



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 171 OF 2006

DAMARIS AKAMA APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD RESPONDENT

(Being an appeal from the judgment and decree of the Principal Magistrate S.M.S. Soita dated 7th June, 2006 in CMCC No. 539 of 2001)

JUDGMENT

1. The appellant instituted proceedings against the respondents for compensation for breach of a contract to grow and sell sugarcane on the appellant's plot of land. She claimed that the contract commenced on 21st December, 1995 and was to remain in force for a period of 5 years or until one plant and two ratoon crops of sugarcane were harvested whichever period was less. This appeal is against the decision of the trial court dismissing the appellant's claim on the grounds that she had failed to prove her case on a balance of probabilities. The grounds of appeal are as follows:

- a. The learned trial magistrate erred in law and in fact in dismissing the plaintiff's suit for failure to produce the contract book, yet the said contract was not an issue for determination;
- b. The learned trial magistrate erred in law in allowing the defendant to depart from its pleadings on record and by basing his judgment on the said points of departure arrived at a fundamentally wrong decision;
- c. The learned trial magistrate erred in law in failing to consider the defendants admission in favour of the plaintiff and thereby came to a wrong decision;
- d. The learned trial magistrate erred in law in failing to adequately and sufficiently consider the evidence adduced so as to arrive at a correct decision; and
- e. The learned magistrate erred in law in failing to assess the damages awardable had the plaintiff succeeded in the suit.

2. Both parties filed written submissions and highlighted the same before this court. Counsel for the appellant argued that the trial court erred in its decision to call for proof of the contract yet the defendants had admitted its existence. On his part, counsel for the respondent supported the trial court's decision, saying that the court had been right to seek the contract which the appellant had relied on in support of her case.

3. The role of a first appellate court is well settled. This court is required to re-evaluate the evidence on record and reach its own conclusion in the matter. Keeping in mind that it did not see the witnesses testify and making due allowance for this. (See *Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123*).

4. The plaintiff testified that she had a contract with the defendant which was to remain in force for 3 harvests but could not recollect when she had entered into the agreement. She testified that in the month of February, in a year she could not recall, her cane was burnt by an unknown arsonist 2 months after it was ready for harvesting. She told the court that she was expecting Kshs. 1,500/= per tonne for the crop and produced a delivery note issued by the respondent in support of her claim.

5. Francis Abongó who was at the time working for the respondent as a senior agricultural supervisor testified that the appellant had made an application for land development but her agreement was not signed. He explained that when the respondent received an application for land development they would visit the site to inspect the plot to ensure it formed a block of about 7 hectares. The appellant had been in one block with six other farmers. Two of the farmers pulled out and the rest of the farmers could not sign an agreement with the respondent since the acreage was less than what was required. He denied that the appellant had been issued with seed-cane or had planted the plant cane as she alleged. He also refuted the appellant's claim that she had reported the burning of her cane to the respondent.

6. He conceded in cross examination that when one is issued with a delivery note such as the one the plaintiff had produced as an exhibit, it would mean that they had been supplied with seed cane. In re-examination, the defendant testified that the plaintiff's delivery note did not refer to the same geographical area and that the plaintiff had a previous contract on the same account number.

7. The issues arising for determination in this appeal are:

a. Whether the trial court erred in dismissing the appellant's claim when there had been an admission by the respondent that there was a contract between the parties; and

b. Whether the appellant pleaded and proved her claim as special damages.

8. On the first issue, the appellant, in her written submissions complained that despite the concessions made in the defence, the defendant's witness had disowned the plaintiff, the contract and the existence of the cane which was a complete departure from the defence filed. The appellant contends that she was given no opportunity to address the new issues raised. The appellant cited the decision of the Court of Appeal in **David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No. 76 of 2014 [2014] eKLR** and also relied on the case of **John Ogola Nyanjwa vs South Nyanza Sugar co. Ltd Civil Appeal No. 27 of 2016** to support this.

9. The respondent on its part submitted that the only document relied on by the appellant in support of her claim predated the contract. She had produced a delivery note dated 12th October 1995 yet the contract was said to have been entered into on 21st December 1995. The respondent argued that the appellant did not lead evidence to show that by the time the cane got burnt, it had passed the maturity period. The respondent supported the trial court's decision stating that there was no proof of the allegations that the respondent had obligations under the contract which it failed to fulfil.

10. Looking at the defence filed by the respondent, it is apparent that the defendant admitted the existence of a contract between itself and the appellant. The defence went on to admit that the appellant's cane was burnt up by an arsonist and also stated that the respondent commenced harvesting but was forced to abandon the process due to tribal clashes within the vicinity of the appellant's plot.

