



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.27 OF 2018

SOIN SUGAR COMPANY.....APPELLANT

VERSUS

KIPSIGIS TRADERS LIMITED.....RESPONDENT

(Appeal from the judgment delivered on 12th September 2018 in Kericho CMCC No.422 'B' of 2016 – B. R. Kipyegon SRM)

JUDGMENT

1. This appeal arises from the judgment of the Kericho magistrate's court delivered on 12th September 2018 in which the trial court entered judgment against the defendant in terms of prayers made in the plaint, with costs of the suit

2. The appellant (who was the defendant in the trial court) being dissatisfied with the trial court's decision has now come to this court on appeal through counsel M/s Siele Sigira & Company advocates on the following grounds -

1. The learned trial magistrate erred in law and in fact in making a finding based on an illegal claim and thus arriving at a decision that will potentially unlawfully enrich the respondent.
2. The learned trial magistrate erred in law and in fact in arriving at a judgment in vacuo
3. That the learned magistrate erred in law and in rules of procedure in failing to give reasons for his decision.
4. That the learned magistrate erred in law and in fact in failing to appreciate that the respondent did not meet the threshold required on a balance of probabilities for proof of a claim for special damages.
5. The learned trial magistrate erred in law and in fact in failing to take into account the respondent's defence and written statement. The trial magistrate erred by making a finding that the respondent's case was not challenged in evidence.
6. The learned trial magistrate erred in law and in fact in failing to make a finding that the respondent's witness testimony was never corroborated.
7. The learned trial magistrate erred in law and procedure by failing to dismiss the respondent's witness who neither proved that he was plaintiff's manager nor did he produce any document (s) in support of the claim for payment of special damages.

3. The appeal by consent of counsel proceeded by way of filing written submissions. The appellant's counsel M/s Siele – Sigira & Company filed written submissions and further submissions, and the respondent's counsel M/s Migiro & Company filed only one set of written submissions. I have perused and considered the written submissions on both sides.

4. I will deal with this appeal in terms of the grounds of appeal. The first ground is that the magistrate based his finding on an illegal claim. I find no illegal claim. I find no illegality on the claim as it was a claim for payment for goods allegedly ordered and delivered, and interest. This claim had to be proved but in my view there was no illegality on the claim. I dismiss that ground.

5. The second ground of appeal is that the judgment was made in vacuo – that is without giving reasons. Counsel for the appellant has relied on Order 21 Rule 4 of the Civil Procedure Rules and the reasoning in the case of **South Nyanza Sugar Co. Ltd – vs – Omwando Omwancho – Kisii High Court Civil Appeal No.214 of 2018**. I agree with the reasoning in that case – that in a defended case the reasons for decision in favour of one side as against the other side have to be given by the trial court. That case is however not applicable herein as this was not a defended case. I will come back to this issue later in the judgment. Secondly, the trial court actually gave reasons for the decision and in my view it is those reasons that could be contested rather than alleging that no reasons were given for the decision. This also covers and disposes ground 3 of appeal.

6. The next ground of appeal is with regard to the threshold for proof of special damages. Indeed special damages have to be specifically pleaded. This position has been stated and re-stated in many judicial decisions including the case **Capital Fish Kenya Ltd – vs – Kenya Power Lighting Co. Ltd – Nairobi Civil Appeal No.189 of 2014 (2016)eKLR** relied upon by counsel for the appellant in which the Court of Appeal restated what had been stated in the earlier case of **NSSF Board of Trustees – vs – Sifa International Ltd (2016)eKLR** that “... it is now well settled that special damages need to be specifically pleaded before they can be awarded”.

7. Such special damages also need to be proved through evidence before they can be awarded by a court. I note that in the plaint herein, the respondent stated that they supplied goods to the appellant for Ksh.1,074,488/= which was subject to commercial interest of Kshs.728,861/17. They were paid Kshs.200,000/= leaving a balance of Kshs.874,488/= and interest of Kshs.728,861/17/= unpaid. It follows that even if this was a case proceeding to hearing on formal proof basis, the respondent was required to prove the above amounts on the balance of probabilities. In my view, since a statement between the respondent and the appellant dated 31/12/2013 was relied upon by the respondent which reflected an amount due of Kshs.1,074,488/=, and the appellant did not offer contra evidence on this, the principal indebtedness of Kshs.874,488/= was proved on the balance of probabilities.

8. With regard to the commercial interest however, no evidence was tendered by the respondent to support such agreement on commercial interest between the parties. This interest in my view, was not proved on the balance of probabilities, and the learned magistrate was thus wrong in awarding this figure relating to commercial interest owing.

9. The next ground of appeal is that the magistrate erred in not taking into account the appellant’s defence and erroneously finding that the respondent’s evidence was not challenged. From the record, the appellant did not tender any evidence in support of their case, though they were given all chances by the trial court to do so. Instead the appellant and their counsel skipped the scheduled hearing of the case. As such, their defence and witness statement filed were merely allegations and they remained as such. They were not evidence to be considered by the trial court. On this, I am guided by the reasoning in the case of **Joseph Murangi & Another – vs – Beatrice Kianda Kaibiria – Nyeri Civil Appeal No.175 of 1996** wherein the Court of Appeal reiterated that “...submissions can only be based on evidence. And evidence must be adduced in accordance with section 107 of the Evidence Act (Cap.80). As no evidence was adduced by the plaintiff in support of her claim for damages, the Judge should have dismissed her claim.”

10. In the present case, there was no witness evidence tendered by the appellant to support their allegations contained in the defence or witness statements. There was thus no fault committed by the trial court as there was no defence evidence to be considered by the trial court. The magistrate was correct in finding that the respondent’s case was not challenged.

11. With regard to the ground that the magistrate erred in not finding that the respondent’s witness testimony was not corroborated, in my view there is no requirement in law for the trial court to make such a finding. The ground is thus dismissed.

12. The last ground of appeal is that the magistrate erred in not dismissing the suit after making a finding that the respondent’s witness neither proved that he was the plaintiff’s manger nor did he produce documents to support their claim. In my view, there was no legal requirement that the witness had to prove that he was the plaintiff’s manager. All he had to do as a witness was to show that he knew or was conversant with the affairs of the plaintiff (the respondent) and also conversant with the transactions in question which he did. I dismiss this ground.

13. Consequently, I allow the appeal in part. I vary the judgment of the trial court to the extent that I disallow the claim for commercial interest and uphold the trial court’s judgment for award of only Kshs.874,488/= with interest at court rates till payment in full. Parties will bear their respective costs of appeal, as the appeal has been allowed in part.

Dated this 30th day of April 2020.

GEORGE DULU

JUDGE

Delivered through video conferencing in the presence of Mr. Langat court assistant, Mr. Musyoka ICT officer, Mr. Siele for the appellant and Mr. Migiro for the respondent.