No. 2770

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 74 OF 2008

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

-VERSUS-

EARNEST NGONJE MAGAMBO.....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of Hon. S.M.S Soita Principal Magistrate in original Kisii CMCC No. 56 of 2005 delivered on 28th May, 2008)

By an amended plaint dated 6th July, 2004 and filed in court on 9th July, 2004, the respondent as the plaintiff sued the appellant as the defendant for:

- **Kshs. 911,822/= being the value of the 123 stacks of cane delivered and wrongfully paid to Jeremiah Omoke Kinago.**

- **Costs of the suit.**

- **Interest at 24% from November, 1996 till payment in full.**

What informed the suit were the following undisputed facts. The respondent entered into a cane contract with the appellant on or about 21st February, 1995 with regard to plot number 811A, field No. 59 and account number 611328. Pursuant to the agreement, the respondent planted sugar cane which matured and was harvested by the appellant in terms of the agreement. The same was harvested on 26th November, 1996 and delivered to the appellant's factory for processing. The cane realized kshs. 911,822/= being the

net amount due to the respondent after the appellant had deducted all the expenses incurred in harvesting and transporting the same. The appellant did not however pay the amount to the respondent as expected. Instead it ended up paying the amount to a third party by the name, **Jeremiah Okore Kiriago** to whom the respondent had assigned his interest in plot number 811C filed number 59 and account number 611330. Despite several demands, the appellant had refused, failed and or neglected to rectify the mistake and pay the respondent the amount, hence the suit.

In defence, the appellant averred that the respondent assigned his interest in account no. 611328 to one, **Jeremiah Okore Kiriago**, the third party which was witnessed by **Nathan Ondiko Kiriago** and therefore the money was paid to the rightful person. The appellant further pleaded that the acreage on account number 611328 as indicated in the contract was 1.8Ha. However through fraud perpetuated by the respondent, other people and employees of the appellant, non contracted cane was unprocedurally harvested from other fields using account number, 611328 leading to abnormal yield of 905.5 tonnes.

On 27th July, 2004, the respondent filed an application under the then order XXXV rules 1 & 5 of the **Civil Procedure Rules** and section 3A of the **Civil Procedure Act** seeking that summary judgment be entered for him against the appellant in the sum of kshs. 911,822/= plus costs and interest as prayed in the amended plaint. He further prayed that the appellant be allowed to defend only the residue of the claim in the plaint after judgment as aforesaid and that the costs of the application be provided for.

The application was grounded on the fact that the amount for which summary judgment was sought was liquidated and that the amended defence applied only to a part of the respondent's claim which was unrelated to the liquidated claim aforesaid. That this was the clearest of cases where the summary procedure should be invoked. Putting the claim to a full trial would only amount to delay of justice and that the appellant had no good defence to the claim and ought therefore not to be permitted to defend the same in the interest of justice.

The affidavit in support of the application was sworn by the respondent. He merely reiterated and expounded on the foregoing grounds.

As expected, the application was vehemently opposed. A replying affidavit filed by **Mr. Gabriel Ouma Otiende** to the application was to the effect that it was true that the proceeds for sugar cane on account No. 611328 field No. 59 plot NO. 811A was paid to the third party as their books and records at the time showed that the said third party was the owner thereof of the cane as the said account had been assigned by the respondent to the third party. The amended defence therefore raised weighty triable issues, which could only be ventilated fully at the trial. It was evident from the amended defence that the respondent was out to perpetrate fraud through the court by forcing the appellant to pay him the amount and thereby unjustly enrich himself. Finally, he deponed that it would be absurd to enter summary judgment in this case on money which had already been paid out to the respondent's nominee.

Arising from the defence advanced, the appellant took out 3rd party proceedings against the third party. By an application dated 16th September, 2004 he sought that the third party be enjoined to the suit as a defendant, in the alternative leave be granted to the appellant to issue third party notice to the third party. The application was by consent allowed on 18th November, 2004. On 24th November, 2004 again by the consent of the parties this suit was transferred by **Bauni J.** from this court to the then Senior Principal Magistrate's court at Kisii for hearing and final determination.

On 14th May, 2008, the application for summary judgment came up for interpartes hearing before **SMS Soita**, then the Principal magistrate. In a reserved ruling delivered on 28th May, 2008, the learned magistrate allowed the application holding thus ***"… I have considered the affidavits and annextures and submissions by both sides. Clearly the agreement was between the plaintiff and the defendant. It is not disputed that some money was paid to the third party. I have also looked at the pleadings. The defendant does not have a sustainable defence. I am minded to allow the application with costs…".***

That ruling prompted this appeal. 10 grounds were advanced in support of the appeal. They were:-

"1. The learned trial magistrate erred in law and in fact when he held that the appellant did not have a sustainable defence without assigning and or giving any reasons for such holding.

2. The learned trial magistrate erred in both law and in fact when having found that the sum of kshs. 911,822/= claimed summarily in the application before him had been paid to the third party by the appellant; he did not consider and resolve the dispute between the appellant and the third party.

3. The learned trial magistrate erred in both law and in fact when he awarded interest on the principal sum of kshs. 911,822/= at the rate of 24% per annum with effect from November, 1996 until payment is made in full without any basis and when such claim for interest at such rate of 24% was never pleaded, alluded to and or proved by affidavit evidence and neither had the same been contractually agreed on and without first finding that the said rate of interest was due and or applicable in the circumstances of this case and without assigning any reasons in respect thereof.

4. The learned trial magistrate erred in both law and infact when, without jurisdiction he awarded to the respondent, a judgment and decree summarily in the sum, of over kshs. 3,600,000/= which amount is well in excess of his pecuniary jurisdiction.

5. The learned trial magistrate erred in both law and infact, when in his ruling that contained a summary judgment, he failed to comply with the provisions of Order XX rule 4 of the Civil Procedure Rules as his decision never contained a concise statement of the case, the points for determination, the decisions thereof and the reasons for the decision.

6. The learned trial magistrate erred in both law and in fact when he failed to consider the respondents claim for interest as is provided for under section 27(1) and (2) of the Civil Procedure Act.

7. The learned trial magistrate erred when he failed to appreciate and to address his mind to the applicable principles for grant of an application for summary judgment and in failing to consider both the amended defence and the replying affidavit which all disclosed triable issues which should have allowed the defendant to unconditional leave to defend the suit.

8. The learned trial magistrate erred in both law and in fact when on the award of interest; he allowed a very large claim without specifically saying so in his decision and without assigning any reasons, as the award of interest at the rate of 24% per annum with effect from November, 1996 could not be simply implied.

9. The learned trial magistrate erred in law when he awarded interest on the principal sum from a date before the suit of November, 1996 when the respondent never gave any justification for such claim and in excess of the court interest rate of 14% per annum.

10. The learned trial magistrate erred in law when he awarded costs of the suit in the matter together with interests at the rate of 24% per annum with effect from November, 1996 as was prayed in the amended plaint without any basis and or justification whatsoever, and without assigning any reasons thereto.

When the appeal came up for hearing before **Musinga J.** on 30th September, 2010, parties agreed to file

and exchange written submissions. This was subsequently done. However, by then **Musinga J.** had left the station on transfer. It was then agreed that I take over the file and craft the judgment on the basis of the written submissions then on record.

Having considered the record of appeal, rival written submissions and the applicable law, I have no doubt at all in my mind that this was a case where summary procedure was inapplicable. The appellant had a plausible and sustainable defence on record to warrant the suit to go for a full trial so that it is afforded an opportunity to be heard. Thus the summary procedure was not properly invoked by the learned magistrate. As stated in the case of **Industrial and Commercial Development Corporation –vs- Daber Enterprises Ltd "…*Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his case tried by a proper trial … summary procedure is applied to enable a plaintiff to obtain quick judgment where there is plainly no defence. Where the defence is a point of law and the court can see at once that the point is misconceived or, if arguable, plainly, unsustainable, summary judgment will be given. Summary procedure should not be used for obtaining an immediate trial, the question must be short and dependent on few documents …. A defendant who can show by affidavit that there is a bonafide triable issue is to be allowed to defend that issue without condition …".**

No doubt, the appellant's replying affidavit to the application raised several plausible defences. First and foremost, it claimed that the respondent had assigned his interest in account No. 611328, field No. 59 plot No. 811A to a third party. However, the respondent pleaded that he made no such assignment. This therefore was a triable issue which could only be resolved during the plenary hearing of the suit and on evidence. The fact that the respondent assigned his interest to the third party as aforesaid was reiterated by the appellant in its defence. No reply to that amended defence was ever filed by the respondent. In the absence of a reply aforesaid then the respondent is deemed to have admitted the fact that he had assigned his interest.

