



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

HIGH COURT CIVIL APPEAL NO 03 OF 2016

RICHARD O OKUDHE.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR COMPANY LTD.....RESPONDENT

(An appeal from the judgment of L.K.Sindani RM in Migori SPMCC No 414 of 2014)

JUDGMENT

1. **RICHARD O OKUDHE** (appellant) had filed a claim against **SOUTH NYANZA SUGAR COMPANY LTD** (respondent) seeking a declaration that the respondent was in breach of the cane contract they had entered into and an award for the value of the un-harvested sugarcane as well as costs of the suit and interest thereon.
2. The background to the claim in the magistrate's court was that the parties had entered into an agreement where the appellant was to cultivate sugarcane on his field being plot No1626 E, Field No 8B measuring 0.9 hectares vide Account No 281385. The terms of the contract were that upon the cane maturing the respondent was to harvest it and pay the appellant its value.
3. After the appellant had developed the cane to maturity, the respondent refused and /failed to harvest the plant crop, the 1st and 2nd ratoon, and also refused to give consent to the appellant to dispose of the cane to a third party or the open market.
4. As a result the appellant lost approximately 90 tonnes for the plant crop and another 90 tonnes for each ratoon cycle.
5. The respondent denied liability saying the appellant was the author of his own misfortune as he failed to properly maintain the crops to the required standards to warrant the same harvested and milled.
6. At the hearing the appellant adopted his statement saying he entered into an agreement with the respondent in the year 2003 whilst the respondent insisted that the contract they entered into was in the year 2005. On cross examination he stated that the plot was first ploughed in the year 2005 and thereafter the respondent supplied him with seed cane and in-puts
7. The respondent's Senior Field Supervisor **RICHARD MUOK** (DW1) maintained that the agreement was in the year 2005 and by the time the cane was due for harvest in the year 2007 there was no cane to harvest nor did the farmer avail any cane.
8. The trial magistrate pointed out that Clause 4 of the contract which the appellant relied on proved that the period he ought to have based his claim on was 2005 and not 2003. She also took note of the

submissions by the appellant's counsel who perpetually referred to the year 2003 and the agreement book which had both the year 2003 and 2005 to indicate that there was a departure from the pleadings and it was not even clear from the documents relied on, which dates the appellant was basing his claim on.

9. It was on this account that the court dismissed the claim pointing out that date on the contract book, the pleadings, and the appellant's statement did not support each other, and were confusing even to the party defending the case. The trial magistrate was of the view that it was possible the parties were talking about two different contracts.

10. These findings are contested on grounds that the trial magistrate failed to consider, evaluate and balance the pleadings, evidence and submissions thereby reaching a wrong conclusion. Further that the claim was dismissed on a mere technicality occasioned by a small discrepancy on the date of the contract, and the court raised threshold of standard of proof to a higher level than that required by law.

11. The appeal was canvassed by way of written submissions but the respondent did not file any written submissions. where the appellants counsel argued that the pleadings and the witness' statement referred to the year 2003, and this was also his evidence.-which then found support in the contract book which referred to the date of commencement of the contract as 27th October 2003. Counsel argued that it was the trial court which got confused when the appellant stated in cross examination that the plot was first ploughed in the year 2005, and regarded that as the year of the agreement.

12. He also explained that there was no contradiction in the contract book which had both year 2003 and 2005, saying the two dates served different purposes i.e. 2005 was the year of signing the agreement but 2003 was the year that the agreement commenced. In this regard counsel invited the court to consider clause 2 (a) of the agreement which provided that:

“.....this agreement shall be deemed to have commenced the 27th day of October 2003 notwithstanding that the agreement may have been signed after that date.”

13. I have perused the contract document both in the record of appeal and in the original lower court record and I see that it only has two pages and the clause 2(a) referred to There is no clause 4 in both document unless the position is that the record of appeal and the lower court as filed is incomplete. Under the circumstances I can only use the information available and which confirms the date of the contract as 27th October 2003 and not November 2005 when the appellant cultivated the field. 2003 is the date referred in the pleadings, in the evidence in chief and in the documents produced by the appellant.

14. However my dilemma is that without the complete contract document it is very difficult for me to determine exactly what the terms of clause 4 were regarding preparation of the field and exactly when the cane was to be planted.

15. As to whether the two dates misled the respondent, it is submitted that nothing could be further from such a thing as the respondent did not even complain about the inability to give evidence due to contents of the pleadings, the statements, evidence or exhibits and that although DW! Referred to the year 2005 as the date of the contract, he did not have anything else to support it. This point could only have been resolved if the complete contract document had been made available to this court. To make a finding on the trial magistrate's findings on this limb without the aforesaid document would be groping in the dark.

16. This court is urged to find that the appellant proved he had a plant crop yield of 90 tonnes at a price of Ksh. 2500 as at the year 2007 which would have realized the sum of Ksh. 225,000 worked out as 90 tonnes x Ksh. 2500/- less Harvesting charges at Ksh. 210 per ton to give a net award of Ksh. 170,190/-.

17. He also suggests the sum of Ksh. 218,700/- for the 1st ratoon being 90 tonnes yield x Ksh. 2850 per ton as the price in the year 2009 less transport charges @ ksh 399 per ton being Ksh 35,910/- less harvesting charges at Ksh. 210 per ton.

18. For the 2nd ratoon counsel suggests a sum of Ksh. 260,190 made up of 90 tonnes yield x 3500 as the price in the year 2011 less transport charges at Ksh 399 per ton less harvesting charges at Ksh. 210/- per ton being Ksh. 18900/-.

19. This court was also urged to be guided by the decision in **JOHN RICHRD OKUKU OLOO versus SOUTH NYANZA SUGAR COMPANY LTD KSM COURT OF APPEAL NO 278 OF 2010** and award interest at court rates from the date of judgment.

20. Whereas the appellant had sound arguments on these last points, I am afraid without first establishing the actual contents of the entire contract document, then any other decision would be based on quick-sand and I therefore decline to delve into them

21. The upshot is that the appeal fails and is dismissed. Each party shall bear its own cost.

Written and dated this 20th day of February 2017 at Homa Bay

H.A.OMONDI

JUDGE

Delivered and dated this 20th day of February, 2017 at Migori

A.C.MRIMA

JUDGE