Origa v South Nyanza Sugar Co. Ltd (Civil Appeal 19 of 2022) [2023] KEHC 1858 (KLR) (15 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1858 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 19 OF 2022

TA ODERA, J

MARCH 15, 2023

BETWEEN

CALVINCE OMONDI ORIGA .... APPELLANT

AND

SOUTH NYANZA SUGAR CO. LTD .... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. C. M. Kamau (RM) delivered on 29th April 2019 in Rongo Principal Magistrates Court Case No 215 of 2016)

JUDGMENT

Introduction

1. In his decision of April 29, 2019, the Learned Trial Magistrate, Hon CM Kamau, (RM) dismissed the Appellant's suit with costs to the Respondent.
2. Being aggrieved by the said decision, on February 25, 2022, the Appellant filed a Memorandum of Appeal dated February 24, 2022. He relied on four (4) grounds of appeal.
3. His Written Submissions were dated January 12, 2023 and filed on January 13, 2023. The Respondent did not file any submissions.
4. The Judgment herein is therefore based on the Appellant's Written Submissions only.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

7. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Appellant proved his case on a balance of probabilities.

8. The Appellant submitted that he had a contract with the Respondent whereby his cane was not harvested, went to waste and caused him loss and damage. It was his case that the issue raised by the defence about a warning letter, sprang up on the date of the defence hearing, that is, July 10, 2018. He argued that he had no chance and/or opportunity to rebut it. He relied on the case of Sipora Achieng v South Nyanza Sugar Co Ltd HCCA No 105 of 2019 where the court held that the Appellants could not be said to have had their fair day in court when they were ambushed with such defence statements on the eve of the hearing day.

9. He asserted that the evidence he led on trial court was therefore uncontroverted and the court ought to have found in his favour. He pointed out that the defence statement alleging he had sold his contracted cane to a third party was not pleaded, was not factual and was misleading and untrue.

10. He placed reliance on the case of Mary Anyango Anyango v South Nyanza Sugar Co Ltd HCCA No 50 of 2019 (eKLR) where the court held that parties are not allowed to depart from their pleadings 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.

11. He was categorical that the decision of the Learned Trial Magistrate was arrived at without any proper material or basis and ought to be set aside. He added that importing into a decision a non-existent evidence, the trial court acted in a biased manner and such conduct called for censure. He asserted that the totality of the evidence on record was that he proved his case and ought to have been compensated. He prayed that he be awarded Kshs 810,000/= as pleaded in his Plaint and as submitted on trial. He urged the court to allow his appeal with costs and interest of the award from the date of filing suit in the trial court.

12. Notably, the Appellant tendered his evidence as PW 1 and the only witness for his case. He testified that he was a farmer at Kabuoch area and had entered into a cane agreement with the Respondent over his parcel at Kakmasia Sub Location which agreement was breached by the Respondent. He produced the Agreement, Demand Letter and Cane yields as P. Exhibit 1, 2, and 3 respectively. In his cross-examination, he indicated that the contract was entered on October 28, 2010 and that he had already planted cane at the time of execution of the said contract. He informed the court that he planted the cane in January 2010 and used fertilizer urea two (2) bags of 50Kgs DAP but he did have receipts for the same. He stated that he did not develop ratoon crops. On re-examination he indicated that the Respondent had custody of the original contract.

13. On it's part, the Respondent's Senior Field Supervisor under Agriculture Department testified as DW 1. He adopted his statement as evidence in court. He acknowledged that indeed there was a contract between the Appellant and the Respondent dated October 20, 2010 of plot area 0.4 hectares and cane price agreed at Kshs 2, 500/=. He further stated that the Appellant developed cane and on May 5, 2013 he sold the contracted cane to a third party a fact that was communicated to him on May 10, 2016

through the area chief. He added that the Appellant failed to develop ratoon crop. He urged the court to dismiss the Appellant's case with costs.

14. In his Judgment, the Learned Trial Magistrate held that the Appellant had not proven the actual loss he claimed he had suffered and relied on the case of *Gideon Mutiso Mutua v Mega Wealth International Limited* [2012] eKLR where the court held that the damages which are recoverable in an action for breach of contract are either nominal damages that is to say where a party has proved breach of contract but not proved that he sustained any actual loss consequent to the breach, or substantial loss, that is to say, where a party has not only proved a breach of contract but has also proved that he sustained some actual loss as a result of the breach.

15. Having said so, it is trite law he who alleges must prove. Though the Appellant in his appeal blames the Respondent for having filed its statement of defence on the day before the hearing and therefore he was not granted time to rebut that evidence, he himself had failed to prove his case on a balance of probability and the same could not be allowed, the Respondent's evidence notwithstanding.

16. The provisions of Order 7 rule 5 of the *Civil Procedure Rules, 2010* provide as follows:-

> " The defence and counter claim filed under rule 1 and 2 shall be accompanied by –
>
> (a) An affidavit under Order 4 rule 1(2) where there is a counter claim;
>
> (b) A list of witnesses to be called at the trial.
>
> (c) Written statements signed by the witnesses except expert witness; and
>
> (d) Copies of documents to be relied on at the trial.
>
> Provided that statement under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under order 11."

