Transmara Sugar Company Limited v Okombo (Civil Appeal E105 of 2022) [2023] KEHC 21115 (KLR) (18 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21115 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E105 OF 2022

RPV WENDOH, J

JULY 18, 2023

BETWEEN

TRANSMARA SUGAR COMPANY LIMITED ..... APPELLANT

AND

FRED OTIENO OKOMBO ..... RESPONDENT

(An Appeal from the judgement and decree of Hon. Munguti, Senior Principal Magistrate - Migori dated and delivered on 27/7/20222 in Migori CMCC No. 1310 of 2016)

JUDGMENT

1. This is an appeal by Transmara Sugar Company Limited against the judgement and decree of Hon. Munguti (SPM) dated and delivered on 27/7/2022 in Migori CMCC No. 1310 of 2016. The appellant is represented by the firm of Oyagi, Ong'uti, Magiya & Co. Advocates. The respondent is represented by the firm of Odingo & Co. Advocates.

2. By a plaint dated 2/6/2016, the respondent (formerly the plaintiff) filed a suit claiming general damages for the 3 cycles of sugar cane, costs of the suit, interest and any other relief that the court deems fit to grant. It was pleaded that on the 13/5/2011, the parties entered into a written agreement for the harvest and purchase of the existing sugar cane in the respondent's L.R. No. 2447 measuring 0.5 hecatres situated at Bomonyama area, Nduru sub - location, South Gucha District within Kisii County. The respondent pleaded that he developed the sugar cane without any participation of the appellant; that without any reasons advanced to him, the appellant refused to harvest the plant crop which at the time of filing the suit, had dried up in the shamba thus affecting the preparation of the ratoons. Further, it was pleaded that the sugar cane could weigh an average of 48 tonnes and the price per tonne at that time was Kshs. 4,300/=.

3. The appellant (formerly the defendant) entered appearance and filed a statement of defence dated 10/1/2017. The record of appeal shows that the statement of defence was later amended on 24/2/2020

but there is no evidence of an application in the original trial court file showing that the appellant sought leave to amend its defence. This court will only consider the statement of defence dated 10/1/2017. The appellant generally denied the contents of the plaint. The appellant averred that if at all there exists a duly executed agreement as averred by the respondent, then the same has a legally binding effect upon the parties thereto. The appellant averred that it was to raise a preliminary objection to have the suit referred to arbitration. The appellant asked the trial court to dismiss the suit with costs.

4. After the hearing, the trial court entered judgement in favour of the respondent in the sum of Kshs. 240,881.50/= being compensation for the three cycles, cost of the suit and interest.

5. Being aggrieved by the decision of the learned Magistrate, the appellant preferred the instant appeal. The memorandum of appeal is dated 25/8/2022. The appellant introduced an amended memorandum of appeal dated 13/1/2023. Order 42 Rule (3) and (2) allows a party to amend its memorandum of appeal before directions on hearing are given under Rule 13. This appeal was mentioned before Odera J on 19/1/2023 for directions. The appellant was well within time in filing its amended memorandum of appeal without seeking leave of this court. However, the amended memorandum of appeal is not engrossed with the court's receiving stamp. It cannot be known whether the amended memorandum of appeal was properly filed in court. I am of the view that the amended memorandum of appeal cannot therefore be said to be properly part of the record of appeal. It is also known whether the amended memorandum of appeal was served upon Counsel for the respondent. The court will therefore revert and consider the grounds in the grounds in the memorandum of appeal dated 25/8/2022.

6. The 14 grounds of appeal are summarised in the following 7 grounds as follows:-

    i. The learned Magistrate failed to acknowledge that the appellant has several weighbridges including two weighbridges at the respondent's locality and that it was the duty of the respondent to deliver the cane at the weighbridge for it to be weighed and tonnage taken;

    ii. The learned Magistrate assumed and presumed that cane production for the plant crop, ratoons one and two yield equal proceeds in a straight line when evidence has been adduced that as the crop ages there is steady reduction in crop yields;

    iii. The trial Magistrate erred in law and in fact in awarding compensation for three harvests yet the plaintiff in his own admission never incurred any damages for two harvests as the plant crop had dried up in the field;

    iv. The trial Magistrate erred in awarding damages of Kshs. 240,881.50/= whereas the same had neither been pleaded nor proved in accordance with the law;

    v. That the trial Magistrate erred in using a pricing range that was not applicable at the relevant time when the crop could have matured and harvested;

    vi. That the trial Magistrate erred in awarding compensation that was above the actual yields per acre by relying on a Kenya Sugar Research Foundation (KSREF) report that was not on record as the report on record indicated lower expected yields from the outgrowers' fields;

    vii. That the trial Magistrate erred in failing to deduct transport and harvesting charges from the decretal amount yet he had arrived at the conclusion that it was the duty of the appellant to transport and harvest sugarcane from the plaintiff's farm.

    The appellant prayed as follows:-

    a. That the appeal be allowed and the entire judgement and decree of the trial court dated 27/7/2022 be set aside or varied.

b. That this court be pleased to substitute the decision and/or decree dated 27/7/2022 with one setting aside the entire compensation of Kshs. 240,881.50/= for the alleged cane crop which was not harvested nor delivered to the defendant/appellant's mill by the plaintiff/respondent in terms of the contract.

c. Costs of the appeal and those incurred in the subordinate court be borne by the respondent.

d. Such other further orders be granted as this court may deem fit.

7. The appeal was canvassed by way of written submissions. The appellant filed its undated submissions on 13/1/2023. The appellant made lengthy submissions on the several findings made by different courts on the principle that courts cannot rewrite contracts between parties. The appellant also submitted that in this case, it is the respondent who breached the contract and not the appellant and therefore it cannot be held liable for the respondent's own breach.

8. On the duty to harvest the cane, the appellant submitted that the duty fell on the farmer and not the miller; that in the case of John Richard Okuku Oloo vs South Nyanza Sugar Company Limited Civil Appeal No. 278 of 2010, the contract imposed the duty upon the miller to harvest and deliver the sugarcane but that is not the case herein; that even if the duty fell on the miller, the transport, harvest and other charges should be deducted from the total charges. It was submitted that the sugarcane yield within the region yields between 51 - 65.4 tonnes and the average between the two is 58.2 tonnes; that the reduction rate is 25% and a realistic figure would be Kshs. 137, 950/=.

9. The appellant further submitted that the farmer ought to have used other options to deliver the cane or dispute resolution which it did not. Further, the appellant submitted that placing reliance on the Sugar Act 2001 would not help the respondent since statutes do not create contracts. The appellant faulted the farmer for not using the alternative options for dispute resolution as it was provided for in the contract. It was also submitted that general damages are not applicable in contractual disputes. The appellant concluded by urging that there was no breach of contract on its part, and it would be against public policy to allow the respondent to benefit from his own breach.

10. The respondent filed submissions dated 6/2/2023. It was submitted that the respondent gave evidence that the appellant did not harvest the cane upon maturity and it dried in the farm and he sought compensation for the plant crop and the ratoons.

11. On the duty to transport the cane to the millers it was submitted that there are numerous decisions which has upheld that it is the duty of the miller to harvest and transport the cane. The respondent referred the court to Section 6 (a) and Schedule 2 of the Sugar Act 2001 which provides on the role of the miller. It was further submitted that it has also been decided that any contractual proviso that contravenes any Act of Parliament is void to that extent.

12. On the duty of the court to interpret contracts and not to rewrite them, it was submitted that the lower court did not rewrite the contract in so far as clause 10 (c) of the suit contract is concerned; that the trial court took into account the provision of Section 6 (a) of the Sugar Act and Clause 10 (c) of the contract. In the circumstances, the court did not rewrite the provisions of the Sugar Act 2001.

13. On the statutory deductions, it was submitted that it is a matter of fact and should be proven in evidence; that the appellant did not meet the expenses of harvesting, transportation and other levies charges and there was no justification in awarding them. It was urged that the statutory deductions should not apply.

14. On the damages and interest, it was submitted that they were discussed in the trial court and should be upheld. The respondent urged the court to dismiss the appellant's appeal with costs.

15. This being the first appeal, 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. See the decision in Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123.

16. 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 Mbugua Kiruga v Mugecha Kiruga & another [1988] eKLR.

17. Guided by the above decisions, I have read, understood and considered the grounds of appeal, the record of appeal and the rival submissions by both parties. The issues which arise therefrom are:-

    a. Who has the duty to harvest, weigh and transport the cane?

    b. Whether the respondent was entitled to the damages.

18. There is no dispute that the parties herein entered into an agreement dated 13/5/2011. Clause 10 (c) outlines the obligations of the Sugarcane Farmer. There is no ambiguity on who was responsible to harvest and transport the cane as it solely fell on the farmer (respondent). Clause 10 (c) provides that the Sugarcane Farmer shall: -

> " Offer for delivery on maturity and deliver to the Miller all such cane as derived from his contracted cane field and no other using the Miller's transport or the Cane Farmer's appointed transporter approved in advance by the Miller."

19. The parties signed the contract on 19/7/2011 when the Sugar Act, 2001 was in force. The Sugar Act was operational as from 1/4/2002 and it was specifically enacted by Parliament to provide for the development, regulation and promotion of the sugar industry in Kenya. However, it was repealed by the enactment of the *Crops Act* No. 16 of 2013 and became operational as from 1/8/2014.

20. The question then becomes what is the place of statutes where parties enter into a contract which contravenes the statute? Are parties still bound by the contracts by virtue of the doctrine of privity of contract? In Patel v Singh (1987) eKLR the parties appealed to the Court of Appeal against the decision of Aganyaga J (as he was then) in which he held that the agreement for the advance of Kenyan money on the Indian Currency in India was contrary to Section 3 (1) of the Exchange Act was illegal and unenforceable in Kenya. The three-judge bench upheld the decision of the learned Judge of the Superior Court. Nyarangi JA quoting with approval the findings in Archbolds (Freightage) Ltd v S Spanglett Ltd (1961) 1 QB 374, at page 388 Devlin L.J (as he then was) in which the issue of illegality, was held as follows:-

> " The effect of illegality upon a contract may be threefold. If at the time of making the contract there is and intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab inito and that arises if the making of the contract is expressly or impliedly prohibited by statue or is otherwise contrary to public policy."

21. Further, a different bench of the Court of Appeal in Njogu & Company Advocates v National Bank of Kenya Limited (2016) eKLR held: -

> "...any contract that contravenes a statute is illegal and the same is void, ab initio and is therefore unenforceable. The logical conclusion of this finding would be that the contract between the appellant and the respondent regarding the payment of legal fees is unenforceable."

22. It is clear that contracts which are founded upon illegality and contravene public policy, are void ab initio. The court cannot aid parties to enforce illegalities. I also associate myself with the views of Mrima J in Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR in relation to the Sugar Act, he held as follows: -

> "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 of 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."

23. I would hasten to add, the drafters of the Sugar Act, intended to protect farmers who after investing their resources in planting the sugar cane, are left with it in their plots; and since they would not have the capacity to acquire the heavy machinery and manpower required to harvest the cane, the sole responsibility to harvest the sugarcane was placed on the millers. The sugar cane industry was intended to be mutual and interdependent between the farmers and the millers. Whereas the farmers have the land to plant the crops and the ratoons, in return, the millers were to provide the inputs and eventually harvest the cane produce. A contract which is drafted contrary to the provisions of any statute would be against public policy.

24. Mrima J in Transmara Sugar C. Ltd & Another vs Ben Kangwaya Ayiemba & Another (2020) eKLR held that: -

> "...courts must protect the public from deceit and help maintain standards of commercial morality. Where a dominant party for instance in a standard form agreement uses its obvious advantage to create a situation where it remains to fully benefit from the agreement in every manner and in total disregard to the weaker recipient party's position whatsoever, public interest demands that the dominant party be estopped from enjoying such benefit."

