



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 4 OF 2019

ODHOCH NYAMBUGAAPPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD..... RESPONDENT

(Being an appeal from the judgment and decree of the Senior Resident Magistrate Hon. S.N. Makila dated 26th October 2018 in CMCC No. 721 of 2005 Kisii)

JUDGMENT

1. The appellant is aggrieved by the trial court's decision to dismiss his suit against the respondent. He had sued the respondent for breach of an agreement dated 4th January 1996, whereby the defendant had contracted him to grow and sell to it sugarcane on his parcel of land measuring 0.2 hectares being parcel no. 145 in field no. 84, in Kakmasia sub-location. He averred that he was assigned account number 260861 and had planted the cane as agreed. He claimed that it was an express term of the contract that the agreement would commence on 4th January 1996 and would remain in force for a period of 5 years or until one plant crop and two ratoon crops of sugarcane were harvested on the plot, whichever period was less. Within that period, the plant crop and ratoon crop cane would be harvested at the ages of 22-24 months and 16 to 18 months after planting and subsequent harvest.
2. However, in breach of the contract, the respondent only harvested the plant crop and ratoon I but failed to harvest ratoon II when it was mature and ready for harvesting. The appellant claimed that the breach of the contract by the respondent had caused him to suffer loss for which he sought damages.
3. The respondent refuted all averments made by the appellant in its statement of defence. It claimed that the appellant had only developed the plant crop and ratoon I but deliberately failed to develop ratoon II which he abandoned. It also denied the appellant's claim that his plot could yield 135 tonnes per acre and stated that the sugar cane yield in the appellant's sugar belt was only 60 tonnes per hectare. The respondent also contended that the appellant's suit was defective as general damages were never awarded for breach of contract and also claimed that the suit had been filed outside the period of limitation without leave.
4. As the first appellate Court it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter bearing in mind that it did not hear the witnesses testify. (See *Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123*).
5. Samson Okongo Olik (PW1) testified before the trial court on behalf of the appellant who was his father. He adopted his statement as his evidence and his documents as exhibits and added that the cane was only harvested twice but the respondent did not harvest the cane the third time.
6. During cross-examination, PW1 stated that his father had suffered a stroke ten years before and could not even talk. He explained that he had signed in the agent book that he would act for the appellant but admitted that did not have a power of attorney to appear in the case. He also testified that the appellant had gotten 135 tonnes per hectare from the 1st ratoon although he could not recall when it had been harvested.
7. The respondent's senior field officer at the time, George Ochieng' (DW1), also adopted his statements and list of documents as his evidence. In cross-examination, DW1 stated that the date of the contract in question was 4th November 1996 and was to lapse after a period of 5 years on 4th January 2001. He admitted that the plant crop and ratoon I were harvested but ratoon II was not harvested. He also testified that the farmer was given a notice on 30th April 2003 warning him for cane diversion.
8. The trial court's decision to dismiss his suit for the reason that he was the one in breach of the contract provoked the appellant to file this appeal. He enumerated the following grounds of appeal against the trial court's decision:

a. The learned trial magistrate failed to find in fact that as plant crops was harvested on 27/10/2001(Dexh.1), Ratoon I on 27/10/2003 (D. Exh 3) the contract was already breached by virtue of late harvests outside the contract period which ended on 4/1/2001 and that indeed the defendant was in breach of the whole contract and thus liable;

b. The trial magistrate erred in law and in fact in failing to disregard evidence on an issue i.e. that of abandonment of sugarcane, when the same was not proved to the required standards;

c. The trial magistrate erred in law and in fact by relying on an alleged letter dated 4/5/2003 to disentitle the plaintiff judgment when no such letter existed and the exhibited letter dated 30/4/2003 was dated 2 years outside the 5 years' contract period and obviously made up to defeat the plaintiff's claim.

d. The learned trial magistrate erred in law and in fact by failing to find that the said letter dated 30/4/2003 (or 4/5/2003) was not compliant with the contract and went to proof of no issue.

9. The appellant's counsel, Mr. Oduk, submitted these grounds of appeal in his written submissions and the respondent's learned counsel Mr. Odero also filed his written submissions opposing the appeal.

10. Having considered the submissions and the memorandum and record of appeal, I find that the three main issues raised in the appeal can be summarized as follows:

a. Whether the trial court erred in finding that the appellant was in breach of the contract;

b. What amount of damages would be sufficient to compensate the appellant if he suffered loss; and

c. When interest on the award should begin to accrue.

11. The appellant's counsel argued that the respondent was the one in breach of the contract, for failing to harvest the cane as per the time lines stipulated in the contract. According to counsel the respondent was actually liable for all 3 harvests but was lucky that the appellant had confined his claim to ratoon II only. He urged this court to dismiss the argument that the farmer had neglected the plantation since the respondent had harvested the plant crop on 27th October 2001 and ratoon I on 27th October 2003, thereby compromising the crop.

