REPUBLIC OF KENYA

High Court of Kisii

Civil Case 48 of 2007

DALMAS OJWANG ODENY …….....…….
APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED …….....……
RESPONDENT

(Being an appeal from the judgment and decision of the lower court by S.M. Soita, SPM,

in the original Kisii CMCC NO.440of 2005dated and delivered on 28th February 2007)

JUDGMENT

1. the appellant herein was the plaintiff in Kisii CMCC No.440 of 2003 in which he filed suit against the respondent praying for judgment against the respondent for:-

a) Payment for approximately 200 tonnes of cane expected on the plaintiff's farm at a rate of Kshs.1730/= per tonne.

b) Costs of this suit.

c) Interest thereon at present court rates until payment in full.

2. The appellant averred that by an agreement dated 20th February 1996, the respondent contracted the appellant to grow and sell to it sugarcane at his local land parcel being plot number 223B measuring 0.4 hectares in field number 11 North Sakwa location of Migori District. The term of the contract was a period of 5 years or until one plant crop and two ratoon crops of sugarcane were harvested on the plot aforesaid whichever period was the less. The appellant averred that contrary to the said agreement for which the appellant was assigned account number 251455, the respondent failed to harvest the plant crop at 22-24 months or the ratoon crops at 16-18 months. Further that in or about the year 2001, the respondent commenced harvesting other peoples' cane, but refused to harvest the appellant's cane terming it stale and the same was left to go to waste. The appellant held the respondent liable in breach of contract and in the alternative he termed the respondent's alleged refusal to harvest the cane as wrongful, oppressive, unconscionable, discriminative and unlawful.

3. The respondent filed defence on 11th July 2003 and denied that it had breached the contract agreement between itself and the appellant. It denied that it is entrusted with the development,

improvement, harvesting and sale of sugar cane from the sugar cane growing and farming community around Awendo area. In the alternative, the respondent specifically denied the allegations set out in paragraphs 3, 4 and 5 of the plaint alleging the existence of any agreement between the appellant and itself or that it had any obligation under the said agreement or at all. The respondent also contested the jurisdiction of the court and reserved the right to raise a preliminary objection on the same at the first hearing. Finally it was averred that the plaint as drafted and filed was bad in law for being an affront to the rules of pleadings; that the same revealed no cause of action as against the respondent. The court was urged to dismiss the suit with no order as to costs.

4. The suit was heard in the court below and after conclusion of the hearing; the trial magistrate found that the appellant had not proved his case against the respondent on a balance of probabilities. The appellant's suit was dismissed with costs.

5. The appellant was aggrieved by the said decision of the trial magistrate and has come to this court on appeal. In the Memorandum of Appeal dated 21st March 2007 and filed in court on 23rd March 2007, the appellant raises the following 4 grounds:-

1. The learned trial magistrate erred in law in taking an unduly long period to deliver the judgment and the delay prejudiced the quality and outcome of the judgment when eventually delivered.

2. The learned trial magistrate erred in law in failing to adequately consider the plaintiff's evidence and exhibits adduced in support of his case and further erred in not concluding that on the evidence the defendant had failed to rebut the same adequately.

3. The learned trial magistrate erred in law in accepting the false and contradictory evidence of the defendant.

4. The learned trial magistrate erred in law in failing to make a finding on

the award payable.

6. The appellant therefore prayed that the appeal be allowed and the judgment dated 28th February 2007 be set aside. The appellant also prayed that the court do assess the damages payable and to award the same to the appellant together with the costs of the suit in the court below and of this appeal.

