



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 28 OF 2019

BETWEEN

MICHAEL OPIYO OKIROAPPELLANT

AND

SOUTH NYANZA SUGAR CO. LTD.RESPONDENT

(Being an appeal from the judgment and decree of Senior Principal Magistrate, Hon. Nathan S. Lutta dated 8th August 2018 in Kisii, CMCC No. 475 of 2010)

JUDGEMENT

1. The appellant has preferred the instant appeal against the trial court's decision to review its judgment in CMCC No. 475 of 2010. He lists the following grounds of appeal in his memorandum of appeal dated 26th February, 2019;

a. The trial magistrate erred in law and in fact in reviewing the judgment when the court's jurisdiction to review the award had not been properly invoked as required under the provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules;

b. The trial magistrate erred in law and in fact in sitting on an appeal over his own judgment; and

c. The trial magistrate improperly entertained the application for review when the judgment sought to be reviewed was neither extracted [n] or exhibited.

2. The appellant had sued the respondent for breach of a contract to cultivate, harvest and sell sugarcane from his land plot number 265A in field number 102, Kajulu Sublocation measuring 1.2 hectares. Having considered the evidence of both parties, the trial court found that the respondent had breached the contract by failing to harvest two subsequent ratoon crops and in its judgment dated 19th December 2017, it awarded the appellant Kshs. 810,000/= in damages.

3. Thereafter, the respondent made an application for review of the judgment and decree of the court. The trial court allowed the respondent's application and reviewed its initial award to Kshs. 220,758.72 on 8th August 2018.

4. The appellant agitated his appeal by way of written submissions dated 11th June 2019. He submits that the respondent did not extract the decree sought to be reviewed and failed to specify any reason to call for review under Order 45 of the Civil Procedure Rules. He also protests the trial court decision to disregard its earlier judgment entirely and come up with a fresh judgment without giving a reason for setting aside the previous one.

5. The appellant relied on the Cases of *Peres Olindo & Anor Vs Diamond Trust Bank Kenya Ltd HCCC No. 1230 of 1992* and *Bernard Githinji Vs Kirata Farmers Corporation Ltd HCCC No. 32 of 1974* in support of his argument that the trial court erred in reviewing its decision when the respondent had not extracted the decree. He also cited the case of *Abasi Balinda Vs Frederick Kangwamu & Anor 1963 EA 557* where the court held;

"A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."

6. **Order 45, Rule 1** of the **Civil Procedure Rules** provides the conditions to be met by a party seeking review of the court's judgment as follows;

45(1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

7. These factors were summarized by the Court of Appeal in the case of **Francis Origo & Another v Jacob Kumali Mungala Civil Appeal 149 of 2001 [2005]eKLR** in the following terms;

“From the foregoing, it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.”

8. The court then held;

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end.”

9. The respondent's in its application dated 26th January 2018, complained that the trial court had, in computing the award payable to appellant, applied the price of Kshs. 2,500/= instead of Kshs. 2,000/=. It also argued that the court had erroneously awarded the appellant 135 tonnes instead of 46.93 tonnes and had failed to take out the necessary deductions from the award. The respondent went on to seek a clarification of when interest would begin accruing in its application for review.

10. The suit that fell for determination before the trial court related to a breach of contract for which the appellant sought special damages as compensation. It is trite that an award of special damages must not only be specifically pleaded but must also be proved with a degree of certainty and particularity. (See **Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010 [2013] eKLR**)

11. The appellant testified in support of his case and specifically led evidence on the price of cane at the time and his expected yield for the abandoned crop. The respondent called its own witness countering the appellant's testimony. The parties' evidence on these questions of fact informed the trial court's judgment dated 19th December 2017. It was therefore erroneous for the court to substitute its decision with a fresh decision on the same set of facts as this amounted to the court seating on appeal of its own judgment. Furthermore, no reason was given by the trial court for reviewing its earlier decision. Ultimately, the right recourse for a party convinced that the trial court misconstrued the evidence in some way, would be by way of appeal as opposed to a review of the decision.

12. As for the respondent's failure to annex a copy of the decree to its application for review, my view is that this would not necessarily be fatal to his application, in the current constitutional dispensation when courts are required to determine matters without undue regard to procedure.

13. That said, I find that this appeal is merited and allow it. The judgment of the trial court dated 8th August 2018 is set aside and the judgment of the trial court dated 19th December 2017 is reinstated. The appellant shall have the costs of this appeal.

Dated and Delivered at Kisii this 16th day of October 2019.

A.K NDUNG'U

JUDGE