**South Nyanza Sugar Company Limited v Oduol (Civil Appeal 140 of 2019) [2023] KEHC 960 (KLR) (14 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 960 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MIGORI**

**CIVIL APPEAL 140 OF 2019**

**RPV WENDOH, J**

**FEBRUARY 14, 2023**

**BETWEEN**

**SOUTH NYANZA SUGAR COMPANY LIMITED ..... APPELLANT**

**AND**

**FLORENCE ANYANGO ODUOL ..... RESPONDENT**

***(An Appeal from the Judgement and Decree of Hon M O Obiero Principal Magistrate Migori dated and delivered on July 25, 2019 in CMCC no 1728 of 2016)***

## JUDGMENT

1 The appellant, South Nyanza Sugar Company Limited, preferred the instant appeal dated September 22,2021 against the judgement and decree of Hon M O Obiero (PM) dated and delivered on July 25, 2019. The appellant is represented by the firm of Okong'o Wandago & Co Advocates while the respondent is represented by the firm of Nelson Jura & Co Advocates.

2 By a plaint dated December 29, 2016 and filed in court evenly, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for compensation for three cycles of cane, costs of the suit, interest and any other relief. It was pleaded that on or about September 13, 2011, the parties entered into an agreement to cultivate and develop sugarcane on the respondent's plot number 783 filed no 96 vide account no 511873; that the appellant was to harvest the sugar cane upon maturity. The respondent developed the sugarcane on a plot measuring approximately 0.8 Ha but the appellant failed to harvest the plant crop on maturity thereby compromising the development of the 1st and 2nd ratoons.

3 The respondent particularized the breach on the part of the appellant and pleaded that as a result of the breach of contract, she lost approximately 80 tons of the plant crop and 80 tons for each ratoon crop and the cane prices at that time was kshs 4,500/= per ton. The respondent claimed that she suffered loss which the appellant has failed and/or neglected to compensate.

4 The appellant filed a statement of defence dated February 2, 2017. The appellant denied the contents of the plaint and shifted the blame on the respondent for having failed to develop the sugarcane and being in breach of the said agreement. The appellant denied that demand and intention to sue was issued on him and asked the trial court to dismiss the respondent's suit with costs.

5 The suit proceeded to hearing. The respondent testified in support of her case as PW1. Justus Otieno George the appellant's senior field officer in the department of agriculture testified as DW1. The trial court found in favour of the respondent and awarded her all the three cane crop cycles, costs of the suit and interest.

6 Aggrieved by the decision, the appellant disputed the findings of the trial court on the following nine (9) grounds of appeal: -

1. The learned Magistrate erred in law and in fact in failing to find and hold that the claim in the suit before him was not proven in law and in failing to dismiss the suit for want of proof;
2. The trial court erred in failing to find that the respondent was in breach of the contract while deciding the merits of the suit thus reaching a wrong conclusion;
3. The trial court erred in failing to find that the respondent's evidence was fatally and fundamentally at variance with the respondent's plaint;
4. The trial court erred in finding that the respondent's plot could yield an average of 61.2 tons of sugarcane per hectare which was based on no evidence at all;
5. The trial court erred in finding that the respondent was entitled to the plant crop, the first and second ratoons but none of the ratoons were harvested which award was speculative and went beyond the respondent's prayer of compensation of the value of the unharvested sugarcane;
6. The trial court erred in awarding the respondent a sum of Kshs 402,960.04 while that amount was not pleaded or proved;
7. The trial court erred in failing specify the time which the interest in Kshs 402,960.04 was to run from thus leaving the parties with an imprecise decree.

7 The appellant asked this court to allow the appeal with costs, dismiss the suit in the lower court and award interest on any sums awarded from the date of judgment, if this court is to find that compensation was due.

8 The appeal was canvassed by way of written submissions. Both parties filed their respective submissions. The appellant filed in court its submissions dated June 3, 2022 on even date while the appellant filed her submissions dated October 26, 2022 in court on October 27, 2022.

9 The appellant submitted that the respondent pleaded that the contract between the parties was dated September 13, 2011 and not the one made in the year 2012 as testified by the respondent in her oral testimony. It was further submitted that the contract was not formally produced as an exhibit in court and there was no basis for the magistrate to awarding the respondent kshs 402,960.4/= as compensation. The appellant also submitted that there were four leaves of the contract and therefore there is no full version of that contract.

10 Further to the foregoing, the appellant submitted that the award of interest was ambiguous; that interest should have been awarded from the date of judgement as it was quantifiable then as it was held in *South Nyanza Sugar Company Limited vs Samwel Nyandiga Mac' Ondiwa* (2021) eKLR.

11 On the respondent's part, she submitted that the issue of whether the respondent specifically pleaded and proved his case was not raised in the trial court and it is being raised now as an afterthought; that the respondent specifically pleaded the loss at paragraphs 6 and 7 of her plaint. The respondent also submitted that the agreement book was produced as exhibit no. 1 as per her list of documents and it is proof that there was a contract; that the respondent has also filed a supplementary record of appeal and produced the full copy of the agreement book as it was produced in the trial court.

12 Further, the respondent submitted that it is now settled that the success of the 1st and 2nd ratoon crops is dependent on the harvesting of the plant crop and therefore she is entitled to the same. On when the interest should run, the appellant submitted that it should be calculated from the time of filing suit as was held by the Court of Appeal in *John Richard Okuku vs South Nyanza Sugar Company* and *South Nyanza Sugar Company vs Awino Oreko*.

13 This being the first appellate court, it 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. See the decision in *Selle & Another vs Associated Motorboat Co Ltd* (1968) EA 123.

14 It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* (1988) eKLR where the Court of Appeal held:-

> An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."

16 Guided by the above decisions, I have carefully considered the memorandum of appeal, record of appeal, the supplementary record of appeal and the rival submissions. The issues for determination are: -

i. Whether the respondent proved the pleaded contract.

ii. Whether the appellant was in breach of the contract.

iii. Whether the respondent was entitled to damages awarded.

iv. When should interest start running from.

17 On the first issue, there is no dispute that there was a contract between the parties for the planting and harvesting of sugar cane. The appellant contended that the respondent's pleading on the contract date was at variance with the actual date of the contract and her oral testimony. The appellant further contended that the contract was not produced as an exhibit and it is an incomplete document. I have considered the contract document in the lower court record. It is dated September 13, 2012. There are two sets of the respondent's list of documents both of them received in court on December 29, 2016. In the first list of documents, the copy of the contract has 4 pages. The pages do not contain the clauses

of the obligations between the parties. The second list of documents has the original contract which is complete. On July 25, 2017 when the respondent testified, she stated: -

> I did enter into a cane development contract with the defendant in 2012...I have recorded a statement and filed a list of documents which I will rely on as my exhibits."

18 The original contract was produced in court and there was no objection to its production. The trial court therefore rightly relied on it. From the above excerpt, this court is of the view that the respondent did produce a full contract as an exhibit before the trial court.

19 On the variance between the date of the contract in the pleadings, the contract itself and the oral testimony, Counsel for the defendant was in court when the respondent testified. He did not cross examine the respondent to explain the variance between her pleadings and the contract in question. The variance is not of a great magnitude as to affect the substance of the issue before the trial court, which is the breach of contract. Justus Otieno George, DW1 testified that they had a contract with the respondent. Therefore, the contract was not denied by the appellant. It is this court's finding that the respondent did prove that a contract exist between the parties.

20 On whether the appellant was in breach of the contract, the appellant's witness testified that they did not assist the respondent to develop the sugar cane. He further stated that the plant crop was to be harvested in 2014 but it was not harvested. The duty to harvest the sugar cane is now settled that it falls on the miller. Contracts which contravene statute cannot be said to be enforceable. See the decisions of the Court of Appeal in *Patel vs Singh* (1987) eKLR and *Njogu & Company Advocates vs National Bank of Kenya Limited* (2016) eKLR. The parties signed the agreement on September 13, 2012 when the *Sugar Act 2001* was in force. Clause 3.10 of the agreement says as much as it provides that the grower should comply with the provisions of the Sugar Act 2001.

