



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 120 OF 2018

BETWEEN

GEORGE O. GOGO.....APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD.....RESPONDENT

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

SRM dated 9th November 2018 at the Magistrates Court

at Kisii in Civil Case No. 535 of 2009)

JUDGMENT

1. The appellant is aggrieved by the judgment of the subordinate court dismissing his claim and challenges the decision based on his memorandum of appeal dated 12th November 2018 as follows;

1. The learned trial magistrate erred in law in failing to disregard evidence led on an unpleaded issue, i.e, the burning of sugar cane, and relied on it when it was not permissible to do so.

2. The learned trial magistrate erred in law in treating the contract requiring the defendant to harvest the sugar cane on the due date as frustrated, when the defendant neither pleaded nor proved it and in any event, when the same was not permissible in law.

3. The learned trial magistrate ignored judicial precedent and brought the practice of law into disrepute.

2. Before I deal consider the issues raised in the appeal, let me set out the parties' respective positions before the trial court. According to the amended plaint, the appellant was contracted by the respondent to grow sugarcane on his land parcel; Plot 1008 in field number 141 in Kanyamgony 'A' Sub location measuring 0.3Ha by an agreement dated 31st March 2004. He was assigned number 235373. The agreement would remain on force for a period of 5 years or until the plant crop and 2 ratoon crops of sugarcane were harvested, whichever period would be less. The respondent claimed that the appellant failed to harvest the sugarcane when it was ready for harvesting and that it commenced harvesting when the sugarcane was 24 months old, it failed to take delivery causing him to suffer loss equivalent to three crop cycles amounting to Kshs. 244, 822.50.

3. In its amended statement of defence, the respondent denied the allegations by the appellant and put him to strict proof. In the alternative, it pleaded that its policy was not to cut or harvest poorly maintained cane and that the plaintiff failed to employ the recommended crop husbandry to the extent that the cane was overshadowed and dwarfed by weeds and totally destroyed hence it was not contractually bound to harvest it. It also accused the appellant of executing the agreement for the purpose of obtaining inputs and services on credit from the respondent with the fraudulent and intention of not planting the cane and bringing the suit yet he had totally abandoned the farm and undertook no husbandry.

4. The appellant testified as PW 1. He stated that he was a contracted farmer and he made a claim for the three crop cycles as his cane was not harvested. In cross-examination, he admitted that his cane got burnt after 24 months. The respondent's Senior Field Supervisor, Richard Muok (DW 1), he confirmed that appellant was its contracted farmer. He stated that the cane got burnt in December 2015 at 15 months into

the contract hence the respondent was not bound to purchase the cane under Clause 6.2 of the contract.

5. After considering the evidence, the trial magistrate concluded as follows:

In absence of any proof of breach by the defendant. I find that the plaintiff has not proved its case on the balance of probabilities against the defendant. The plaintiff is thus not entitled to any compensation and the suit is hereby dismissed with costs to the defendant.

6. In his oral submissions, counsel for the appellant reiterated the grounds of appeal I have set out above. He pointed out that trial magistrate had no basis for finding that the claim had not been proved since the issues raised by the respondent were not pleaded. The respondent filed written submissions in which it contended that the appellant had not proved its case by showing that it notified the respondent that the cane was ready for harvesting and that it never developed the two ratoons.

7. As this is a first appeal, I am required to evaluate the entire evidence and reach an independent decision bearing in mind that I never saw and heard the witnesses testify. From the evidence there was no dispute that the appellant was a contracted farmer. The point of departure between the parties was who breached the agreement. The appellant claimed that the respondent failed to harvest its cane within the time limited for harvesting the plant crop. He also claimed that the cane got burnt after 24 months of developing the plant crop. The respondent contended that it was not bound to harvest the burnt cane under the agreement as this took place within 15 months of the agreement.

