Ongeso v South Nyanza Sugar Company Limited (Civil Appeal 123 of 2018) [2023] KEHC 2026 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEHC 2026 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 123 OF 2018

TA ODERA, J

FEBRUARY 15, 2023

BETWEEN

JULIANA ODIRA ONGESO ..... APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED ..... RESPONDENT

(An appeal from the juedgement and decree of Hon C.M Kamau RM in Rongo PMCCC No. 92 of 2016 delivered on 5/9/2018)

JUDGMENT

1. The appellant's claim in the subordinate court as captured in paragraph 3 of the plaint dated 10th February, 2016 is that the respondent contracted the appellant to plant sugarcane on her plot and the respondent would harvest and sell. The terms are stated to have been reduced into writing by contract dated 13/10/2013. It is pleaded that when the cane was ready for harvesting, the respondent failed to harvest causing the cane to waste and loss. She therefore sought damages for breach of contract and costs of the suit.

2. The respondent filed its statement of defence denying breach of contract on its part and averred that the appellant failed to notify it when the cane was ready for harvesting.

3. The suit proceeded to hearing. The appellant testified as PW-1 stating that she entered into agreement with the respondent to plant sugar in her parcel measuring 0.4 Ha. She expected a yield of 40 tonnes the price being Kshs 2,850/- per tonne. The respondent failed to harvest the cane.

4. DW-1 Gerorge Ochieng testified that there was indeed a contract for planting sugar cane which was diverted to a third party by the appellant when the crop was 18 months and the defendant was unable to recover its costs. That the appellant did not develop the crop as agreed.

5. After consideration, the trial magistrate returned a verdict dismissing the appellant's claim thus the instant appeal contained in her memeorandum of appeal dated 14th September, 2018 in which she raises the following grounds;

   i. The learned magistrate erred in law and fact in finding and holding that the contract is void and unenforceable for illegality.

   ii. The learned trial magistrate erred in law and fact in finding and holding that the contract contravenes the guidelines in the repealed *Sugar Act*.

   iii. That the learned trial magistarete erred in law and fact in holding that the contract confers the duty to harvest upon the farmer.

   iv. That the learned magistrate erred in law and fact in disregarding and or ignoring the basic operative guiding principes in interpretation of of standard form contracts.

   v. That the learned trial magistrate erred in law in taking into consideration extraneous issues in his final determination.

   vi. The learned trial magistrate failed to cumulatively and or exhaustively evaluate the entire evidence on record and hence failed o capture and decipher the salinet issues and or features of the suit thus arriving at an entirely erroneous conclusion.

   vii. That the learned magistrate erred in law and fact in dismissing the appellant's case when the same was proved on a balance of probability.

6. The appeal was disposed of by way of written submissions. Both parties complied. The appellant submits that the court dismissed her case based on issues which were not before the court for determination and cited *Independent Electoral and Boundaries Commission & anor v Stephen Mutinda Mule & 3 others* [2014]eKLR.

7. On the parties' duty to harvest the cane, it is submitted that the respondent's duty is to harvest, weigh, transport and mill the sugar. This submission is supported by the authority in *Edward Kennedy Aloo v South Nyanza Sugar Co. Ltd* [2018] eKLR and *South Nyanza Sugar Co. Ltd v Joseph O. Onyango* [2017] eKLR.

8. Counsel submits that the trial magistrate made an error by issuing orders that was against the interest of justice.

9. On the issue or remedies, she submits that she is entitled to damages since the breach was on the respondent's part. She cites the cases of *South Nyanza Sugar Co. Ltd v Hillary M. Marwa* [2017] eKLR and *James Maranya Mwita v Sony Sugar Company Ltd* [2017] eKLR.

10. On the respondent's part, it is submitted that the court is only invited to set aside and quash the subordinate's court without a prayer for assessment of damages so that the court cannot on its own motion award what has not been prayed for. That the appeal must therefore fall for want of substantive prayer.

11. On the issue of costs, it is submitted that costs follow the event and in the instant case, thereis no substantive prayer. The appeal must therefore fall and costs be awarded to the respondent.

Analysis and determination

12. The duty of ths court as an appellate court was stated in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira T/a Machira & Co. Advocates* [2013] eKLR, where it was held;

> " 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."

13. I have carefully perused the record and I am of the view that the main issue arising for determination is whether the lower court's judgement was erronouse and or based on irrelevant facts to warrant the setting aside.

14. Both parties concede to the fact the relationship between them was governed by an agreement dated 13/10/2009 which is alleged to have been breached at the respondent's instance. That as a result of the breach, the appellant fell into losses out of which she now claims damages. This court is therefore called upon to interrogate the agreement to determine the obligations of each party and who between them breached the agreement.

15. Before delving into the issue, a preliminary issue was raised in the respondent's submissions that the grounds of appeal lack a substantive prayer. I have perused the memorandum of appeal which contains 3 prayers, the 1st among them seeking the following relief;

> " The judgement and decree of the learned trial magistrate dated 5th September, 2018 be set aside and or quashed."

16. The other 2 prayers seek costs of the appeal and such further and or other relief the court may deem fit and expedient.

17. I am aware that ours is an adversarial system whereby parties are bound by their pleadings. This was underscored by the Supreme Court in *Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others* [2014] eKLR where it was held: -

> " ....It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it.....
>
> It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties."

