South Nyanza Sugar Company Limited v Adek (Civil Appeal 73 of 2022) [2023] KEHC 1811 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1811 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 73 OF 2022

RPV WENDOH, J

MARCH 16, 2023

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED ..... APPELLANT

AND

LUKAS ONYANGO ADEK ..... RESPONDENT

(An Appeal from the Judgement and Decree of Hon. R.K. Langat Principal Magistrate Rongo dated and delivered on 28/5/2022 in Rongo PMCC No. 287 OF 2017.)

JUDGMENT

1. The appellant, South Nyanza Sugar Company Limited, preferred the instant appeal dated June 20, 2022 against the judgement and decree of Hon RK Langat (PM) dated and delivered on May 28, 2022. The appellant is represented by the firm of Okong'o Wandago & Co Advocates while the respondent is represented by the firm of Oduk & Co Advocates.

2. By a plaint dated September 7, 2017, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for breach of contract, costs of the suit, interest from August 20, 2013 until payment in full and any other relief that the court may deemed fit and just to grant. It was pleaded that on or about August 20, 2013, the appellant and the respondent entered into a contract to grow and sell sugarcane on the respondent's plot number 533B in field no. 383 in Kakmasia Sub Location measuring 0.2 hectares; that the respondent was assigned account number 265789 and planted the cane as agreed; that it was a term of the contract that the agreement would commence on August 20, 2013 and remain in force for a period of five (5) years or until one plant and two ratoon crops of sugarcane were harvested on the aforesaid plot whichever period was less.

3. The respondent particularized the loss and damage suffered and further pleaded that in breach of the terms of the agreement, the appellant failed to harvest the plant crop and the two subsequent ratoon crops when the same were mature and ready for harvesting; that by reason of the aforesaid breach, the

respondent suffered loss of his bargain and expected profit from the harvest of the plant and the ratoon crops.

4. The appellant entered appearance and filed a statement of defence dated October 4, 2017. The appellant denied the contents of the plaint and put the respondent to strict proof thereof. The appellant denied that the contract was to commence on August 20, 2013 and remain in force for a period of 5 years and the breach of the said agreement. The appellant blamed the respondent for failing, refusing and/or neglecting to develop the sugar cane and therefore there was no sugar cane capable of being harvested. The appellant further denied the particulars of loss and damage of Kshs 348,000/= and the claim that the plot was capable of producing an average of 135 tonnes per hectare for the plant and ratoon crops. The appellant averred that any payments on the yields if any should be subjected to deductions either contractual and or statutory based on the applicable sugar cane price.

5. The appellant further averred that in the Kakmasia sub location a maximum yield was 66.56 per tonne for the plant crop and 48.76 tonnes for the ratoon crops; that if the sugarcane was cultivated, the respondent would yield 13.35 tonnes of sugarcane and 9.75 tonnes for the ratoon crops; that the appellant was paying sugarcane farmers Kshs 2, 850 per tonne. The appellant denied the alleged loss of Kshs 348, 300/= and asked the trial court to dismiss the suit with costs.

6. The respondent testified as PW1. Justus Otieno George the appellant's Senior Field Officer in the Department of Agriculture testified as DW1. In his judgement, the trial Magistrate found in favour of the respondent and awarded a sum of Kshs 117, 754.12/= in damages, costs and interest to run from the date of filing suit.

7. Being aggrieved by the magistrate's decision, the appellant disputed the findings of the trial court on the following five (5) grounds of appeal: -

    1. The learned Magistrate erred in law and in fact when he found and held that the appellant breached the contract, whereas the respondent never led evidence to show when and if in fact he planted the cane;

    2. The trial Magistrate erred in law and in fact when he entered judgement for the respondent, against the appellant, for a principal sum of Kshs 117, 754, 12/- which was neither pleaded nor specifically proved in law;

    3. The trial court erred in fact and in law in awarding damages for the ratoon crops;

    4. The trial Magistrate in law and in fact in failing to make provision for transport, harvesting charges, when he had the discretion and was duty bound in law to make provisions for such charges;

    5. That the trial Magistrate erred in law and in fact after he assessed the damages in judgement at Kshs 117, 754.12/= and awarded interest from the date of filing suit as opposed to the date of judgement and thus, he exercised his discretion wrongly.

