Transmara Sugar Company v Omwamba (Civil Appeal E017 of 2021) [2023] KEHC 19585 (KLR) (5 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19585 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E017 OF 2021

TA ODERA, J

JULY 5, 2023

BETWEEN

TRANSMARA SUGAR COMPANY ..... APPELLANT

AND

JULIUS NTAMBO OMWAMBA ..... RESPONDENT

(Being an appeal from the whole judgement and decree of Chief Magistrate Hon. D. Onyango delivered on the 22/6/2020 in Migori CMCC No. 669 of 2016)

JUDGMENT

1. Transmara Sugar Company Limited, the appellant herein, commenced the instant appeal by an amended memorandum of appeal dated 6/6/2022. The appeal is against the judgement and decree of Hon. D. Onyango dated and delivered on 27/1/2021 in Migori CMCC 1220 of 2016. The appellant is represented by the firm of Wachira, Wekhomba, Aim & Associates Advocates while the respondent is represented by the firm of Nelson Jura & Co. Advocates.

2. This is the lead file in a series of appeals being Civil Appeals Nos. E015 of 2021, E018 of 2021, E027 of 2020 and 35 of 2020. The decision shall apply to the aforementioned files.

3. The factual background which gave rise to this appeal is a plaint dated 19/9/2016. The respondent (formerly the plaintiff) pleaded that on or about 10/4/2011, the respondent and the appellant entered into an agreement whereby the respondent was to cultivate/develop sugarcane on his plot no. 2597B measuring approximately 0.8 Ha and on its maturity asked the appellant to harvest/purchase the said sugarcane as per the agreement but the appellant in breach of the contract refused or failed to harvest the plant crop and thereby compromising the development of the 1st and 2nd ratoons.

4. The respondent pleaded that his sugarcane matured by April 2013 and the appellant refused to harvest the same and occasioned the respondent great financial loss. The respondent particularized the breach of the appellant and pleaded that as a result, the respondent lost 32 tons for the plant crop and another

32 tons for each of the ratoon crops and at the time of the contract the price was Kshs. 3,800 per tonne. The respondent asked the trial court for judgement against the appellant for the breach of contract for the loss of the expected tonnes in the three (3) cycles, cost of the suit and interest at court rates.

5. The appellant entered appearance and filed a statement of defence dated 16/5/2016 but it was later amended on 3/12/2019. The appellant generally denied the contents of the respondent's plaint and asked the trial court to dismiss the suit with costs.

6. The suit was set down for hearing and the respondent testified as PW1. Nathan Nyakweba testified as DW1, Wilson Lelekeny Letii testified as DW2 and Stephen Mosoiko testified as DW3.

7. The trial Magistrate rendered his judgement on 22/1/2021 in favour of the respondent awarding him damages of Kshs. 540, 519/= together with costs and interest from the date of judgement.

8. The aforementioned decision gave rise to the instant appeal. The grounds of appeal in the amended memorandum of appeal dated 6/6/2022 are as follows:-

    1. That the trial Magistrate erred in law and in fact when he held that the plaintiff had proved his case on a balance of probability vis a vis the facts surrounding the case despite the fact that the plaint failed to prove (on a balance of probabilities) in line with the conditional terms of the contract and Rule 12 (f) of the guidelines for agreement between parties in sugar industry made pursuant to Section 29 of the Sugar Act No. 10 of 2001 that;

        a. He did not offer his crop for harvest to the appellant.

        b. He notified the defendant that his cane/crop was ready for harvest and/or delivery in writing as per the terms of the contract Para 3A.

        c. His sugarcane was ready for harvesting at between 18 - 24 months after the execution of the contract as per his allegations in the plaint.

        d. His variety of cane was of the quality approved by the defendant and KESREF.

    2. The trial court erred in law when it failed to consider the contractual principle of Pari - delicto when it was evidently clear that the plaintiff was in breach of his duties under the contract and also his duties as provided for under the regulations made pursuant to the Sugar Act, of 2001 (repealed);

    3. That the trial court erred in law when he gave probative value to reports on Sugar Cane yield and production the same having been produced contrary to Section 35 and 36 of the *Evidence Act* Cap 80 Laws of Kenya;

    4. That the learned Magistrate erred in law and in fact by giving probative value to sugar cane yield report produced by the plaintiff as evidence without taking into consideration that:-

        i. The report has listed different varieties of sugar cane crop and which varieties the plaintiff never planted.

        ii. That the report was specifically made for the Sony sugar belt and the report was commissioned for 2008.

    5. The trial Magistrate erred in law when he awarded specific damages to the plaintiff despite the fact that:-

i. The plaintiff had not specifically pleaded nor specifically provided the damages owed to him despite the fact that the alleged damages incurred could be ascertained at the time of trial.

