REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 148 of 2009

SOUTH NYANZA SUGAR COMPANY LIMITED ……. APPELLANT

AND

DAVID OTIENO ONGACHO …….....…….. RESPONDENT

(Being an appeal from the judgment and decision of the lower court, Wewa, SRM (Mrs.)

dated 18th March 2009 in the original Kisii CMCC No.60 of 2004)

JUDGMENT

1. The respondent was a contracted sugarcane farmer by the appellant under the agreement dated 6th February 1998. The respondent was required to plant and maintain sugarcane on plot Number 347 in field No.61 in North Sakwa Location, Kakmasia sub location, measuring 0.8 hectares. The contract was to last 5 years or until one plant crop and two ratoon crops of sugar cane were harvested on the plot aforesaid, whichever period shall be the less. The respondent averred that in breach of the aforesaid contract, the appellant failed to harvest the plant crop when the same was mature and ready for harvesting and the same dried up occasioning the respondent loss and damage. According to the respondent, his plot was capable of producing an average of 135 tonnes per hectare and the rate payable by the appellant then per tone was Kshs.1730/=. He therefore claimed damages for the loss.

2. The claim was defended. The appellant generally denied the respondent's claim and in particular , it denied:-

a) the existence of the contract, raised the question of privity of contract, averred that the respondent failed to maintain his first crop to an extent that the cane was overshadowed and dwarfed by weeds and totally destroyed thus not available for any economical harvest. The appellant further averred that the plaint as drafted was bad in law and even if the respondent's cane had been well maintained, it was incapable of yielding 135 tonnes per hectare having regard to the harvests and other fields in the vicinity. Finally the appellant contested the jurisdiction of the court to hear and determine the dispute.

3. During hearing interpartes the respondent stated the following:-

- *The agreement was signed on 6th February 1998 on field No.61 and the land was 0.8 hectares and Account No.26109 was opened.*

- *The agreement was for 5 years. The first cut was to be done at 24 months, 2nd and 3rd cutting at 18 months.*

- *The appellant cut some of the cane in August 1999. They were to come back but they did not come for it. The cane eventually dried up.*

- *The respondent did not prepare ratoon because of the patches left. He estimated tonnage at Kshs.1,735. He was never paid nor issued with a statement. He took delivery but there was no payment.*

4. On cross examination, the following was established:-

- *The respondent could not recall tonnage of the cane that was cut.*

- *The account No.260694 showed that the appellant harvested from the respondent's farm 24 tonnes but money was not put into the account because the respondent did not sign for the delivery.*

- *Respondent's agent signed the verifying affidavit of the plaint.*

- *Respondent had not calculated how much he was to be paid but can calculate if given time.*

5. The appellant then raised a preliminary objection on the ground that the replying affidavit being filed had not been sworn under **Order VII rule 1 sub rule 2**. He urged the court to strike out the plaint.

6. In a ruling delivered on the 19th April 2006, the learned Senior Resident Magistrate considered submissions by both counsel and held that:-

"The overriding principle is to do justice to all. It is a finding that failure to comply with a procedural requirement is illegal while an irregularity may be executed under Order VIII rule 7 of the Civil Procedure Rules.

The permissible language of **Order VII rule 1 (3)** of the **Civil Procedure Rules** leads to a conclusion that despite the mandatory terms, a breach of **Order VII rule (1) (2)** of the **Civil Procedure Rules** is an irregularity which can be cured."

7. The trial magistrate then proceeded to declare that the failure of the respondent to sign the verifying affidavit himself is an irregularity which can be cured and not a nullity. The trial was then set to resume for hearing of the defence case.

8. Meanwhile, before the defence case was heard, the appellant preferred an appeal to the High Court on the above ruling. He prayed for stay of proceeding pending determination of the appeal in the High Court. The learned Resident Magistrate held that an appeal is not a stay of its own. The application to stay proceedings was disallowed by consent on 17th October 2006. The matter in the lower court then proceeded to defence hearing.

