



Okoth v Kibos Sugar & Allied Industries Limited (Civil Appeal E102 of 2023) [2024] KEHC 4752 (KLR) (9 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4752 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E102 OF 2023
RE ABURILI, J
APRIL 9, 2024**

BETWEEN

JOHN ODEGO OKOTH APPELLANT

AND

KIBOS SUGAR & ALLIED INDUSTRIES LIMITED RESPONDENT

(An appeal arising out of the Judgement of the Honourable M.I. Shimenga in the Chief Magistrates Court at Kisumu delivered on the 15th June 2023 in Kisumu CMCC No. 369 of 2020)

JUDGMENT

Introduction

1. The appellant herein John Odego Okoth instituted suit against the respondent Kibos Sugar & Allied Industries Limited vide a plaint dated 10th August 2020 seeking judgement for specific performance of the agreement dated 15th April 2020 as well as special damages for loss incurred of Kshs. 1,020,600 together with costs of the suit.
2. The respondent entered appearance and in its statement of defence denied each and every allegation made against it by the appellant.
3. The trial court in its decision found that the respondent did not breach any terms of the agreement but that on the contrary, it was the appellant who breached the agreement by contracting third parties to harvest the sugarcane thus the appellant was not entitled to specific performance. The trial court dismissed the appellant's claim for special and general damages.
4. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 4th July 2023 raising the following grounds of appeal:



- a. The learned trial magistrate erred in law and fact in awarding dismissing the plaintiff's suit without any legal and/or evidential justification.
 - b. The learned magistrate erred in law and in fact in failing to appreciate the long-established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion.
 - c. The learned magistrate erred in law and fact in holding that the plaintiff did not prove his case without any legal and/or evidential justification.
 - d. The learned magistrate erred in law and in fact by failing to order for specific performance yet a valid contract between the plaintiff and the defendant existed.
 - e. The learned magistrate erred in law and in fact by failing to award general damages yet there was evidential justification.
 - f. The learned magistrate erred in law and in fact in failing to award the plaintiff special damages in spite of the evidence tendered to prove the same.
 - g. The learned trial magistrate erred in law and fact in dismissing the suit with costs without regard to the plaintiff's submissions.
 - h. The learned magistrate erred in law and fact in entering judgement against the plaintiff overlooking the fact that the plaintiff had proved his case.
5. The parties agreed to file submissions in disposal of the matter however a perusal of the CTS reveals that there were no submissions for the respondent on record. The respondent's counsel nonetheless filed word document submissions via the submissions email which were accessed during the writing of this judgment.

The Appellant's Submissions

6. The appellant submitted that the respondent acted in breach of the contract having carried out all the processes relating to supervision of growth, maturity, harvesting and transportation only to hold that the harvested cane was not proper for processing.
7. Reliance was placed on the case of *Trans Mara Co. Ltd v Jared Okiagera Nyabuto 7 Another* [2020] eKLR where the court held that the Sugar company was in breach of contract for failing to harvest in time and upheld the compensation of the farmer as well as the case of *Martin Akama Lango v South Nyanza Co. Ltd HCCA No. 20 of 2000 (KSM)* where it was held inter alia that: "the contract must be interpreted in the spirit that it was made and that is... it was meant to benefit both parties unconditionally and for the appellant to maximise his profits."

The Respondent's submissions

8. On behalf of the respondent, it was submitted that the appellant's appeal has no merit and that there were material contradictions and inconsistencies between his pleadings and his evidence as adduced in court. Counsel for the respondent reiterated the settled law that parties are bound by their pleadings and that therefore the court cannot venture outside the pleadings by the respective parties. He relied on the case of *Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others* [2014] eKLR, where the Court of Appeal cited with approval the decision of the Supreme



Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressing itself on the importance and place of pleadings as follows:

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

9. Further reliance was placed on the decision by the Supreme Court of Kenya in its ruling on inter alia, scrutiny in the case of *Raila Amolo Odinga & Another v IEBC & 2 others [2017] eKLR* where it held as follows on the essence of pleadings in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

