



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 244 OF 2006

CALEB NYAGILO ODUNDO.....APPELLANT

VERSUS

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

(Being an appeal from the judgment and decree of the Senior Resident Magistrate A.A. Ingutia in Kisii CMCC No. 495 of 2004 dated 16th August 2006 and delivered on 19th September, 2006)

JUDGMENT

1. The appellant herein being dissatisfied with the judgment of the trial court in **Kisii CMCC No. 495 of 2004** delivered on 19th September 2006, has appealed against that decision of the court dismissing his suit against the respondent for breach of a contract to cultivate and sell to it sugarcane. The entire decision of the trial court was as follows;

“Caleb Nyagilo Odundo brought this suit against the defendant seeking for compensation in the form of damages and costs.

His testimony was that on 20th December, 1990, he was contracted by the defendant to grow cane which he did but the defendant failed to harvest the first ratoon which got burnt at thirty months of age. He told the court that he did not develop the second ratoon. The plaintiff relied on the written contracts dated 20th December 1990. Clause 12 of the agreement provided that any dispute is to be referred to the Outgrower’s Board. There is no evidence herein that this dispute was so preferred. Consequently, this suit is premature and I dismiss it with costs.”

2. When this matter came up for hearing, Mr. Oduk, counsel for the appellant submitted on the four grounds of appeal set out in the amended memorandum of appeal of 14th November, 2006. Counsel submitted that the trial magistrate erred in finding that the matter should have been referred to arbitration, as this was a ground that had not been canvassed. He submitted that the respondent had not applied to have the matter before the lower court stayed and sought its referral to the tribunal and that they had in fact tendered evidence.

3. Counsel submitted that the parties were in agreement that the plant crop was harvested. The only issue was the 1st and 2nd ratoon crops. The appellant’s case was that the cane got burnt at 30 months as it was not harvested. This, counsel submitted, had been acknowledged by the respondent, who had written to the appellant instructing him to dispose of the cane. It is counsel’s submissions that the respondent could not then claim that it had harvested the cane.

4. It was further submitted that though the respondent claimed it had harvested the 2nd ratoon crop on 30th October 1997, this was outside the contract period. Counsel urged the court to calculate damages based on the price of Kshs.1533/= and the area of 0.4 ha for two plant cycles. The appellant relied on the cases of **David Sironga Ole Tupai vs Francis Arap Muge Civil Appeal No. 76 of 2014**; **Malawi Railway Ltd vs Peter Nyasulu Misc Civil Appeal No. 13 of 1992**; **Kisumu walla Oil Industries vs PAN Asiatic Commodities 1995-1998 1EA 153 at page 159 (j)** and **R.J. Fernandes vs Rosterman Gold Mines 1954 21 EACA at 97** in support of his case.

5. Counsel for the respondent, Mr. Odero, submitted in support of the trial court’s decision to dismiss the appellant’s suit for failure to adhere to clause 12 of the agreement. He stated that the contract had been produced in evidence and thus had to be considered and applied in totality. He relied on the case of **Joseph Okoth vs Sugar Company C.A 114 of 2012 Kisii [2013] Eklr** in support of this argument. Counsel further submitted that if the trial court was going to dismiss the suit, it was not bound to assess the damages it would have awarded had the claim succeeded. Counsel relied on the case of **Jane Adhiambo Atundo vs South Nyanza Co. Ltd [2012] eKLR** in support of this.

6. On the merits of the claim, it was submitted that the appellant had pleaded that the respondent had breached the contract by failing to harvest the cane, but the appellant had said that only the 1st ratoon was not harvested and that he never developed the 2nd ratoon. He stated that the plaint was not clear on the crop being claimed and that in any case the claim had been countered by the defence’s witness who said that all 3 crops had been harvested. Since there was evidence that the 1st crop yielded 40.6 tons counsel submitted that if the court was inclined to award damages then it should use that figure as opposed to 135 tonnes per hectare.

7. Counsel further submitted that it had been 12 years since the appeal had been filed and that it would be improper to award interest which would go beyond the award. He urged the court to award interest from the date of judgment of the court. On this, he relied on the case of **Kubai Kirungu and 2 Others [2013] eKLR**.

8. As this is a first appellate court, I will appraise and reassess the evidence on record afresh and reach my own conclusions, making due allowance for the fact that I neither saw nor heard the witnesses testify. (See **Selle v. Associated Motor Boat Company Ltd [1968] E.A. 123 at p. 126**)

9. When this matter came up for hearing before the trial court, the appellant produced a copy of his contract with the respondent for his field no. 103; plot no 94B;A/C 250318 measuring 0.4 hectares. He testified that the agreement was for 3 harvests over an 8 year period. He told the court that the host crop was to be harvested after 24 months and the 2nd and 3rd after 18 months. He stated that he developed the plant crop which was harvested on 14th January 1993 after it had over matured. It yielded 40.60 tonnes. He then developed ratoon 1 which was not harvested and got burnt on 1st November 1996 when it was 30 months old. He reported the matter to the respondent who failed to harvest the cane. He told the court that he did not develop the 2nd ratoon and stated that at the time a tonne was selling at Kshs. 1,800/=.