12. He further argued that the plaintiff's statement showed that the plant crop was harvested on 31st January 2003 but by acts of erasure and alterations, the defence exhibits showed that the plant crop was harvested on 27th October 2001. He pointed out that the exhibit marked DW3 was an incomplete statement for a different plot which had been altered to read plot 145. And in any case, both fell outside the contract period and were irrelevant to prove any fact.

13. Concerning the warning letter, counsel submitted that as of 30th April 2003 when the letter was issued, the contract had already lapsed. He submitted that the letter was inconsequential in view of the paragraphs 4, 10(a) and (g) and 11 of the contract. The case of **South Nyanza Sugar Co. Ltd vs. Ezekiel Oduk HCCA No. 80 of 2017**, was relied on in support of this submissions. Counsel urged this court to allow the plaintiff's claim for damages plus costs and interest from the date of filing the suit.

14. On the other hand, Mr. Odero, argued that in the case of **South Nyanza Sugar Company Ltd v Dickson Aoro Owuor, Migori HCCA No. 86 of 2015 [2017] eKLR** the court had held that time begins to run when the first crop cycle was not harvested for limitation of actions. Therefore, if the appellant was of the opinion that the entire contract was breached by the respondent when it failed to harvest the plant crop within the time stipulated in the agreement then the appellant ought to have filed his suit as against the respondent at the initial alleged breach. He submitted that the area assistant chief had received a letter dated 30th April 2003 warning the appellant of the state of his ratoon II crop cycle in accordance with the contract.

15. Regarding the award of damages, counsel submitted that yields for the plant crop could not be the same as those of ratoon crops as the sugar cane yields reduced as the cycles went by. Counsel assailed the sugarcane productivity reports relied on by the appellant as they related to a study carried out 5 years before ratoon III was harvested. Instead, he referred the court to the Cane Yield Report produced by its witness, for the average yields in the appellant's locality. From that report, ratoon II would have yielded 9.752 tonnes of sugarcane which would entitle the appellant to a sum of Kshs. 16,870.96/=. Counsel submitted that this amount had to be subjected to various deductions hence the cumulative award due to the appellant would be Kshs. 10,595/=.

16. On interests, counsel urged this court to consider that awarding interest from the date of filing suit before the trial court would amount to penalizing the respondent for the appellant's failure to prosecute his suit diligently.

ANALYSIS AND DETERMINATION

17. The existence of an agreement between the appellant and the respondent for cultivation of sugarcane on the appellant's plot No. 145 is not in issue. PW1 produced the Outgrowers Cane Agreement he signed on behalf of the appellant, which took effect on 4th January 1996 and was to remain in force for a period of 5 years or until one plant or two ratoon crops of sugar cane were harvested on the plot whichever period was less, according to Clause 1 thereof.

18. In **Martin Akama Lango v South Nyanza Sugar Co. Ltd Kisumu HCCA No. 20 of 2000 (UR)**, the court interpreted a similar clause thus;

“The contract must be interpreted in the spirit that it was made, and that is it was meant to benefit both parties economically and for the appellant to maximise his profits, the more harvest he makes the more profits he would make.

I think the trial magistrate interpreted the provisions of clause 1 of the said agreement narrowly and had she applied a liberal interpretation she shouldn't have come to that conclusion. The clause says the agreement, “remains in force for a period of five years or until one plant and two ratoon crops are harvested on the plot.”

To my mind what that means especially the last part is that one plant and two ratoon crops must be harvested in fulfilment of the obligation of the parties agreement...

When the Respondent failed to do the harvesting and waited until the crop was burnt by arsonists, it was in breach of the terms of the agreement and had the trial magistrate correctly interpreted the provisions of the said agreement, she should have held that the respondent was in breach of the contract and liable to pay damages.”

19. The parties are in agreement that cane was planted on the appellant's land as agreed and that the plant crop and ratoon I were harvested but ratoon II was not harvested. The appellant and respondent each blame the other for the failure to harvest ratoon II. On the one hand, the appellant claims that the respondent had all along been in breach of the contract by failing to harvest the three crop cycles in time hence compromising the crop but he nevertheless chose to claim compensation for only one crop cycle being Ratoon II. In contrast the respondent claims that the appellant was the one in breach as he abandoned the last crop cycle.

20. The statement produced by PW1 indicates that the Plant Crop was harvested on 31st March 2003 while the statement produced by the respondent showed that the Ratoon I was the crop cycle that was harvested on 31st March 2003. The respondent's statement was initially similar to the appellant's, but the crop cycle was amended by cancelling the word Plant Crop and inserting the letters “RI” for Ratoon I. The respondent also produced a statement indicating that the Plant Crop was harvested on 21st October 2001 which had also been amended by inserting the appellant's plot number 145 and cancelling the average yield of 122.4 and inserting 61.2.

21. It is likely that the respondent may have improperly amended its exhibits as argued by the appellant's counsel but the production of the documents before the trial court was not challenged nor was the issue ever brought up before the trial court.

22. I similarly reject the appellant's argument that the trial magistrate erred by failing to find that the respondent breached the contract by harvesting the Plant Crop and Ratoon I outside the stipulated time lines as the claim before the trial court was only confined to Ratoon II. The contract between the appellant and the respondent commenced on 4th November 1996. It was expected that the Plant Crop would have been harvested by 4th November 1998, 24 months later and Ratoon I by 4th May 2000, 18 months later. However, the respondent claimed that it harvested the Plant Crop on 27th October 2001 and Ratoon I on 27th October 2003, many months after the stipulated timelines. While I might agree with the appellant that the respondent was liable for late harvest of the Plant Crop and Ratoon I, I find that he is not allowed to claim that the respondent breached the contract by failing those crop cycles within time, since his claim was for Ratoon II only. The appellant is bound by his pleadings and cannot be permitted to travel beyond the issues raised in his pleadings. (See *Raila Amolo Odinga & Another v IEBC & 2 others [2017] eKLR*)

23. In my view, the appellant chose not to seek compensation for the Plant Crop and Ratoon I to skirt the Limitation of Actions Act. **Section 4 (1) (a) of the Limitation of Actions Act** provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. Had the appellant sought compensation for the Plant Crop and Ratoon I, time would begin to run from the time the respondent was supposed to have harvested the Plant Crop which was on 4th November 1998 hence the suit which was filed on 8th August 2005 would have been time barred.

24. However, the appellant sought compensation for Ratoon II. Both parties agree that Ratoon II was not harvested. By the time the respondent issued the warning letter dated 30th April 2003, admonishing the appellant of neglecting his cane, the agreement which was for a period of 5 years had already lapsed on 4th January 2001. The letter was issued two years late and was clearly of no consequence. The respondent did not terminate the contract while it was still in effect and appears to have been content with the state of affairs. It gave no plausible reason for failing to harvest Ratoon II within the contract period and was therefore in breach of its duty under the contract.

25. It follows that the appellant is entitled to damages for the loss of Ratoon II. The parties agreed on the price of cane and the acreage of the appellant's land but differed on the yield that the appellant's field was capable of producing. PW1 stated that the land was capable of producing 135 tonnes per acre. On the other hand, DW1 produced a cane yield report indicating that land situated ratoon crops in Kakmasia were capable of producing 48.76 tonnes per hectare. I am inclined to adopt the estimate given by DW1 given his expertise in the field by virtue of his position as a senior field officer.

26. The appellant's parcel of land measured 0.2 Hectares which would yield 9.752 tonnes. The price of cane per hectare was Kshs. 1,730/= per tonne which means that the appellant is entitled to Kshs. 16,870.96/= less deductions of Kshs. 6,276.368/= being harvesting charges, transport charges, cess and levy which are computed as follows:

a. Harvesting charges- Kshs. 210 x 9.752 tonnes = Kshs. 2,047.92/=

b. Transport charges-Kshs. 399/= x 9.752 tonnes = Kshs. 3,891.048/=

c. Cess – 1% of Kshs. 16,870.96 = Kshs. 168.70/=

d. Levy 1% of Kshs. 16,870.96 = Kshs. 168.70/=

Total - 6,276.368/=

27. The appellant is therefore entitled to special damages of Kshs. 10,594.592/=.

28. He is also entitled to interest on the amount at court rates. Ordinarily, interest for special damages accrues from the date of filing suit but this does not take away the court's discretion in awarding interest. In this case, the appellant filed his suit on 8th August 2005 and judgment was rendered on 26th October 2018 more than 13 years later. In the course of proceedings, the appellant had the matter stood over generally more than once. It would be unconscionable to burden the respondent with interest caused by the appellant's lethargic prosecution of his claim. I therefore award interest at court rates from 9th July 2018, which is when the appellant gave evidence before the trial court in support of his case, until payment in full.

29. The upshot is that the appeal is allowed in the following terms:

a. The judgment of the subordinate court is hereby set aside and substituted with a judgment for Kshs. 10,594.592/= with interest at court rates from 9th July 2018 until payment in full.

b. The appellant shall have the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF APRIL 2021

R.E. OUGO

JUDGE

In the presence of:

Appellant Absent

Mr. Odero For the Respondent

Ms. Rael Court Assistant