



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 248 OF 2006

MOSES SAMUEL OGWENO ONGOO.....APPELLANT

VERSUS

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

(Being an appeal from the judgment and decree of the Senior Resident Magistrate A.A. Ingutia (SRM) in CMCC No. 938 of 2004 dated 16th August 2006 and delivered on 19th September, 2006)

JUDGMENT

1. The appellant commenced proceedings against the respondent claiming damages for breach of an Outgrowers' Cane Agreement dated 5th March, 1996. The appellant's case was that the respondent had contracted him to grow and sell to it sugarcane on his land being plot number 764 in field number 16, in Kaluoch Sub location measuring 3.0 hectares. The respondent failed to harvest the plant crop and the two (2) ratoon crops as agreed, occasioning the appellant loss of all three crops.
2. The trial court found that the parties had not referred the dispute to arbitration as agreed and declined to determine the suit on merits. That decision is what occasioned the filing of this appeal.
3. As a first appellate court, this court is required to analyse and reassess the evidence on record afresh and reach its own conclusions, making due allowance for the fact that it neither saw nor heard the witnesses testify. (*See Selle v. Associated Motor Boat Company Ltd [1968] E.A. 123 at p. 126*)
4. At the hearing before the trial court, the appellant testified and called one more witness. He stated that he had entered into an agreement with the respondent to plant cane on his land for a period of 5 years or 3 harvests. He planted the cane to the respondent's specifications but the respondent failed to harvest the cane when it matured. He put his expected yield at 125 tonnes and the buying price at Kshs. 1,730/= per tonne. The plant crop was to be harvested between 18 to 24 months and the second crop between 12 to 18 months. He told the court that he had reported the matter to the respondent but it had failed to take any action. He produced a copy of the agreement and a copy of the tender as exhibits.
5. PW2, a cane district agricultural officer, from the ministry of agriculture stated that he had visited the appellant's farm and prepared a report which he produced as an exhibit. He put the appellant's field at 3 hectares and estimated the yield for the plant crop as 118 tonnes per hectare. He calculated the appellant's total loss for all three crops as Kshs. 1,593,950/=.
6. On his part, the respondent's sole witness took the court through the process of contracting a farmer to develop cane. He affirmed that the agreement produced by the appellant had been signed by the respondent but testified that the appellant had abandoned the crop at an early stage.
7. At the hearing of this appeal, both parties opted to rely on their written submissions. From the said submissions, the memorandum and the record of appeal, the main issue arising for determination is whether the trial court erred in invoking the arbitration clause in dismissing the suit without going into the merits of the case.
8. The appellant contends that the trial court had no obligation to determine issues not raised by the parties. On this the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others Civil Appeal No. 219 Of 2013 [2014] Eklr* stated inter alia:

“Lord Denning was of course alluding to the essential difference between an adversarial system of justice such as we have in which the judge is or ought to be more of an impartial umpire and the inquisitorial system where the judge is an active investigator after evidence and truth. The good law Lord had proceeded to quote Lord Green MR who had explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations for, by descending into

the arena the judge is liable to have his vision clouded by the dust of conflict.

...

The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

9. Looking at the defence the respondent contested to the court’s jurisdiction for the reason that the suit was statute barred. The respondent did not raise the issue of application of the arbitration clause in its pleadings and as such the trial court determined the case on an issue that had not been placed before it.

10. The arbitration clause in the contested agreement provided that any dispute arising between the parties was to be referred to the decision of a single arbitrator to be agreed between the parties. The arbitration clause, clause 13, was to apply subject to the provisions of the Arbitration Act Cap 49 as maybe amended from time to time.

11. The appellant argues that the respondent having filed its defence and participated in the trial had waived its right to arbitration. The appellant relied on the case of ***Kisumuwalla Oil Industries vs PAN Asiatic Commodities 1995-1998 IEA 153 at page 159 (j)*** to buttress this argument. In that case, the Court of Appeal distinguished the application of arbitration clauses, also known as Scott v Avery clauses, in the English context and their application in Kenyan legal context. In England, a party had no cause of action in respect of a claim falling within the ambit of an arbitration clause. Conversely, in the Kenyan legal regime, such arbitration clauses were to be applied subject to statutory provisions, particularly the Arbitration Act.

12. When the parties to this suit entered into the agreement in 1996, **section 6 of the Arbitration Act No. 4 of 1995** provided as follows:

6(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters an appearance or files any pleading or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration, unless it finds-

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

13. In the present case, none of the parties moved the court to stay the proceedings and have the matter referred to arbitration. In the words of G.S. Pall J.A in ***Kisumuwalla Oil Industries (supra)*** parties could expressly agree to disregard the arbitration clause or do so by conduct. Once the parties had submitted to the court’s jurisdiction they could not blow hot and cold and subsequently rely upon it without the consent of each other. The parties in this matter submitted themselves to the court’s jurisdiction. The trial court erred when it failed to determine the matter on merit, the parties having submitted to its jurisdiction.