10. In this case, Counsel for the respondent submitted that despite the appellant alleging in his pleadings that “... on 16/4/2020 the Respondent undertook to harvest in the Appellant’s farm where instead of harvesting the agreed 2 acres, the Respondent harvested 9 acres...upon completion of that harvest, the Respondent only took 13.4 tons of harvest leaving the rest to waste” (paragraphs 4 and 5 of the *Plaint*).
11. And further at paragraph 8 of the *Plaint*, the Appellant alleged that “... he went ahead to carry out damage assessment on his farm on the 24th June 2020 which was carried out by Mr. Henry Olilo, the Ward Agricultural Officer, East Kano/Wawidhi, Kisumu County who wrote a report that stated that there was 100% damage on the farm to the tune of Kshs, 1,020,600.”
12. That based on the Appellant’s averments in the aforesaid paragraphs, the Appellant’s pleadings had serious inconsistencies and that the evidence tendered by the Appellant and his witnesses is not in tandem with the pleadings.
13. Further reliance was placed on *Kenya Commercial Bank Ltd v Sheikh Osman Mohammed, CA No. 179 of 2010* where the Court expressed itself thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the Appellant’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

14. It was submitted that that the Appellant did not discharge the burden of proof as he did not set his case to the reasonable degree of probability, but not so high as is required in a criminal case. Further submission on burden of proof was that the Appellant conceded that there was no authority issued to him by the Respondent to have his sugarcane harvested in June 2020. That the Authority to Harvest



- Milling Cane dated 15/4/2020 was specifically for the harvest of the Appellant's sugarcane in April 2020, but that the intended harvest was not to be because of an act of God, the weather was too wet and hence harvesting was halted. It was submitted that the Appellant's witnesses agreed that sugarcane was harvested on 5/6/2020 without Authority to Harvest Milling Cane issued by the Respondent.
15. It was therefore submitted that the appellant having undertaken to harvest sugarcane without authority from the Respondent, on 5/6/2020, the respondent cannot be held liable for the actions undertaken unilaterally by the Appellant.
 16. It was further submitted that as the appellant's claim was founded on two contracts, one of 20/2019 and the Authority to Harvest Milling Cane dated 15/4/2020, the appellant could not, under the "parol evidence" rule, introduce oral evidence to the said "agreement." Reliance was placed on Chitty on Contract 29th Edition Vol. – General Principles 12.096 which describes the principle that:

“It is often said to be a rule of law that if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract ... The rule is usually known as the “parol evidence” rule. Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation. The rule has been justified on the ground that it upholds the value of written proof the finality intended by the parties in recording their contract in written form and eliminates great inconvenience and troublesome litigation in many instances.”
 17. According to the respondent, the weather is a natural phenomenon, it is an act of God hence a force majeure, which was covered under clause 21.1 of the agreement (Exhibit P 3), which prevented the respondent from harvesting the appellant's sugarcane in April 2020, owing to unfavourable weather, which was too wet. That the respondent did its part by issuing Notice, reported the unsuitable conditions for harvesting and therefore the Appellant was on notice that it was practically impossible to harvest the Appellant's sugarcane in April 2020.
 18. On whether the writ of specific performance was available to the Appellant, it was submitted that a court cannot be called upon to re-write an agreement or a contract between parties, as was held in National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd [2002] 2 E.A. 503, [2011] eKLR at page 507 that:

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
 19. See also Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR.
 20. In this case, it was submitted that Clause 6.2 of the agreement dated 10/6/2019 provides that “The miller may reject any sugarcane found not to be of requisite quality based on parameters established by the Board and as specified in this agreement, and sugarcane rejection parameters shall include; - Extraneous matter of more than 10%; Harvest to mill time of green sugarcane of three (3) or more days.
 21. It was therefore submitted that the respondent having undertaken a cane analysis on 20/6/2020 which showed that the appellant's case lying in the Appellant's farm was “Not suitable, cane is in activity in growth”, and having found that cane unsuitable for milling, the rejection was within the provisions of clause 6.2 of the agreement dated 10/6/2019.