18. I am of the view that the memorandum of appeal as drafted does not clearly state the prayer sought after setting aside the trial court's finding. The appellant should have indicated and specifically pleaded what she wants the court to grant in the circusmtances if the judgement was to be set aside. In the circusmtances, the court is left guessing what to grant in the circumstances.

19. The prayer that the court does grant other and further orders will not help the appellant either. A party should be specific on the orders he wishes to be granted. This prayer is ambiguous and amounts to inviting the court to try the matter suo moto which may ultimately prejudice the respondent because such orders were not prayed for in the first place.

20. I am equally alive to the provisons of Article 159 of the *Constitution* and the overriding objectives under the *Civil Procedure Act* which mandate the courts to sustain matters rather dismissing them summarily based on a technicality at the expense of substantive justice. From my analysis however, this is a flaw that cannot be cured by the above provisions as it goes to the very root of the appeal and cannot be wished away as a mere technicality.

21. In any event, as per Pexh 1 , it was an express /implied term and practice that ;-

    i. within the (5) year period or less the plant crop ratoon cane would be harvested at the ages 22-24 months and 16-18 months after planting and subsequent harvest respectively.

22. The respondent would under the contract be bound to exercise due care whilst harvesting and taking delivery of the cane. The appellant submitted that ‘’The appellant also cited Migori High court civil Apeal no. 87 of 2016 *Edward Kenedy Alolo v South Nyanza Sugar* Co. Ltd[2018] eKLR Where it was held in relation to the sugar Act ‘’Migori High Court Civil Appeal No. 41 of 2016 *Jane Adhiambo Atinda v South Nyanza Sugar Co. Ltd* [2017] eKLR thus: -

> " 18. That now brings me to the finding by the trial court that the Appellant failed to adhere to Clause 3.1.2 of the Contract in not harvesting and delivering the cane to the Respondent. A contract document must always be considered in its entirety. The good reason for that lies in the truism that clauses in a contract tend to complement one another and one risks not getting the whole intention of the parties if a consideration or reference is put on just a portion of the document. Had the learned trial court done so, it would have come across Clause 3.1.12 which requires the Miller (Respondent) to: -
>
> > ‘Prepare the harvesting program setting out the approximate expected time of harvesting which program will be subject to changes necessitated by factors beyond the control of the Miller.’
>
> 19. A look at Clauses 3.1.2 and 3.1.12 of the contract places a duty upon the Respondent before the actual harvesting of the cane. That duty is for the Respondent to ‘inspect the cane and determine its maturity and to prepare the harvesting program setting out the approximate expected time of harvesting’. There is no evidence that the Respondent discharged that contractual duty in the first instance. That failure, in the face of the fact that the cane had matured, can only mean that it is the Respondent who was in breach of the contract. With tremendous respect, the finding of the learned trial Magistrate that the Appellant failed to harvest and deliver the cane to the Respondent was not only unsupported by evidence but also arrived at without a full consideration of the contract and was therefore erroneous. That finding must be interfered with.
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> 26. Needless to say, there are several other clauses in the contract which when cumulatively taken buttress the position that the duty to harvest the cane is the Respondent’s. Further thereto, there is the *Sugar Act* (hereinafter referred to as ‘the *Act*’). This Act was the applicable law by the time the contract was entered. The *Act* stipulated under Section 6(a) of the Second Schedule thereof, which Schedule was a creation of Section 29 of the Act, that: -
>
> ‘The role of the miller is to -

(a) Harvest, weigh at the farm gate, transport and mill the sugar cane supplied from the growers' field and nucleus estate efficiently and make payments to the sugar cane growers as scheduled in the agreement.' (emphasis added)

27. The Act being an Act of Parliament went through all the stages of law-making until it became law in Kenya. The Act can only be subordinate to the *Constitution* and/or may in specific and clear instances be ousted by an express provision on another Act of Parliament. In this case there is an attempt by the contract to oust the provision of the Act. The contract is an agreement between the parties herein whereas the Act is an expression of the will of the people of Kenya through Parliament. The contract is hence subordinate to the statutory legislation. Any attempt by parties to an agreement to otherwise oust the provisions of an Act of Parliament can only be void and severable as far the attempt is concerned. The contract therefore offends the express provisions of the Act in respect to the duty to harvest the cane and as such it cannot stand in the face of the Act; it must give way to the Act."the said case emanates from the High court and can only be pursuasive on this court.

23. I do agree with Justice Mrima an agreement must be read and interpreted as a whole and not piece meal and that under section 6a of the 2nd schedule of the *sugar Act* (repealed) which was in force at the material time that the duty to harvest the cane was upon the miller . The agreement herein at clause 3.1.2. imposed the duty of harvesting upon the grower which was against the sugar Act and clauses 3.1.2 and 3.1.12 . the cited *Edward case* there was no duty of harvesting imposed upon the grower in the agreement while in this case the agreement was expressly against the *sugar Act* as it contradicted the Act by placing the responsibility of harvesting on the grower. The case thus supports the respondents case. The agreement cannot be enforced for illegality as right found by the learned Trial Magistrate.

24. Appeal is thus dismissed .

25. Each party to bear it's own costs .

T.A ODERA – JUDGE

15. 2. 2023

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

Court Asistant; Bor,

Parties are absent despite Notice.

T.A ODERA – JUDGE

15.2.2023