Opalla v South Nyanza Sugar Company Limited Migori (Civil Appeal 127 of 2022) [2024] KEHC 17029 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 17029 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 127 OF 2022

RPV WENDOH, J

MAY 2, 2024

BETWEEN

STEPHEN ODHIAMBO OPALLA ..... APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED MIGORI ..... RESPONDENT

(An Appeal from the Judgement and Decree of Hon. R.K. Langat (PM) dated and delivered on 4/10/2022 in Rongo PMCC No. 106 of 2016)

JUDGMENT

1. Stephen Odhiambo Opalla (the appellant) commenced this appeal against the judgement and decree of the Hon. R.K. Langat (PM) dated and delivered on 4102022. The appellant is represented by the firm of Ochillo & Co. Advocates while South Nyanza Sugar Co. Ltd (the respondent) is represented by the firm of Moronge & Co. Advocates.

2. The background of this appeal is that the appellant filed a suit by a plaint dated 1022016. He pleaded that on 2242010, he entered into a written agreement with the respondent to grow sugarcane on his land being Plot No. 139 in NKJuok Sub Location measuring 0.3 Hectares; that he was assigned account number 445530 and planted the cane as agreed.

3. It was further pleaded that it was a term of the agreement that the contract was to remain in force for a period of 5 years or until one plant crop and two ratoon crops are harvested or whichever period shall be less; that the plant crop or the two ratoons would be harvested at the ages of 22 - 24 months and 16 - 18 months respectively. The appellant contended that he developed the cane but the respondent failed to harvest the same.

4. The appellant alleged that the plot could yield an average of 30 tonnes per hectare and the rate applicable per tonne then was Kshs. 3, 128=. The appellant's claim was for the loss of the three cycles

of crops on 0.3 hectares at the rate of 30 tonnes and payment of Kshs. 3, 128=, costs of the suit, interest at court rates from 2242010 until payment in full and any other relief which the court deemed fit.

5. The respondent entered appearance and filed a statement of defence dated 2622015. The respondent denied the allegations in the appellant's plaint. In particular, the respondent denied the yield of the alleged tonnage and rates of the cane prices. The respondent further denied that the appellant suffered any loss and it put the appellant to strict proof thereof.

6. The suit proceeded to hearing. The appellant (Stephen Odhiambo Opalla) testified as PW1. The respondent's Senior Field Supervisor DW1 Justus Otieno George testified on behalf of the respondent.

7. The trial Magistrate delivered his judgement on 4102022 and dismissed the appellant's suit with costs. The learned Magistrate found that whereas the appellant pleaded for the three crop cycles, the evidence which was led before him, was that the plant crop and 1st ratoon were harvested. The trial court opined that the appellant had to lead evidence to show that the 2nd ratoon was developed but he did not. The Magistrate observed that the appellant instead of developing the 2nd ratoon, he had planted maize. From the foregone reasons, the trial court dismissed the appellant's suit with costs.

8. Being dissatisfied with the judgement and decree of the trial court, the appellant commenced this appeal and preferred three (3) grounds of appeal as follows: -

    a. The learned trial Magistrate erred in dismissing the appellant's claim for damages for the unharvested ratoon 2 when there was no evidence to the effect that the appellant did not develop the ratoon 2;

    b. That the trial court erred in dismissing the appellant's suit on the basis that the claim was not proved on a balance of probability;

    c. The trial court failed to consider the evidence and testimony of the appellant in proof of the claim.

9. The appellant prays for orders:-

    i. That the appeal be allowed and judgementdecree in Rongo PMCC No. 106 of 2016 be set aside.

    ii. That the court does assess the award on damages due to the appellant.

    iii. Costs of the of the appeal and the subordinate court be awarded to appellant.

10. Directions were taken that the appeal be canvassed by way of written submissions. It is only the appellant who complied by filing written submissions dated 23112023. I have considered the grounds of the appeal, the submissions of the appellant and the trial court's record.

11. The main issue for determination is whether the appellant was entitled to the award of the 2nd ratoon.

12. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123.

13. It is not disputed that the parties entered into an agreement dated 2242010 in which the appellant was to grow sugarcane on his land being Plot No. 139 Field No. 154B measuring 0.3 Ha. The appellant pleaded that none of the crop cycles were harvested.

14. The testimony of the appellant was that the plant crop and the 1st ratoon were harvested and he was paid. In cross examination, the appellant stated that he is seeking one cycle. On the other hand, the respondent's witness stated that the appellant did not develop the 2nd ratoon and he produced a census report to prove this assertion.

15. I have considered the documents on record. None of the parties produced documents confirming that the appellant was paid for the plant crop and the 1st ratoon crop but there is consensus that the appellant was paid for the same. There is a document which was produced as a cane census report by the respondent's witness. The said document confirms that the appellant's plot was found to have been planted with maize instead of the 2nd ratoon.

16. Even if that was not the case, it is now trite and settled law that parties are bound by their pleadings. A party cannot be allowed to travel beyond the confines of his pleadings. Even the evidence being adduced by a party, must be in consonance with the pleadings. Pleadings prepare not only the parties but the court on what it is to expect in the proceedings. Any evidence, however, convincing which is at variance with the pleadings, is for rejection.

17. The Supreme Court of Kenya rendered itself on the essence of pleadings in the case of Raila Amolo Odinga & Another vs IEBC & 2 others (2017) eKLR as follows: -

> 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..."

18. Guided by the above decision, the appellant could not be allowed to use the hearing platform to amend his pleadings through his testimony in chief and claim what he had not included in his pleadings. The pleadings are clear that the intention of the appellant was to claim for the loss and damage allegedly incurred on the three crop cycles but not only the 2nd ratoon. The onus of proof was on him to prove that he developed the 2nd ratoon but the respondent failed to harvest the same and pay.

19. The trial court correctly found that the appellant's evidence was at variance with his pleadings and the case census report proved that no harvest of the 2nd ratoon crop took place.

20. The upshot is that the appeal is hereby dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 2ND DAY OF MAY, 2024.

R. WENDOH

JUDGE