



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
CIVIL APPEAL NO.134 OF 2015
BETWEEN
SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT
AND
PROF. RIEWA ONYANGO GENGA.....RESPONDENT
(Being an appeal from the ruling and order of Hon. E.M. Nyagah Esq., RM
in Migori CMCC No.309 of 1999 delivered on 25th November, 2015)

JUDGMENT

1. **SOUTH NYANZA SUGAR COMPANY LIMITED** (the appellant) has contested the decision made in favour of **PROF. RIEWA ONYANGO GENGA** (the respondent) directing the appellant to disclose the tonnage of sugarcane harvested from the respondent's plot **NO. ANYAMKAGO/KAMGUNDHO/914** on 27th August, 1998. Further that upon establishing the tonnage harvested, the appellant do pay the respondent proceeds of the same based on the rates applicable at the time of harvest; or in the alternative proceeds paid in Civil Case No.634 of 2000 be paid to the respondent. The court also awarded respondent interest at court rates from 4th August 1999 when the judgment was entered.
2. This decision is now contested on grounds that the trial magistrate erred in ordering for disclosure of tonnage when no such prayer had been made. Further, that the trial magistrate erred in finding that some of the prayers in the plaint had not been executed when there was nothing in the pleading to show that the court had awarded such prayers. The appellant's contention is that the trial court had in the earlier judgment only awarded the sum of Kshs.250,000/= which amount had already been settled by the appellant.
3. The trial magistrate was also faulted for directing that the respondent be paid proceeds in Migori SPMCC No.634 of 2000 where the respondent was not a party – in any event those payments had been made to the decree holder in that suit. It is argued that the trial magistrate decided the case against the weight of evidence, which was before him and ignored all law legal principles. It was further submitted that the application before the magistrate was an attempt to recover a civil debt which had already been overtaken by dint of the statute of limitation of actions.
4. The appeal was canvassed by way of written submissions, although the respondent's counsel

highlighted his submissions orally. Mr Odero submitted on behalf of the appellant that the prayer for disclosure sought by the respondent in the notice of motion filed in a Miscellaneous Cause or in an application of execution in the **SPMCC NO.309 of 1999** was mischievous as it related to a claim dating back to 30th August 1998 and was allegedly founded on the tort of trespass which ought to have been presented to this court before the lapse of 3 years.

5. Counsel pointed out that the said prayer had in fact been made in **Migori SPMCC NO.309 of 1999** and the motion dated 25th June 2015 was a fresh suit filed by the respondent who had failed to secure judgment on 4th August 1999. Counsel explains that the appellant had unsuccessfully attempted to act aside, that judgment. Further, that if this is not a fresh suit, then Mr. Odero contends that it is an application seeking to enforce a decree which the subordinate court had passed ex-parte on 4th August 1999 – 17 (seventeen) years later and **Section 4 (4) of the Limitation of Actions Act (Cap 22 Laws of Kenya)** ought to apply. **Section 4 (4)** provides that no action may be brought on a judgment after 12 years from the date when judgment was delivered and interest on such judgment may not be recovered after expiry of 6 years.

6. It was also argued that the respondent is conducting litigation by instalments – having failed to establish the existence and harvest of any cane on his farm, and he now comes to court seeking disclosure. Further that the only cane which existed was on parcel **NO. KANYAMKAGO/KAMGUNDHO/914** was acknowledged by the respondent as being harvested weighed 329.27 tons and the proceeds paid to **JOHN OKETCH AWITI** and **SYPROSE AKOKO AWITI**. The respondent never joined these two individuals in the suit before the subordinate court – infact when the said **JOHN OKETCH AWITI** applied to be joined in the suit, his application was dismissed. Mr. Odero submits that the respondent knew and has always known what he was claiming in the suit was the same they claimed by **JOHN AWITI** in **Migori SPMCC NO.634 of 2000**, and the subordinate court clearly appreciated the fact that the appellant had paid to **JOHN AWITI** what the respondent was claiming in the notice of motion, and the orders favouring the respondent therefore subjected the appellant to TRIPLE jeopardy.

7. It was further explained that the respondent and **JOHN AWITI** had mutual claims to the sugar cane harvested by the appellants and which was the subject of **Migori SPMCC No.309 of 1999** filed by respondent and **Migori SPMCC No.634 of 2000** filed by **JOHN OKETCH AWITI**, and the application by respondent whose outcome is now contested by way of appeal. In both suits, the appellant lost and settled both decrees, yet is now being subjected to payment a third time.

8. The upshot of the arguments is that the appellant never harvested sugarcane from the respondent's plot **NO. KANYAMKAGO/KAMGUNDHO/914** on 27th August 1999 and cannot therefore comply with the orders requiring it to disclose the tonnage of cane harvested.

9. In opposing the appeal, Mr. Odhiambo Roch submitted that the firm of Okongo and Co. Advocates have never been properly on record and are mere busy bodies who are not competent to argue the appeal.