9. The appellant then called one Evans Otieno, a supervisor of the appellant. He testified that:-

- *Before the appellant enters into any contract, there are documents that are signed which is the agreement signed between the farmer and the company. Once they harvest they give a job completion certificate.*

- *Where no certificate is issued then no operation was done on the shamba.*

- *He acknowledged that they had a contract with the plaintiff signed on 6th February 1998. However, nothing showed that harvest of plant crop was done.*

- *The job completion certificate showed that the respondent was paid after harvest vide the*

National Bank of Kenya on 3rd March 1999.

- *The respondent was paid unofficially an amount which is not shown. The tonnage realized is shown and the respondent signed the job completion certificate. The record however did not show payment.*

- *The agreement in clause 13 stated that any dispute is to be referred to a tribunal. The respondent has not approached the appellant for arbitration.*

10. On cross examination, it was established that:-

- *To get any money for harvest a job completion certificate is signed only after completion of harvesting.*

- *0.8 hectares of land would fetch 60 tonnes and would not fetch 135 tonnes.*

11. On re-examination, it was established that:-

- *Exhibit 2 (which was a demand letter written by the respondent's counsel to the appellants) was not received by the appellants.*

- *In a short judgment delivered on 18th March 2009, the learned magistrate ruled in favour of the respondent by holding that :-*

    (i) *there was a breach of contract;*

    (ii) *compensation for 1st and 2nd ratoon was at 135 tonnes respectively;*

    (iii) since there was no proof that harvest was half way done Kshs.467,100 be granted.

12. It is against the above events and judgment that the appellants came to court under a certificate of urgency application. The most interesting bit about this application is the fact that the certificate of urgency bears the correct names of the appellant and respondent. However, the notice of motion and the affidavit supporting the certificate bears the names of one Magdalina Danny and Wilfrida Anyango (as the respondent).

13. The notice of motion is brought under **Order XLI Rule 8B (2)** of the **Civil Procedure Rules** and **section 3A** and **79G** of the **Civil Procedure Act**. Section 79G provides:-

"Every appeal from the subordinate court to the High Court shall be

filed within a period of 30 days from the date the decree or order appealed against …. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

14. I agree with counsel for the respondent that though the appellant evinced the intention to appeal out of time, it never filed an application against the respondent DAVID OTIENO ONGACHO to enable it to obtain leave. Consequently, the appeal herein was filed without leave and is a nullity. Furthermore, any order extracted will reflect that leave to appeal out of time was against Magdaline Danny and Wilfrida Anyango and not the respondent. I need not go further with this appeal but dismiss it.

15. However I will invoke **Article 165 (6)** of the **Constitution of Kenya 2010** which states:-

"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function but not over a superior court."

16. Putting the above constitutional provision in mind, and upon reading through this whole suit, I disagree with the decision made in the ruling by the trial magistrate on the undisputed fact that the verifying affidavit was not signed by the respondent but by his agent.

17. On the 21st January 2004, the respondent filed this suit and stated in paragraph 1 of the plaint that:-

"The plaintiff is a male adult of sound mind working and residing for gain in Awendo."

18. How is it possible then that a person who has pleaded to be an adult and of sound mind let another person sign his own affidavit? Even if I allow the decision by the trial magistrate that "the overriding principle is to do justice to all" it will still not stand as the verifying affidavit is dated on 14th November 2003.

19. Now common practice entails that once a plaint is drawn the contents of the plaint are verified by the affidavit. The plaint was dated on 21st January 2004, how then is the affidavit verifying the correctness of the plaint dated 14th November 2003? I find this ridiculous and irreconcilable that the respondent verified the plaint before it was drawn.

20. I agree with the words of my brother Justice D. Musinga, J in

Peninah Sanganyi & another – Civil case No.98 of 2007 who stated:-

"a plaint has to be verified by an affidavit but the latter cannot be amended."

21. Without further ado I make the following orders:-

(a) The appeal be and is hereby dismissed.

(b) The ruling dated 19th April 2006 and the judgment dated 18th March 2009 be and is hereby set aside.

(c) The amount given as security by the appellant to the respondent be

returned to the appellant with no interest.

(d) Each party bears their own costs.

Dated and delivered at Kisii this 1st day of November 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

---------- for Appellant

---------- for Respondent

---------- Court Clerk

RUTH NEKOYE SITATI

JUDGE.