REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.118 OF 2011

ISABELLA AKUMU NGUTU &JENIPHER AKOTH OPIYO

(Suing as legal and personal representatives

of the estate of SAMUEL N. NGULA.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Appeal from the judgment and decree of the Resident Magistrate, Kisii, dated 25th May 2011 in CMCC NO.1527 of 2004)

JUDGMENT

1. This is an appeal from the RM's court from the judgment dated the 25th of May 2015. The appellant filed a Memorandum of Appeal stating the following grounds;

> **1. The Learned trial Magistrate erred in law and in fact in striking out the appellant's suit yet the order of amendment was granted by consent of the parties in court on 14th March 2006 and "deemed" the plaint as duly amended and the trial proceed on that basis.**
>
> **2. The Learned trial Magistrate erred in law in failing to assess the damages payable had the appellant succeeded in the suit.**
>
> **3. The Trial Magistrate erred as to the order on costs.**

The appellant prays that

> **(i) The appeal herein be allowed and the judgment dated 25th May 2011 striking out the suit be set aside.**
>
> **(ii) The suit be remanded to the trial court with an order that the court do assess the damages payable.**
>
> **(iii) The costs of this appeal and the suit be awarded to the appellant**.

2. The appeal was argued by way of written submission. As the first appellate Court, it is now well settled that the role of this court is to reconsider the evidence on record, evaluate it and draw my own conclusion though I must bear in mind that I neither saw or heard the witnesses. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 126**). This court notes that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless it is shown that the trial court acted on wrong principles in reaching the findings.

3. The plaint in the lower court was filed on the 22nd of November 2004. The plaintiff was Samuel N. Gula and the defendant South Nyanza Sugar Company. The defense was filed on the 20th December 2004. On the 16th September 2005 the firm of Ms Oduk & Company for the plaintiff filed a chamber summons dated 15th September 2005 brought under Order XXIII Rule 1,3,5,9, and 12 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the following orders that;

> ***a) Isabella Akumu Ngutu and Jenifer Akoth Opiyo be made plaintiffs instead of Samuel Ngutu Gula now deceased.***
>
> ***b) The plaint be deemed to be amended accordingly.***

c) The costs of the suit be provided for.

4. On the 14th March 2013 Counsels recorded a consent as follows; **"By consent chamber summons dated 6th September 2005 be allowed. Cost in the cause. Serve date for hearing**". The matter proceeded to hearing on the 15th of September 2010. Isabela Akumu Ngotu testified as the plaintiff. The defendant did not call any witness. By a judgment dated the 25/5/2011 the trial magistrate dealt with 3 issues for determination. The issues were on Jurisdiction, Limitation of Actions Act and Pleadings. The appeal is on her findings on the issue of pleadings. The trial court held as follows; *"The plaint herein as the pleadings stand is Samwel N Gula vide an application dated 6/9/2005, one Isabella Akumu Ngutu and Jenfipher Akoth Opiyo applied to be made plaintiffs in the suit and for the plaint to be amended accordingly. The application was allowed by consent on 14.3.2006 by consent, but then the plaint was never amended as required. It is obvious that it was upon the plaintiff to amend the pleadings accordingly as proceeding on basis of the original plaint means that the plaintiff therein who is deceased is definitely the wrong party to be named as plaintiff having been removed when the application dated 6/9/2005 was allowed. It was necessary that all pleadings be in order because they are the basis upon which a given claim rests. Failure to amend the plaintiff accordingly, I do find was fatal to the suit at hand because how is the plaintiff going to execute in the event that the judgment is entered in her favor on this ground alone. I do find that the plaint is defective. I hereby strike out the suit with costs to the defendant."*

5. Mr. Oduk for the appellant submits that the order to amend the plaint was by consent and it read the plaint be deemed as amended. That the word "deemed" is used in various senses but for their purpose it is apt to state:- " when a certain order , is said to be "deemed to be" an order made under a certain section , it must mean that for all purposes the order has been passed under the particular section. It is deemed to be an order under the section because although it was not actually passed under that section , but in all other aspects it is as good as an order passed under that section" see KJ Aijar Judicial Dictionary 16th Edition WL1-A to K at pages 528-529. That the amendment was "deemed" as per the order dated 14/3/2006. That it was a consent of the parties. It was further submitted that it was wrong for the trial magistrate to import a fresh issue into the very clear effect of the order given under her own hand. That it was a technical objection she ought not to have entertained especially after the proceedings took place on the clear understanding of the effect of the order. That under Order 2 rule14 of the Civil Procedure Rules it's provided that, "No technical objection may be raised to any pleading on the ground of any want of form".

6. In assessing damages it was submitted that the trial court failed to do so. Mr. Oduk requested the court to use the evidence on record to assess the damage due to the appellant as 0.8ha x135 tones x1730x2 crops cycles =373,680/=. That the order of costs against the appellant be set aside and one for costs for the appellants imposed.