14. The suit before the trial court was filed more than a decade ago, I find it prudent to proceed and determine the matter on merit on the material before me. The appellant in his suit claimed a breach of contract by the respondent. The respondent’s witness denied having knowledge of the appellant’s parcel of land but acknowledged that the agreement he had produced was signed by the respondent. The balance of probabilities leans in a favour of there being a contract between the appellant and the respondent.

15. The contract produced by the appellant provides that the agreement was to remain in force for a period of five years or until one plant or two ratoon crops of sugar cane are harvested on the plot whichever period was less. The respondent’s witness told the court that the appellant abandoned his crop at an early stage. The respondent pleaded that the appellant had failed to employ crop husbandry and it was duly entitled to decline to harvest the cane. The respondent also pleaded that the appellant had a duty to negate its own losses and was obliged to harvest and deliver the cane if indeed it was mature for harvest.

16. On the issue of mitigation of losses, the Court of Appeal in ***African Highland Produce Limited v John Kisorio Civil Appeal No. 264 of 1999 [2001]JeKLR*** had the following to say:

“The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimise the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant. See Halsbury's Laws of England Vol 11, Page 289, 3rd Edn 1955.”

17. Guided by the above mentioned Court of Appeal decision the duty to adduce proof of the means by which the appellant should have mitigated his loss fell upon the respondent. Clause 4 of the contract provided that if either party was in breach of the terms, a written notice was to be served upon the defaulting party. The respondent did not adduce any evidence to show that it notified the appellant of his alleged failure to develop the cane as agreed.

18. Additionally, the contract provided that both parties had the responsibility to ensure that the crop produced was of a satisfactory yield.

The appellant was expected to maintain his crop in accordance with clause 11 (j) in order to achieve an acceptable yield whereas clause 10 (g) required the respondent to carry out operations necessary to maintain the cane at its optimum standard if the appellant failed to do so and deduct its expenses from payments made. The Agreement also had several restrictive clauses which would make it impossible for the Respondent to take any reasonable steps to mitigate the loss. Hence as a result of the respondent's failure to harvest the plant crop as agreed, the appellant was unable to develop ratoon crops and suffered loss of all three crop cycles.

19. As there was a breach of contract by the respondent, I will now proceed to determine what award the appellant is entitled to.

20. The appellant's enumerated the orders he sought as follows :

a. Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of the three (3) crops on 3.0 hectares of land and at the rate of 135 tonnes per hectare and payment of Kshs. 1,730/= per tonne for the expected three (3) crops;

b. Costs of this suit;

c. Interest thereon at court rates from 5th day of March 1996 until payment in full; and

d. Any other relief that this Honourable court may deem just and expedient to grant.

21. It is a settled principle of law that special damages must be pleaded with particularity and proved (*see Dharamishi v Karsan [1974] EA 41, Maritim & Another v Anjere [1990-1994] EA 312 and Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR*).

22. The appellant set out the acreage of his field, the number of crop cycles lost, his expected yield and the cost of a tonne per hectare in paragraphs 3, 7, 8 and 9 of his plaint. To prove his claim, the appellant gave oral evidence and called an expert witness to testify.

23. The acreage of the appellant's field was set out as 3 hectares in the copy of tender which he produced as exhibit 2. This was affirmed by the expert witness, PW2. All witnesses agreed that the price of cane per tonne at the time was Kshs. 1,730/=.As determined above, the appellant was entitled to all three crop cycles by virtue of the respondent's breach of contract. The only contention is on the expected yield for the three crop cycles.

24. The appellant testified that he expected 125 tonnes whereas the respondent's witness estimated a yield of 75 tonnes per hectare. The appellant's expert witness in his report estimated the yield of the plant crop as 115 tonnes per hectare, for the 1st ratoon crop as 105 tonnes per hectare and for the 2nd ratoon crop as 95 tonnes per hectare. I find this estimate from the expert witness who was independent and had experience on the matter being a cane district agricultural officer, the most accurate estimate.

25. Taking all the above into account, I compute the appellant's loss as Kshs. 1,634,850/= made up as follows:

a. Plant crop $Kshs. 1,730 \times 115 \text{ tonnes} \times 3 \text{ hectares} = Kshs. 596,850/=$

b. 1st ratoon crop $Kshs. 1,730 \times 105 \text{ tonnes} \times 3 \text{ hectares} = Kshs. 544,950/=$

c. Amount for the 2nd ratoon crop $Kshs. 1,730 \times 95 \text{ tonnes} \times 3 \text{ hectares} = Kshs. 493,050/=$

I set aside the subordinate court's judgment and I enter judgment for the Plaintiff at Kshs.1634850/=.

26. This appeal was filed on 11th October 2006 and only heard more than a decade later, I award interest at court rates from the date of filing suit that is 10th August 2004 to the date the memorandum of appeal was filed that is on 11th October 2006. Interest shall then accrue from the date of this judgment until payment in full.

27. The appellant shall have costs for this appeal.

Dated, signed and delivered at Kisii this 17th day of January 2019.

R.E.OUGO

JUDGE

In the presence of;

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

Mr. Bosire h/b Mr. Yogo For the Respondent

Rael Court Clerk