183, Field No. 84, vide Account No. xxxx and by the terms of the said contract/agreement, the defendant was to purchase/harvest the sugar cane on maturity and pay the plaintiff and the value thereof."

23. In the plaint, which is part of the record of appeal, paragraph 3 states:-

> "On or about the September 20, 2006 the plaintiff and the defendant entered into an agreement. Contract whereby the plaintiff was to cultivate/develop sugarcane on Plot No. 51, Field No. 522, vide Account No. xxxx and by the terms of the said contract/agreement, the defendant was to purchase/harvest the sugar cane on maturity and pay the plaintiff and the value thereof."

24. The plaint in the record of appeal varies from the plaint in the trial court and in particular on the dates when the agreement was entered into, the plot, field and account number. The plaint in the trial court was not amended either in writing or orally. I do not know what to make of the differences in the two plaints neither does this court wish to speculate on what may have transpired for there to be such significant differences but it certainly raises eyebrows.

25 Flowing from the above, there is no competent appeal before this court for consideration. I find no need to go into considering the other issues. The appeal is hereby struck out with costs to the respondent.

Dated, Delivered and Signed at Migori this 29th DAY OF July 2022.

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Ms. Otieno for the Appellant.

N/A for the Respondent.

Nyauke - Court Assistant.