7. The respondent opposed the appeal. It was submitted that the trial magistrate was right in dismissing the appellant's claim. That the general powers to amend pleadings is donated by section 100 of the Civil Procedure Act which is the substantive law and its handmaiden is Order 8 Rule 5 (1) of the Civil Procedure Rules. That Order 8 Rule 7 (2) describes how amendments should be done that, ***"All amendment shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible and by underlining in red ink all added words."*** That the amended plaint was never filed even though parties had by consent allowed the appellant's application dated 6/9/2005. That the mere fact of allowing the application by consent did not automatically amend the plaint neither did the appellant annex amended plaint which would have been deemed as filed and served. That the failure to amend the plaint was a fatal error which rendered the appellant's entire suit defective. That even if they were to proceed on the assumption that the original plaintiff was still on record then the suit abated as the original plaintiff died on 18/5/2005 and there was replacement for a year. The respondent submitted that the appeal should be dismissed.

8. This appeal is mainly on the consent order dated the 14/3/2013 recorded as follows; **"By consent chamber summons dated 6th September 2005 be allowed. Cost in the cause. Serve date for hearing".** In the appellant's application dated the applicants sought to be made plaintiff's instead of their deceased husband one Samuel Ngutu Gula who died on the 18/1/2005. In their application they sought to have the plaint deemed to be amended. According to the appellants they recorded a consent which was binds the parties. The respondent argue that the appellants ought to have filed the amended plaint in compliance with the provisions of Order 8 of the Civil Procedure Rules. The application was brought under order 23 of the Civil Procedure Rules, this was in order. The issue for determination is whether the trial magistrate erred in dismissing the appellant's suit in light of the consent order. From the proceedings the trial court accepted the consent order between the parties and recorded it became an order of the court. The consent order was that the plaint be deemed. By dismissing the suit the trial court relied more on procedure then substantive *justice. Article 159 (2) (d) of the Constitution provides that justice shall be administered without undue regard to procedural technicalities*. The court trial court accepted the consent. By making a conclusion that the appellant did not file an amended plaint was in my view rewriting the consent the parties entered in. Under section 1A or B of the Civil Procedure Act a court has a duty to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. **Section 1B provides that.** The respondents submissions on amendments of pleadings is proper however this was not a case where the court made a further order that the appellant file an amended plaint. The parties recorded a consent and they were bound by it. The trial magistrate erred in dismissing the appellant's suit. The order dismissing the appellants' suit dated the 25th May 2011 is set aside.

9. The next issue is whether the trial magistrate should have assessed damages. (See in R.J Fernandes vs Rosterman Gold Mines 1954 21 EACA 97). This being the first appellant court I can assess the damages rather than submitting the case back to the lower court for assessment. This appeal was filed in 2011 and in line with the provisions of sections 1A and 1B of the Civil Procedure Act, I will proceed to assess damages. The appellant's evidence was that they had a cane planting agreement with Sony sugar. The agreement was to last 5 years, 3 harvests. They planted sugarcane and maintained it to maturity. The plant crop was harvested. The 2nd and 3rd ratoons were not harvested. The sugarcane ended up drying. The defendant promised to have the cane and they did not. The plant was to be harvested after 16 months. Their plot was 0.8ha. She produced a, payment receipts dated 25/11/98. Kshs. 1735/- was paid per tonne. She also produced a delivery note. On being cross examined the appellant stated that the ratoon crop ended drying on the land and that she had surrendered the contract book to the respondent who claimed that they had misplaced their copy. That the husband died in 2005 and that they transferred the contract in their names. The appellant in their plaint sought damages for breach of contract and compensation for the loss of 2 acres crops on 0.8 hectares of the land at the rate of 135 tonnes per hectare and payment of Kshs. 1730/- per tonne. The appellant's evidence that they had an agreement with the defendant for a period of five (5) years. The agreement commenced on the 5th of April 1996 and was to remain in force for the 5 year period or until one crop and two ratoon crops of sugarcane was harvested on the plot. She explained why she did not have the contract book. She produced 2 copies of Out growers Harvesting Advice notes serial numbers 525432 and 525427 bearing the name of Samuel N. Gula for plot no. 34. She also produced a delivery note seed cane dated the 5/4/1996 and debit advice to out growers dated 29/3/96 and 5/4/1996 in name of Samuel Gula for ploughing and 1st & 2nd harrowing and trimming. The appellant through these documents has shown

that there was some kind of business between Samuel Gula and defendants. Even if the defendant did not call any evidence it was upon the appellants to prove their case on balance of probabilities. It was the appellants evidence that the deceased was paid his dues but the 2nd and 3rd ratoon was not harvested. She produced payment receipts exhibit 1 (a) and (b) dated 25.11.98. Kshs 1,735 was paid per tone. Her plot was 0.8 ha. She also produced receipts for harrowing and ploughing. The appellants claim was for damages for breach of contract and compensation. The appellant talked of a contract book which was not produced in court. There was no notice to the respondents to produce the contract book which she claimed she gave the respondent's office. The documents produced show dealings with the respondent but no evidence of the contract or agreement. For this court to assess the damages and compensation it was important that the contract be exhibited. In the absence of the said contact this court is unable to assess the damage if there was evidence of the agreement then the appellant would have been entitled to payment of the 2 crops not harvested at the rate that was being paid by the defendants at the said time on the acreage of 0.8ha. The appellant appeal therefore succeeds in part. There shall be no order as to costs.

Dated signed and delivered this 25th day of October 2018

R.E.OUGO

JUDGE

In the presence of;

Appellant Absent

Mr. Momanyi h/b Miss Anyango For the Respondent

Ms. Rael Court clerk