10. Francis Abonto (DW1) a senior agricultural supervisor for the respondent admitted that the appellant was one of the respondent's farmers but stated that they had harvested the appellant's crop three times. He produced a certificate of completed cane transport marked D exhibit 1 and dated 15th April 1993 which showed that the plant crop was harvested and transported and produced a copy of the farmer's statement marked D exhibit 2 to show that the appellant had been paid for the plant crop. DW 1 further testified that the 1st ratoon crop was harvested and the appellant paid Kshs. 21,360.75/=. He produced a copy of certificate of work completed and statement as D exhibit 3 and 4 respectively. DW 1 also produced the job completion certificate for the transportation of the 2nd ratoon crop which he testified had yielded 14 tonnes and produced a statement to show that the appellant had been paid for that crop cycle as well.

11. On cross examination he confirmed that the plant crop was harvested on 11th April 1993 and stated that the 2nd ratoon crop was harvested on 30th October 1997. He testified that the price of cane in 1996 was Kshs. 1,553/= and that the farm measured 0.4 hectares. He testified that farmers did not share accounts even in the case of redevelopment.

12. From the memorandum, record of appeal and the parties' rival submissions, the first issue that comes up for determination is whether the trial court erred in finding that the dispute should have been referred to the Outgrower's Board.

13. I find that the trial court erred when it dismissed the suit for being premature and for holding that the matter should have been referred to the Outgrower's Board. The parties at clause 12 of the agreement contracted to have any disputes that arose between them concerning the interpretation or implication of any clauses of the agreement referred to the Outgrower's Board for resolution. However, as is clear from the proceedings, both parties opted to disregard the dispute resolution clause and readily participated in the trial process to its conclusion. The parties are deemed to have accepted the court's jurisdiction over the matter, therefore the trial court was required to proceed and determine the matter on its merits. (See **Kisumuwalla Oil Industries Limited V Pan Asiatic Commodities PTE Limited & another Civil Appeal 100 of 1995 [1997] eKLR**)

14. Next, I must will consider whether the appellant's claim should be allowed. In his plaint, the appellant sought judgment against the respondent for *inter alia*, "an inquiry as to damages based on the yield average of 135 tonnes per hectare at the rate of Kshs. 1,730/= per tonne."

15. The appellant pleaded as follows in his plaint;

7. In breach of the agreement, the defendant failed to harvest the cane when it was due and ready for harvesting.

8. On or about the 1st day of November 1996, when the cane was grossly overmature, the cane accidentally caught fire and burnt down.

9. A report of the burnt cane was given to the defendant but the defendant negligently and in breach of the contract, refused and/or neglected to harvest the crop.

10. The aforesaid action was wrongful, oppressive, unconscionable, discriminative and unlawful, the defendant having represented to the plaintiff that it had accepted to harvest the plaintiff's cane.

11. The average cane proceeds her (sic) hectare was 135 tonnes and the plaintiff's claim against the defendant is for payment of approximately 135 tonnes of cane at the rate of Kshs. 1,730/=per tonne being the average yield of unharvested cane by the defendant.

16. I agree with the respondent's submission that the plaint is unclear on what crop cycle the appellant seeks compensation for. Counsel for the appellant submitted that the appellant's claim was for the 1st and 2nd ratoon crop. It was necessary for the appellant to plead and prove his claim with certainty and particularity. The Court of Appeal in **Kenya Commercial Bank Limited v Sheikh Osman Mohamed Civil Appeal No. 179 of 2010[2013]eKLR** set out the purpose of pleadings in the following terms;

"It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."

17. Despite the uncertainty of the pleadings, the respondent adequately countered the claim. DW1 produced certificates of work completed and statements in respect to the appellant's field no. 103; plot no. 94 B showing that all three crop cycles were harvested and the appellant duly paid. The letter allegedly written by the respondent instructing the appellant to dispose of his burnt cane was not produced before the trial court.

18. The documentary evidence on record shows that the 1st ratoon crop was harvested on 19th June 1994, contrary to the appellant's claim that the plant was still on the field in 1996. The exhibits also show that the 2nd ratoon crop was harvested on 6th September 1997. The appellant argued that this was outside the contracted period but did not provide proof of the loss suffered as a result of the delay as he did not lead evidence of his expected yield of 135 tonnes per hectare.

19. For these reasons I find that the appellant did not prove his claim. The appeal is dismissed with costs to the respondent which I assess at Kshs. 15,000/=.

Dated, signed and delivered at Kisii this 28th day of **February 2019**.

R.E.OUGO

JUDGE

In the presence of;

Mr. Wesonga h/b Mr. Oduk for the For the Appellant

Mr. Otero h/b Mr. Odera For the Respondent

Rael Court clerk