



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 30 OF 2018

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

VERSUS

CHARLES OCHIENG ONGENGO.....RESPONDENT

(Being an appeal from the decision of judgment of Hon. Makila Senior Resident Magistrate at Kisii in KISS CMCC No. 479 of 2010 dated 29th March 2018)

JUDGMENT

1. The subject of this appeal is the judgment dated the 29.3.2018 delivered by Hon. Makila. In the said judgment the trial court entered judgment for the respondent against the appellant at Kshs. 168,750 plus costs of the suit and interest from 9.12.2004.
2. Dissatisfied by the trial court's order on interest, that interest be paid from the 9.12.2004 the appellant filed its memorandum of appeal dated the 24th day of April 2018. Its grounds as enumerated in the said memorandum of appeal are as follows;
 - i. *That the learned trial magistrate erred in law and in fact by awarding the respondent costs and interests from 9/12/2004 despite express provisions of the law thus arriving at a wrong decision.*
 - ii. *That the learned trial magistrate erred in law and fact by wrongly calculating the costs and interests awardable to the respondent.*
 - iii. *That the learned trial magistrate erred in law and in fact by wrongly calculating the time within which interest started to accrue hence arriving at a wrong decision.*
3. The appeal was canvassed by way of written submissions which parties highlighted at the hearing of this appeal. As a first appellant court am required to re-evaluate the record, proceedings and judgment of the trial court bearing in mind that I never heard or saw the witnesses. The subject of this appeal is the interest awarded by the trial court in its judgment dated the 29.3.2018. The trial court entered judgment for the respondent in the sum of Kshs. 168,750 plus costs and interest from 9.12.2004.
4. By a plaint dated the 29th September 2010 the respondent sought judgment against the appellant for damages for breach of contract and that the defendant be ordered to compensate the plaintiff for the loss of two(2) ratoon crop on 0.5 hectares of land at the rate of 135 tonnes per hectare and payment of 2,500 per tonne. The respondent also sought costs of the suit and interest thereon from the 9th day of December 2004, at current court rates until payment in full and any other relief the court would deem fit to grant. A perusal of the plaint indicates that the respondent claimed that it had a written agreement dated 9th December 2004 with the appellant to grow and sell the sugarcane in his landparcel being plot number 491 in field no. 28A in West Kogello Sub- location measuring 0.5 hectares. This plaint was amended and an amended plaint dated 17th April 2010 was filed. The amended plaint particularised the damages claimed for the expected crop yield for the 1st and 2nd ratoon.
5. In a defence dated the 27th April 2011 the appellant denied the respondent's entire claim and put the respondent to strict proof and sought to have the respondent's claim dismissed with cost.
6. In its judgment dated the 29.3.2018, the trial court found that the respondent had proved his claim and awarded him Kshs. 168,750 being a sum for 135 tonnes x 0.5 ha x 2,500. The trial court further held that the respondent shall also have costs and interests of the suit and interest from 9.12.2004.
7. In its written and oral submissions in court counsel for the appellant argued that the appeal is solely hinged on cost and interest. That the trial court granted the respondents costs from the 9.12.2004 which is the date the parties entered the contract. That whereas award of interests

is discretionary the trial court erred in exercising the said discretion. Reliance was made on section 26 (1) of the Civil Procedure Act which provides that;

(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

8. It was further submitted the trial court did not exercise its discretion properly considering that the appellant never breached the contract during the harvest and duly harvested the respondent’s plant crop. The appellant relied on the case of **Highway Furniture mart Limited – vs- The Permanent Secretary & Another, EALR (2006)2EA** where the court held as follows;

“Interest antecedent to filing suit is only claimable where there is an agreement stipulating the contractual rate of interest where there is no stipulation but interest is allowed be mercantile usage which must be pleaded and proved or where there is statutory right to interest or when an agreement to pay interest can be implied from the course of dealing between the parties”

9. It was also submitted that the respondent has not met the threshold of the above case since it never indicated in the contract between the parties the rate of interest that would apply in case of a breach and neither is the practice allowed by mercantile usage. That the trial court ought to have awarded interest from the date of delivery of judgment in the lower court, hence the lower court judgment should be set aside on interest and the same to be awarded from the date of judgment.

10. The respondent submitted that the whereas the respondent prayed for the order expressly in the plaint at prayer (c) and in the submissions, the appellant never controverted the same or even submit on it. That there was no material; which the trial court should consider to take into account to express a contrary view on. It was argued that section 26 (1) of the Civil Procedure Act gives the court the discretion in money decrees to award interest “for any period before institution of the suit” or from “such earlier date as the court thinks”. That it being a judicial discretion the appellant court cannot substitute its own views over that of the trial court unless it is shown that the said court did not act judiciously. That there is no such evidence before the court and therefore the appeal should be dismissed.

DETERMINATION

11. Section 26 of the Civil Procedure Act provides how interest is to be awarded in civil suits. The provisions as pointed out are very clear. Trial court is guided by the said section to exercise its discretion in the circumstances mentioned. At paragraph (c) of the plaint the respondent sought interest at court rates from the 9th December 2004 until payment in full. Paragraph 5 states that it was a term of the contract express and implied that the agreement would commence on the 9th day of December 2004. 9th of December 2004 was the date the contract was to commence. Paragraph 7 mentions the alleged breach the appellant was sued for. The suit was filed on the 17th November 2010. Judgment was delivered on the 29.3.2018, 8 years after the suit was filed and 14 years after the date of commencement of the agreement. In the defence filed the appellant denied the respondent’s claim and sought of the respondent’s suit.

12. My understanding of the appellant’s pleading is that the appellant denied the respondent entire claim including interest. The respondent did not refer to any agreement indicating that interest was to be awarded from the date of commencement of the agreement. To claim interest from the date of commencement of the agreement and not the date of breach was unreasonable in my view. The demand was from a contract which the parties had. The claim was specified and it was quantified in the plaint and evidence. Am guided by the decision in the case of, **Highway Furniture mart Limited –vs- The Permanent Secretary & Another(supra), that“ “Interest antecedent to filing suit is only claimable where there is an agreement stipulating the contractual rate of interest where there is no stipulation but interest is allowed be mercantile usage which must be pleaded and proved or where there is statutory right to interest or when an agreement to pay interest can be implied from the course of dealing between the parties”**

13. On discretion to interfere with the trial court discretion am guided by the decision in the case of **Musa Cherutich Sirma -v- IEBC & 2 others, SC Petition No. 13 of 2018**, the Supreme Court held that an appellate court can only interfere with exercise of discretion if the appellant can show that in exercise of its discretion:

- i. the ...court acted on a whim or that;*
- ii. its decision is unreasonable and*
- iii. it is made in violation of any law or the Constitution or that;*
- iv. it is plainly wrong and has caused undue prejudice to one party.*

The trial court entered judgment as prayed in the suit. The trial court ought to have taken into account the paragraph detailing the claim and the time taken to file suit and the time taken to prosecute the matter. In my view undue prejudice was caused to the appellant when the trial court awarded interest from the date of commencement of the agreement caused undue prejudice to the appellant. I therefore set aside the trial court judgment on interest, the award that interest shall accrue from 9/12/2004 shall be replaced with interest shall accrue from the date of delivery of the judgment. The appeal is allowed with costs.

Dated, signed and delivered at Kisii on the 30th day of October 2019

R.E. OUGO

JUDGE

In the presence of;

Appellant Absent

Respondent Absent

Rael Court clerk