The appellant too pleaded fraud in his defence. It alleged that the respondent committed acts of fraud in collusion with the appellant's former employees and purported to have brought in sugar cane amounting to 905 tonnes. Those employees had since been sacked. The appellant proceeded to give particulars of fraud in the defence. That ground of defence was raised and elaborated upon by the appellant in its replying affidavit to the application. By failing to reply to the aforesaid allegations, he is deemed to have admitted the same. On what basis then would a court proceed to invoke summary jurisdiction in the light of such contested issues. Clearly, the appellant had a sustainable defence to the respondent's claim.

The power exercisable in a summary procedure which the lower court adopted is a statutory power and is a remedy exercisable in the discretion of the court. The scope of the rule is defined by Order XXXV rule 1 of the **Civil Procedure Rules** and there is no discretion to go outside the rule. See **Olympic Escort International Co. Ltd –vs- Parminder Singh Sandhu & Anor C.A No. 306 of 2002 (UR)**. It appears that the respondent not only sought liquidated sum but also sought for and obtained by way of summary judgment interest at the rate of 24% in the nature of a penalty, backdated to November, 1996, even before the filing of the suit and which had not been contractually agreed upon. In my view, this took the application outside the purview of the summary procedure envisaged under Order XXXV of the **Civil Procedure Rules**. It is trite law that interest chargeable before the filing of a suit is a matter of substantive law which must be specifically pleaded and thereafter strictly proved. In any case the rate of interest 24% went so far and well beyond the maximum rate of interest allowable under section 27(2) of the **Civil Procedure Act**. The court did not assign any reason for such an award of interest when under the law, the maximum interest allowable was 14%. In the case of **New Tyres Enterprises Limited –vs- Kenya Alliance Insurance Co. Ltd (1987) KLR 380** the Court of Appeal observed ***"…The principle which guide the court in the administration of Justice when adjudicating on any dispute is that where possible disputes should be heard on their merits …".*** The trial court ought to have heard the matters fully and investigated it before adopting the summary procedure. The rate of interest chargeable was therefore also an issue for determination.

By the time the application for summary judgment came up for interpartes hearing, the third party was on board. Directions had not been taken in the manner the proceedings between the respondent and the appellant on one hand and between the third party and the appellant on the other part will be

conducted. In those circumstances, I think it was completely unsafe to shut out, the appellant and the third party from being heard on the merit of their defences. It is instructive that in his defence, the third party had averred that he had been rightfully paid the cane proceeds on the basis of an assignment agreement executed between him and the respondent. The respondent never filed any response to the third party defence. Therefore it was only open for the court in the circumstances to determine all issues which were already in the fore. Summary procedure was the unsafe way to go in the circumstances.

As alluded to by counsel for the appellant in his written submissions, the principle of double jeopardy comes to the fore in this matter. Having been aware that the appellant had paid the cane proceeds to the third party who had also been brought into the suit, the trial magistrate ought to have decided all the issues between the parties and considered their respective cases in the ruling. Had he done so I do not think that he would have arrived at the decision that the application was deserving.

Again, one wonders why from the onset, the respondent never deemed it necessary to sue the third party whom he was all along aware that he had been paid proceeds on his account and on account of an assignment jointly with the appellant. This goes to the bonafides of the respondent's claim. This issue has to be interrogated and can only be done at full hearing.

It appears to me that the trial magistrate treated the application as one based on admissions. This is not however true from the pleadings. In any event the summary procedure was never adopted on the basis of an admission. The fact that the third party was paid the sum of kshs. 911,822/= by the appellant was admitted and the reason why this was done was explained both in the pleadings and the replying affidavit to the application. The reason should have been the focus of the learned magistrate's consideration.

In conclusion I say the following:-

- **The defence on record raised triable issues which the appellant was entitled to defend.**

- **Justice in the suit could only be done after a full hearing and on evidence.**

- **The respondents suit was never plain and obvious as the appellant had raised several issues in the defence which were not countered.**

- **In any event, lengthy affidavits with several annextures were filed which it is undesirable way to decide the case in a summary manner without testing the same through evidence and cross-examination.**

All in all, this appeal is meritorious and must be allowed. I set aside the order of the subordinate court made on 28th May, 2008 on the Notice of Motion dated 27th July, 2004 and substitute therefore an order dismissing the notice of motion. The appellant shall have costs of the appeal and of Notice of Motion before the subordinate court.

Judgment dated, signed and **delivered** at Kisii this 4th day of May, 2011

ASIKE-MAKHANDIA

JUDGE