



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

HIGH COURT CIVIL APPEAL NO 3 OF 2016

KEPHA B. NDEGE.....APPELLANT

VERSUS

SONY SUGAR COMPANY LTD.....RESPONDENT

(An appeal from the judgment and decree by D.K. Kimei (CM) in Migori CMCC No 7 of 2015 delivered on 23rd December 2015)

JUDGMENT

- 1. KEPHA B. NDEGE** (the appellant) contests the decision dismissing the suit he had filed against **SONY SUGAR COMPANY LTD** (the respondent) where he had sought compensation for loss of sugar cane he had planted on his 0.6 Ha plot subsequent to a temporary contract with the respondent in the year 2004. The respondent failed to harvest the cane and unreasonably refused to give him permission to dispose of the cane to other Third parties so as to mitigate his loss. He had expected a yield of 100 tons selling at Ksh 2015/- per ton. He therefore sought orders to the effect that the Respondent was in breach of the agreement and should pay him the value of the sugar cane which was not harvested at the rate of Ksh. 2015/- per ton.
2. The respondent admitted entering into a sugar cane farming and supply agreement with the appellant but denied liability saying the appellant was the author of his own misfortune as he failed to properly maintain his crops to the required standards to warrant the same being harvested and milled by the respondent. The respondent contended that its responsibility was to simply facilitate harvesting of the sugarcane-which the appellant was unable to do.
3. At the hearing the appellant adopted his written statement saying the contract was for one harvest only and he would not object to deductions being made for the harvest and transport.
- 4. RICHARD MUOK (DW1)** testifying on behalf of the respondent insisted that the appellant's cane was harvested on 26/05/2004 and he was paid a total sum of Ksh 488, 047/26cts- he relied on the statement of account to support this position.
5. On cross examination DW1 said the contract was for Keyian farmers which was infact 4.0 Ha
6. The appellant presented the contract document which showed the account number as 813437 yet the statement of accounts produced by the respondent showed that such number belonged to Keyian farm. The trial magistrate was convinced that since DW1 was categorical that one account number cannot be shared by two farmers, then that number to Keyian Farmers as shown in the statement of accounts generated by the respondent.

7. Although the respondent claimed that the agreement produced by the appellant was a forgery, the trial magistrate noted that the both the agreement and the statement of account emanated from the respondent and were therefore both genuine. The court then pointed out as follows

“The only swang (sic) here is that the account 813437 shows the crop was harvested and a farmer duly paid since the amount could not have been shared by two farmers, the irresistible conclusion one makes is that the farmer who was finally paid had legitimate sugar cane crop which was duly harvested. It is thus possible for the plaintiff to have acquired’ the temporary agreement or contract without a physical crop on the ground”.

8. These findings are challenged on grounds that the trial magistrate failed to consider and evaluate the evidence presented and therefore arrived at a wrong conclusion. The trial court is also accused of being biased purporting to raise the threshold of the standard of proof to a level higher than that required by the law.

9. The hearing proceeded *ex-parte* and **MR. JURA** submitted on behalf of the appellant that the court failed to consider the appellant’s evidence that his farm was in Kamagambo and the issue of acquiring the temporary agreement without a physical crop on the ground would not arise as in temporary contracts it is the respondent’s representatives who go to the ground and carry out a physical assessment before engaging in the contract.

10. It was further argued that there was no document presented to the court to prove that the respondent had entered into a contract with the said Keyian farmers who were based in Transmara.

11. If the agreement referred to by the appellant and the statement of accounts relied on by the respondent were both found to have originated from the respondent, then what disentitles the appellant from realizing his claim? What emerges on a balance of probabilities despite the denial by the respondent is that the two farmers were given similar numbers and this was because they were from different areas.

12. What the respondent is touting as payment to an entity other than the one it duly entered into an agreement as shown by Ex 1 OR the statement of accounts is a computer generated ploy simply intended to hoodwink the court and ensure the appellant does not realize his claim. If indeed the respondent had a contract with Keying Farmers- nothing could have been easier than to present the contract document between them, and evidence of a representative of Keyian signing a document to acknowledge payments.

13. Under the circumstances I am in agreement that the trial court erred by failing to analyze in depth the evidence presented. These were two separate fields with different acreage, owned by two different parties- the appellant was not to blame for the double assignment of account numbers. If indeed the either field was duly harvested I would expect copies of weigh-bridge tickets and job completion certificates to confirm that the cane was cut, weighed and moved from the field-non was presented.

14. Consequently judgment is set aside and the sum due is worked out at the rate of **0.6 Ha x estimated yield of 40 tonnes as per the agreement x prevailing price at the time being Ksh 1800/- = 43,200/- (Forty three thousands and two hundreds only).**

15. There would be no logic in deducting harvest and transport charges yet the court has already found that no harvest took place in respect of the appellant’s field. I award interest at court rates from the date of filing suit. The respondent shall bear the costs of this appeal.

Written and dated this 21st day of February 2017 at Homa Bay

HELLEN A. OMONDI

JUDGE

Delivered and dated this 21st Day of February, 2017 at Migori

A.C.MRIMA

JUDGE