8. I agree with the appellant that the respondent could not rely on the ground it could not harvest the appellant's cane because it was burnt after 15 months of planting as this claim would be inconsistent with its pleaded defence. The respondent's defence was that the appellant failed to employ proper husbandry causing his cane to be overrun and destroyed by weeds. The respondent's case was obviously at variance with the pleadings. Although the principle that the evidence which is at variance with the pleading must be disregarded is a notorious principle, I would only re-state what the Supreme Court stated in a ruling on scrutiny in an election petition in the case of **Raila Amolo Odinga & Another v IEBC & 2 others [2017] eKLR** as follows:

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....

9. In light of this finding, the only issue is whether the respondent violated the terms of the agreement when it failed to harvest the cane. The fact that it failed to harvest the cane is admitted since the reason given for doing so is not borne out by its defence. The evidence by the appellant is that the respondent failed to harvest the cane and is therefore liable for breach of contract and must pay damages. Since the agreement was for five years and the appellant failed to harvest the plant crop, it must bear the consequences of breach. I therefore find and hold that the appellant was entitled to damages for the three crop cycles as was held in **Martin Akama Lango v South Nyanza Sugar Company Limited KSM HCCA No. 20 of 2000 (UR)** that:

[The Contract] remains in force for a period of five years or until one plant and two ratoon crops are harvested on the plot.

To my mind what that means especially the last part is that one plant and two ratoon crops must be harvested in fulfillment of the obligation of the parties agreement When the Respondent failed to do the harvesting and waited for until the crop was burnt by arsonists, it was in breach of the terms of the agreement and had the trial magistrate correctly interpreted the provisions of the said agreement, she should have held that the respondent was in breach of the contract and liable to pay damages.

10. The appellant pleaded that his plot was capable of producing on 135 tons per Ha and in evidence he produced a report titled, "CANE PRODUCTIVITY SUB LOCATIONWISE" which show the yield per hectare for various sub-locations for the years 1995/96 and 1996/97. Obviously the report does not apply to the yield for the time of the contractual period. PW 1 did not give evidence on who prepared the report or its basis. On the other hand, the respondent's witness, DW 1, did not produce its own data stating the yield per ton but stated in its cross examination that the average yield of a plot in Kanyamgony A was 62.04 tons per Ha while the yield for the ratoon crop was 56.86 tons per Ha. Since the DW 1 was an officer knowledgeable about the operations of the respondent I accept the figures he proposed. The price per ton of cane was Kshs. 2,000/- was not disputed.

11. Having reached the conclusions above, I find that the respondent was entitled to the plant and two ratoon crops as follows:

Plant Crop 0.3Ha X 2000 X 62.04 ton per Ha = Kshs. 37,224.00

1st Ratoon 0.3 Ha X 2000 X 56.86 ton per Ha = Kshs. 34,116.00

2nd Ratoon 0.3Ha X 2000 X 56.86 ton per Ha = Kshs. 34,116.00

TOTAL Kshs. 105,456.00

12. As regards interest, I note from the record that after the suit was filed on 9th September 2009, the appellant did not take any steps to prosecute the suit until a date was fixed on 8th February 2011 for hearing on 19th October 2011. On that date, neither party attend court for hearing. It is only on 29th August 2012 when the parties recorded a consent to amend the pleadings. I shall therefore order interest to run from the date of filing the amended plaint that is, 17th September 2012.

13. For the reasons I have set out, I allow the appeal and set aside the judgment and decree of the subordinate court and substitute it with a judgment for the appellant against the respondent for the sum of **Kshs. 105,456.00/-** together with interest at court rates from 17th September 2012 until payment in full. The respondent shall have costs in the subordinate court and costs of this appeal assessed to Kshs. 15,000/-

SIGNED AT NAIROBI BY

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISII this 25th day of JULY 2019.

R. E. OUGO

JUDGE

Mr Oduk instructed by Oduk and Company Advocates for the appellant.

Otieno Yogo and Ojuro and Company Advocates for the respondent.