22. Therefore, that sugarcane being a perishable crop produce, which sugarcane was already harvested by the appellant two and half years ago, specific performance cannot issue to harvest and mill the sugarcane in issue.
23. On whether the Appellant was entitled to special damages of Kshs 1,020,600.00, it was submitted that the appellant breached the provisions of clause 5.1.2, of the agreement dated 10/6/2019 by failing to prepare and submit to the respondent a programme for harvesting the cane and that he instead hired third parties who harvested the cane and that the respondent was therefore not liable for any losses that the appellant may have incurred as it was not privy to the agreements between the appellant and the third parties who harvested his cane. Reliance was placed on *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR, the Court of Appeal relying on its previous decisions in the cases of *Agricultural Finance Corporation v Lengetia Ltd* [1985] KLR 765, *Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another*, CA NO 274 of 2003 and *William Muthee Muthami v Bank of Baroda*, CA NO 91 of 2004, reiterating that a contract affects only the parties to it and that it cannot be enforced by or against a non-party.
24. On whether the Appellant was entitled to General Damages, it was submitted that the appellant having engaged third parties to harvest his cane, breached the terms and conditions of the agreement hence he was not entitled to the general damages sought as the respondent was not privy to the third party agreements between the appellant and those third parties. Reliance was placed on *Agricultural Finance Corporation v Lengetia Ltd* [1985] KLR 765).
25. On the conduct of the appellant, it was submitted that he had made many futile attempts to distance himself from the contractual terms of the agreement dated 10/6/2019 and at the same time wishing to rely on the same as the foundation of his case, which conduct is frowned upon by the law as it amounts to approbation and reprobation as defined in *Banque De Moscou v Kindersley* [1950] 2 ALL EER 549 where Sir Evershed said of such conduct as follows:

“This is an attitude of which I cannot approve, nor do I think in law the Respondents are entitled to adopt it. They are, as the Scottish Lawyers (frame it) approbating and reprobating or, in the homelier English phrase, blowing hot and cold.”
26. Further reliance was placed on *Sonko & another vs Patel & another* (1955) 22 EACA 23.
27. On the judgment of the trial court, it was submitted that the trial court set out and rehashed the evidence as tendered by the parties and proceeded to evaluate, assess and analyse the same and even framed the issues for determination which are on record and evaluated each of those issues hence the lamentation by the appellant are without merit.

Analysis and Determination

28. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
29. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

30. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubv v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-
- “A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
31. Having considered the Appellant’s Grounds of Appeal and the parties’ Written Submissions, this court has identified the main issue for determination as to whether the trial court erred in dismissing the appellant’s suit.
32. From the onset, I must reiterate that the law is clear that he who alleges must prove. The term burden of proof draws from the Latin Phrase *Onus Probandi* and when we talk of burden we sometimes talk of *onus*.
33. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term ‘burden of proof’ has two distinct meanings:
1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to prove their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
 2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.
34. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.
35. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.
36. As earlier herein stated, the appellant sought judgement against the respondent for specific performance of the agreement dated 15th April 2020 as well as special damages for loss incurred of Kshs. 1,020,600, general damages as well as general damages and costs of the suit.
37. The appellant testified before the trial court that his sugarcane was cut by the respondent but that the respondent failed to carry the sugarcane. It was his testimony that he was a member of Jonam Framers Cooperative Society who were agents between the farmers and the respondent and who were licensed by the respondent to cut sugarcane with one Edward who was the one contracted to cut the sugarcane.



38. In cross-examination, the appellant stated that his sugarcane was cut by one Robert Ndiawo who was not brought in by the Society and that 3 tractors of the sugarcane were taken and received at the respondent's factory.
39. PW2, the Chairman of Jonam Framers Cooperative Society testified that he prepared the harvesting program for the appellant which cane was harvested on the 5th June 2020. He corroborated the appellant's averments that only 3 tractors were loaded which tractors he testified, were brought by one Samuel Bonyo.
40. In cross-examination, PW2 testified that the sugarcane was harvested on 5th June 2020 although the harvesting was without a permit. He further admitted that he had never seen an agreement between the respondent factory and the farmer. It was his testimony that he knew Edward Otengo who was a contractor but did not harvest the plaintiff's sugarcane and further that he did not have a permit allowing Edward to harvest the appellant's sugarcane. In re-examination, PW2 stated that there was a permit issued and that harvesting of the sugarcane was authorised on 14th April 2020.
41. PW3 Robert Odhiambo Ndiawo testified that he was a sub-contractor for the respondent and that on 3rd June 2020 he received a call from one Johannes Ojino, a worker for the respondent, to go and harvest cane on the appellant's land. He stated that on the 5th June they started cutting the cane and that only 3 tractors of cane were carried off with the rest being left to dry.
42. In cross-examination, PW3 stated that he got a permit to go and cut cane from the farm and that he had no authority to go and harvest the appellant's cane as the said permit was through the Society.
43. DW1, Richard Sewe testified that he was an employee of the respondent as the Agricultural Manager. He adopted his various witness statements and various reports dated 15th April 2020 and 20th June 2020.
44. In cross-examination, he stated that the appellant's cane was to be harvested on the 16th and 17th April 2020 but the weather was not conducive as it was too wet. He denied that the respondent had any relationship with PW3, Robert Ndiawo and further stated that no payment was made to the appellant as there was a loan to be recovered. He testified that the transporter of the appellant's cane to the factory was an independent contractor. It was his testimony that from PEX3, the respondent intended to harvest 200 tonnes of cane from the appellant's farm but only managed 14.3 tonnes on the 17th and 18th June 2020 due to the bad weather.
45. From the evidence on record it is undisputable that there was a valid agreement dated 10th June 2019 between the parties herein on the growth, harvest and sale of sugarcane. The appellant averred that the respondent breached the said agreement by firstly harvesting 9 acres of cane instead of the agreed 2 acres and subsequently taking only 13.34 tons of harvested cane leaving the rest to waste and thus exposing him to a loss of Kshs. 1,020,600.
46. It is noteworthy that for Specific performance to arise and/or ensue, the Agreement and/or Contract must be lawful, legal and/or legitimate, in accordance with the law and not otherwise.
47. In the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* [2006] eKLR, Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”