7. The parties filed written submissions together with relevant authorities. I have read both sets of submissions and the authorities. I have also carefully read the pleadings filed by the parties to this appeal and the proceedings and judgment of the trial magistrate. This being a first appeal, I am under a duty to reconsider and evaluate the evidence afresh with a view to determining whether or not the conclusions reached by the trial magistrate should be supported. While doing so, it is important to remember that I have no privilege of seeing and hearing the witnesses who testified in the court below. In the well known case of **Peters –vs- Sunday Post Ltd. [1958] EA 424**, the Court of Appeal stated that **"while an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to**

appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide." That was also the principle stated in the case of **Watt –vs- Thomas [1974] 1 All ER 582** and applied in such cases as **Astariko E.A. Abule –vs- Elijas M. Ambaisi - Court of Appeal Civil Appeal No.228 of 1998**. It is never enough that the appellate court might have come to a different conclusion. See **Geoffrey Kihunyu Wanjura –vs- Gichiru Kiguta & another – Court of Appeal Civil Appeal No.67 of 1997**.

8. In the instant appeal, the issue for determination is whether the appellant proved the existence of the

agreement between himself and the respondent and whether the respondent was in breach of the said agreement. In other words, did the appellant prove his case against the respondent on a balance of probabilities? While the appellant contends that he did the respondent does not think so. The parties agreed that there was the agreement **P. Exhibit I**. In his evidence in chief, the appellant testified as PW1 and stated that he signed an agreement on 20th February 1996 to grow cane on his 0.4 hectare farm. He testified that he was told the contract was to last for six years or three harvests, with the first harvest being within 24 months, while the second and third harvests were to be within 18 months each. He averred that the respondent did not harvest the cane as agreed. He was expecting 75 tonnes per hectare and that in total, he was expecting 140 tonnes at the rate of Kshs.2000/= per tonne. He asked to be compensated for the 3 cycles.

9. During cross examination, the appellant stated that though he planted sugar cane in February 1996, after the field was prepared for him by the respondent, he did not have any documents to prove that he developed the cane for which he was given a job completion certificate. He said all the documents were at home. He also testified that when his cane matured, he did not write to the appellant to ask them to harvest the cane, but he expected them to harvest the cane on the 24th month. They did not do so, and that he had to chop off the plant crop to make room for the ratoon to develop. He said ratoon 1 developed to 18 months and again the respondent failed to harvest it. He had to chop it off to make way for ratoon II which also grew to 18 months but had to be abandoned when the respondent failed to honour the terms of the contract for the third time in a row. That was the whole evidence given by the appellant.

10. The case of the respondent was anchored in the testimony of Francis Abongo, DW1, an Agricultural Supervisor with the respondent. DW1 explained the procedure adopted by the respondent with contractors who grow cane for the respondent and stated that there is normally a Job Completion Certificate issued to contract farmers after survey, ploughing, supply of seed cane, supply of fertilizer and top dressing. DW1 stated that according to the acreage expected to be under cane, it was not realistic to expect 140 tonnes of cane from the appellant's farm, and that for the particular area, the expected harvest was 22 tonnes at Kshs.1730/= per tonne giving a total of expected earnings of Kshs.38000/= when the crop is well developed. DW1 maintained that the appellant did not develop the cane as alleged because if he had, he would have had the Job Completion Certificate as well as completion of **clause 11 (a)** of **P. Exhibit 1**. DW1 was unable to produce the cane census report which would have confirmed whether or not the appellant developed the cane. He denied that the respondent neglected the appellant's cane.

11. DW2 was the respondent's Senior Accountant, Samwel Otieno Ngani. His evidence was that there were no records of the appellant because he did not plant any cane. In cross examination, DW2 stated that where there was no harvesting of cane, the farmer would have no records. He also questioned the authenticity of the agreement – **P. Exhibit I**– which though dated January 1996 was not signed until April 1996.

