



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.31 OF 2019

BETWEEN

AGUNYO PETERLIS OMBOK.....APPELLANT

AND

SUKARI INDUSTRIES CO. LIMITED.....RESPONDENT

(Being an Appeal from the judgment in Ndhiwa Senior Resident Magistrate's

SRMCC No. 212 of 2016 by Hon. S.K Arome –Senior Resident Magistrate).

JUDGMENT

1. Agunyo Peterlis Ombok, the appellant herein was the plaintiff in Ndhiwa Senior Resident Magistrate's SRMCC No. 212 of 2016. He was seeking damages for breach of contract. The learned trial magistrate delivered judgment dated 14th December, 2018 and dismissed the claim.

2. The appellant was aggrieved by the said judgment and filed this appeal. He was represented by the firm of Nelson Jura & Company Advocates. The appellant raised the following grounds of appeal:

a) The learned trial magistrate erred in law and fact when he failed to award to the plaintiff/appellant as had been pleaded and proved.

b) The learned trial magistrate erred in law and in fact when he delivered judgment that was against the weight of pleadings, evidence and submissions made by the parties.

3. The appeal was opposed by the respondent who were represented by the firm of Ogejo, Olendo & Company, Advocates. The following grounds of opposition were raised:

a) That it was the appellant who occasioned the loss complained of.

b) That the appellant failed on his obligation to remedy the loss as provided for in the contract.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The appellant contended that when his cane was ready for harvesting, he informed the respondent verbally. I have perused the Cane Farming and Supply Contract between the parties herein and noted that there was no prescribed format for the appellant to inform the respondent. The evidence of the appellant that he informed the respondent about the cane being ready for harvest went unchallenged. The appellant therefore satisfied the provisions of clause 7.2 of the agreement. The clause provides:

The grower shall offer for delivery on maturity in accordance with clause (1) above and deliver to the miller all such cane as is derived from his contracted field and no other using the Miller's transport or the Grower's appointed transporter approved in advance by the Miller.

6. After the appellant had informed the respondent about the cane that was ready for harvesting, and sensed a delay, he was under the contract, expected to mitigate the loss by invoking the provisions of clause 3. This clause provides:

Should either party commit a breach of this Agreement and fail to remedy such breach within thirty (30) days after receipt of a notice in writing to the effect that the other party serving such notice, the party not in breach may, by further notice in writing shall be at liberty to terminate this Agreement from the date of completion of delivery of cane from the next ensuing harvest.

7. In *South Nyanza Sugar Company Limited v Joseph O. Onyango* MGR HCCA No. 10 of 2016 [2017]eKLR Mrima J said:

[21] I will now look at whether the Respondent was in a position to mitigate loss in this type of a contract. As stated elsewhere above the contract was for a period of a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the farm whichever period shall be less. Therefore the success of the main plant crop determines the success of the first ratoon and likewise the success of the first ratoon determines the success of the second ratoon. In other words if the main plant crop is compromised then the ratoons will definitely be equally compromised. Hence unless the miller is in a position to foresee its failure to harvest the cane in advance and put the farmer on appropriate notice and in accordance with the Agreement, there is very little a farmer can do to salvage the situation once the miller fails to harvest the cane under the Agreement.

8. I agree with the learned judge that once the main plant is compromised, then this determines the first and the second ratoons.

9. The purpose for compensation by way of damages for breach of contract was explained by the High Court in the case of *Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015)eKLR* as follows:

The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred.

10. In the instant case, I find that the appellant was entitled to damages. The learned trial magistrate had assessed the damages for the expected 190 tonnes x3800=144,400.00. I therefore set aside the judgment by the trial magistrate and substitute it with an award of Kshs. 144,400.00 in favour of the appellant less the transportation costs to be agreed on by the parties with costs in this court and in the lower court.

DELIVERED and SIGNED at HOMA BAY this 30th day of November, 2021

KIARIE WAWERU KIARIE

JUDGE