21 Section 29 of the *Sugar Act 2001* stipulates that agreements in the sugar industry should conform with the second schedule of the Act. Section 6 (a) of the *Sugar Act* provides that the role of harvesting, weighing and transporting the cane rests on the miller. The appellant cannot run away from that responsibility and shift it to the respondent. The appellant was therefore in breach of the contract.

22 The failure to harvest the plant crop automatically affects the growth of the 1st and 2nd ratoons. In *South Nyanza Sugar Company vs Awino Oreko* (*supra*) the Court of Appeal held: -

> The contract itself was for a period of five years or until one plant crop and two ratoons were harvested on the plot, whichever period would be less. The evidence accepted by both courts below, and which has not been challenged before us, is that Sony was guilty of breach by failing to harvest the plant crop. Once the plant crop was not harvested, it dried and the ratoon crops could not grow. This was a natural consequence of the breach. It is therefore reasonably foreseeable that failure to harvest the plant crop would imperil the subsequent ratoon crop and naturally, so too, the 2nd ratoon crop. In this way a loss of the plant crop was also a loss of the two ratoon crops."

23 The respondent was therefore entitled to claim for the 1st and 2nd ratoons as a result of the breach of contract on the part of the appellant.

24 On the awarded damages for the breach of contract, the respondent produced a report by the Kenya Sugar Research Foundation (KESREF) and the prices of sugar cane offered by the appellant's company as of March 1, 1998. The appellant also produced a list of cane prices as of June 30, 2017. The trial Magistrate considered the report by KESREF and adopted the highest yield of 61.2 tons per Ha and

a cane price of kshs 3,200/=. The trial court also found that according to the KESREF report the 1st and 2nd ratoon crops reduce by 21.4%.

25 This court has also considered table B of the KESREF report. The table shows that the area where the appellant's land is situated, yields an average of 61.2 tons per Ha. Tables C and D show a reduction in yields of the plant crop, i.e the 1st and 2nd ratoons and the trial court adopted a reduction of 21.4%. This court finds no reason to interfere with the findings of the trial Magistrate on the damages awarded to the respondent for breach of contract.

26 On the issue of interest, award of interest is the discretion of the court which should be exercised judiciously. Referring to the decision of the Court of Appeal in *South Nyanza Sugar Company vs Awino Oreko* (*supra*) the court had this to say about interest on special damages claims:- -

> ...interest on such damages ought to run from the date of filing suit as the money will have been due to the respondent from that date. This result is also in consonance with the spirit of statutory law that governed the contract between the respondent and the appellant at the material time. The contract was then subject to the provisions of the repealed *Sugar Act*...the effect of paragraph 9 (1) ( e) as read together with 9 (2) of the Second Schedule of the Act was that a miller who failed to pay an out grower institution within thirty days of sugar cane delivery was liable to pay interest. The spirit is to compensate the farmer by way of interest for late payment. I see no reason why the same principle should not be extended to where there is breach by the miller like here."

27 This court is bound by the decision of the Court of Appeal. The foregone conclusion is that the appeal is devoid of merit and the following orders do issue:-

a. The Judgement and Decree of Hon Obiero (PM) dated and delivered on July 25. 2019 is hereby upheld.

b. Interest on the damages to run from the date of filing the suit.

c. Costs of the suit and this appeal awarded to the respondent.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 14TH DAY OF FEBRUARY, 2023.**

**R WENDOH**

**JUDGE**

**Judgment delivered in the presence of;**

Mr Odero for the appellant.

Mr Singei holding brief Mr. Jura for the respondent.

**Nyauke** Court Assistant**.**