



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.13 OF 2019

JECKONIA O. RANGA.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. S.K. Onjoro (SRM))

dated and delivered on 21st December 2018 in Kisii CMCC No. 1477 of 2004)

JUDGMENT

1. According to the plaint filed in the subordinate court, the appellant entered into an agreement with the respondent dated 30th April 1996 to grow and sell to it sugarcane on land plot number 102 D in field number 50, in Kadera Kwoyo Sub location measuring 1.1 hectares. The agreement was to remain in force for a period of 5 years or until one plant crop and two ratoon crops of sugarcane were harvested whichever period would be less. The appellant claimed that the respondent only harvested the plant crop and the 1st ratoon crop but failed to harvest the 2nd ratoon crop when it matured and was ready for harvest leading to waste and loss. He therefore sought compensation at the rate of 135 tonnes per hectare and payment of Kshs. 1,730/= per tonne for the loss of the crop.
2. The respondent denied that it had breached the contract and stated that it had harvested the plant crop and ratoon 1 but was unable to harvest the 2nd ratoon crop on time due to tribal clashes between neighbouring communities at the time. The respondent also denied that the appellant's plot was capable of producing an average of 135 tonnes per hectare and averred that it could only produce a maximum of 65 tonnes per hectare.
3. As the first appellate Court, it is now well settled that the role of this court is to reanalyse the evidence on record, evaluate it and reach its own conclusion in the matter. (See **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**).
4. Before the trial court, Margaret Anyango (PW 1), who had obtained a power of attorney from the appellant, testified that she had witnessed the appellant signing the agreement with the respondent and had participated in growing the sugarcane with him. She testified that when the sugarcane matured it had been cut once instead of thrice and abandoned. She produced her listed documents and also adopted the statement of the appellant as her evidence.
5. During cross examination, PW 1, testified that the land measured 2 to 3 acres and was expected to yield 20 tonnes. She stated that she had developed the 1st ratoon but did not develop the 2nd one as the cane had dried up. She left the cane in the farm as it belonged to the respondent who had refused to cut it. She admitted in re examination that she did not know how much tonnes the first harvest produced and that it was possible to produce 135 tonnes.
6. The respondent's witness, George Ochieng' (DW1) stated that he was a senior field supervisor for the respondent. He admitted that there had been a contract between the appellant and the respondent but stated that the expected yield for the plant crop in Kadera Kwoyo sub location was 61.28 tonnes per hectare. The yield for the ratoon crop had been 48.6 tonnes per hectare. He testified that the plant crop and ratoon 1 had been harvested by the respondent at that the price of cane at the time was Kshs. 1,730/=.
7. He however denied that PW 1 was the actual farmer who had signed the contract with the respondent and testified that the document purported to give power of attorney dated 17th October 2005 did not resemble the signature on their contract documents and urged the court to dismiss the suit.
8. After analysing the evidence before it the trial court found that the appellant's witness had admitted that the 2nd ratoon crop was not

developed hence there was no indication that the respondent had breached the terms of the agreement. The trial court found that the appellant's claim for compensation was unmerited and dismissed it with costs.

9. The appellant, being dissatisfied with that decision, filed a memorandum of appeal setting out the following grounds of appeal;

- a. The learned trial magistrate erred in law and in fact by failing to properly and sufficiently evaluate the evidence so as to come to a correct determination of the suit as urged by the appellant;
- b. The learned trial magistrate erred in law and in fact in determining the suit on issues that were not pleaded by the parties and in the result came to a wrong judgment;
- c. The learned trial magistrate erred in law and in fact in failing to find that the appellant had properly and sufficiently proved his case on the issues raised, the evidence led and the facts admitted both in the evidence and in the pleadings.

10. The appellant's counsel, Ms. Koko, relied on the written submissions filed before the trial court. She further submitted that the suit had been filed within the time stipulated by the Limitation of Actions Act. This point was however not dealt by the trial court or raised in the memorandum of appeal.

11. Mr. Odero, for the respondent similarly adopted the submissions filed before the trial court. He further submitted that he opposed the appeal as the appellant had not proved her case. That at paragraph 7 of the plaint the appellant pleaded that the contract was breached when the respondent failed to harvest the 2nd ratoon after harvesting the plant crop and the 1st ratoon. At paragraph 13 of the plaint, the appellant pleaded that because of the said breach, the plaintiff suffered loss for one ratoon crop yet he pleaded, at paragraph 8 of the plaint, that the appellant claimed that he had suffered loss from two ratoon crops. Counsel contended that these inconsistencies in the plaint made it unclear what the cause of action was.

12. Counsel further argued that when the appellant's witness testified she stated that the sugarcane was planted but was only harvested once. The witness further stated that 2 harvests weren't cut and the sugar dried up in the farm which meant that the 1st and 2nd ratoon crop weren't harvested. In cross examination she testified that the 1st ratoon was developed and not harvested and then went on to say the 2nd ratoon was not developed as the cane had dried up. Counsel contended the evidence at the trial departed from the plaintiff's pleadings thus the trial court was right in dismissing the suit for want of proof.

13. Having perused the record of appeal, the lower court file and the parties' submissions, I found that the main issue arising for determination was whether the appellant had proved his case to the required standard.

14. The appellant's claim for special damages was based on the Out grower's Agreement dated 30th April 1996, which both parties agreed existed between the parties. Both parties also agreed that in the period, within which the contract was in force, the respondent was to harvest the plant crop and two ratoon crops. The appellant's case was that the respondent had only harvested the plant crop and 1st ratoon crop but failed to harvest the 2nd ratoon crop when it was due for harvest in breach of the contract. The appellant therefore sought damages against the respondent for one ratoon crop.

15. However, at paragraph 8 of the plaint, the appellant pleaded as follows;

8. By reason of the said neglect and breach, the plaintiff suffered loss his bargain and expected profit from the two (2) ratoon crops and suffered loss and damage.

16. The appellant's case through evidence of PW1 was that the respondent harvested only one crop cycle of sugar and abandoned the other two. In cross examination, she reiterated that she had developed the 1st ratoon crop but did not develop the 2nd ratoon as the cane had dried up when the respondent refused to cut it.

17. It is a well settled principle of law that parties are bound by their pleadings and that any evidence deviating from what is pleaded must be disregarded. This principle was pronounced by the Court of Appeal in the case of **David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No. 76 of 2014 [2014] eKLR** thus;

In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

18. The evidence tendered by the appellant's witness in this case was a clear departure from the pleadings. There was no amendment made to the pleadings to clarify whether the respondent abandoned one or both ratoon crops. In her evidence PW 1 testified that the 1st ratoon crop

was abandoned by the respondent therefore she could not develop the 2nd ratoon crop. This contradicted the written statement by the appellant who claimed that he had redeveloped ratoon 2. Despite the admission by the respondent that the 2nd ratoon crop had not been harvested, DW 1's testimony cast further doubt on the evidence given by PW1 when he testified that the signature appended to the document giving PW 1 power of attorney did not resemble the signature on their contract documents.

19. The appellant had a duty to prove his case. It was evident that the evidence presented in support of the claim, did not support the pleadings. The suit was therefore properly dismissed by the trial court.

20. Consequently, I dismiss this appeal with costs to the respondent.

Dated, signed and delivered at Kisii this 6th day of February 2020.

R.E.OUGO

JUDGE

In the presence of;

Mr. Wesonga h/b Mr. Oduk For the Appellant

Respondent Absent

Ms Rael Court clerk