



REPUBLIC OF KENYA



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**Ochieng & 3 others v South Nyanza Sugar Co Ltd (Civil Case 619, 958 & 850 of 2015
(Consolidated)) [2022] KEMC 22 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEMC 22 (KLR)

**REPUBLIC OF KENYA
IN THE MIGORI LAW COURTS
CIVIL CASE 619, 958 & 850 OF 2015 (CONSOLIDATED)
PA NDEGE, PM
OCTOBER 4, 2022**

BETWEEN

CHRISTOPHER O OCHIENG PLAINTIFF

AND

SOUTH NYANZA SUGAR CO LTD DEFENDANT

AS CONSOLIDATED WITH

CIVIL CASE 958 OF 2015

BETWEEN

MICHAEL OKUMU ABONYO PLAINTIFF

AND

SOUTH NYANZA SUGAR CO LTD DEFENDANT

AS CONSOLIDATED WITH

CIVIL CASE 850 OF 2015

BETWEEN

MARY W GATHUU 1ST PLAINTIFF

JANE AKINYI ONOKA 2ND PLAINTIFF

AND

SOUTH NYANZA SUGAR CO LTD DEFENDANT



JUDGMENT

1. These suits have been consolidated only for the purpose and ease of hearing and judgment. The plaintiffs in the suits were contracted by the defendant sugar company pursuant to the provisions of the Sugar Act, 2001. It is their case that on or about the months of February 2003, the defendant unlawfully and with intent to defraud them, deducted various amounts from their sugarcane proceeds as Presumptive Income Tax (PIT), yet it knew or ought to have known that the said tax was not payable as it had been suspended by the Minister for Finance. The plaintiffs' claims are therefore for the refund of the amount deducted together with a penalty interest of 3% per month and interest on the sums at court rates.
2. The defendant denied the claims herein, and averred that if at all any amount were deducted from the plaintiff's sugar cane proceeds, then the same was a genuine and bona fide mistake and/ or done erroneously, and that the plaintiffs have since been refunded. That the defendant has always given the plaintiffs opportunities to claim and get refunded, which opportunity the plaintiffs have ignored and instead chosen to saddle it with court proceedings with the main purpose or intention to vex and annoy it so as to unjustly enrich themselves. The defendant, further pleaded that the instant suits are sub judice, statutorily time barred, unreasonable and amount to abuse of the court process.
3. PW1, Ezra Okoth, was the only witness for the plaintiffs. He produced some documents seeking to prove that the plaintiffs herein were members of a farmers group or union which he leads and that some illegal deductions in the form of PIT were done on the plaintiffs, even after the government had stopped levying the tax on farmers. That the defendant has however refused to refund the amounts prompting the filing of these suits.
4. In cross-examination, he stated that the plaintiffs herein went to his office to claim the refunds. He also admitted that he has not filed any register of farmers who are members of his farmers union. That a Credit Advice Note (PEXH. NO. 17) was issued by the defendant to the farmers which only shows that the defendant owed them the refunds, but does not in itself prove the refund.
5. DW1, Evans Odhiambo Okato, an accounts supervisor with the defendant also testified for the defendant and produced the same Credit Advice Note, as DEXH NO. 9 which according to him, proves that the plaintiffs were paid. That the document was stamped when the plaintiff was paid.
6. There were written submissions filed at the close of hearing. After going through the submissions, the evidence that was tendered, and the impressive authorities cited herein, there is no dispute that some deductions were irregularly made as claimed by the plaintiffs. The only issue remaining herein is however whether the plaintiffs were paid the refund or not. All the other issues raised in the pleadings and the submissions herein, such as whether the suit is sub judice, res judicata, statutorily time barred, or whether the plaintiffs herein ought to have come personally to testify, have been subject to several superior court decisions such as those that have been cited by the counsel for the plaintiff and have thus been impressively answered. There is thus no need to reinvent the wheel. These suits are properly before me.
7. On the issue of whether the plaintiff was refunded or not, it is the plaintiffs' word or evidence, against the defendant's. This therefore brings me to the issue of burden and standard of proof. Whoever bears the burden will fail if that burden is not discharged, and the threshold of proof met.
8. It is a principle of law, or trite that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the [Evidence Act](#) provide as follows:



- 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
9. I rely on the case of *Muruingu Kanoru Jeremiah Vrs Stephen Ungu M'mwarabua* [2015] eKLR where the court held as follows with regard to the burden of proof:
-As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.
10. I also refer to *The Halsbury's Laws Of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:
- The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to act; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.
16. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?
11. Thus, there is a distinction between the legal and evidential burden of proof. Whereas the evidential burden would have, and kept on shifting throughout the trial process herein, the legal burden of proof herein lay with the plaintiff to prove that he is owed the amount, and that burden does not shift to the defendant as the plaintiffs appear to have purported to do herein. The plaintiffs claim is in the nature of special damages, given that the sum claimed is specific and can be ascertained. The plaintiff was therefore expected to specifically prove the amounts claimed. All the documents brought in proof of the claim herein, except the Credit Advice note (PEXH NO. 17 and DEXH NO, 9) are not clear, appear to be photocopies, that because of over usage have since faded that a serious court or tribunal



cannot decipher anything from them. On that basis, I find no clear evidence from the plaintiff that can make me find that the debt herein has not been paid by the defendant.

12. I, on the other hand, find that the evidence in PEXH. NO. 17 and DEXH NO. 9, was sufficiently explained by DW1, and with the stamp PAID clearly on it, I find no evidence to the contrary that a cheque was not issued, or that a cheque was issued but dishonored or in any way whatsoever, unpaid or not cashed etc., as claimed by PW1. No bank statement was produced to the satisfaction of the court which confirms that no cheque was raised with regards to the Credit Advice Note. The evidential burden of proving that shifted to the plaintiff. As held in *Muruingu Kanoru Jeremiah Vrs Stephen Ungu M'mwarabua* [2015] eKLR, it was upon the plaintiff to prove that the Credit Advice Note was not honoured or paid, despite they bearing the defendant's stamp 'PAID' as has been proved by the defendant. Oral evidence cannot override documentary evidence especially where both opposing parties are relying on the same documentary exhibit. I see no ambiguity that arose from the Credit Advice Note.
13. The upshot is that I find no evidence to find that the plaintiffs herein were not refunded and or are still owed some monies by the defendant, and more specifically as pleaded herein. I do not also see where the penalty percentage being claimed by the plaintiffs herein came from. The plaintiffs have not discharged their burden of proof and these cases therefore fail for that reason i.e. want of clear proof. All these suits are hereby dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT MIGORI IN OPEN COURT THIS 04TH, DAY OF OCTOBER, 2022

ALOYCE-PETER-NDEGE

PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: Achola

Defence Counsel: Otieno

Plaintiffs: Absent

Defendant's representative: Absent