12. The above is the evidence and also the facts as they relate to this appeal. Having evaluated the evidence, I can now deal with the 4 grounds of appeal one by one. As far as ground 1 is concerned, I do not think that the appellant's complaint is valid. Judgment was initially for delivery on 21st September 2005, but it was not delivered until 28th February 2007. The appellant contended that a delay of 18 months for delivery of judgment was inordinate delay which should result in this appeal being allowed because **a)** no explanation was given for the delay and **b)** the trial magistrate failed to evaluate the evidence and instead relied on only one side of the story. Reliance was placed on the case of **Elizabeth Braganza –vs- Tysons Habenga – Court of Appeal at Nairobi Civil Appeal No.285 of 1997**. In this appeal, the appellant wants the appeal allowed and the case to go for retrial. In the **Bragonza** case, the Court of Appeal said it would have allowed the appeal on the ground of delayed judgment, and order a rehearing of the case. On the other hand, the respondent relied on the following 2 authorities: **Johnson M. Mburugu –vs- Fidelity Shield Insurance Co. Ltd. – C.A. No.105 of 2003 [2006] e KLR** and **Nyagwika Ogora alias Kennedy Kemoni Bwogora –vs- Francis Osoro Maiko – C.A No.271 of**

2000 (unreported). In the **Nyagwoka case**, the Court had the following to say on delayed judgments:-

"The real question is what the consequence of non-compliance is therewith? No doubt that rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void IPSO facto. The rule cannot and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while non-compliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officer concerned from the in-charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal."

13. Though it is appreciated by this court that there was a delay by the trial court, in the delivery of judgment, this is not the only issue to consider in this appeal. The court has to consider whether the evidence that was placed before the trial court was sufficient to prove the appellant's case on a balance of probabilities so that even as the case were to be remitted for retrial, the appellant would not be getting an opportunity to fill in the gaps in his evidence.

14. Having reconsidered and evaluated the appellant's case and the evidence adduced in support thereof, I am satisfied that the trial court was right in concluding that the appellant had failed in proving his case against the respondent on a balance of probabilities. The burden of proof in this case was upon the appellant and not the respondent, with or without any evidence from the respondent. The trial magistrate could not have manufactured any evidence for the appellant. It was the appellant's duty to demonstrate through expert evidence that his farm could produce 200 tonnes of cane and that he would have sold the same at Kshs.1730/= per tonne. There was no such evidence. Apart from the agreement, the appellant did not produce the Job Completion Certificate which he said he had left at home. If it was true that he had it he could have sought adjournment or applied to be recalled so that he could produce it. He exercised neither option. In my humble view, the trial magistrate adequately considered the only available evidence that was before him before reaching the conclusion that the said evidence was not sufficient to support the appellant's claims against the respondent. The appellant's case was for special damages and as was held in **Jivanji –vs- Sanyo Electrical Company Limited [2001] EA 98**, special damages must be specifically pleaded and specially proved with a degree of certainty and particularity. Also see **Margaret Muga Oduk –vs- South Nyanza Sugar Company Ltd. – Kisii HCCA No.207 of 2001 (UR**). The appellant failed in his duty and so his complaints before this court on grounds 2 and 3 must fail.

15. As regards ground 4, it is desirable for a trial court to indicate the damages that it would have awarded if the suit had been successful. See **F. Friedman & another –vs- Njoro Industries Ltd. [1954] 21 EACA 172**. I however find that the trial court's failure to do so cannot be a reason for allowing this appeal.

16. In the premises the appellant failed to adduce evidence to support his claims, and as such there was no other evidence which the trial court could have addressed its mind to in resolving the dispute that was before it. The trial court cannot therefore be faulted for acting on the only evidence that was before him. It did not matter that the respondent's evidence may have been contradictory.

17. The appeal is accordingly dismissed with no order as to costs.

18. Lastly, the delay in delivering this ruling/judgment is very much regretted. At the time

it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

19. It is so ordered.

Dated and delivered at Kisii this 12th day of September, 2012.

RUTH NEKOYE SITATI
JUDGE

In the presence of:

Mr. G.S. Okoth for Ojul (present) for Appellant

Mr. Oguttu-Mboya for Ogweno (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.

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