



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 19 OF 2017

JOHN ODHIAMBO OKELLO.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Resident Magistrate in Kehancha Principal Magistrate's Court Civil Suit No. 74 of 2004 delivered on 20/08/2015)

JUDGMENT

1. The appeal subject of this judgment shall succeed mainly due to the status of the record in **Kehancha Principal Magistrate's Court Civil Suit No. 74 of 2004** (hereinafter referred to as '**the suit**'). The suit was filed by the Appellant against the Respondent. The suit was on breach of contract.
2. The Appellant testified before the trial court. There was a consent recorded to the effect that the evidence of PW2 in CC No. 80 of 2004 was to be adopted as part of the evidence in the suit. The Appellant then closed his case.
3. The suit was severally and unsuccessfully fixed for hearing of the Respondent's case. There was no indication in the suit on what eventually happened to the Respondent's case. From the record it seems the trial court at one point asked the parties if they were agreeable to the court rendering judgment on the basis of the parties' filed statements and documents. There was consensus by both parties. The record is however silent on whether the Appellant agreed to waive his right to cross-examine the Respondent's witness on adoption of the statement.
4. The trial court had to formally adopt the statement and the documents as part of the evidential record in the suit (See the Court of Appeal in **Kenneth Nyaga Mwigie v Austin Kiguta & 2 others (2015) eKLR**). There was need for an order adopting the statement of the Respondent's witness as the evidence of the Respondent. It was also necessary that an order be made to the effect that the Appellant had forgone his right to cross-examine the Respondent's witness. There was to be a further order indicating which documents were produced as exhibits. Be that as it may, what surprises me is that the said statement and the documents are not in the suit.
5. The trial court in its judgment captured the evidence of the PW2 in CC No. 80 of 2004. The witness was one *Gordon Abayo*, a Senior Principal Research Scientist in-charge of Agronomy at the Kenya Sugar Research Foundation (Kesref). The court also captured the evidence of the Respondent's witness; a field superintendent. Surprisingly, the evidence of PW2 in CC No. 80 of 2004 and that of the field superintendent did not find its way to the suit. That is on the basis of the current record before me. The evidence of PW2 in CC No. 80 of 2004 and that of the field superintendent is hence unavailable for review by this Court on appeal.
6. As the first appellate Court, 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**.
7. In view of the status of the trial court's record this Court is not able to discharge its duty as an appellate Court. It is on the foregone basis that I stated at the start of this judgment that the appeal has to succeed.
8. The fairest order in the circumstances is to accord the parties a fresh opportunity to properly ventilate their respective cases. To that end the following orders do hereby issue: -

(a) The appeal succeeds and the order dismissing Kehancha Principal Magistrate's Court Civil Suit No. 74 of 2004 be and is hereby set-aside accordingly.

(b) The suit shall be heard afresh. In view of the age of the suit the hearing shall be prioritized.

(c) Each party to bear its own costs of the suit and the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. kerariom@gmail.com for the firm of Messrs. Kerario Marwa & Company Advocates for the Appellant.
2. okongowadangomigori@gmail.com for the firm of Messrs. Okong'o Wandago & Company Advocates for the Respondent.
3. Parties are at liberty to obtain hard copies of the judgment from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE