NO. 137
REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 165 OF 2005

JANE .A. AMOLO ……. APPELLANT

-VERSUS-

SOUTH NYANZA COMPANY LIMITED ……. RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and decree of the Principal Magistrate Kisii dated 4th August 2005 S. M Soita in Kisii CMCC No. 100 of 2002)

The appellant **Jane A. Omolo** was the plaintiff in the civil case she lodged in the Chief Magistrates Court at Kisii on 21st February, 2002. She filed the suit against, **South Nyanza Company Limited**, the respondent in this appeal.

In the said suit, she claimed a sum of Kshs. 391,000/= together with the interest at 26% from 30th November, 1999 until payment in full, costs and interest. The basis of the suit was that by a written agreement dated 27th September 1999 the respondent contracted her to cut and transport the non-contracted cane to the its factory at Awendo. In the month of October 1999 or thereabouts the appellant commenced the execution of the contract and had delivered to the respondent cane weighing approximately 240 metric tonnes. It was a term of the contract express and/or implied that upon taking delivery of the cane, the respondent would pay the appellant the value thereof within 30 days of delivery of the cane to the factory. The respondent in breach of the agreement failed to pay for the cane so delivered to the tune Kshs. 391,000/= approximately. Hence the suit.

When the summons to enter appearance were issued to **Messrs Oduk & Co. Advocates** for the appellant, they served the same on the firm of **Wachakana and Company Advocates** who in turn filed a memorandum of appearance and subsequently a statement of defence dated 12th March, 2002, purportedly on behalf of the respondent. The defence was to the effect that there was no such agreement between the appellant and respondent as alluded to the plaint. In the alternative, it was averred that if there was such an agreement the same was void and was not binding on the respondent. Pursuant to that defence, the appellant filed an application by way of Notice of Motion dated 25th March, 2002 for summary judgment. The application proceeded ex-parte as the respondent failed to defend the same though served. The application was allowed and judgment was entered against the respondent in the said sum of Kshs. 391,000/= plus interest at the rate of 26% per annum with effect from 30th November, 1999 until payment in full.

A decree was subsequently extracted but as it was in the process of being executed, the respondent by a Notice of Motion dated 12th June 2002 and filed in court on the same day, applied to set aside the said ex-parte judgment and expunge from the record the Memorandum of Appearance and statement of defence filed by **Messrs Wachakana and Company Advocates** for the respondent as aforesaid. The application

was canvassed and in a reserved ruling delivered on 19th July, 2002, the application was allowed. Subsequent thereto, **Messrs Okong'o & Co Advocates** now on record for the respondent filed a defence dated 10th July 2002.

In the said statement of defence, the respondent admitted having issued a contract to the appellant for the supply of non-contracted sugarcane on 27th September, 1999. It however specifically denied the rest of the appellant's claim in these terms:-

"4. The defendant absolutely denies the content of paragraph 4 of the plaint. To the contrary, the defendant avers that the plaintiff in collusion with its employee, one Lucas Ouma conspired to falsely and did falsely fake delivery notes in respect of nonexistent cane and purported to demand the same from the defendant. As a result of the said fake and or falsified cane delivery notes, the plaintiff further conspired together with the defendants weighbridge employees to generate fake and or falsified weighbridge tickets in respect of nonexistent cane and was subsequently issued with false and or falsified weighbridge tickets which she is now using to claim from the defendant.

PARTICULARS OF FRAUD

- ***Colluding with the defendant's former employee, one Lucas Ouma to generate extra cane delivery notes which were then raised and given to the plaintiff and to the defendant's weighbridge clerk, one Thadayo Otieno Orembo to generate fake weighbridge ticket.***

- ***Presenting the delivery note from the defendant ex filed (sic) staff named Lucas Ouma which was authenticated by the harvesting and transport staff appending or causing to be appended false signatures on cane delivery notes.***

- ***Presenting delivery notes whose details were not recorded in the daily report and or inserted well after such reports.***

- ***Presenting delivery notes with altered and or doctored particulars.***

- ***Claiming payments on weighbridge tickets which were forged.***

- ***Presenting falsified delivery notes in respect of cane purported to have been harvested from plot number 45 Kuja Kadera and 48 Chamigiwadu-Kanyawanga through Lucas Ouma the defendants ex employee.***

5. The defendants therefore upon discovery of the aforesaid issuing of false excess and or falsified cane delivery notes by its employee aforementioned and the issuing of false, falsified and fake weigh bridge tickets carried out investigations.

6. The defendant therefore avers that the plaintiffs plot could not have yielded the alleged 240 tonnes of cane or at all and calls for strict proof thereof.

7. The defendant avers that had the plaintiff delivered cane to her which in this case were not delivered as alleged, it could have paid out the proceeds thereof within 30 days as pleaded in paragraph 6 and avers that for reasons of such non delivery, it could not pay the same as in fact no cane was delivered to its factory.

8. The defendant avers in reply to paragraph 6 that as a result of the foregone (sic) it had no obligation to pay for that which was never delivered to her and therefore denies being indebted to the plaintiff in the sum of Kshs. 391,000/=
6. FURTHER AND without prejudice to the foregone,(sic) the defendant in further answer to the plaintiff's claim avers that it had reported the alleged fraud to the police who in turn are carrying out investigations involving the defendant's employees and among others the plaintiff.

7. The defendant further avers that it terminated the services of the following of its employees who together with the plaintiff were involved in the scandal. Luca Ouma. Thadayo Otieno Orembo, David Okebe Ojwang, Robert Odoyo Ochomo and Tom Ogweno Onyango."

It was the respondent's prayer therefore that the suit be dismissed forthwith.

The appellant in support of her case, testified and called one witness. Her evidence as captured through evidence in chief and cross-examination a nutshell appears to be that:- "She sourced non contracted sugarcane on 2 parcels of land No. 45, Kadera Kwoyo area (Kuja Old Bridge) and number 48 of Kanyawanga area (Cham gi wadu). She applied to the respondent by a letter dated 20th September 1999 to be allowed to harvest and transport the cane to the respondents factory, and sell it to them. The respondent agreed to the request in writing by a letter dated 27th September, 1999 and issued a NCC Self Harvesting Transport Agreement spelling out the terms and conditions to be complied with.

The appellant proceeded to harvest and transport cane to the factory, after the respondent had confirmed the area, existing cane and suitability of the same as per the NCC Self Harvesting and Transport terms and conditions applying. The total delivery was 240 tonnes against which the respondent generated a statement by the computers at the weighbridge chits showing actual deliveries to the factory made.

It was after this that the respondent refused to pay for the deliveries without any explanation whatsoever. Legal demands were made but no response was forthcoming. It was then that the appellant sued the respondent. The respondent only came up with alleged fraud after it had been sued.."

The evidence of her witness, **Elijah Olunga Obambo** was that he got to know the appellant when she harvested her sugarcane and asked him to look for tractors to ferry the same to the respondent's factory. He sourced 6 tractors for that purpose. They ferried the cane and were issued with delivery notes by the respondent's field assistant by the name **Lucas**. They took the cane to the respondent's factory and at the weighing bridge they were given yellowish slips some which had his names whereas others had names of the other tractor drivers. The witness could not however tell how many tonnes were delivered.

For the respondent its evidence came through **Andrew Manyara Mangwa,** the harvesting and transport manager, **Fredrick Otieno Agoro**, an employee of the respondent in the legal department, **Hesbon Owino Ogoda** who allegedly sold parcel no. 45 to the appellant and **Sila Okeko Aduda** assistant chief. In brief **Andrew Manyara Mangwa** admitted signing some documents after he was misled by one **Lucas Ouma**. The documents were in relation to plot numbers 45 and 48. Those plots had no cane according to his subsequent investigations. They also conducted a search in the lands office with regard to the 2 plots. The acreage in the mutation forms was different from that claimed by the appellant and the names of the plot owners were different. He tendered in evidence the mutation forms. The appellant's claim was thus fraudulent. **Lucas Ouma** apparently was involved in the scam. He was an employee of the respondent. He and other employees of the respondent were involved in generating false documents that led to payment of ghost cane growers and transporters. When the scheme was discovered **Lucas Ouma** and his cohorts were all fired by the respondent. The appellant's claim fell in this category. **Fredrick Otieno Agoro** is the one who obtained mutation forms from the lands office. The forms showed that the plots were non-existent as they had been subdivided in 1981 and 1994 respectively. It was not therefore correct that the appellant had developed cane on area of 1.3 hectares in 1999. No such plot was existing at the time. As for **Hesbon Owino Ogoda**, he testified that he was the original ownerof plot 45 which he sold to one, **Joseph Odero.** No cane was planted on the plot. The assistant chief testified that **Elijah Olunga Obambo** was in fact a husband of the appellant and pointed him out in court.

The learned magistrate having carefully evaluated the evidence by the respondent as well as the appellant found favour with the respondent's case and dismissed the appellant's claim. He delivered himself thus:-

"I have carefully appraised the evidence on record. Documents relied on by the plaintiff clearly show that there was cane delivery to the defendant. It was her evidence that the cane was grown on plot no. 45 Kadera and plot no. 48 Kanyawanga. From the evidence brought in by the defence, the 2 plots do not exist. The court visited the sites on which the plaintiff alleged she harvested cane. On the parcels

said to be no. 48 Kanyawanga we found one, Erick Odhiambo Onditi. Although he confirmed there was sugarcane he sold he said the parcel said to be no. 45 Kadera Lwala. (sic) We found it to be near the Kuja old bridge. It was the evidence of the plaintiff that she bought already developed cane. She was not able to tell the names of the persons to whom she had paid Kshs. 100,000/= being the consideration of the cane she bought and ultimately delivered to the defendant. She could not give the names of the witnesses. When she was being cross-examined initially she said the agreements were verbal. Let me quote her evidence:

"The leases of developed cane were verbal."

Pressed further she said the agreements were written but her answers were disjointed. I will quote her:

"The agreement were hand written. They were written by a clan elder. The plots are under different clan elders. It is one clan elder who wrote for the 2 parcels. Actually they were separate clan elders. I cannot remember their names." With evidence I have seen the mutation forms and the evidence of DW3 the original owner of parcel 45. (sic) Kadera Lwala when it existed and also evidence that PW1 and PW2 are husband and wife I find that on a balance of probabilities the plaintiff has failed to establish her case. The same is dismissed with costs…".

The judgment and decree aforesaid triggered this appeal. In a Memorandum of appeal dated 31st August, 2005, and filed in court on the same day, the appellant attacked the judgment and decree on 6 grounds to wit:

"1. The learned trial magistrate erred in law and in fact in not making a finding that there were two valid, and proper agreements for the delivery of cane by the appellant to the defendant.

2. The learned trial magistrate erred in law and in fact in deciding the suit on the basis of a lease or lease agreements between the appellants and the persons she bought the cane from whereas the said leases were not in dispute or in issue or the subject of the suit preferred against the respondent.

3. The learned trial magistrate failed to appreciate that evidence gathered at the site visits on 4th August, 2003, proved conclusively the existence of the cane on the sites at the time of the agreement and in so failing, arrived at a wrong conclusion and judgment.

4. The learned trial magistrate erred in law and in fact by failing to appreciate the dirth (sic) of the documentary evidence disclosing clearly the existence of the agreement, the harvesting of the cane, the transportation thereof, the weighing of the cane and the computation of the appellant dues by the respondent and came to a fundamentally wrong judgment.

5. The learned trial magistrate failed to find that the defence evidence was unconvincing not cogent, lacking in any material proof and tailor made to wrongly defeat the appellants claim and that it totally failed to rebut the appellants evidence.

6. The learned trial magistrate erred in law in finding for the defence whereas the fraud pleaded by the defendant was not proved to the required standards…".

When the appeal came up for directions it was agreed amongst other directions that the appeal be canvassed by way of written submissions. Parties subsequently filed and exchanged written submissions which I have carefully read and considered.

This being a first appeal its my duty to re-evaluate the evidence, assess it and come to my own conclusion, remembering that I have not seen nor heard the witnesses and making due allowance for the same. The cases of **Selle V Associated Motor Boat Company Ltd (1968) E.A 123 and Williamson Diamond V Brown (1970) E. A 1** are instructive in this regard.

I would wish first to deal with a technical aspect of the pleadings herein. It is apparent that no reply to the averments of the respondent as contained in its defence was filed by the appellant. By dint of the Provisions of Order VI rule 9 (1) of the **Civil Procedure rules** the appellant is deemed to have admitted all the averments on matters of facts that were pleaded in the said defence unless such averments were specifically traversed by her in a subsequent pleading which is usually a reply to the defence. Such traverse can be either a denial or a statement of non admission. None of the above was done by the appellant in this case. It is therefore follows that the appellant admitted each and every adverse matter of fact which the respondent had pleaded against her in the statement of defence. It should be recalled that the respondent pleaded that the appellants claim was fraudulent. It went out of its way to give particulars of fraud. No reply was filed to traverse those averments. The assumption then must be that she admitted fraud and the particulars thereof as alleged by the appellant. Had the trial court acceded to her claim, it would have given a seal of approval to her claim that was fraudulent. In the case of **Mount Elgon Hardware V United Millers Ltd KSM C.A no.19 of 1996 (UR)** the court of appeal observed that a plaintiff who does not traverse the particulars of negligence as alleged by the defendant, admits the negligence as alleged in the defence. The same situation obtains here save that in this case the appellant did not traverse claims of fraud. The appellant having not traversed fraud attributed to her, she is deemed to have admitted the same.

The evidence of the appellant as correctly pointed out by counsel for the respondent was to say the least very evasive and at best wholly made up. She testified that she delivered cane to the respondent that had been grown on 2 plots; **Kadera/Kuja plot no. 45** and **Kanyawanga/Chamgiwadu plot no. 48.** Those parcels of land were not hers. She had allegedly leased them from 2 different persons with developed sugar cane thereon. However she conveniently forgot the names of the people from whom she had leased the plots. She also forgot ***albeit*** conveniently again the names of the witnesses to the verbal lease agreements in which she alleged to have paid out Kshs. 20,000/= and Kshs. 80,000/= for plots no. 45 and 48 respectively. Eventually she harvested the cane and transported it to the respondent's factory. In fact in so far as the alleged witnesses to the verbal lease agreements were concerned, the appellant was categorical that she was not prepared to part with their names! Under cross-examination, she was adamant that ***"I cannot give the names as they are residents of that area".*** From the foregoing it is clear that though she knew the names of the witnesses to the alleged agreements, she was nonetheless not willing to disclose their names for no apparent reason. If her claim was genuine, why would she find it so difficult to give out the names or the owners of the plot and or even the witnesses to the transaction? In view of the foregoing, the appellants testimony in my mind is spurious and smacks of fabrication. I do not therefore think that she leased the said plots and or that they had cane as pleaded and testified to or at all. I doubt that it can be that easy to forget the names of persons from whom you buy sugarcane at a total cost of Kshs. 100,000/=. This is a substantial sum of money. The respondent had specifically denied the appellants allegation that she had cane on the plots which she harvested and transported to the respondent's factory. It was thus incumbent upon the appellant to lead credible evidence to the contrary since it is trite law that he who alleges must prove. She was bound to prove existence of cane which she harvested and delivered to the respondent. The totality of evidence on record tends to show that the existence of the parcels of land and cane thereon was highly doubtful.

Further there is unrebutted evidence on record that the acreage of the 2 plots could not have raised the alleged tonnage claimed by the appellant. The trial court visited the 2 plots and its findings were in conclusive as to the acreage, location as well as whether or not they had sugar cane planted thereon. All along PW2 had hidden from the court his relationship with appellant. A reading of his evidence points to a person who only had business dealings with the appellant, while in truth he was actually her husband. Why did PW2 play this game with the court until he was busted by DW4? Further, the appellant's sworn testimony was that she had delivered 240 tonnes of sugarcane to the respondent. Her own testimony was that a tone was to cost Kshs. 1730/= and that the respondent was not entitled to deduct anything from her alleged cane proceeds. Why then did she not sue for the entire value of sugarcane which she had delivered as alleged? Simple arithmetic shows that what the appellant ought to have sued the respondent on the basis of the foregoing would have been the sum of Kshs. 415,000/= and not Kshs. 391,000/=.

The appellant also testified to the effect that not all the cane which she had harvested was transported and

delivered to the respondent's factory. She does not explain why she was unable to deliver the remaining cane. After all she had engaged PW2 (her husband) to look for the tractors to ferry the produce to the respondent's factory at her cost. To my mind the conduct of the appellant and her husband (PW2), the manner in which the alleged agreements if at all were allegedly executed, (verbal) but with witnesses whom the appellant vowed not disclose can only mean as all along claimed by the respondent that the claim was fraudulent. She did not at all lease sugarcane from the alleged 2 plots which she delivered to the respondent and which formed the basis of her claim against the respondent. DW1 testified before the trial court and admitted the existence of the agreement though but denied genuiness of the documents generated by the appellant in support of her claim. Under cross-examination on her said documents, the appellant stated:-

