



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO 60 OF 2016

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

MARTIN OMBOGO OKOMBO.....RESPONDENT

(An appeal from the Judgment and Decree of Hon J. Njoroge, Senior Principal Magistrate dated and delivered on the 1st September, 2016 in Kisii CMCC No. 1121A of 2004)

JUDGMENT

1. The respondent **Martin Ombogo Okombo** was the plaintiff before the trial court and South Nyanza Sugar Company Limited, the defendant. The respondent and appellant entered into a contract where the respondent was to cultivate sugar cane on plot No. 433 B, Field No. 125, vide Account Number 412280 and by the terms of the agreement the appellant was to purchase, harvest and transport sugar cane to its factory on its maturity. The respondent on the basis of the agreement grew sugar cane on his plot measuring 0.3 Ha but the appellant in total breach of the contract refused to harvest the plant crop, 1st ratoon and 2nd ratoon thereby causing loss to respondent. He averred that he expected 28 tonnes per harvest. The respondent sought a declaration that the appellant was in breach of contract, an order that the value of un-harvested sugarcane at the rate of Kshs 1,730/- per tonne, cost of the suit and interest.

2. The appellant filed its statement of defence on 13th October 2004. It admitted of the contract between itself and the respondent. The appellant averred that the respondent was under the obligation to plant and tend to the cane in order to achieve satisfactory yield, a duty which was breached by the respondent. The appellant thus had no obligation to harvest the poorly maintained, neglected and abandoned cane. They denied that the respondent's plot could not have produced 25 tonnes as claimed and that the price per tonne was Kshs 1,553/-.

3. **Martin Ombogo Okombo** (Pw1) testified for the respondent. He testified that he was to grow sugarcane and the appellant was responsible for harvesting the cane. That the plant crop was not harvested, the 1st ratoon was cut and the 2nd ratoon was not harvested. That he expected 28 tonnes for each cycle at the price of Kshs 1,730/- per tonne. On cross examination he testified that his claim did not account for the appellant's output. The appellant called **Richard Mauti**, a senior field officer with the appellant, as its witness. He testified that no cane was grown on the parcel but when pressed on cross examination admitted that he had no evidence that the respondent did not develop the plot.

4. The trial court made the following finding:

“The defence did not explain why they failed to terminate the contract. In my view, I find the defendant to blame for breach of contract and shall compensate the plaintiff as follows:-

Crop – 0.3 x 100x 1730 = 51,900

Less transport – 30 x 365 = 10,950

Less interest charges 30 x 210 = 6,300

Total = 34,650/-

For 3 cycles = 34x3=103,950”

5. The appellant aggrieved by the finding of the trial court lodged its memorandum of appeal dated 29th September 2016. The appeal is based on the following grounds;

1. The learned Trial Magistrate erred in both law and in fact when he awarded damages for breach of contract in the sum of Kshs 103,950/- which was an amount, well beyond the scope of what had been claimed in the plaint, and which had neither been pleaded nor proved at the trial as is required by law, and when

2. The Learned Trial Magistrate erred in both law and in fact when he awarded compensation based on several crop circles when only one circle had been pleaded as having been lost.

3. The learned trial magistrate erred in both law and in fact when without evidence and without finding he held that the Respondent's lost sugarcane in respect of each circle of crop as he had awarded, on the average yield of 100 tons per hectare, when in actual fact the respondent had pleaded for and claimed less in the plaint.

4. The Learned Trial Magistrate erred both in law and in fact when he awarded global compensation to the Respondent in respect of crop circles which ever were developed by the Respondent and therefore never existed at all, thereby failing to take into account a relevant fact and circumstance that the Respondent was under a duty to mitigate his/her losses and in failing to apply the principle of mitigation of losses.

5. The Learned Trial Magistrate in the circumstance therefore, and on the main decided case against the weight of evidence, awarded compensation beyond the scope of the pleadings and contrary to law and known legal principles, thereby exercised his discretion wrongly when he failed to dismiss the Respondent's suit in the court below with costs.

6. The Learned Trial Magistrate erred in fact and in law when he failed to appreciate the fact that the respondent's suit before him had been filed outside the period prescribed under the Limitation of Actions Act as by failing to dismiss the suit.

6. The appeal was dispensed by written submission, the appellant filled his written submissions and also made oral submissions at the hearing of the appeal. The Respondent made no submissions on the matter.

