



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CIVIL APPEAL NO. 31 OF 2016

JAMES OKUMU OGEMBO (*Suing as the Administrator*)

of the Estate of **LUCAS OTIENO OGEMBO****APPELLANT**

versus

SOUTH NYANZA SUGAR CO. LTD......**RESPONDENT**

*(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Resident Magistrate in
Kehancha Principal Magistrate's Civil Suit No. 134 of 2004 delivered on 11/05/2016)*

JUDGMENT

1. This is an appeal from the dismissal of the Appellant's suit by the trial court vide the judgment rendered on 11/05/2016 for lack of evidence that the ratoon crops were developed. One of the hotly contested issues in this appeal is the capacity of the Appellant in the suit and whether the Appellant's case was supported by the evidence.

2. By a Plaint dated 21/09/2004 and filed on 06/10/2004, the Appellant averred that he entered into a contract with the Respondent herein towards cane planting, maintained and harvesting but upon maturity the Respondent failed to harvest/purchase the same and as a result the Appellant suffered loss of expected income. The Appellant sought for a declaration that the Respondent was in breach of the contract, the value of un harvested cane, costs and interest at court rates. The Appellant filed an amended Plaint dated 10/01/2006 on 12/01/2006 but the same did not contain any amendments. It appears on pages 9 and 10 of the Record of Appeal.

3. The contract in issue was filed as part of the List of Documents by the Appellant. It was eventually deemed produced by the concurrence of the parties. The existence of the contract is not denied by the Respondent. I have looked at the contract document. It is dated 06/02/1998 on the front and second pages but on the third page the date appears as 31/03/1998. It is between one **LUCAS OTIENO OGEMBO** and the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD** where the said Lucas Otieno Ogembo was contracted by the Respondent to grow and sell to it sugarcane at his parcel of land being Plot No. 344 measuring 0.8 Hectares in Field No. 52 in Kakmisa sub-location within Migori County. 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.

4. From the record, the said Lucas Otieno Ogembo died on 30/12/2003. By that time the contract had expired by February or March 2003, depending on when the same began to run from. The Appellant herein, **JAMES OKUMU OGEMBO**, applied for and was granted a Limited Letters of Administration for the Estate of Lucas Otieno Ogembo (hereinafter referred to as '**the deceased**') who was his brother. That was on 13/07/2003. The Appellant then filed **Kehancha Principal Magistrate's Civil Suit No. 134**

of 2004 (hereinafter referred to as '**the suit**') on 06/10/2004.

5. The Respondent entered appearance and filed a Statement of Defence dated 02/11/2004 on the 03/11/2004 and although it admitted the existence of the contract, it denied that it was in breach.

6. The suit was heard by reliance to the filed witness statements, documents and written submissions without calling any witnesses. The trial court thereafter rendered its judgment and accordingly dismissed the suit with costs. It is that judgment which is the subject of this appeal.

7. The Appellant in praying that the appeal be allowed and appropriate compensation be awarded proposed the three grounds in contending that trial court failed to consider, evaluate and balance the pleadings, evidence and the parties' submissions and as such arrived at an erroneous conclusion.

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. On his part, the Appellant submitted that there was ample evidence in proof that the Respondent was in breach of the contract by not harvesting the first ratoon crop and hence compromising the development of the second ratoon crop and wondered why the trial court chose to ignore all that evidence. The Appellant urged this Court to find in his favour and relied on the decision of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** for the award of interest from the filing of the suit.

9. The Respondent supported the trial court's decision and strenuously submitted that the pleadings were not supported by the evidence and that the suit was filed by the Appellant on his own and not on behalf of the deceased. It further submitted that indeed there was no evidence that the ratoons were developed and as such the claim could not succeed. It urged this Court to affirm the decision of the trial court.

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 carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

12. A look at both the original and the amended Plaints show that the suit was brought by the Appellant in his own capacity and not on behalf of and for the benefit of the estate of the deceased. That position is supported by the filed and adopted statement of the Appellant dated 11/02/2015. Apart from the heading of the title in the plaints, there is no nexus at all between the contract and the Appellant. The Appellant did not plead under what law and for whose benefit he was bringing the suit even after amending the plaint. As things stand, no one is aware if the deceased has any beneficiaries who are to benefit from the claim on the contract. The Appellant cannot therefore succeed to use the contract between the deceased and the Respondent in a case where he is pursuing an alleged breach of a contract between himself and the Respondent; if any. If the Appellant was to at least succeed in such a set-up, then he ought to have demonstrated that he was a beneficiary of an assignment of the contract between the deceased and the Respondent, but even in that case he would not have required to file for any representation.

13. I have also had a look at the application for the Letters of Administration (on pages 4 to 7 of the Record of Appeal) made before the lower court at Migori in **PMCC No. 257 of 2005** and noted that the Appellant did not disclose that he wanted to use the grant for purposes of filing for the proceeds of the deceased out of the contract. He only stated that he wanted to pursue a claim on behalf of the deceased; period!

14. The Appellant's claim therefore as tailored and supported by the evidence of the Appellant and the

contract, cannot succeed. The suit is simply not brought on behalf of and for the benefit of the estate of the deceased. The same is hence a non-starter and ought to have been struck out instead.

15. Having so found, I do not see what benefit the consideration of the other aspects of the appeal will avail to the Appellant. I opt to come to the end of this judgment and hereby make the following final orders: -

a) The appeal is hereby dismissed but the finding of the learned magistrate dismissing the suit with costs is hereby substituted with an order striking out the suit accordingly;

b) The Appellant shall bear the costs of the suit as well as the costs of the appeal in person and not the estate of LUCAS OTIENO OGEMBO.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 6th day of June 2017.

A. C. MRIMA

JUDGE