8. The appellant sought judgement against the respondent and prayed that:-

    a. This appeal be allowed;

    b. The judgement and decree of the subordinate court dated May 28, 2022 be set aside;

c. The respondent's suit before the subordinate court be dismissed;

d. The costs of the respondent's suit before the subordinate court be awarded to the appellant;

e. The court be pleaded to order that any interest on a sum of money awarded as damages, if any, be calculated from the date of judgement, if the court were to find that damages are due;

f. The costs of this appeal be awarded to the appellant.

9. The appeal was canvassed by way of written submissions. It is only the respondent who filed his submissions dated January 13, 2023 which I have duly considered.

10. 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.

11. 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."

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

a. Whether the respondent proved the pleaded contract;

b. Whether the appellant was in breach of the contract;

c. Whether the respondent was entitled to damages awarded;

d. When should interest start running from.

13. On the first issue, is whether there was breach of and, the respondent planted the crop.

14. There is no dispute that there was a contract between the parties for the planting and harvesting of sugar cane. The respondent testified that on August 20, 2013, he entered into a contract for cane growing and it matured at 22 - 24 months but the appellant did not harvest. "DEXH 5 - 6" are the debit advice to outgrowers dated January 22, 2013 which indicate that the farmer was supplied with seed cane and DXP fertilizer. Further "DEXH 7" are the job completion certificates number 407746 and 394687 dated September 19, 2013 and September 29, 2013 respectively which show that fertilizer was supplied and planting was done. The aforementioned documents are proof that planting on the respondent's farm took place. On whether the respondent proved the pleaded contract and the existence of the cane on the farm, the answer is in the affirmative.

15. On breach of contract, the appellant's claim that the plant crop was not developed and therefore not capable of being harvested. The respondent submitted that this issue never arose in the defence case; that the respondent's claim was that the cane was poached or sold to third parties and the plant crop was to be harvested on August 20, 2015. In his written witness statement, DW1 stated: -

> "it came to the attention of the defendant that the plaintiff deliberately poached the developed cane to other company with an intention to escape the recovery of the outstanding bills."

16. There is a warning letter dated June 21, 2012 which alluded to the above fact. The trial Magistrate was of the view that since the issue was not pleaded, the defendant could not be allowed to make a detour of his pleadings and it was properly be rejected. This is because it is trite law that each party is bound by their pleadings. The issue of whether the respondent intended to poach the cane to third parties was not properly canvassed before the trial court. The appellant should have at least tried to lead further evidence to demonstrate whether the respondent was served with the notice and whether or not he heeded the warning. In the absence of doing that, the court is left to believe that the plant crop was developed but the appellant neglected to harvest the same. This court makes a finding that there was a breach of contract.

17. On the damages awarded, the trial court considered the two documents produced by both parties in order to assist him in determining the yields. The Magistrate held: -

> "The document relied on by the plaintiff although indicated to be the defendant's document, a glance at it says otherwise. It is a bear (sic) document. There is no letter head or any feature to prove that it is indeed the defendant's document unlike the document relied on by the defendant which has features indicative of the author. I am thus persuaded to adopt the yields provided by the defendant."

18. The trial court went ahead with the assumption that the plant crop was planted on August 20, 20213 and the harvest would have been on August 20, 20215 when the price was Kshs 3,200/= per tonne. The court also adopted the proposed tonnage by the appellant of 66.56 tonnes. In addition, the trial court also factored in the costs already expended by the appellant being the survey, seed cane, DAP and urea costs. The Magistrate arrived at a net award of Kshs 117, 754.12/=. The Magistrate could not have made an award for transport and harvesting when in fact, the appellant did not carry out the actual activities as required. The respondent was thus entitled to the damages awarded.

19. On when the interest should start running, the Court of Appeal in Kisumu Civil Appeal No 138 of 2017 *South Nyanza Sugar Company vs Awino Oreko* held: -

> "...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."

20. This court is guided and bound by the decision of the Court of Appeal. The trial court was right in finding that interest should run from the date of filing suit.

21. The foregone conclusion is that the appeal dated June 20, 2022 is devoid of merit and the same is dismissed. The following orders do issue:-

    a. The Judgement and Decree of Hon RK Langat (PM) dated and delivered on May 28, 2022 is hereby upheld.

    b. Costs of this appeal are awarded to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 16TH DAY OF MARCH, 2023.

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Mr. Odero for the Appellant.

Ms. Theuri for the Respondent.

Nyauke Court Assistant.