“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

48. I have perused the Agreement dated 10th June 2019 and the Authority to Harvest Milling Cane dated 15th April 2020, I find that it was clear that the sugarcane on the appellant’s farm was to be harvested on the 16th April 2020 and delivered between 17th April 2020 and 19th April 2020. The said Authority was clear that the respondent would not be liable for any excess or unauthorised cutting or burning of sugarcane.
49. However, in his testimony, DW1 stated that the harvesting of the sugarcane could not proceed as agreed on the 16th April 2020 as the weather was bad but that when its field officers went to the ground, they found the appellant had already harvested the cane.
50. The question is, who then harvested the cane, if it was not the respondent as agreed? A reading of Clause 4 of the agreement dated 10th June 2019 reveals that the respondent was to harvest the cane. DW1 testified that the appellant went to the respondent’s office and reported that the cane had already been harvested. However, the appellant testified that Jonam Farmers’ Cooperative Society of which he was a member was given the license by the respondent to cut the cane.
51. The aforementioned license is the Authority to Harvest Milling Cane dated 15th April 2020 which lacks a permit number though it appears signed by a field assistant/clerk and authorised and approved by someone with a different signature.
52. There was no evidence adduced by the appellant, other than testimony which was controverted by the respondent, to prove that the person who harvested his cane was acting on instructions of the respondent and thus any excess cutting of the cane and subsequent wastage could be attributed to the respondent.
53. On the contrary, the respondent produced the Harvesting Site Allocation dated 15th April 2020 that showed that one Edward Otieno was the one who was supposed to harvest the cane on the appellant’s property.
54. From the initial review of the evidence adduced in these two initial documents cited above, the agreement dated 10th June 2019 and the Authority to Harvest Milling Cane dated 15th April 2020, it is clear that the respondent was not in breach of either of the two documents.
55. Additionally, the agreement dated 10th June 2019 at Clauses 6.0 and 6.1 detailed the quality of cane that the respondent would accept from the appellant and the subsequent rejection of any cane which did not meet this quality. In this end, DW1 testified, which testimony was not controverted by the appellant that the respondent undertook a cane analysis on the cane lying on the appellant’s farm and found that the same was not suitable for milling as was detailed in the Cane Analysis Report dated 20th June 2020 produced as DEx2, which report was not disputed by the appellant before the trial court and subsequently before this Court.



56. Taking all the aforementioned into consideration, the evidence on record points to the fact that the appellant failed to prove his case before the trial court.
57. From the detailed judgment of the trial court, I am satisfied that it considered the appellant's pleadings, evidence and even framed issues for determination and determined those issues quite appropriately.
58. On whether specific performance is available to the appellant, in so far as the agreement dated 10th June 2019, upon which the claim and/or plea for specific performance is premised, I agree that specific performance does not lie as the respondent did not breach any terms and conditions of the agreements between it and the appellant herein.
59. In the end, I find and hold that the trial court did not err when it dismissed the appellant's suit for want of proof on a balance of probabilities. I uphold the judgment of the trial court dismissing the appellant's suit against the respondent with costs.
60. I however order that each party shall bear their own costs of this appeal, considering that bad weather conditions contributed to the situation giving rise to the dispute herein.
61. This file is closed.
62. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 9TH DAY OF APRIL, 2024

R.E. ABURILI

JUDGE

