



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 104 OF 2015

CLEOPHAS O. ORIDI..... APPELLANT

-VERSUS-

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

(Being an appeal from the ruling and order by Hon. L. K. Sindani Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 532 of 2014 delivered on 23/06/2015).

JUDGMENT

1. On 30/04/2015 judgment was delivered by the lower court (**Hon. P. Y. Kulecho, Resident Magistrate**) where the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD**, was found to have breached the contract it entered with the Appellant and the Appellant was awarded Kshs. 37,600/= with costs and interest.

2. As the said judgment was silent on when the interest was to start running from, the Appellant filed a Notice of Motion dated 21/05/2015 and sought the following orders:

1. That for purposes of this Application, this case be consolidated with the following cases: 490, 531, 533, 510, 544, 526, 542, 545, 564, 5151, 554, 524, 537, 489, 562, 535, 567, 487, 511, 530, 488 & 507 ALL OF 2014.

2. That this Honourable Court be pleased to correct the omissions and or slip of the date when interests should start running.

3. That costs be in the cause.

3. The application was opposed by the Respondent who filed the Grounds of Opposition dated 28/05/2015 and contended that:

1. That the application lacks merit as there is no omission on the part of the court to necessitate correction of the Judgments.

2. That the applicant seeks to have the court apply the Sugar Act 2001 which was repealed by the Crops Act judgment which is proper under Section 26 of the Civil Procedure Act.

3. That the application seeks to interfere with the courts discussion that was properly exercised

4. The application was heard by way of oral submissions before **Hon. P. Y. Kulecho, Resident Magistrate** but the learned Magistrate was transferred to another station before delivering the ruling. The

ruling was then wrote and delivered by **Hon. L. K. Sindani Resident Magistrate** on 23/06/2015 where the application was dismissed with no orders as to costs. That is the order that precipitated this appeal.

5. By a Memorandum of Appeal dated and evenly filed in this Court on 13/07/2015, the Appellant preferred the following grounds:

1. The learned magistrate erred in law and in fact when she misconstrued the nature of the appellant's application as to that of review, yet the appellant's application was that of correction of omissions and or slip as to when interest should start running, brought under Section 999 & 1000 of the Civil Procedure Act.

2. The learned Magistrate erred in law and fact when she held that the repealed Sugar Act 2001 is not applicable to the contract yet the appellant and the respondent contracted under the said Sugar Act 2001.

3. The learned Magistrate erred in law and in fact when in her ruling failed to state the date as when interest should start running, yet the court having awarded to the appellant interest, it was no longer a matter of discretion, but an obligation for the court to state the date at when interest should start running, as per Section 26 of the Civil Procedure Act.

4. The learned trial magistrate erred in law when she ignored cited authorities of superior courts.

5. The learned trial magistrate was biased against the appellant.”

6. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions. In his submissions the Appellant submitted that the learned magistrate misconstrued and treated the application as one seeking review of the judgment whereas the same was very specific as it was to settle the issue of interest which was in abeyance. It was further submitted that by dismissing the application then the issue of interest remained in abeyance hence rendering the judgment incapable of full execution due to the uncertainty of when the interest was to start running from. The Appellant relied on the decision of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013)eKLR** in urging the Court to allow the appeal and settle the issue of interest, that interest ought to be charged from the date of filing the suit as so held by the Court of Appeal.

7. The Respondent supported the decision in issue. It was submitted that the Appellant did not plead any issue of interest in his pleadings and as such he laid no basis for such a claim. Two decisions were cited in support of the submission. It was further submitted that even if this Court is to determine the time the interest ought to accrue from then it has to be as from the date of judgment. The case of **Salim and Another v. Kikava (1989) KLR 534** was relied on. The Court was also urged to dismiss the ground that the lower court was biased on the Appellant and again a persuasive decision was relied upon. The Respondent prayed that the appeal be dismissed with costs.

8. I have carefully and keenly read and understood the proceedings, the judgment and the ruling of the trial court appealed from as well as the parties' submissions both before the lower court and on appeal. I will first deal with the ground as to whether the lower court misconstrued the application before it treated it as one seeking for review. The application was brought under **Order 51** as read with **Section 99** and **100** of the **Civil Procedure Act**. Its prayers have been captured elsewhere in this judgment. **Section 99** of the **Civil Procedure Act** states as follows:

"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

9. The learned Magistrate in dismissing the application stated as follows:

"...In the instant case the fact that the cases have been consolidated bars the Applicants, having appealed against the same decision, from seeking its review. Once the Applicant elects to appeal against a decision, they are precluded from applying for review thereof...."

10. It is therefore clear that the learned Magistrate, with respect, truly treated the application under **Section 99** of the **Civil Procedure Act** as an application for review. That was an error in law and cannot stand. The court had the jurisdiction to make further or other orders based on Section 99 of the Civil Procedure Act. It therefore goes without say that had the learned Magistrate treated the application correctly as one under **Section 99** of the **Civil Procedure Act** she would definitely have arrived at a different decision.

11. Having so found I will now deal with the issue as to when interest ought to be charged from. However I wish to make it clear that contrary to the Respondent's submission that the Appellant never raised the issue of interest in his pleadings, the correct position is that the Appellant so well did so in the Statement of Claim filed in the Sugar Arbitration Tribunal. That submission is therefore without merit and is hereby rejected.

12. To me the issue as to when interest ought to start running in a matter like this one was long settled by the Court of Appeal in the case of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013)eKLR**. The above matter arose from a similar background as this case and the same went all the way to the Court of Appeal. One of the issues which the appellate Court settled was the issue of when interest would start running from and in considering the matter as a breach of contract and that the remedy lies in special damages, the Court was very clear that interest in such cases run from the time the suit was filed. As that decision is binding on this Court and since there has been no successful review or appeal against that finding of the Court of Appeal, I cannot purport to find otherwise. I therefore so find that the Applicants were entitled to interest from the date of filing the suits.

13. I am in agreement with the Respondent that the learned Magistrate did not exhibit any bias in the matter. She made her findings and appended her reasons as well and if the Appellant was dissatisfied with the same, that cannot be said to be a demonstration of bias. That ground fails.

14. As I come to the end of this judgment, this Court makes the following final orders:

a) The appeal be and is hereby allowed and the ruling and order delivered on 23/06/2015 in Migori Chief Magistrate's Civil Suit No. 532 of 2014 is hereby set-aside;

b) The Notice of Motion dated 21/05/2015 is allowed in terms of prayer 2 thereof to the extent that the interest in respect to the judgment delivered on 30/04/2015 shall be calculated from the date of filing the suit.

c) The Respondent shall bear the costs of this appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 23rd day of February 2017.

A. C. MRIMA

JUDGE