



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.23 OF 2020**

**BETWEEN**

**JOHNSON OTIENO ODERO .....APPELLANT**

**AND**

**SOUTH NYANZA SUGAR COMPANY LIMITED.....RESPONDENT**

*(Being an Appeal from the judgment in Rongo Senior Resident Magistrate's SRMCC No. 344 of 2016*

*by Hon. C.M.Kamau- Resident Magistrate).*

**JUDGMENT**

1. The appellant herein was the plaintiff in Rongo Senior Resident Magistrate's SRMCC No. 344 of 2016. He had sued for a declaration that withholding of some proceeds of sugar cane was unlawful and illegal, for an order that the respondent accounts for and make immediate payment of the monies due to him and for damages for breach of contract. The learned trial magistrate delivered judgment dated 24<sup>th</sup> January, 2018 and dismissed the appellant's case.

2. The appellant was aggrieved by the said judgment and filed this appeal. The appellant was represented by the firm of Adera & Kenyatta Advocates. The appellant raised the following grounds of appeal:

- a) That the learned trial magistrate erred in law and in fact in finding that there was no breach of contract.
- b) That the learned trial magistrate erred in and in fact in finding that there was no written consent on record from the respondent for the assignment of the cane contract.
- c) That the learned magistrate erred in law and in fact by failing to find that there was no prescribed format for the written consent described in the out growers agreement.
- d) That the learned magistrate erred in law and in fact by failing to find that the affidavit by Mary Ajwang dated 10<sup>th</sup> August, 2005 served as sufficient written consent for the purposes of the said transaction.
- e) That the learned magistrate erred in law and in fact in failing to find that it is on the strength of the affidavit that account number 144180 was assigned to the appellant.
- f) That the learned magistrate erred in law and in fact in failing to find that the Harvesting Advice Note and the weighbridge ticket and the Contract book issued to the appellant was a recognition of ownership of the cane contract.
- g) That the learned magistrate erred in law and in fact in finding that the Harvesting Advice Note and the weighbridge ticket were a reflection of ownership of the piece of land and not of the cane contract.
- h) That the learned magistrate erred in law and in fact in finding that the documents presented before it were not proof of contract between the appellant and the defendant.
- i) That the learned magistrate erred in law and in fact in failing to find that the defendant was estopped from denying the existence of the contract when by their conduct they had acknowledged the same.
- j) That the learned magistrate erred in law and in fact in failing to appreciate uncontroverted evidence laid before it.

3. The respondent was represented by the firm of Okongó Wandago & Company, Advocates who opposed the appeal.
4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. The issues that I will address my mind to are:
  - a) Whether the appeal is incompetent for being filed out of time;
  - b) Whether the respondent adduced any evidence;
  - c) Whether the appellant was assigned the ownership of the contracted sugar cane as envisaged in the contract between the respondent and Mary Ajwang; and
  - d) Whether the appellant was entitled to the orders sought.
6. The impugned judgment was delivered on 24<sup>th</sup> January, 2018 and the memorandum of appeal was filed on 23<sup>rd</sup> February 2018. The same was filed on the 29<sup>th</sup> day after delivery and was therefore not filed out of time.
7. I have perused the record and noted that the respondent did not adduce any evidence. In **CMC Aviation Ltd Vs. Cruise Air Ltd (1) [1978] KLR 103, Madan – J.** stated:

**Pleadings contain averments of the three concerned until they are proved or disproved, or there is admission of them or any of them by the Parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.**

In the instant case I therefore find that the plaintiff's case was not controverted in any way.

8. The respondent testified and produced documents to the effect that he was assigned the contracted cane by Mary Ajwang after he bought the land in question and notified the respondent accordingly by way of a duly sworn affidavit. Plaintiff's exhibits 4 & 4A indicate that the respondent harvested the cane in issue in the name of the appellant. He is therefore estopped from claiming that the appellant is a stranger to the contract.
9. It is evidently clear that the learned trial magistrate misdirected himself and arrived at an erroneous conclusion. I accordingly set aside the judgment by the learned trial magistrate and substitute it as hereunder:
  - a) Orders do issue in terms of prayers (a) & (b) of the plaint;
  - b) Kshs. 200,000/= damages for breach of contract;
  - c) Costs in this and the lower court to the appellant; and
  - d) Interest on (b) & (c) above and on the unpaid monies and on costs from the date filing at court rates.
10. The appeal therefore succeed.

**DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF JULY, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**