



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO.4 OF 2016

BETWEEN

MARY A. AKUMUAPPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED.....RESPONDENT

(Being an appeal from the Judgment and decree of Hon. D.K. Kirui (CM) in

Migori CMCC No.16 of 2015 dated on 23rd December,, 2015)

JUDGMENT

1. **MARY A. AKUMU** (the appellant) had filed a case against South Nyanza Sugar Company Limited (the Respondent) seeking orders that the respondent was in breach of the Sugar Cane Agreement they had entered into, and should pay her compensation of Kshs.500,000/= being the price of the un-harvested sugar cane.
2. The trial magistrate dismissed her claim; with costs to the respondent.
3. The appellant's case was that she had entered into a temporary contract with the respondent in the year 2004 where the latter was to harvest herself developed sugar cane. The main features of the contract as described by the appellant were:-
 - a. *Cane contracted when it was 20 metres.*
 - b. *The cane was to be harvested once only.*
 - c. *The estimated yield was 160 tons.*
4. At the time of expected harvest the price per ton ranged between Kshs.2000-3000/=. However the respondent failed to harvest the plant crop which is why she seeks compensation.
5. The defendant denied liability saying there was no privity of contract as it had not been asked by the appellant to harvest any sugar cane nor had it assumed any obligation to harvest and purchase any cane. The respondent accused the appellant of fraudulent misrepresentation by procuring an agreement book to be signed that she had a piece of land when there was none. Further that she failed to plant cane once the agreement was extended on the false premise with a predetermined designed to file this suit. The respondent claimed that the appellant forged and executed the agreement.

6. It was further pleaded on a without prejudice basis that even if the appellant planted any sugarcane, she failed to follow the recommended husbandry and the crop became overgrown and overshadowed by weeds, rendering it uneconomical to harvest – so she did not suffer any loss but wants to be rewarded for her own deeds of omission. She is also blamed for not mitigating her losses instead leaving the cane to overgrow and get dried in the field.
7. It was also stated that she converted the field into a grazing field and no crop ever matured for harvest.
8. At the hearing the parties relied on their statement of claim and basically reiterated the same information I have alluded to in the earlier part of this judgment.
9. The respondent's witness RICHARD MUOK (DW1) stated that there was an application for a temporary contract for only one harvest and the cane was harvested on 30th May 1999 and it realized a tonnage of 30.99 tons for which a sum of Kshs.54,201/50 cents was paid.
10. On re-examination DW1 admitted that the appellant's account number was TC819028 and she had an acreage of 2.0 hectares but insists that their records (which were not produced) shows the appellant was paid. He did not have the final harvest note or weight.
11. The trial magistrate in his judgment pointed out that the respondent produced a statement of account indicating various entries one of which showed the appellant had received some cash advance.
12. It was held that indeed parties had entered into a temporary contract. He pointed out that a statement of accounts produced by the respondent referred the plot number as well as the TC account number and the cane delivery details.
13. The appellant was faulted for failing to present a report by agricultural field extension officer whose evidence could have established whether there was any standing cane abandoned. It was in the absence of any corroborating evidence that her claim was dismissed.
14. The respondent's version of the state of affairs was accepted by the trial magistrate as more convincing and that the appellant did not dislodge the evidence presented by the respondent. The trial magistrate was convinced that the respondent did not cook up the figures it presented as payment made to the appellant.
15. The hearing of the appeal proceeded ex-parte. The appellant's counsel Mr. Jura submitted that the trial magistrate erred in dismissing the appellant's case and did not consider and evaluate the evidence presented. Counsel's contention was that the claims of the cane being harvested and paid for were not supported by any record. He stated that for instance there were no weigh bridge tickets produced to prove that the cane was harvested, weighed and crushed before it was paid for.
16. Counsel also poked holes at the harvest statement relied on by respondent and the trial court saying it was dated 13th August 2015 yet the contract in question was for the year 2004 and the cane was due for harvest in 2004. He argued that the defence raised by the respondent about a harvest was an afterthought which is why they attempted to generate a harvest statement for the year 2015.
17. The issue is narrowed to the evidence showed that the respondent had discharged its contractual duties. This is because at the hearing DW1 admitted that there had been a temporary contract with the appellant for only one harvest.
18. If there were no records presented, no final harvest statement or even weigh bridge tickets, then how was it established that the cane had been harvested.
19. The transaction note which is faulted by Mr. Jura details tons of tonnage achieved between 30th May 2004 – 14th September 2005. It would appear the same was sent by fax hence the transaction date shown

on top as 13th August 2015. The trial magistrate therefore properly relied on this document to make his finding. It shows harvest, transport and milling.

20. If there was any other cane left in the field, then the appellant had a duty to prove that and I can think of no better way than through the report of an agricultural extension officer.

21. Consequently I find no basis for interfering with the trial magistrate's findings and the appeal is dismissed.

Written and dated this 25th day of January, 2017 at Homa Bay

H.A. OMONDI

JUDGE

Delivered and dated this 31st day of January, 2017 at Migori

A.C. MRIMA

JUDGE