



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 143 OF 2019

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

versus

GEORGE OMOLO NGESO.....RESPONDENT

(An appeal from the Judgment of Hon M. Wachira Senior Resident Magistrate Migori in Migori PMCC No. 31 of 2014 delivered on 5th day of November 2019)

JUDGMENT

George Omolo Ngeso, the respondent, formerly plaintiff, filed Migori CMCC 2691/2015 against South Nyanza Sugar Co Ltd (the appellant, formerly the defendant) seeking a declaration that the appellant was in breach of the cane contract; the value of the unharvested cane, costs of the suit and interest. The trial court rendered its judgment on 5/11/2019 in favour of the respondent for Kshs. 339,620/40.

The appellant being dissatisfied with the said judgment, preferred this appeal based on six grounds of appeal vide the Memorandum of Appeal dated 3/12/2019. The grounds can be condensed into three issues namely:

- i) Whether the plaintiff was properly identified;**
- ii) Whether the appellant was liable for breach of contract;**
- iii) Whether the awards on the ratoon crops should be set aside.**

The Respondent had pleaded in his plaint that he entered into a contract with the appellant to grow and develop sugarcane on plot No. 1453 (0.4ha) under farmers account number 264497. They signed an out growers cane agreement with the appellant on 28/8/2019 in which the respondent was to grow cane and upon maturity, sell it to the appellant. It was the testimony of the Respondent and his witness that the appellant failed to assist in the development of the cane and upon maturity, the appellant declined to harvest the cane as a result of which the ratoon was compromised.

The appellant had filed a defence on 14/3/2016 in which the contract and alleged loss were denied and instead, it was pleaded that if the respondent suffered any loss, he was the author of his own misfortunes by failing to properly maintain his crop to the required standard and harvesting the cane would have been uneconomical.

The court directed that the appeal be disposed of by filing of submissions. The firm of **Moronge & Co Advocate** filed submissions on behalf of the appellants.

On the first issue of the Respondent's identity, it was submitted that the Respondent produced a different identity card from the one he had entered in the cane agreement and his explanation was that he had lost his identity card. It is the appellant's submission that the person who testified in court was not the person who contracted with the appellant; that though the issue of identity was raised in cross examination, the respondent did not bother to call evidence to clarify the issue and that the trial court did not address the issue. It was also submitted that the respondent's evidence was contradictory, first on the issue of identity and secondly though the respondent and that his witness was Opiyo, the contract indicated that it was Pitalis O. Mikwayo and that the contract was signed in Kakmasia and not Sakwa as alleged by the Respondent. Lastly, that the contract as captured in Schedule A as SD (Self Developed) and not INCC (initially Non –Contracted Cane).

On liability, it was submitted that there is an issue of the contracting parties is not resolved and the trial court failed to address it, the respondent is a stranger to the agreement, and therefore the terms of the contract cannot as regards the prayers, it was submitted that the respondents never sought prayer for ratoon crops, that though the ratoon crops was alluded to in the plaint, the respondent did not seek any prayer thereon and only prayed for the value of the "unharvested sugarcane." The appellant therefore prays for the setting aside of the award on ratoon cycles in the event that the suit is not dismissed.

The Respondent's counsel, **Kerario Marwa**, submitted in reply, that the respondent properly identified himself and produced his identification card and that the appellant had all the time to rebut his evidence but failed to do so by filing a formal application to have the plaintiff stood down; so that his testimony to be expunged from the record nor was any formal report of fraud made to the police; that DW1 also stated that the details in the contract book are filed by the representatives of the appellant and it was the duty of the appellant to ensure that the names and identifications are entered properly.

On liability, it was submitted that the contract between the respondent and the appellant is not denied; that three harvests were to be done but none was done.

As to whether the award on ratoon crops should be set aside, counsel submitted that the law is that ratoon crops need not be specifically pleaded as they are a natural crop cycle arising from the sugarcane crop. Counsel relied on the decision of **Ngina Gitiba =vs= South Nyanza Sugar Co Ltd (MGR)HCC 24 OF 2015**.

I have given the grounds of appeal and the rival submissions due consideration. There is no doubt that a Growers Cane Farming and Supply contract was entered into between the appellant and a grower by name George Omollo Ngeso on 28/9/2009 for a period of five years or until one plant crop or two ratoons of sugar cane had been harvested from the subject parcel of land. The subject land was plot No. 1453 measuring 0.4 HA in KM Zone E. The first issue that the appellant has raised is whether PW1 who testified in court is the same person who entered into the contract with the appellant.

At paragraph 2 of the appellant's defence, the appellant had denied the contents of paragraph 3 of the plaint where it was pleaded that the Respondent had entered into an agreement for the purchase or harvest of sugarcane upon maturity. During the cross examination of PW1, he was asked for his identity card. He produced an identity card number 3381073. It is obviously different from the identity card number entered in the contract document which is 8148094. PW1's explanation for the difference in the identity cards is that he had once lost his identity card and was issued with a different one. Once the appellant raised the issue of difference in the identity card numbers belonging to the same person, the onus rested on the respondent to prove that the two identity cards belong to one and the same person, that is the respondent. PW1 did not indicate when he lost the identity card or whether he was ever issued with a Police abstract form. One would have expected the respondent to seek an adjournment to call an officer from the Registrar of persons to confirm that the two identity cards belonged to one and the same person i.e the respondent. The appellant did not have any duty to prove that the identity cards belonged to the different people. In any event, this was the respondent's case and it was his duty to prove on a balance of probability, that he is the person who entered into the cane contract with the appellant. I do not think that I am wrong to take judicial notice of the fact that when one loses an identity card and is issued with another, the identity card number always remains the same.

In addition to the above, in his testimony, the respondent told the court that his agent was Opiyo Kawaka. However, the contract document produced in court clearly shows that the agent was Pitalis O. Mikwaya. He signed the agreement as Odero Mikwaya not Opiyo. This was another glaring contradiction in the respondent's case but no evidence was called to clarify whether Pitalis O. Mikwaya is also known as Odero and Opiyo. Again; the contradiction goes to buttress the question as to whether indeed PW1 is the person who entered into the cane Growers agreement with the appellant. Though the issue of PW1's standing in the matter was raised in the defence and at the hearing, the trial court did not bother to tackle this very crucial issue. Having failed to prove that PW1 was the person who signed the cane Growers contract with the appellant, then the other issues of liability and award must fall by the way.

In the end, I find merit in the appeal. I allow the appeal and set aside the award made by the trial court and dismiss the respondent's claim with costs in the trial court and appeal, to the appellant

DATED, SIGNED AND DELIVERED AT MIGORI THIS 18TH DAY OF MARCH, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of

No appearance for counsel

Oloo Court Assistant