17. Order 11 Rule 5 states that;

> " Where orders or directions are given at a case management conference -
>
> (a) The judge or deputy registrar or magistrate or case management officer shall record the orders or directions and inform the parties thereof; and
>
> (b) Where necessary, the judge or deputy registrar or magistrate or case management officer shall allocate time within which the orders or directions shall be complied with by the parties and fix a date at which the judge or deputy registrar or magistrate or case management officer shall record compliance by the parties or make such other orders as may be just or necessary including the striking out of the suit."

18. The above provisions are clear on the requirement for parties to file documents within certain parameters. If documents are not available, as at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. Similarly, any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/or documents before the hearing of the plaintiff's case. The purpose of case management conference is to facilitate the expeditious disposal of cases by ensuring proper management of cases before the courts. This was aptly put by Waweru, J in the case of *PH Ogola*

Onyango t/a Pitts Consult Consulting Engineers v Daniel Githegi t/a Quantalysis [2002]eKLR when he stated as follows:-

> "Indeed, discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the trial has began, it is another thing for a party to seek to introduce documents once the opposing party has closed its case. The present suit was filed way back in 1999. The Defendant filed his defence in January 2000. He had more than ample time to make discovery before the trial commenced. To allow him to introduce documents after the Plaintiff has closed his case will occasion the Plaintiff serious prejudice that cannot be cured by cross-examination. In civil litigation there must be a level playing field. That field cannot be level were one party to be permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed."

19. Perusal of the trial court record reveals that the Respondent's counsel requested the court to grant him time to comply on October 27, 2016. On December 13, 2016 the Respondent only filed List of witnesses dated August 30, 2016. The person listed therein was not the actual person who gave actual evidence in court. As the next document was the Defendant's Witness Statement dated July 9, 2018 and filed on July 10, 2018 when the matter was heard on defence hearing.

20. There is however no indication on the court's record that the Appellant and/or his counsel raised any issue with regard to the court adopting the Respondent's Statement of Defence and proceeding to hear its witness. The hearing of the suit commenced one almost one and a half years later after the pre-trial and it is only after the Appellant had testified and closed her case that the Respondent filed its Statement. The Appellant ought to have objected to the filing of the impugned Statement by defence but failed to do so.

21. This court has a constitutional mandate to promote fair hearing under Article 50, hence, a court can disallow the tabling of evidence not provided to the other party as contemplated under the *Constitution* and the Rules. The Supreme Court in the case of *Raila Odinga & 5 others v IEBC & 3 others*, Supreme Court of Kenya, Petitions Nos 3, 4 and 5 of 2013 (2013) eKLR, declined to allow additional evidence filed outside the contemplation of the rules and stated that;

> "The parties have a duty to ensure they comply with their respective time lines, and the court must adhere to its own."

22. Going further, although the court has a duty to ensure that justice is not delayed by ensuring procedures are followed to the letter, it must also endeavor to do justice to all parties and not to be too strictly bound by procedural technicalities as provided under Article 159 (2) (d). This principle was well emphasized in the case of *Attorney General vs Torino Enterprises Limited* [2020] eKLR, Muigai J. stated as follows;

> "Two clear constitutional principles, articulated in Article 159 of the *Constitution*, are always in play in objections like the one raised before us, and calls for pragmatic balance rather than robotic adherence. The first principle, set out in Article 159 (2)(b), demands that justice shall not be delayed, and hence set timelines must be respected. The second principle, in Article 159 (2) (d) demands that justice shall be administered without undue regard to procedural technicalities, meaning that where the interests of justice so demand, the court may excuse non-compliance with the timelines it has set. It is also for that reason that the

overriding objective demands of the court, when it is interpreting the law or exercising its powers, to act justly in every situation, to pay regard to the principle of proportionality, to create a level playing ground for all the parties and as much as possible, to dispose of disputes on merits rather than on technicalities."

23. From the foregoing, it is evident that the court may consider and allow evidence to be adduced even after the lapse of the requisite period laid out in legislation so as to allow such party the opportunity to present his case in full. However, such consideration must not cause undue prejudice to the other party and this varies depending on the circumstances of each case. The court should however address its mind to questions such as reasons for late availability of the witness, the discovery of a new document, and importantly the stage of the proceedings at which the additional evidence is sought to be introduced. It is obvious that little prejudice will be occasioned where the trial has not started. The prejudice to the other party increases as the trial progresses.

24. In the present case, the Respondent without leave of court, filed the witness statement on July 10, 2018. This was on the defence hearing day and way after the Appellant had testified and even closed his case. The Statement introduced evidence of a letter that the Appellant denies having been served with. The said warning letter was not produced as an exhibit but the learned Trial magistrate wrongly relied on it in his judgment. To that extent, the trial magistrate erred. Be that as it may, a perusal of the record showed that he did not adduce evidence to prove the loss of crops that he was claiming. No report was filed to show the damage and actual assessment of costs. This court is not persuaded that the Appellant had good grounds that warranted it to disturb the trial court's decision. He had failed to prove his case on a balance of probabilities as the burden to prove his case laid on him and not the Respondent. Blaming the Respondent at this juncture could not salvage the case.

25. For the foregoing reasons, this appeal is not merited and the same be and is hereby dismissed. Costs to respondent

26. Orders accordingly.

T.A ODERA - JUDGE

15. 3. 2023

DELIVERED VIA TEAMS PLATFORM IN THE PRESENCE OF;

NO APPEARANCE FOR APPELLANT,

N. BOSIRE FOR RESPONDENT,

COURT ASSISTANT; NYAOKE.

T.A ODERA - JUDGE

15. 3. 2023