



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 52 OF 2017

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD.....APPELLANT

AND

JOHN OMUGA ANJUDO.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Njoroge, PM dated 30th May 2017 at the Magistrates Court in Kisii in Civil Case No. 1136 of 2004)

JUDGMENT

1. At the hearing of this appeal, the respondent in this appeal, **JOHN OMUGA ANJUDO** (“Anjundo”), attended court and complained that the proceedings were irregular and he was entitled to judgment. Although served, counsel on record for the respondent, *Kerario Marwa and Company Advocates*, did not attend court for the hearing. Mr Odero, counsel for the appellant, drew the court’s attention to the fact that the plaint had been amended by substituting the original plaintiff who was Anjudo with another plaintiff, **JOSEPH ODONGO OLICK** (“Olick”). Unfortunately, subsequent proceedings did not reflect this fact and maintained Anjudo as the plaintiff.

2. The original plaint dated 13th September 2004 was filed on behalf of Anjudo. It was claim for breach of contract of the Outgrowers Cane Agreement in relation to Plot 661, Field No. 18 and Account No. 520549. The plaint was accompanied by a verifying affidavit. The appellant filed a statement of defence on 13th October 2004. On 22nd December 2014, Anjudo’s witness statement was filed. On 26th July 2005, the parties filed a consent dated 18th July 2005 on terms that, *“By consent of Advocates for both parties, the Plaintiff is given leave to amend his Plaint with corresponding leave to the Defendant.”*

3. On 27th July 2005, an amended plaint was filed on behalf of Olick who was now the new plaintiff. His claim was for breach of contract of the Outgrowers Cane Agreement Plot No. 446, Field No. 4 and Account No. 520715. The appellant did not file a defence to the amended plaint.

4. On 9th March 2015, after several adjournments, the matter proceeded for hearing. Anjudo (PW 1) testified and closed his case. However, before the hearing of the defence, the parties’ advocates set aside the proceedings of 9th March 2015 by consent and fixed the matter for hearing. Olick (PW 2) testified on 5th December 2016 and closed his case. The defendant called one witness, Richard Muok (DW 1) and closed its case. Thereafter judgment was delivered on 31st May 2017. The court entered judgment in favour of Anjudo.

5. In the judgment, the trial magistrate considered the evidence accepted Olick’s evidence that the appellant had failed to harvest the cane when it was mature and that DW 1 did not give any explanation why it failed to harvest the cane. In the circumstances, he found that the appellant was liable for damages for the three crop cycles.

6. The appellant appealed against the judgment on the grounds set out in the memorandum of appeal dated 19th June 2017. It complained that the trial magistrate erred in law and in fact in awarding damages for breach of contract that were neither pleaded nor proved as required by law. It stated that the trial magistrate failed to take into account the proven scientific fact that the sugarcane yield decreased from the plant crop to the two ratoons and that the trial magistrate erred when he awarded damages for two ratoon crops which were in fact not cultivated and that he failed to take into account that the respondent failed to mitigate his losses.

7. From the narration I have given, the original plaint had been amended to introduce, Olick, as the new plaintiff. The proceedings in respect of Anjudo were set aside hence they could not be the foundation of any judgment. However, the proper plaintiff, Olick, did not appeal against the judgment and decree nor file a cross-appeal. He did not file an application to review or set aside the judgment entered in favour of

Anjundo.

8. Although the appellant appealed against the judgment and decree, none of its grounds of appeal alluded to the fact that Anjundo was the wrong plaintiff or decree-holder. The appellant did not file a defence to the amended plaint filed by Olick. Its defence was in respect of the claim by Anjundo. Since it was bound by its defence, DW 1's evidence in so far as it related to Olick was inadmissible and inconsistent with that defence. I am therefore left with the evidence of Olick as the claimant for consideration. He is not a party to this appeal yet he is directly affected by the judgment.

9. The mistakes in the proceedings cannot be corrected in the absence of Olick. To do so would deny him the right to heard. Any judgment before this court would prejudice not only his rights but those of Anjundo. I think the appropriate remedy lies before the trial court. In the circumstances, I find the appeal incompetent and I strike it out but with no orders as to costs.

DATED and DELIVERED at KISII this 18th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr Odero instructed by Okong'o Wandago and Company Advocates for the appellant.

Respondent in person.