6. That the trial Magistrate erred in law when he held that the defendant was in breach of his contractual terms but went ahead and exercised his discretion by assessing damages awardable to the plaintiff.

9. The appellant prayed:-

a. That the appeal be allowed.

b. That the judgement and decree of the Hon. Magistrate together with all consequential orders be set aside.

c. That costs of this appeal be provided for.

10. The respondent filed a memorandum of cross appeal dated 4/7/2022 on the following ground:-

a. That the learned trial Magistrate erred in law and fact when he ordered interest to accrue on the principal award from the date of judgement in total disregard to the binding decisions of the Superior Courts and Court of Appeal which have consistently held that interest in a matter like this accrues on the principal amount from the date of filing of the suit.

11. The appellant prayed that this appeal be allowed by: -

i. Setting aside and/or substituting the judgement of the trial court with suitable orders that interest on the principal amount do accrue from the date of filing the suit.

ii. Costs of this appeal be in the cause.

12. The appeal was canvassed by way of written submissions and both parties filed their respective submissions.

13. The appellant filed its submissions dated 30/1/2023. On whether the respondent proved his case on a balance of probabilities, the appellant addressed the issue under several sub - headings. The appellant submitted that the burden of proof lay on the respondent as per Sections 107, 109 and 112 of the *Evidence Act*. The appellant submitted that the respondent did not prove among others that the property belonged to him, he planted the sugarcane, the cane was grown in line with the requirements, that he notified the appellant that the cane was ready for harvest and the specific date that cane was ready for harvest as per the guidelines for agreements Rule 12 (f) of the Sugar Act No. 10 of 2001. It was further submitted that the aforementioned were not proved on a balance of probabilities and reliance was placed in the case of Balozi Kenga vs Kenya Power & Lighting Co. Ltd (2021) eKLR. The appellant also submitted that the Magistrate should have found that the respondent did not prove his suit to the required standard.

14. On whether the trial Magistrate erred in misinterpreting the contractual principle of pari - delicto, the appellant submitted that the court ought to have found that both parties to the contract were at fault; that the appellant could only have harvested the plant crop after receipt of communication from the farmer but this did not happen. The appellant relied on the case of Nicodemus Osoro & G4S Kenya Limited vs Jane Gatwiri & Others (2020) eKLR and submitted that the trial court should have found that both parties were in breach and left the parties in the situation they were in before they approached the court for any remedies.

15. On whether the trial Magistrate erred in giving probative value to the sugarcane yield report, it was submitted that the report was commissioned in the year 2008 over Sony Sugar Cane Zone dispute and therefore the report was too old to be relied on in assessing the damages suffered by the respondent. Further, it was submitted that the report was produced without calling its maker contrary to Section 35 and 36 of the *Evidence Act* and therefore the findings could not be tested on cross examination; that the court erred in giving the report the probative value it did, therefore used it as a base for calculation of quantum. The appellant relied on the findings in Rosemary Wanjiru Kungu vs Elijah Macharia Githinji & Anor (2014) eKLR and Theodore Otieno Kambogo vs Norwegian People's Aid Nairobi Milimani HCCC No. 774 of 2000.

16. Further to the foregoing, it was submitted that the plaint prayed for general damages for breach of contract which cannot be awarded on claims founded on contractual disputes. In support of this point, the appellant relied on the decision of South Nyanza Sugar Co. Ltd vs Esther Auma Okal (2010) eKLR. The Magistrate erred in awarding the same as special damages ought to be specifically pleaded and proved.

17. The respondent filed his submissions dated 23/1/2023. The respondent submitted on whether the suit was fatally defective and incompetent because of the verifying affidavit contrary to Section 4 of the Oaths and Statutory Declaration Act but this issue did not arise in the grounds of appeal and neither was it addressed by the appellant.

18. On when the interest should start running, the appellant submitted that the trial Magistrate erred when he ordered that interest should run from the date of judgement in total disregard of the binding Court of Appeal decisions.

19. On whether the damages were specifically pleaded, it was submitted that the respondent pleaded and proved his case to the required standard. The respondent relied on the findings in the case of Kisumu Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd, Kisumu Civil Appeal No. 138 of 2017 South Nyanza Sugar Co. Ltd vs Awino Oreko and Migori CA No. 10 of 2016 South Nyanza Sugar Co. Ltd vs Joseph O. Onyango. The respondent submitted that he pleaded in his amended plaint that his farm measured 0.8 Ha and it could have yielded 80 tonnes per harvest for each of the three ratoon cycles; that the respondent produced yield report by KARLO which showed that the yield estimate would be 92 tons per Ha. The respondent also submitted that the schedule of prices was also not challenged by the appellant on cross examination and the appellant failed to produce any other document to challenge that document; that the schedule pf prices which was produced by the appellant was one which emanated from them.

