



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 113 OF 2016

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

-VERSUS-

MARY A. MWITA

MOFATO TIGERE.....RESPONDENTS

(Being an appeal from the judgment and decree by Hon. R. Odenyo,

Senior Principal Magistrate in Migori Chief Magistrate's

Civil Suit No. 2181 of 2015 delivered on 05/10/2016)

JUDGMENT

1. By an Amended Plaintiff filed in **Migori Chief Magistrate's Civil Suit No. 2181 of 2015** (hereinafter referred to as '**the suit**') on the 13/01/2016, the Respondents herein, **Mary A. Mwita** and **Mofato Tigere**, sued for a declaration that the Appellant herein, **South Nyanza Sugar Co. Ltd**, had breached a contract, compensation for the unharvested sugarcane, costs and interest at court rates.
2. The suit was premised on an alleged Growers Cane Farming and Supply Contract dated 30/05/2005 (hereinafter referred to as '**the Contract**') wherein it was averred that the Appellant contracted the Respondents to grow and sell to it sugarcane at the Respondents' parcel of land Plot No. 509C Field No. 55 in Moheto Sub-Location within Migori County.
3. It was further averred that the Contract was for a period of five years or until one plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first. Alongside the Plaintiff, the Respondents filed a List of Documents, a List of Witnesses and a joint Statement.
4. The Appellant entered appearance and filed an Amended Statement of Defence dated 25/01/2016 wherein it denied the existence of the contract and pleaded in the alternative that if such a contract is proved then the Appellant was the author of her own misfortune as she failed to properly maintain the crop to the required standard to warrant the crop to be harvested and milled and that they further failed to mitigate losses by not harvesting the cane themselves. Together with the Defence, the Appellant filed a List of Documents, a List of Witnesses and a Statement of one Richard Muok.
5. The suit was finally settled down for hearing where it was heard by way of oral evidence. The first Respondent testified on her own and on behalf of the second Respondent. The Appellant availed one Richard Muok as its witness.
6. The trial court rendered its judgment on 05/10/2016 and allowed the suit. It entered judgment against the Appellant for Kshs. 1,143,837/= with costs and interest. That is the judgment subject of this appeal.
7. The Appellant in praying that the appeal be allowed, and the suit be dismissed with costs proposed the following eight grounds in the Memorandum of Appeal dated and evenly filed on 16/12/2016: -

a) The learned trial magistrate erred in law and in fact in disregarding the defendant's evidence on expected tonnage hence arriving a wrong tonnage.

b) The learned trial magistrate erred in law and in fact by wrongly evaluating the evidence on record and hence coming to a wrong conclusion.

c) *The learned trial magistrate erred in awarding the Plaintiff a costs per tonnage when the court had found that there was no basis for the same.*

d) *The learned trial magistrate erred in finding for the plaintiff what the plaintiff had not prayed for.*

e) *The learned trial magistrate erred in law and fact in failing to evaluate the duties of parties in the Agreement signed between parties as regards maintenance of the plot.*

f) *The learned trial magistrate erred in law and fact by failing to establish ownership of the suit land hence arriving at a wrong conclusion.*

g) *That the learned trial magistrate erred in law and fact on the applicable interest rates.*

h) *That the learned trial magistrate erred in law and fact in failing to appreciate the standard of proof in a civil case.*

8. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions.

9. The Appellant challenged the finding of the trial court vigorously and more so claiming that the court erred in not finding that the suit was not proved as the trial court based its decision on documents which were not relied to and produced as exhibits by the Respondents in their evidence. Counsel referred to the Court of Appeal decision in **Daniel Toroitich arap Moi & Another vs. Mwangi Stephen Mureithi & Another (2014) eKLR** in buttressing the argument. Counsel for the Respondents opposed the appeal and submitted that the Respondents relied on the documents in their testimony when they referred to their joint statement and list of documents. That, under **Order 3(2)** and **Order 11** of the **Civil Procedure Rules, 2010** plaintiffs are accompanied by statements and the said statements are evidence and that there was no need to repeat such evidence in the statement by way of *vide viva voce* evidence. That, the statement and the list of documents were adopted as evidence and the Appellant was free to cross-examine on that evidence.

10. 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**).

11. 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. This appeal therefore revolves around the issue of whether witness statements and list of documents filed together with the plaint are to be regarded as evidence.