25. Section 29 of the Act provides for the Sugar Industry Agreements. The agreements under this section should conform to the guidelines set out in the Second Schedule of the Act, which provides the general

scope of sugar agreements and further outlines the roles of the parties in the sugar industry. Section 6 (a) of the Second Schedule provides among others that the role of the miller is to: -

> " harvest, weigh at the farm gate, transport and mill the sugar-cane supplied from the growers' fields and nucleus estates efficiently and make payments to the sugar-cane growers as specified in the agreement;"

26. Therefore, Clause 10 (c) of the agreement dated 13/5/2011 is null and void ab initio. It contravened the provisions of the Sugar Act, 2001 and it is therefore unenforceable. The duty to harvest, weigh and transport the sugar rested with the appellant.

27. On whether the respondent was entitled to the damages, there is no dispute that there was sugar cane pre-existing in the respondent's land at the time parties entered into the contract. The respondent testified as PW1. It was his testimony that the cane was 8 months old and the farm's acreage was 0.59 acres, he expected 50 tonnes and the sugar prices were Kshs. 4,500/= per tonne. The appellants' witnesses did not rebut this position. On the cycles which a farmer should be compensated, it was settled by the Court of Appeal in Kisumu Civil Appeal No. 138 of 2017 South Nyanza Sugar Company vs Awino Oreko it was 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."

28. In considering the damages the respondent was entitled to, the trial Magistrate held as follows:-

> " From the contract the defendant planted cane on 0.5 acres which I find could have yielded 43.75 tonnes of cane based on the average yield of 95.81. This cane was planted in May 2011 was to mature in May 2013 when the cane prices were Kshs. 3,800 for the plant crop, the plaintiff therefore lost 43.75 ×3,800 =166,250/= for the 1st ratoon which was to mature between May 2015 when prices had developed to 3,100...the 1st ratoon reduced by 25% that is 75/100 × 43.75 × 3,100 = 101,718.75. the 2nd ratoon will again reduce by 25% for the 1st ratoon as per the KESREF report 75/100 × 32.8125 which is 24.6 tonnes and the price had reduced to 3,800. The 2nd ratoon is therefore 2416 × 3,800=93,515.6 and the total therefore was 166,250 + 101,718.75 + 93,515.62 = 361, 484.40."

29. The trial Magistrate went on to further deduct the transport and harvest charges and found the respondent was entitled to Kshs. 240, 881.50.

30. The KESREF report shows that the cane price was Kshs. 3,800/= at the time of harvest in May 2011. The 1st ratoon would have been priced at Kshs. 3,100/=. The trial Magistrate calculated the price of the 2nd ratoon at Kshs. 3,800/= which I suppose should not be the case since the 2nd ratoon reduces by a further 25% therefore the price would be Kshs. 3,100/= or thereabouts. The reduction of the 1st ratoon

brought the tonnage to 32.81. The 2nd ratoon reduces by a further 25% and the 2nd ratoons tonnage is 24.61 tonnes. The computation of the 2nd ratoon therefore should have been:-

24.61 × 3,100= 76,283.25.

The total computation of damages for the plant crop, 1st and 2nd ratoons would therefore have been

166,250 +101,718.75+76,283.25= 344,252/=

31. On the applicable statutory deductions and other expenses, it is a matter of fact and should be proved by evidence. If at all the plant crop and the ratoons were not harvested, there is no justification in expecting that harvesting charges would apply.

32. The foregone position is that the appeal dated 25/8/2022 partially succeeds. The following orders do issue:-

a. The Judgement and Decree of the Hon. Munguti dated and delivered on 27/7/2022 in Migori CMCC No. 1310 of 2016 is hereby set aside.

b. The respondent is entitled to damages of Kshs. 344, 252/=.

c. The appellant is awarded costs of this appeal.

d. The interest on the damages shall run from the date of filing the suit.

e. The interest on costs shall run from the date of judgement.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 18TH DAY OF JULY, 2023.

R. WENDOH

JUDGE

Judgement delivered in the presence of;

No appearance for the Appellant.

No appearance for the Respondent.

Emma / Phelix Court Assistant.