20. On whether the trial Magistrate was right when he gave probative value to sugar cane yield and production, it was submitted that the report is sanctioned by a government agency that is Kenya Agricultural & Livestock Research Organization Sugar Research Institute which is mandated to do research on sugar cane yields. The respondent asked this court to be persuaded by the findings of Mrima J in Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs Joseh O. Onyango. The respondent further submitted that the court cannot be faulted for relying on a report and the appellant did not produce a report to counter it even at the pre-trial stage. The respondent also submitted that the issue of the cane variety was not an issue at the trial court.

21. On whether the miller has a duty to harvest the cane, it was submitted that that there is no clause in the contract which places the duty to harvest the came on the respondent; that if the appellant intended to shift the burden to the respondent, they ought to have done so in express terms. The respondent submitted that the contract was entered into during the tenure of the Sugar Act, 2001 and it is provided

that the duty to harvest rested on the miller. The respondent placed reliance on the cases Civil Appeal No. 10 of 2019 Transmara Sugar Co. Ltd vs Nelson Dedege Mbai.

22. On whether the trial court was right in awarding damages for all the three crop cycles, it was submitted that clause 1 of the contract was specific on the maturity of the cane; that the respondent was specific in his pleadings and evidence on the failure of the appellant to harvest the cane, compromised his chances of developing the 1st and 2nd ratoon. The respondent relied on the findings of the courts in Kisumu Civil Appeal No. 138 of 2017 South Nyanza Sugar Co. Ltd vs Awino Oreko; Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs Joseph O. Onyango and Transamara Sugar Co. Ltd vs Nelson Dedege Mbai (supra).

23. 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.

24. It is also settled that an appellate court will not ordinarily interfere with the 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 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"

25. I have considered the grounds of appeal, the record of appeal and the rival submissions by both parties. The issues which arise therefrom are:-

    a. Whether the respondent proved its case on a balance of probabilities.

    b. Whether the respondent was entitled to the damages.

26. Before proceeding to the first issue, the respondent refers to an amended plaint. The proceedings shows that on 4/12/2019 the respondent asked for time to file an amended plaint. The prayer was granted and the amended plaint dated 18/1/2020 was filed. There is no evidence that the amended plaint forms part of the records of appeal filed by both parties. The appellant also filed an amended defence dated 23/11/2019. The amended defence does not form part of the appellant's record of appeal but it forms part of the respondent's cross - appeal record.

27. Order 42 Rule 4 of the Civil Procedure Rules provides that the documents to form part of the record of appeal are the pleadings. The amended plaint was the pleading that was used by the trial court in reaching its decision. This should have been the correct pleading to be used. It is now settled that if the record of appeal is not properly filed, the court which sits on the appeal is bereft of jurisdiction. See the Supreme Court decision of Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 Others (2014) eKLR where the court held that:-

> " Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers

conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues."

28. This appeal and the cross appeal are ripe to be struck out for want of compliance but for the completeness of the record, this court shall consider the other issues.

29. Sections 109 and 112 of the *Evidence Act* provides as follows: -

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."

30. The case of Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another (2004) eKLR dealt with the aforementioned provisions and held that:-

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

31. In the case of Evans Nyakwana -vs- Cleophas Bwana Ongaro (2015) eKLR the court held that:-

> " As a general preposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given by either side."

32. The sugar cane contract dated 10/4/2011 is not denied. On cross - examination, the respondent testified that the cane was 2 months old when the agreement was done. This position was not disputed by the appellant. The appellant submitted that the respondent did not discharge the burden of proof when he failed to prove on a balance of probabilities a number of pre-requisites. I have considered the issues which the appellant contends that the respondent ought to have proved. First, the parties herein entered into a mutual contract and each party had its obligations. The issue that the respondent did not prove that the property belonged to him, should have been a precondition clause in the contract that the grower should be the owner of the land. There is no such requirement in the contract. Besides, on cross - examination, the respondent testified that he gave the appellant a copy of his title deed which was not denied by the appellant's witnesses. The same case applies to the acreage of the land. The copy of the contract shows that the acreage of the plant crop was 0.8 Ha and there was no dispute at the point of signing the agreement on the acreage of the plot. If there was doubt on the acreage of the land, the appellant was at liberty to conduct its survey to establish the correct acreage of the land.

33. Secondly, the appellant contended that the respondent did not prove the other pre - condition that he grew the sugarcane and its correct variety. The respondent testified that at the time when they were signing the contract, the cane was already 2 months old. This was not disputed. Clause 1 gives the timelines for the harvest of the plant crop and the 2 ratoons. The plant crop was to be harvested after 18 - 26 months from the time when the contract was signed. After 18 months, the plant crop ought to have at least matured that is 11/5/2013 or thereabouts. None of the appellant's witnesses testified that they visited the respondent's farm to monitor the progress of the sugarcane to confirm whether he had adhered to the terms of the contract.

