



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 108 OF 2017

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

-VERSUS-

HELLEN ODERO ODHIAMBO.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. M. M. Wachira, Senior Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 2554 of 2015 delivered on 19/10/2017)

JUDGMENT

1. The Respondent herein, **Hellen Odero Odhiambo**, filed **Migori Chief Magistrate's Court Civil Suit No. 2554 of 2015** (hereinafter referred to as '**the suit**') against **South Nyanza Sugar Co. Ltd**, the Appellant herein, claiming that by An Agreement dated 26/03/2013 (hereinafter referred to as '**the Contract**') the Appellant contracted the Respondent herein to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 180 in North Kanyajuok Sub-Location measuring 0.2 Hectare within Migori County.

2. The Respondent pleaded that the Contract was for a period of one cane harvest and was to remain in force from execution to payment of the cane yields. That, the Respondent discharged her part of the contract but the Appellant failed to harvest the crop at maturity hence the Respondent suffered loss.

3. Aggrieved by the alleged breach of the contract the Respondent filed the suit claiming compensation for the loss of the unharvested crop, costs and interest at court rates.

4. The Appellant entered appearance and filed a Statement of Defence dated 09/12/2015 wherein it denied the contract and put the Respondent into strict proof. The Appellant further averred that if at all there was any such loss then the Respondent was the author of her own misfortune as she failed to properly maintain her crop to the required standards and failed to harvest and deliver the cane to the Appellant. The Appellant prayed for the dismissal of the suit with costs. The parties filed their statements as well.

5. The suit was finally settled down for hearing where both parties were represented by Counsels. The Respondent was the sole witness who testified and adopted her Statement as part of her testimony. She also produced the documents in her List of Documents as exhibits. The Appellant called its Senior Field Supervisor as its sole witness who also adopted his statement and produced the documents as exhibits.

6. The trial court rendered its judgment and allowed the suit by remedying the Respondent the value of the crop. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and the suit be dismissed with costs the Appellant proposed the following eight grounds in the Memorandum of Appeal dated 15/11/2017 and filed in Court on 16/11/2016: -

1. The learned magistrate erred in law and in fact in finding that the Plaintiff's agreement dated 5/4/2013 was not in dispute and that the same had been signed and sealed by the Appellant yet the agreement before court was not dated 5/4/2013.

2. The learned magistrate erred in law and fact in failing to find that the agreement produced by the plaintiff in court was binding upon the Appellant yet it was not properly sealed as per the provisions of Contract.

3. The learned magistrate erred in law and in fact in failing to find that the plaintiff had a duty to harvest her sugarcane and avail the same to the Appellant as per clause 5 of the Agreement.

4. The learned magistrate erred in law and in fact in failing that it was the duty of the Appellant to harvest the cane as per clause 7 of the agreement yet clause 5 of the said agreement had provided that the plaintiff shall be responsible for harvesting and transporting the cane to the factory however the Appellant in its sole discretion may harvest the cane while clause 7 obliged the grower to allow the company staff access to conduct physical sampling of the cane and to determine other logistical related to harvesting before commencement of harvesting.

5. The learned trial magistrate erred in law and in fact in finding that the alleged contract before court was subject to the provision of the Sugar Act of 2001 yet it is common knowledge that the said Act was repealed by the Crop Act No. 16 of 2013.

6. The learned trial magistrate erred in law and in fact in failing to find that the alleged agreement which was not signed and sealed by the Appellant on 26th March 2013 should be a subject to the provisions of the now repealed Sugar Act of 2001.

7. The learned magistrate erred in law and in fact if awarding costs of the suit to the plaintiff yet the plaintiff failed to prove that he had served the defendant with a demand notice and notice of intention to sue.

8. The learned trial magistrate erred in law and in fact in not relying on the evidence of the plaintiff who confirmed that she did not harvest the cane neither did she transport the cane to the factory but left it to dry up.

7. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied. The Appellant challenged the finding of the trial court vigorously and more so claiming that the court erred in finding that the contract was valid and that the Appellant was under the duty to harvest the cane. The Appellant referred to various decisions in support of its submissions.

8. The Respondent supported the judgment and prayed for the dismissal of the appeal and also relied on various decisions as well.

9. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates 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 the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

10. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

11. I will first deal with the validity of the contract. The Appellant submitted that the contract which is the substratum of the appeal is *void ab initio* as it did not bear the seal of the Appellant and as such is not authentic. Counsel referred to **Sections 3 and 6 of the Law of Contract Act, Section 38 of the Land Act** and several persuasive decisions in support of the submission. The Respondent on her part took the position that the contract was valid as it was signed by senior officers of the Appellant and that the requirement of the common seal was not mandatory. Reference was made to **Section 38 of the Companies Act, Cap. 486** Laws of Kenya (now repealed) and several persuasive decisions.