12. The suit being a civil claim was strictly guided by *inter alia* the **Civil Procedure Act, Cap. 21** of the Laws of Kenya and the **Civil Procedure Rules 2010** (hereinafter referred to as '**the Rules**'). **Order 3(2)** of the **Rules** require all suits except small claims, at the time of filing, to be accompanied by a verifying affidavit, list of witnesses to be called at the trial, written statements signed by the witnesses excluding expert witnesses and copies of documents to be relied on at the trial including a demand letter made before the action. A Defendant must also file like documents in the event such a party opts to defend the claim. However, the party will only file a verifying affidavit in the event of filing a counter-claim.

13. The purpose of such requirements is for parties to clearly disclose the nature of the claim to aid a court in giving appropriate pre-trial directions and in conducting conferences pursuant to **Order 11** of the **Rules**. Before a claim is set down for hearing several steps must be taken which includes at least the holding of a Case Conference and a Trial Conference. A Case Conference is provided for under **Order 11 Rule 3** of the **Rules** and it is the first conference where parties and a court deal with compliance issues and generally consider the possibility of settling the claim without the necessity of a trial. In the event of failure to settle the claim amicably, a Trial Conference is then held under **Order 11 Rule 7** of the **Rules**. Among the issues the parties and the court are to settle during such a conference, including a further attempt of amicable resolution of the dispute, is on how statements of witnesses shall be admitted without calling the makers as witnesses and the production of copies of such statements where the original is unavailable (**Rule 7(1)(d)**) and how the court shall receive in evidence any exhibit (**Rule 7(1)(h)**). At the end of the Trial Conference the court may give further directions and the claim is eventually settled down for hearing.

14. From the reading of **Order 11 Rule 7(1)(d)** of the **Rules** there appear to be no issue when a witness who filed a statement testifies. Ordinarily such a witness will adopt his/her statement as part of the evidence and will be examined on the same. On the issue of the exhibits under **Order 11 Rule 7(1)(h)**, the parties may with the approval of the court agree on how the exhibits will be produced and, in such absence, then the ordinary practice on how such documents are produced as exhibits apply.

15. In this case the parties did not agree on any of the said twin issues. However, the first Respondent testified in respect to their joint statement and the list of documents as follows: -

‘.....I have recorded my statement and filed list of documents to be relied herein in evidence.....’

16. The joint statement was hence adopted as part of the evidence of the Respondents. The statement referred to the various documents in the List of Documents. As to how the documents in the List of Documents were to be transformed into the evidential record of the suit as exhibits, the documents had to be produced as exhibits either by the consent of the parties or under the rules of evidence. None of the modes seem to have been adopted in the suit.

17. The first 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. As said, the documents had to be produced as exhibits either by the consent of the parties or under the rules of evidence. On this issue, I reiterate what I stated in **Migori High Court Civil Case No. 13 of 2015 County Government of Homa Bay vs. Oasis Group International & Another (2017) eKLR** thus: -

³47. In this case all parties filed various documents and entered into two pre-trial consents on the 16/09/2015 and 29/09/2015. Since the twin consents did not expressly state how the documents filed through the parties' Lists of Documents were to be transformed into exhibits, I hold that the documents were hence left to the prevailing rules of evidence. It therefore means that despite the currency of the so many documents on the record, this Court would only deal with those 16 documents that were taken through the rigors of identification and were eventually produced as exhibits thereby becoming part of the judicial record.

48. The foregone position has been fortified by the Court of Appeal in the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR** which decision I hereby reproduce a substantial part thereof on what my Lordships rightly held on the issue: -

16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?

17. The respondents' contention is that he appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation on its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma -vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they have simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa -vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification.....' (emphasis added).

49. The decision in the case of **Daniel Toroitich arap Moi** (supra) is likewise relevant to this case.

50. Since the documents referred to in the List of Documents were not formally produced as exhibits in support of the suit, the learned trial magistrate, with tremendous respect, fell into error in basing his decision on the documents which were not part of the evidential record in the suit. Without the said documents, the Respondents case remained hollow and unproved. The suit could not therefore be determined in favour of the Respondents.

51. The upshot is therefore that the following final orders must issue: -

- a) The appeal hereby succeeds and the judgment of the learned magistrate allowing the suit is hereby set aside accordingly;**
- b) Migori Chief Magistrate's Civil Suit No. 2181 of 2015 is hereby dismissed for want of proof;**
- c) The Appellant shall have costs of the suit as well as costs of the appeal.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 7th day of June 2018.

A. C. MRIMA

JUDGE

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

Mr. Kerario Marwa instructed by the firm of Messrs. Kerario Marwa & Co. Advocates for the Respondent.

Messrs. Otieno, Yogo, Ojuro & Company Advocates for the Appellant.

Evelyne Nyauke – Court Assistant