7. The appellant argued that the respondent was only entitled to compensation of the plant crop and compensation for the 3 cycles was untenable. That there was no evidence that the 2 ratoons were developed. The appellant contends that the respondent only produced a contract to support his claim and did not produce key exhibits to prove the monetary limb of the suit and relied on the case **South Nyanza Sugar Co. Ltd v Mary A. Mwita & another [2018] eKLR**. It was submitted that there was variance between the respondent's pleadings and evidence led in proving his case. Reliance was made on the case of **John Ogola Nyanjwa v South Nyanza Sugar Co. Ltd [2017] eKLR** to advance the argument that the variances were fatal and the respondent's suit ought to have been dismissed. It was further submitted that the respondent's claim before the trial court was not proved. The appellant also cited the case of **John Ogola Nyanjwa v South Nyanza Sugar Co. Ltd [2017] eKLR** to support its case.

8. The first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see **Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126**). I have considered the judgment of the trial court alongside the grounds of appeal, the submissions and the decisions cited.

9. I will first make a determination on the issue of limitation raised by the appellant in his memorandum of appeal. I am guided by the decision in **South Nyanza Sugar Company Limited v Diskson Aoro Owuor MGR HCCA No. 85 of 2015 [2017] eKLR** where the court held that;

[17] There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.

10. The agreement between the parties was executed on 19th March 1997 and since it takes about 24 months to harvest the plant crop, the first breach would have occurred around March of 1999. The respondent's claim before the trial magistrate court should have been filed at the very least by March of 2005. The respondent having filed their claim in September of 2004 the defence of limitations of action was not available to the appellants.

11. I now turn to look at the authorities cited by the appellant. In the **John Ogola Nyanjwa v South Nyanza Sugar Co. Ltd [2017] eKLR** case, the Appellant in that case had pleaded that the Respondent never harvested the cane at all but changed course and adduced evidence that the Respondent harvested and paid for the plant crop but failed to harvest the first ratoon crop thereby compromising the development of the second ratoon crop without amending his pleadings. The court held that the Appellant was bound by its pleadings and in view of its unwarranted departure there from, the Appellant was not entitled to any judgment in his favour and the suit was hence properly dismissed.

12. In this case the appellant contends that there was variance between the respondent's pleadings and evidence led in proving his case. The appellant submitted that the respondent pleaded the sugarcane was never harvested and dried up on the farm causing him loss while he testified that the plant crop was not harvested and wasted away, the 1st ratoon crop was harvested and the 2nd ratoon was never harvested contrary to his pleadings. I have looked at the amended plaint and the respondent at paragraph 5 pleaded as follows;

*5. Pursuant to the said contract/Agreement the Plaintiff grew sugarcane on a plot measuring 0.3Ha and on its maturity asked the Defendant to Harvest/purchase the said sugarcane as per the agreement but the **Defendant but unreasonably, negligently and recklessly and in total breach of the contract refused to Harvest the Plant Crop, 1st and 2nd Ratoon which later got abandoned, damages and dried up on the farm thereby causing loss to the plaintiff.***

13. I am inclined to agree with the observation of the appellant as Pw1 testified that “*The plant crop was not harvested. The 1st ratoon was cut, 2nd ratoon was not harvested*”. The Court of Appeal in **Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others Civil Appeal No. 219 of 2013** cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002** where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

“... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

...

In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

The plaintiff having departed from his pleading in regard to the 1st ratoon, will thus not be entitled to prayers as claimed in his plaint in regard to the 1st ratoon cycle.

14. In the case of **South Nyanza Sugar Co. Ltd v Mary A. Mwita & another [2018] eKLR** cited by the appellant the court dealt with the issue as to when documents are deemed to be produced in a trial. The court in **Mary A. Mwita case (supra)** found that the Respondent’s words ‘*.....I have recorded my statement and filed list of documents to be relied herein in evidence...*’ cannot be deemed to have transformed those alleged documents into exhibits. In this case Pw1 produced the Outgrowers Cane Agreement into evidence. He failed to produce the documents listed in his list of documents filed on 27th January 2015. Pw1 however gave clear testimony that he was expecting 28 tonnes. Pw1 was not cross-examined on this issue hence his testimony was uncontroverted. The evidence of Dw1 was scanty and did not address the issue of yield and price per tonnage and therefore the claim made by the appellant in its statement of defence are mere statements.

15. In conclusion, the appeal is allowed to the extent that the respondent is entitled only to two cycles being the plant crop and 2nd ratoon made up as follows;

Plant Crop 0.3 x 100x 1730 = 51,900 Less

Less Transport 10, 950 (30x365)

Less Interest charges 6,300 (30x 210)

Subtotal 34,650

2nd Ratoon Crop 0.3 x 100x 1730 = 51,900

Less Transport 10,950 (30x365)

Less Interest charges 6,300/- (30x 210)

Subtotal 34,650

NET TOTAL- Kshs 69,300/-

16. The appellant is awarded 40% costs of this appeal. It is so ordered.

Dated, signed and delivered at Kisii this 3rd of December 2019.

R.E.OUGO

JUDGE

In the presence of;

Miss Oeri h/b for Mr. Odero For the Appellant

Respondent Absent

Rael Court clerk