"When I went to Sony I spoke to someone who gave me the authority. Actually I wrote a letter. I did not go personally. I sent the letter through the Post Office. I received the reply through the Post. Exh. I was received (sic) though Post. The agreement was also through Post. Before cutting cane I had not gone to Sony emphasis on own! I signed exhibit 2. Actually I did not sign it. The writings in blue are in my hands. I wrote my names when I was sending it. It is the clerk who wrote my name in exhibit 4. I know Lucas Ouma. He handled my case. He is the one who issued me with the delivery notes. He is not my witness in this case I do not know where he is currently……"

Such confused and inconsistent evidence of the appellant can only point to one irresistible conclusion; the appellant was not certain nor sure of what she was saying. It is a made up story to back up her fraudulent claim. It just does not add up. In any event DW1's explanation as to how the two documents came to be in possession of the appellant is credible. He stated that he had been misled by one **Lucas Ouma** a former employee into issuing the same. That evidence was hardly challenged nor rebutted.

It is also apparent also that a smaller plot, **Kanyawanga 48** which measured 1.3 hectares ended up producing more cane going by the number of Harvesting Advice Noted. From the evidence of the appellant she paid only Kshs. 20,000/= to lease this Plot and the estimated yield was 150 tonnes only. The bigger plot which allegedly measured 1.8 hactares in respect of which the appellant paid Kshs. 80,000/= to acquire being **plot no. 45 Kadera Lwala** produced less cane despite the estimate that it would produce an average of 200 tonnes. This is ironical. It simply does not add up at all. This is further prove that the documents in the hands of the appellant in support of her claim were simply and falsely generated.

As already stated the appellant never delivered cane to the respondent's factory, contrary to her allegations. The respondent stated that it carried out a search on the particulars of registration of the two land parcels from where cane was alleged to have been harvested in the lands office. The registration details of land parcel number **Kadera Lwala** plot 45 was found to have been that it was originally registered in the name of DW3 **Hezron Owino Ogada**. The said land was subsequently subdivided into two parcels of land. The original owner testified that he never grew cane and or sold the land with cane thereon to the appellant. And the same goes for **plot No. 48 Kanyawanga**. Mutation forms for both parcels of land were tendered in evidence by DW2 **Fredrick Otieno Agoro**, an employee of the respondent who carried out a search. With this unchallenged evidence the question that begs for an answer is where then did the appellant harvest cane from and or from whom did she lease the cane from. Why was it so difficult for her to avail these persons from whom she leased the plots?

Proceedings in respect of the two criminal cases against wayward employees of the respondent were tendered in evidence. The contents were not seriously challenged. The respondent's averment in the defence and evidence that there was fraud that involved farmers such as the appellant and its dishonest employees cannot be far off the mark in the circumstances of this case. Such employees included among others, one **Lucas Ouma** who allegedly issued all the sugar cane delivery notes to the appellant.

The appellant in his submissions maintains that the contract was genuinely and properly executed. However as I have endevoured to show in this judgment, that submissions cannot be possibly be correct. They are so many loose ends in the whole transaction that lead to irresistible conclusion that the whole affair was fraudulent. The appellant did not know the names of the persons she leased the cane from. She allegedly knew the witnesses to the verbal agreements but was not willing to disclose their

names either. Again she claimed to have seen someone at Sony who gave her authority. Yet in the same breath, she denied having gone there in person. Instead she wrote a letter. Again she claimed to have signed exhibit 2 and yet in another breathe she claims not to have signed the same. In totality the evidence of the appellant was incredible and to my mind mere fabrication.

It is conceded that the fraud must be proved on a standard higher than on the balance of probabilities. Much as the appellant submits that the respondent did not prove its defence based on fraud as claimed, nothing much turns on this submissions in view of my holding elsewhere in this judgment that since the appellant failed to file a reply to the defence she is deemed to have admitted those allegations of fraud.

The upshot of all the foregoing is that the learned magistrate cannot be faulted in his conclusions in the judgment. Accordingly I find no merit in this appeal and is ordered dismissed with costs to the respondent.

Judgment dated, signed and **delivered** at Kisii this 16th July 2010.

ASIKE-MAKHANDIA

JUDGE