South Nyanza Sugar Co. Ltd v Okech (Civil Appeal 111 of 2018)
[2022] KEHC 10355 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 10355 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 111 OF 2018

RPV WENDOH, J

JULY 29, 2022

BETWEEN

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

AND

DANIEL OCHIENG OKECH ..... RESPONDENT

(An Appeal from the Judgement and Decision of the Lower Court, Mr. R.K. Langat Resident Magistrate (RM) dated 16/8/2018 in the Original RONGO PMCC No. 157 of 2016)

JUDGMENT

1. The appellant herein, South Nyanza Sugar Company Limited, filed the instant appeal against the judgement and decision of Hon RK Langat in Rongo PMCC No 157 of 2016 dated and delivered on 18/8/2018.

2. The firm of Otieno, Yogo, Ojuro & Co. Advocates is on record for the appellant. The respondent is represented by the firm of Ochillo & Co. Advocates.

3. By a plaint dated 14/3/2016, the respondent filed a suit against the appellant for damages for breach of contract. The respondent prayed for compensation for loss of crop on 0.8 hectares at the rate of 80 tonnes, calculated at Kshs 3,128 per tonne for the expected three (3) cycles, costs of the suit, interest at court rates from 6/8/2010 until payment in full and any other relief.

4. The gist of the respondent's case was that by a written agreement dated 6/8/2010, the appellant contracted the respondent to sell to it sugarcane on his land parcel being Number 205B in Kakmasia Sub - Location measuring 0.8 hectares; that the respondent was assigned account number xxxx and planted the cane as agreed; that it was both an express and implied term of the contract that the agreement would commence on 6/8/2010 and would last for a period of 5 years, or until one plant crop and two ratoon crops of cane are harvested or whichever period shall be less. The respondent

contended that the appellant failed to harvest the same when it was mature and ready for harvesting leading to waste which he suffered loss and lost bargain and expected profit from the three (3) cycles.

5. The appellant filed a statement of defence dated 31/3/2016 in which liability was denied. The appellant faulted the respondent for abandoning the farm despite the input and services which it put on credit on the respondent's farm.

6. The suit proceeded to hearing and the trial Magistrate awarded the respondent damages in the sum of Kshs 100,117.95, costs and interest from the date of filing suit. The impugned judgement gave rise to this appeal.

7. Directions were taken and the appeal proceeded by way of written submissions where both parties duly complied. I have certainly considered and appreciated the record of appeal as a whole and the rival arguments by both parties.

8. 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.

9. 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.

10. 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;
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> (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;
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> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
>
> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal..."

11. 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.

12. The record of appeal as filed is incomplete. The record of appeal does not have pages 2 and 4 of the court proceedings which I suppose should contain the testimony of the appellant's witness and the respondent. To the contrary, the original file shows that the appellant and the respondent presented

their cases through their respective witnesses who had testified. Pages 2 and 4 of the proceedings in the trial court were clearly missing at pages 67 to 69 of the record of appeal.

13. The grounds of appeal faulted the trial court for awarding the respondent two cycles of ratoon instead of one. The transcript of the witness testimony is crucial as it would have enabled this court to establish whether the witnesses touched on the issue of the development of the ratoons. This court has taken the liberty to peruse the original file but there is no copy of the typed proceedings in the file.

14. The consequences of an incomplete court of record are well settled. The Supreme Court in *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others* (2015) eKLR 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:
>
> > 'A court is competent, that is to say, it has jurisdiction when –
> >
> > 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'"

15. Article 159 cannot come to the aid of the appellant. In *Raila Odinga vs 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 at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural requirements as they seek justice from court."

16. Flowing from the above, there is no competent appeal before this court for consideration and therefore there is no need to consider 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;

N/A for the Appellant.

N/A for the Respondent.

Nyauke Court Assistant.