10. He explained that the contested application whose ruling favoured the respondent arose from a chain of proceedings i.e. **Migori SPMCC NO.,309 of 1999**, where judgment was delivered on 31.03.1999, **Kisii HCCA NO.118 of 2006** whose judgment was delivered on 07.05.2016 and **Kisumu CA Civil Application No.36 of 2013** whose ruling was delivered on 28.01.2014. He stated that the respondent was the one who filed Migori SPMCC No.309 of 1999 – the appeals were filed by the respondent who lost in both.

11. Mr. Odhiambo argued that had the appellant disclosed the proceeds of the sugarcane from 4th August 1999 when judgment was delivered, the matter would have ended then. Instead the appellant took the respondent around circles yet it had a duty to make such disclosure in terms of tonnage and value of the harvested cane. When the respondent requested the appellant for such disclosure, the appellant instead wrote to him demanding similar information. It is argued that parcel **NO. KANYAMKAGO/KAMGUNDHO/911** was extinguished in 1996 and by subdivision which gave birth

to parcel No.913 and 14 after respondent had purchased part of the land and by the time the Awiti's were entering into a contract with the Appellant, the respondent had long purchased part of what had initially been No.911.

12. Mr. Odhiambo submits that the appellant had sought Jane Awiti be enjoined as an interested party in **Migori SPMCC NO.309 of 1999** but this was rejected. He further argued that the trial court had drawn an incomplete decree which did not provide for the amount claimed and the decretal amount, yet awarded a sum of Kshs.250,000/= as damages, because those sums were pegged on information to be given by the appellant.

13. As to whether there had been a prayer for disclosure of the contested information, Mr. Odhiambo urges the court to refer to the decree, saying execution was left in abeyance pending such disclosure. Why did the trial magistrate order in the alternative that proceeds equivalent to those paid in **SPMCC No.634 of 2000** be paid to the Respondent? Will the appellant be making double may triple payment over the same issue?

14. Mr. Odhiambo submitted that this order was given because the appellant and **JOHN AWITI** being fully aware that the respondent had filed **SPMCC NO.309 of 1999** fraudulently, filed prosecuted and executed payments in **Migori SPMCC No.643 of 2000** – three years after the respondent had obtained judgment, yet none of them joined the respondent in that case.

15. So why would the appellant pay **JOHN AWITI** money it well knew was not due to him, then proceed to pursue an appeal? Mr. Odhiambo says this was sheer conspiracy between the appellant and the Awitis, and that parcel No.911 did not exist long enough for the cane to be grown to maturity – so the appellant is the author of its own woes. He contends that the trial magistrate merely used the evidence available to order for execution of an unsatisfied decree.

16. As regards the application of the statute of limitation, Mr. Odhiambo argues that the main claim was never satisfied and the respondent only executed the decree on general damages, costs and interest.

17. The issues which arose for determination are:

a) Is Appellant's counsel properly on record?

b) what were the prayers made in SPMCC No.309 of 1999?

c) What was the content of the judgment dated 04/08/1999?

d) Did the court in the judgment order the appellant to disclose tonnage and value of the cane harvested?

e) Who had the burden of proving the claim? Was there a request made for better particulars under section 169?

f) What was the purpose of the application dated 25/06/2015? Were the prayers sought overtaken by the statute of limitation? Was the trial magistrate assisting the respondent who had earlier on failed to prove part of his claim?

18. Can a court deliver part judgment and leave the other portion to await further information 16 years later?

Legal Representation

19. Mr. Odhiambo raised this issue and referred the court to the findings by **AWINO (PM)** which held that the firm of Okongo and Company Advocates were not properly on record in the matter. Further that the firm of Okongo Wandago too, were not properly on record as they came to the matter **AFTER**

judgment had been delivered.

20. Mr. Maurice Odero in response submitted that it was the respondents who served the contested orders on their firm and this brought them on record. Is that how an advocate gets to place himself/herself on record and conduct a matter in court?

21. Apparently there had been a charge of legal representation for the appellant when the matter was in the lower court after judgment. However there was no formal order for the court.

Order 9 Rule 9 provides that:-

“When there is a change of advocate or when a party decides to act in person having previously engaged an advocate after judgment had been passed, such change or intention to act shall not be effected without an order of the court –

a. Upon an application with notice to all parties or

b. Upon a consent filed between the outgoing advocate and proposed incoming advocate or party intending to act in person as the case may be.”

22. It matters not that the application was served on the firm of Okongo Wandago – the writing had long been on the wall once the trial court made this finding – which is the correct legal position.

23. I notice that at the time of making such finding the magistrate actually indulged the applicant’s counsel and considered the documents they had filed, in the interests of justice. I think for the court to then allow this kind of conduct to go on would in my mind be giving the appellant an unfair chance to have two bites at the cherry. Had there been compliance with **Order 9 Rule 9** I would have addressed that issue I had summarised.

24. I therefore decline to consider and evaluate any further presented by appellant’s counsel for failure to comply with **Order 9 Rule 9 (a)** and **(b)**.

25. The appeal is thus dismissed.

Written and dated this 26th day of January, 2017 at Homa Bay

H.A. OMNONDI

JUDGE

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

A.C. MRIMA

JUDGE