11. The defendant admitted the contents of paragraph 3, 4,9 and 11 of the plaint which stated:

"3. On or about the 21st day of December 1995, pursuant to its known objectives, the defendant contracted the plaintiff to grow and sell sugarcane at her local land parcel being plot number 173.0 measuring 0.4 hectares in field number 99 Zone B, Kanyimach Location Migori District.

4. The plaintiff duly signed the agreement and was given account number 410995 and duly planted sugarcane as agreed.

9. The plaintiff or her authorised agent duly reported the fact to the defendant and the defendant according to its requirements demanded the delivery of a stack of the burnt cane for sampling and laboratory test before the cane could be harvested.

11. On or about 18th February, 1998 the defendant commenced harvesting and taking delivery of the cane in field 99 but then stopped harvesting the plaintiffs cane leaving the cane to go to waste."

12. There was no application by the respondent to amend its pleadings, therefore when its witness gave evidence denying the existence of the contract, there was a clear departure from what had been pleaded. The Court of Appeal in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others CIVIL APPEAL NO. 219 OF 2013 [2014] eKLR** cited with approval the decision of Nigerian Supreme Court in **ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC** held as follows;

"...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

13. The respondent witness stated that when one was issued with a delivery note, it implied that they had been given seed cane by the respondent. The respondent also conceded in its defence that it began harvesting the crop in February 1998, yet the agreement provided that the crop would be harvested between 22 and 24 months. By the time the cane was burnt up by an arsonist, the respondent was already in breach of contract and could not rely on the doctrine of frustration. I therefore find that the trial court erred when it found that the appellant had not proved her case on a balance of probabilities.

14. Conversely, the respondent submitted that the pleadings as drawn did not disclose the award claimed by the appellant. The respondent submitted that only special damages could be awarded for a breach of contract and they had to be specifically pleaded and proved by way of cogent, credible and consistent evidence. The respondent relied on the decision of the Court of Appeal in **Corporate Insurance Company v LoiseWanjiru Wachira [1996] eKLR** which emphasized the principle that special damages should be pleaded and strictly proved in accordance with the law.

15. In deciding this issue the Court of Appeal in **John Richard Okuku Oloo v South Nyanza Sugar Company Limited KSM CA No. 278 of 2010 [2013]eKLR**, held:

We have in the judgment set out in full this averment by the appellant at paragraph 12 of the plaint where it was pleaded that the average cane yield per acre was 135 tonnes which the appellant claimed at the rate of Kshs. 1,553 per tonne being the average yield unharvested by the respondent.

.....

We have shown that the pleadings on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standards nor offered sufficient proof.

16. The appellant sought “payment for 135 tonnes of cane being the average cane yield per hectare.” In her plaint, she pleaded the acreage of her plot as 0.4 hectares, the yield expected as 135 tonnes per hectare and the cost of each tonne of cane as Kshs. 1,553/= per tonne. She was therefore required to prove her claim, which I find had been properly pleaded as a claim for special damages.

17. The acreage of the appellant’s plot was not in issue. Dw2 testified that the plot measured 0.4 hectares. The appellant testified that at the price of cane prevailing at the time was Kshs. 1,500/=. As for the expected yield the respondent’s witness admitted that the expected yield for the area was 70 tonnes per hectare. Since the appellant only sought compensation for one crop cycle, she is awarded a sum of Kshs. **42,000/=** as follows:

0.4 hectares x 1500/= x 70 tonnes x 1 crop cycle.

18. Ordinarily in a claim for special damages interest is awarded from the date of filing suit until payment in full. In this case however, the suit was filed in 2001 and judgment rendered in 2006. Thereafter the appeal was lodged in 2006 but was only heard in 2019 more than a decade later. The appellant contends that it was a victim of the system but in my view, the appellant ought to have been more diligent in prosecuting this matter. The respondent should not be penalized for the appellant’s delay in prosecuting the suit and appeal. Interest shall therefore accrue from the date of this judgment until payment in full.

19. The upshot is that this appeal is allowed. The appellant is awarded a sum of Kshs. **42,000/=**. Interest shall accrue on this sum from the date of judgement. The appellant shall also have costs for this appeal which I assess at Kshs. 25,000/=.

Dated, signed and delivered at Kisii this 10th day of April 2019.

R.E.OUGO

JUDGE

In the presence of;

Miss Koko

For the Appellant

Mr. Odero

For the Respondent

Rael

Court clerk