34. In my view, the appellant being the miller who supplies the market demand for sugar, should be in a position to exercise the highest form of diligence in ensuring that the farmers with whom it enters into contracts with, perform their duties so that its business continues being a going concern. It is not proper for the appellant to now come and shift the burden to the respondent to prove its adherence to the terms of the contract while it is the party which needs constant supply of the raw material to assist in its operations. The appellant has Field Officers who should also be making periodical visits to the farms where they have signed contracts with the various farmers.

35. The appellant also contended that the farmer did not inform it of the matured plant crop for it to harvest. The duties and responsibilities of the farmer are outlined in clause 10 (a) - (v) of the contract. There is no particular clause which requires the farmer to notify the miller of the maturity of the sugarcane. In addition, Rule 12 (f) of the guidelines for agreement between parties in sugar industry pursuant to Section 29 of the Sugar Act No. 10 of 2001 provides:-

> " Offer for harvest and transport by the out-grower institution all such cane as is derived from his contracted sugar-cane plot and no other for use either as seed cane or mill sugar-cane"

36. A plain reading of the aforementioned provision states that the grower is to offer the cane for harvest and transport by the out-grower institution. Again, there is no obligation that the grower should inform the miller that the cane is ready. All that the grower is expected to do, is offer for harvest the cane but not do the actual harvesting. That is to say, the farmer should not hinder the out-grower institution from accessing his farm to harvest the sugarcane. None of the appellant's witnesses testified that they had been denied an opportunity to harvest the cane when they approached the respondent.

37. As I have stated hereinabove, the appellant being the strongest party in this contract and having the requisite human and financial power, should have its Field Officers make periodic trips to the various farms they have contracts with, to monitor the progress of the cane. The appellant cannot therefore argue that the Magistrate erred when he did not take into account the principles of pari-delicto when it was the only party which was at fault here. It is therefore this court's conclusion that the respondent proved its case on a balance of probabilities on the breach of contract on the part of the appellant.

38. On the claims that the respondent did not plead special damages, at paragraphs 9A of the amended plaint, the respondent pleaded with particularity that it had lost 120 tonnes of the plant crop and ratoon cycles each costing at the then prevailing price of Kshs. 3,800/=. I find that these are pleadings of special damages. The respondent also pleaded for special damages. On the award of the 1st and 2nd ratoons, the same were prevented to grow as a result of the negligence of the appellant failing to harvest the plant crop. Therefore, it is correct for the respondent to claim loss of the 1st and 2nd ratoons as a

result of breach of contract on the part of the appellant. This was the finding of the Court of Appeal in the case of South Nyanza Sugar Company vs Awino Oreko (supra) 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."

39. On the document used by the trial Magistrate to compute the damages, there was no objection to their production. The respondent produced Exhibit Nos. 2 and 3 being the KARLO report and cane prices respectively. The appellant did not also front a different set of documents which the trial Magistrate ought to have relied on. In any event, the report by KARLO was prepared by the Sugar Research Institute on behalf of the appellant company. The report shows the yields between the year 2013 and 2014. The same case applies to the sugarcane price list. The sugar cane price list shows the price of sugarcane the appellant was offering for harvest done between the years 2010 - 2015 against another competitor. I do not see how the Magistrate erred in relying on the said documents.

40. In reaching his findings, the Magistrate considered the assessment report of the expected yields of the plant and ratoon crops and put the same at 73.6 per tonne. The Magistrate also relied on the prevailing cane prices for both the plant crop and the ratoons and placed the same at Kshs. 3,800/=. Although the harvesting was not done, the trial court factored in the costs which the appellant would have incurred and deducted the same from the damages. This court sees no reason to interfere with the trial court's findings.

41. On the issue of interest, the Court of Appeal in the case of South Nyanza Sugar Company vs Awino Oreko (supra) 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."

42. The proper finding on the issue of interest is that it ought to have started running from the date of filing suit since they are special damages.

43. In the end, the following orders do issue:-

    i. The appeal has no merit and it is hereby dismissed with costs to the respondent.

    ii. The cross appeal is merited and it is hereby allowed as prayed.

    iii. The Judgement and Decree of Hon. D.O. Onyango (CM) dated and delivered on 27/1/2021 is hereby upheld.

iv. The interest on the special damages will run from the time of filing suit.

v. These orders applies to Civil Appeals Nos. E015 of 2021, E018 of 2021, E027 of 2020 and 35 of 2020.

T. A. ODERA - JUDGE

5/7/2023

DELIVERED VIA TEAMS PLATFORM IN THE PRESENCE OF;

No appearance for the Appellant.

No appearance for the Respondent.

Court Assistant; Kevin Odhiambo

T. A. ODERA - JUDGE

5/7/2023