



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 112 OF 2018

BETWEEN

SUSAN ONYANGO NGAJI.....APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S.N. Makila, SRM

dated 19th October 2018 at the Magistrates Court at Kisii

in Civil Case No. 543 of 2009)

JUDGMENT

1. The trial magistrate dismissed the appellant's case on the ground that the appellant had failed to produce the contract between the parties and hence failed to prove her case on the balance of probabilities. The appellant has now appealed on the basis of the grounds set out in the memorandum of appeal dated 25th October 2018 as follows:

1. The trial magistrate erred in law and in fact in failing to treat as the contract between the parties the temporary non contracted agreement dated 17/6/2004 (PEXh 1) as the contract between the appellant and the respondent.

2. The trial magistrate erred in law and in fact in bringing into issue the defence of force majeure, when the same was neither pleaded nor proved by the respondent.

3. The trial magistrate erred in law in failing to award the appellant damages for breach of contract.

2. For purpose of appeal and ease of reference, I shall refer to the parties in their capacities before the trial court.

3. Mr Oduk, counsel for the plaintiff, reiterated the grounds of appeal and urged that on the basis of the contract which was established and admitted, the plaintiff was entitled to damages for breach. He urged the court to re-evaluate the evidence and award her damages.

4. Ms Anyango, counsel for the defendant, supported the conclusion of trial magistrate. She agreed that there was a temporary agreement but that the agreement was vitiated by *force majeure*. She pointed out that the defendant had no obligation to harvest the cane outside its cane harvesting programme and that by the time it came to harvest the cane, it rained heavily and due to the black cotton soil, the area was inaccessible and it was unable to harvest the cane.

5. As this is the first appellate court, I am entitled to review that entire evidence and come to an independent conclusion bearing in mind that I neither saw nor heard the witnesses testify (see *Selle and Another v Associated Motor Boat Company Ltd [1968] EA 123*).

6. The plaintiff's claim was set out in the plaint dated 28th December 2007. Although the parties agreed by consent on 11th July 2012 that the plaintiff would be granted leave to file and serve an amended plaint within 21 days, the record shows that she did not file the amended plaint. As a result, the defendant did not file an amended defence. In the circumstances, I shall restrict my determination on the original plaint and defence on record.

7. The plaintiff's case as set out in the plaint was that the parties entered into a temporary non-contracted cane agreement dated 18th June 2004 on the understanding that her ready and mature cane in Kanyamgony A Sub-location, West Sakwa Nyabwanga site measuring 0.2 Hectares, would be harvested during the harvesting period. The agreement was duly signed and she was assigned account number TC 814869. It was a term of the agreement that the respondent would be bound to purchase all the cane that was available and capable of being harvested and delivered.

8. The plaintiff claimed that the defendant breached the agreement by failing to harvest the cane leading to waste and loss causing her to suffer loss and damage. She pleaded that the plot was capable of producing an average of 135 tons per acre at a rate of payment then applicable at Kshs. 2,015/- per tonne which the plaintiff claimed.

9. In its defence, the defendant denied the plaintiff's claim. In the alternative, it stated that its policy was that it could not harvest poorly maintained cane and that the plaintiff failed to employ recommended crop husbandry to the extent that the cane was overshadowed and dwarfed by weeds and totally destroyed and the defendant was entitled not to harvest it under the contract. The defendant further averred that the plaintiff executed the agreement with the intention of fraudulently obtaining inputs and services on credit from the defendant and having signed the agreement, she abandoned the farm.

10. The key issue for consideration is whether there was a contract between the parties. The plaintiff (PW 1) produced the agreement and although the defendant denied that there was any agreement in its defence, its witness, Richard Muok (DW 1) admitted that the parties entered the Temporary Non Contracted Cane Agreement on or about 18th June 2004. The trial magistrate therefore erred in holding that the plaintiff had failed to produce the agreement which was not disputed by DW 1 in his evidence.

11. The question then is what were the terms of the agreement and if so, did the defendant breach those terms as alleged by the plaintiff? PW 1 adopted her statement as her evidence in which she stated that when the cane matured, the defendant neglected to harvest it whereupon, it dried up. DW 1 also adopted his statement in which he stated that the company had no obligation to harvest the cane outside its harvesting programme. He claimed that the harvesting programme for the Nyambwanga site was in the month July/August 2004 and by the time the defendant came to harvest the cane, the plaintiff had already crushed her cane to jiggery. He stated that the defendant could not harvest the cane earlier during the rainy season in June 2004 as the area had black cotton which made harvesting impossible.

12. Both parties admit that the cane was not harvested under the contract. It was the burden of the defendant to show that it was entitled to avoid the contract. Although it purported to rely on the *force majeure*, I find and hold that the evidence of DW 1 was inconsistent with its pleaded defence. As I have set out above, the defendant's defence was that the plaintiff employed poor husbandry and the crop was so neglected that the defendant could not contractually harvest the cane. It also alleged that the contract was procured for a fraudulent purpose yet the claim of fraud was not pleaded. It is thus clear that the evidence of DW 1 was not only inconsistent with the statement of defence but the defence of *force majeure* was not pleaded.

13. I therefore find and hold that the defendant breached the agreement by failing to harvest the cane. The next question is the extent of damages for the breach. The measure of damages in this case is calculated on the basis of what the plaintiff would have earned had the cane been harvested in accordance with the agreement. PW 1 expected to earn Kshs. 2015/- per tonne from 30 tons. On the other hand, DW 1 stated that in Kanyamgony A Sublocation the yield for the plant crop was 100 tons per Hectare and the ratoon crop would yield 60 tons per Hectare.

14. Since the subject agreement was a temporary agreement for harvest of mature cane and it was not established whether the crop was plant or ratoon crop, I would adopt a yield of 70 tons per Hectare. The total yield would therefore be Kshs.30, 225/- made up as follows: 2015/- X 0.2Ha X 75 tons.

15. The court has discretion to award interest but such discretion is to be exercised judiciously bearing in mind established principles. In this case the principle to be applied is that interest on special damages is from the date of filing suit. The suit before the subordinate court was filed in 2009. The respondent should not be penalised for the appellant's failure to prosecute the suit with diligence. I therefore award interest to the appellant at court rates from 11th July 2012 when the order of amendment was made until payment in full.

16. I therefore allow the appeal, set aside the judgment of the subordinate court and I enter judgment for the appellant against the respondent for Kshs. 30,225/-. The appellant shall have the costs of the suit in the subordinate court and costs of this appeal which I assess at Kshs. 15,000/-. Interest shall accrue at 12% pa from 11th July 2012 until payment in full.

DATED and DELIVERED at KISII this 15th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr Oduk instructed by Oduk and Company for the appellant.

Ms Anyango instructed by Otieno, Yogo, Ojuro and Company Advocates for the respondent.