



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J]

CIVIL APPEAL NO. 49 OF 2017

PAMELA ATIENO ABICH.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTDRESPONDENT

(Being an appeal from the judgment and decree by Hon. Kamau Resident Magistrate in Magistrate's Court Civil Suit No. 39 of 2014 delivered on 13/09/2017.)

JUDGMENT

1. **Pamela Atieno Abich**, the Appellant herein, filed **Rongo Resident Magistrate's Court Civil Suit No. 39 of 2011** (hereinafter referred to as '**the suit**') against **South Nyanza Sugar Co. Ltd**, the Respondent herein. The Appellant claimed that by a Growers Cane Farming and Supply Contract entered into on 14/05/2007 (hereinafter referred to as '**the Contract**') the Respondent contracted the Appellant to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 581 Field No. 22 in Kanyamamba Sub-Location measuring 0.4 Hectare within Migori County.
2. It was further pleaded that the Contract was for a period of five years or until one plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first. The Appellant contended that she took good care of the plant crop until maturity but the Respondent failed to harvest the plant crop thereby compromising the development of the ratoon cane crops. The Appellant contended that she suffered loss of income. She sought for compensation for the loss together with costs and interest at court rates.
3. The Respondent entered appearance and filed a Statement of Defence dated 20/04/2015. It denied the existence of the contract. The Appellant was put to strict proof. The Respondent pleaded in the alternative that if the existence of the contract was proved then the Respondent performed its part of the contract by harvesting the plant crop and the two ratoon crops.
4. The suit was finally settled down for hearing where both parties were represented by Counsels. The Appellant was the sole witness who testified and produced several exhibits and adopted her statement as part of her evidence. The Respondent was represented by its Senior Field Supervisor who testified as DW1 and adopted his statement as part of his evidence and also produced the documents in the List of Documents as exhibits. The court thereafter proceeded to render the judgment where it dismissed the suit with costs. It is that judgment which is the subject of this appeal.
5. The Appellant filed a Memorandum of Appeal dated 14/03/2017 on 19/03/2019. The Appellant then filed the Record of Appeal on 06/08/2019. The record of appeal contained a copy of a Notice of Motion dated 03/1/2017 filed in *Migori High Court Misc. Civil Application No. 78 of 2017*. It was an application seeking leave to appeal out of time. There was also a consent duly signed by the parties dated 01/02/2019 and filed in Court on 19/03/2019. The consent allowed the said application.
6. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant duly complied, but the Respondent did not.
7. As the first appellate Court, the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This Court nevertheless appreciates that an appellate Court 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 the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**.
8. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal and the parties' submissions.

9. I noted an anomaly on the record of appeal. Although the issue was not taken up by the parties I will still deal with it as it goes to the substance and competency of the appeal. It is about the filing of the appeal out of time without leave of this Court. Alternatively, it may be a case of absence of the order granting leave to file the appeal out of time from the record of appeal.

10. I have not come across any extracted order granting the leave to file the appeal out of time. The Memorandum of Appeal itself did not indicate that it was filed pursuant to grant of leave to file the appeal out of time. There is no indication that the consent signed by the parties was adopted by the Court. The appeal was hence filed 2 years post judgment. However, what surprises me is that although the appeal file was allegedly opened in 2017 the Memorandum of Appeal was filed in 2019. The official court receipt for fees payment also confirms that the Memorandum of Appeal was filed in 2019. In such a case I would have expected the appeal file to be a 2019 one.

11. That being the position, I will now deal with the effect of the absence of the order granting leave to file the appeal out of time in the record of appeal.

12. **Section 65(1)** of the **Act** is the basis of appeals from the subordinate courts to the High Court. It provides as follows: -

Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court-

(a) (Deleted by 10 of 1969, Sch.);

(b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;

(c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.

13. **Section 79G** of the **Act** provides for the time within which the appeal in **Section 65(1)** of the **Act** may be filed. It states as follows: -

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

14. Appeals from orders are provided for in **Sections 75** and **76** of the **Act** and **Order 43** of the **Rules**. **Order 42 Rule 1** of the **Rules** provide that an appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading.

15. Once an appeal is lodged aforesaid, a Record of Appeal is then filed. The contents of the Record of Appeal are provided for in **Order 42 Rule 13(4)** of the **Rules** as follows: -

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 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;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;

Provided that-

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

16. A Record of Appeal is essentially supposed to be complete with all necessary documents. Courts have severally dealt with cases of incompleteness of Records of Appeal.

17. The Supreme Court in *Civil Application No. 20 of 2014 Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (2014) eKLR*

referred to its earlier finding in *Law Society of Kenya vs Centre for Human Rights and Democracy & Others*, Supreme Court Petition No. 14 of 2013 as follows: -

[16] For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the Supreme Court Rules, 2012 which provides that:

An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –

- (a) a petition of appeal;**
- (b) a record of appeal; and**
- (c) the prescribed fee.**

[17]

[36] The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition, the Record of Appeal, and the prescribed fee.

[37]

[38] The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

18. The Court further held, at paragraph 39, that:

[39] If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.

19. **Ngaah, J** in *Nyeri High Court Civil Appeal No. 51 of 2013 Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo (2016) eKLR* dealt with how the Court of Appeal in ***Kyuma vs Kyema (1988) KLR 185*** dealt with the interpretation of **Section 79G** of the Act.

20. The Court of Appeal held as follows: -

The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay” Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon “as possible and in any event within such a time as the court may order”. Therefore a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant “a copy of the order” of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were the proceedings and judgment”.

21. **Sitati, J** in *Kakamega Election Petition Appeal No. 3 of 2018 Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others (2016) eKLR* dealt with the same issue in an election petition appeal from the subordinate court. In that appeal the Record of Appeal did not include the decree of the judgment appealed against. The Learned Judge held as follows: -

32. What then am I saying about the failure by the appellant to attach a certified copy of the decree appealed from? I am saying that that omission is not a mere technicality for if it were so, the drafters of the rules would not have made its attachment a mandatory requirement. I am therefore satisfied that the applicant has satisfied this court that the said omission is fatal to the petition and I so find.

22. I will also add my voice on the subject. **First**, under **Order 42 Rule 13(4)** of the **Rules** a Court may dispense with any document to be part of the Record of Appeal except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from and in appropriate cases the order giving leave to appeal. **Second**, the saving grace under **Article 159(2)(d)** of the **Constitution** is inapplicable in this case. That is because the provision only applies to matters relating to procedure or form and not the substance thereof. **Third**, despite clear provisions on extension of time the Appellant who allegedly filed an application seeking the extension of time never extracted the order to confirm that indeed the consent of the parties was adopted as an order of the Court. The Appellant further did not explain any difficulty in obtaining an extracted copy of the order granting the leave to appeal out of time if at all it was issued. I am also at a loss on how the appeal file was opened in 2017 and the first document filed in 2019.

23. As said, the appeal was filed 2 years out of time. From the record no leave to appeal out of time was obtained. The Record of Appeal is therefore incomplete for want of the order granting the leave to appeal out of time. In the words of the Supreme Court in ***Civil Application No. 20 of 2014 Bwana Mohamed Bwana*** (supra) ‘such an appeal would be incomplete and hence incompetent.’ The appeal is for rejection.

24. Having said so, there is no competent appeal for consideration. The appeal is therefore struck out with costs.

25. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of February, 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Oduk, Counsel instructed by the firm of Messrs. Oduk & Co. Advocates for the Appellant.

Mr. Emukhule, Counsel instructed by the firm of Messrs. Otieno, Yogo Ojuro & Co. Advocates for the Respondent.

Evelyne Nyauke – Court Assistant