12. I have seen the contract. It consists of two pages. The first page contains *inter alia* the summary of the parties' details. On the part of the Appellant the contract was inspected by the Appellants OES Supervisor, was confirmed by the OES Superintendent and was approved by the OES Manager at execution. The Respondent executed the contract on her part. The contract comprises of 13 terms and conditions on the second page and also has the execution part which also appears to have been signed by the three officers who signed on the first page on behalf of the Appellant. The contract however has no common seal of the Appellant.

13. The trial court addressed its legal mind on the issue. The court observed that: -

...On the first page the same is signed by the OES Supervisor and Manager [and] this was not questioned by the defendant.....It was for the defendant to discharge the burden that the said officers had no capacity to bind the company which it failed to do....'

14. The Respondent is a farmer and a natural person whereas the Appellant is a Miller and a company hence an artificial legal person. The Appellant is comprised of a Board of Directors, the Management and Staff. It only acts through its duly authorized officers. As to the scope of authority of each officer of the Appellant unless expressly provided for many a times that information may not be easily within the public purview and that is why the law presumes that officers of a Company when dealing on behalf of the company usually act in good faith and within their scope of authority (See **Part IV of the Companies Act No. 17 of 2015**).

15. In this case the contract was signed by the OES Supervisor, the OES Superintendent and the OES Manager on behalf of the Appellant. There is no doubt that these officers are senior officers of the Appellant and unless otherwise proved to the satisfaction of the law their actions bind the Appellant and that is why the trial court, rightly so, made its said finding.

16. As to whether the failure to affix a company seal invalidated the contract, **Section 38 of the Companies Act, Cap. 486** Laws of Kenya (now repealed) firmly settled the issue in the following manner: -

A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorized officer of the company, and need not be under its common seal.

17. As stated, there is no evidence that the OES Supervisor, the OES Superintendent and the OES Manager who executed the contract on behalf of the Appellant were not the Appellant's authorized officers. As such, the requirement for fixing the seal was not mandatory. I therefore find and hold that the contract is valid as executed and the ground fails.

18. On the duty to harvest the cane, I have in previous decisions considered the duty to harvest the cane under a sugar contract. Since I still hold that position I hereby reproduce what I stated in the **Migori High Court Civil Appeal No. 12 of 2017 Ben Oloo Liare vs. South**

22.I partly stated in the Migori High Court Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR thus: -

18. That now brings me to the finding by the trial court that the Appellant failed to adhere to Clause 3.1.2 of the Contract in not harvesting and delivering the cane to the Respondent. A contract document must always be considered in its entirety. The good reason for that lies in the truism that clauses in a contract tend to complement one another and one risks not getting the whole intention of the parties if a consideration or reference is put on just a portion of the document. Had the learned trial court done so, it would have come across Clause 3.1.12 which requires the Miller (Respondent) to: -

‘Prepare the harvesting program setting out the approximate expected time of harvesting which program will be subject to changes necessitated by factors beyond the control of the Miller.’

19. A look at Clauses 3.1.2 and 3.1.12 of the contract places a duty upon the Respondent before the actual harvesting of the cane. That duty is for the Respondent to ‘inspect the cane and determine its maturity and to prepare the harvesting program setting out the approximate expected time of harvesting’. There is no evidence that the Respondent discharged that contractual duty in the first instance. That failure, in the face of the fact that the cane had matured, can only mean that it is the Respondent who was in breach of the contract. With tremendous respect, the finding of the learned trial Magistrate that the Appellant failed to harvest and deliver the cane to the Respondent was not only unsupported by evidence but also arrived at without a full consideration of the contract and was therefore erroneous. That finding must be interfered with.

23. Needless to say, there are several other clauses in the contract which when cumulatively taken buttress the position that the duty to harvest the cane is the Respondent’s. Further thereto, there is the Sugar Act (hereinafter referred to as ‘the Act’). This Act was the applicable law by the time the contract was entered. The Act stipulated under Section 6(a) of the Second Schedule thereof, which Schedule was a creation of Section 29 of the Act, that: -

‘The role of the miller is to -

(a) Harvest, weigh at the farm gate, transport and mill the sugar cane supplied from the growers’ field and nucleus estate efficiently and make payments to the sugar cane growers as scheduled in the agreement.’ (emphasis added)

24. 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 on 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.

19. I therefore find and hold that the Appellant was in breach of the contract in failing to harvest the cane at maturity. The Respondent was hence entitled to compensation of the lost crop which the trial court assessed at Kshs. 63,231/60 based on the Kesref Report on the yields, the size of the land and the prevailing prices. Since I am in agreement with the said assessment and the two main grounds of appeal having failed I find that the appeal is unmeritorious and must fail. The same is hereby dismissed with costs.

20. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 11th day of July 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Marvin Odero Counsel instructed by the firm of Messrs. Okong’o Wandago & Company Advocates for the Appellant.

Mr. Mwita Kerario Counsel instructed by the firm of Messrs. Kerario Marwa & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant