IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KIHARA KARIUKI, PCA, GATEMBU &

MURGOR, JJ.A)

CIVIL APPEAL NO. 135 OF 2014

BETWEEN

HENRY WAFULA KHAEMBA ..... APPELLANT

VERSUS

NZOIA SUGAR COMPANY LTD ..... RESPONDENT

***(An appeal from the Judgment of the High Court of Kenya at Bungoma, (F. Gikonyo, J.) dated 20/03/2014* in**

HCC.A. NO. 15 OF 2012)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court at Bungoma (F. Gikonyo, J.) delivered on 20th March 2014 rejecting the appellant's claim for damages for alleged breach of contract.

Background

2. On 31st March 2001, the appellant filed suit against the respondent in the Magistrates' court at Bungoma. He claimed that he entered into a Cane Transport Contract with the respondent on 15th November 1999 under which he was to transport cane for the respondent; that on or about 6th December 1999, the respondent breached that contract by substituting the appellant's name, as the contracting party, with the name of another person, namely, Nasilai and Sons Contractors; that the respondent made payments under the contract to the said Nasilai and Sons Contractors and omitted to pay the appellant; and that as a result the appellant suffered loss and damage.

3. The appellant asserted in his plaint that his attempt to have the dispute referred to arbitration in accordance with the dispute resolution provision in the contract was thwarted by the respondent as it failed to cooperate in that regard.

4. Based on those pleas, the appellant sought judgment against the respondent for general damages for breach of contract, costs and interest.

5. In its brief statement of defence, the respondent denied contracting with, or breaching any contract with the appellant. It claimed that any payments made to Nasilai and Sons Contractors were for work validly done by that entity for the respondent.

6. The respondent pleaded further in its defence that any arbitration attempts made were unsuccessful due to "*misrepresentations made*" by the appellant. It therefore denied that it was liable to the appellant for the alleged loss and damage and prayed for the dismissal of the suit.

7. After hearing the parties and their witnesses, the trial magistrate dismissed the appellant's suit with costs in a judgment dated 5th December 2007. The trial court found as a fact that critical documents produced by the appellant in support of his case were not genuine. According to the magistrate, the "*transport document*" produced by the appellant was "*a complete fake*"; *"fakeness" pervades most of other documents produced by the plaintiff. These include the weighbridge tickets which were produced*…" The trial court concluded its judgment by stating that the appellant acted in bad faith in instituting the suit. Aggrieved by that decision, the appellant appealed to the High Court.

The 1st appeal

8. In his memorandum of appeal before the High Court, the appellant complained that the trial court delivered its judgment without notice to him; that the trial court disregarded his evidence and wrongly concluded,without proof, that the documents he produced were fake; that the trial magistrate failed to properly apply the law in relation to termination of contracts; and that the trial court made prejudicial observations and was biased against him.

9. F. Gikonyo, J. heard the appeal in the High Court. The learned Judge isolated the complaint that the trial court delivered its judgment without notice to the appellant and dealt with it as a preliminary issue. He delivered a "Partial Judgment" dated 28th January 2013, in which he upheld that complaint and stated: "*Failure to give notice of the delivery of judgment to the plaintiff makes the judgment a nullity and the judgment delivered on 5/12/2007 is hereby declared as and is a nullity. It is accordingly set aside*."

10. Having set aside the judgment of the trial court, and being satisfied that there was "*sufficient evidence upon the record to enable the appellate court to pronounce judgment*" the judge took the view that this "*is not a proper case for re-trial*". He directed the advocates for the parties to file submissions "*directed to the primary suit and limited to the evidence as tendered before the trial court*". The advocates did that.

11. The Judge considered those submissions, and in his impugned judgment dated 11th March 2014 (delivered on his behalf by A. Mabeya, J. on 20th March 2014) the Judge held that "*the appellant has not proved its case on balance of probabilities*" and dismissed his case with costs to the respondent. Still, that did not satisfy the appellant. He lodged the present appeal.

The 2nd appeal and submissions

12. In support of this appeal, the appellant filed written submissions in which he expounded on the grounds of appeal contained in his memorandum of appeal. Appearing before us in person on 14th February 2017,

The appellant highlighted his written submissions and the contract, the respondent wrongfully changed the particulars of the contract without his knowledge before terminating it; that the contract provided for arbitration but that provision was not invoked; and that in the absence of expert evidence, there was no basis for the courts below to conclude that the documents he relied upon in support of his claim were forged.

13. Opposing the appeal, learned counsel for the respondent, Mr. George Murunga, submitted that it is not open to this Court, on a second appeal, to delve into matters of fact. According to counsel, the only issues in this appeal are; whether general damages can be awarded for breach of contract; whether the arbitration provisions in the contract were exhausted; and whether the award for costs made by the lower court in favour of the respondent was justified.

14. Regarding the question whether general damages can be awarded for breach of contract, counsel referred us to the case of **Habib Zurich Finance (K) Ltd vs. Muthoga and another [2002] 1 EA 81** where this Court cited with approval a holding in the case of **Dharamshi vs. Karsan [1974] EA41** to the effect that damages for breach of contract are usually quantifiable and are not at large and that when damages are quantified, they cease to be general damages. In that regard, counsel stated that the appellant prayed for general damages in his plaint but in his evidence stated that he would have earned Kshs. 2,800,000.00 but for the alleged breach; and that the appellant should therefore have pleaded that specific figure in his plaint.

15. In any case, counsel stated, the figure claimed was not proved. In that regard, counsel relied on the case of **Provincial Insurance Company East Africa Limited vs. Mordekai Mwanga Nandwa, Civil Appeal No. 179 of 1995 (C.A)(Kisumu),** where the Court held that it is clear *"**that no general damages may be awarded for a breach of contract**"* and that *"**special damages need to be specifically pleaded before they can be awarded**."*

16. On the question of arbitration, Mr. Murunga stated that although the contract had a provision for arbitration, the learned Judge correctly concluded, based on the evidence, that it was not invoked and that the Judge carefully reviewed the evidence and arrived at the correct finding.

17. Finally, on costs, counsel submitted that under Section 27 of the Civil Procedure Act costs are in the discretion of the court subject to the general principle that they follow the event; and that the suit having been dismissed, the court rightly awarded costs to the respondent.

18. In his brief reply, the appellant reiterated his earlier arguments and submitted that the issue of arbitration does not arise as the suit was not contested on that basis. As regards his claim for Kshs. 2,800,000.00 the appellant stated that he produced weighbridge tickets that established the daily average transportation, and that that amount was proved and should have been awarded.

Determination

19. We have considered the appeal and the submissions. Although the appellant framed 10 grounds of appeal, the issues that require determination are three. The first is whether the appellant established that he had a valid contract with the respondent and whether the learned Judge erred in failing to make a finding to that effect. If the answer to that first question is in the affirmative, the next question is whether the appellant established breach of that contract by the respondent. Finally, if breach of the contract on the part of the respondent was established, whether the appellant is entitled to the relief (sought).

20. We begin with the questions whether the appellant established that he had a valid contract with the respondent, and if so, whether the appellant established breach of that contract by the respondent.

Considering that the 1st appellate court set aside the judgment of the trial court on the ground that notice of delivery of judgment was not given to the appellant, it is necessary for us to review and evaluate the evidence in order to answer the two questions.

21. In his testimony before the trial court, the appellant stated that he entered into a Cane Transport Contract with the respondent dated 15th November 1999. He produced it as an exhibit. Under the terms of that contract, the respondent agreed to hire the services of the appellant for purposes of loading and transporting quantities of mature cut cane produced in its Nucleus Estate and Outgrowers Fields to the factory yard on the terms therein set out. It was to commence in July 1999, and was remain in force for 12 calendar months. Either party was at liberty to terminate the contract by giving 30 days written notice to the other. Such notice would not prejudice the accrued financial and legal interests of either party.

22. The contract contained a dispute resolution provision that stipulated that any dispute arising therefrom should be referred to the Chief Executive of the respondent. In the event of any party being aggrieved by the decision of the Chief Executive, provision was made to refer the dispute to "*some competent arbitrator to be nominated by the Chairman for the time being of the Law Society of Kenya*."

23. According to the appellant, it was agreed that payments under the contract would be made after every 14 days depending on the quantity of cane transported. He stated that he received the first payment under the contract amounting to Kshs. 2,756.95. In that regard he produced, as an exhibit, a payment voucher in his favour dated 10th November 1999 for that amount that was marked as "paid".

24. The appellant's further testimony was that after the successful end of what he referred to as "*the second period*", he went to collect payment from the respondent, only to discover that his name as a contracting party in the contract had been removed and substituted with that of one Sammy Wanyama Nasilai without his knowledge and consent; that on enquiring from the transport manager why that was done, his contract was unprocedurally terminated without service on him of the requisite 30 days prior notice.

25. The appellant went on to say that in accordance with the dispute resolution provision in the contract, he wrote a letter dated 8th February 2000 to the Chief Executive of the respondent complaining that his contract was changed on 6th December 1999; that the Chief Executive of the respondent in turn referred the matter to the Company Secretary who, in a letter dated 10th March 2000 addressed to the appellant purported to explain the circumstances under which the contract was changed and subsequently terminated.

26. The Company Secretary's letter dated 10th March 2000 was accompanied by an internal memo from the transport manager dated 29th February 2000 in which it was stated that Tractor No. KAB 853 started working on seed cane before a contract with the owner was signed; that the Cane Development Manager then contacted the transport office to process the contract so that payment could be made; that the person who called at their office on 12th November 1999 was the appellant and requested that the unit, KAB 853, be registered under the name of Nasilai and Sons Contractors; that before that was done, the appellant returned to the office on 15th November 1999 and requested that the contract be done in his name for ease of payment, which was done; that on 6th December 1999, the respondent received other instructions to change the contract to the earlier name of Sammy Wanyama Nasilai, which was also done.

27. The appellant further testified that upon receiving that communication from the Company Secretary of the respondent, he approached the Law Society of he instituted a suit in the magistrate's court that has culminated in the present appeal.

28. Testifying for the defence, the transport manager of the respondent, Fred Simiyu Ndala, stated that the appellant went to their offices on 12th November 1999 and informed "them" that his brother in law, Sammy Wanyama Nasilai t/a Nasilai and Sons Contractors who had a tractor wanted to transport cane for the respondent; that he (Ndala) gave contract forms to the appellant to fill; that the appellant returned the forms duly filled with the name of Nasilai and Sons Contractors as the contractor; that on 15th November 1999, the appellant returned to his office and informed him that he had discussed the matter with Sammy Wanyama Nasilai, his brother in law, and wanted the contractor's name in the contract changed to his name "*for ease of work as he could draw cheques directly*"; that "*we did another contract in his name Henry Khaemba*"; that on 16th December 1999 the respondent received a letter from Nasilai and Sons Contractors stating that he wanted the contract in his name; that on the basis of that letter the respondent effected the change; and that thereafter, it was Nasilai and Sons Contractors who effected transportation up to 30th December 1999.

29. Based on our review and evaluation of the evidence and in particular the testimony of the appellant and that of Fred Simiyu Ndala, the defence witness, there is no doubt in our minds that the parties entered into the Cane Transport Contract dated 15th November 1999. In the respondent's internal memo dated 29th February 2000 addressed to Agriculture E.S. Manager, to which we have referred, the respondent's Transport Manager stated that on 15th November 1999 the appellant asked the respondent "*that the contract be in his name (Henry Wafula Khaemba) for ease of payment. <u>This was then done</u>*." [Emphasis]. That was clearly an unequivocal acknowledgment by the respondent that it entered into a contract with the appellant. In light of that acknowledgment, the denial by respondent that it entered into a contract with the appellant contained in the statement of defence, was displaced.

30. The respondent did not plead, as it endeavored to demonstrate at the trial, that the contract was procured by misrepresentation or that the appellant did not have the capacity to enter into the contract by virtue of not being the owner of the tractor. Those, in our view, were futile efforts on the part of the respondent to avoid taking responsibility for the manner in which it mishandled the contract.

31. If indeed the respondent was satisfied that the contract it had made with the appellant required to be changed by substituting the contracting party, nothing would have been easier than to seek the concurrence or consent of the appellant with whom the contract dated 15th November 1999 was concluded. The respondent could not unilaterally, as it did, substitute the name of the appellant as the contracting party, with that of another person. Furthermore, nothing stopped the respondent from terminating the contract by invoking the termination clause in the contract and thereafter entering into a contract with Nasilai and Sons Contractors, if it was so minded. It is also instructive that the respondent did not contest that in part performance of the contract, it paid to the appellant the amount of Kshs. 2,756.95 as alluded to above.

32. In our judgment therefore, we find and hold that the appellant established, on a balance of probabilities, that it entered into a contract with the appellant and that therespondent breached that contract by purporting to substitute the appellant's name with that of the Nasilai and Sons Contractors.

33. The remaining question, to which we now turn, is whether the appellant is entitled to damages, as claimed, for the breach of contract by the respondent. As already indicated, the relief the appellant sought in his plaint is for general damages for breach of contract. However, during the trial, the appellant asserted that he would have earned Kshs. 2,800,000.00 if the respondent did not breach the contract. He urged us to award him that amount. His claim in effect became a claim for special damages. [1] In **Bamburi Portland Cement Company Ltd vs. Imranali Chandbhai Abdulhussein [1996] eKLR**, this Court stated:

> "***This court has said time without number that special damages must not only be specifically pleaded but must be strictly proved. Authorities to that effect are legion***."

34. That said, how did he arrive at that amount of Kshs. 2,800,000.00? The appellant produced weighbridge tickets on the basis of which he asserted that prior to the termination of the contract, he was able to transport an average of 42 tons of cane per day for which he was entitled to payment of Kshs. 335 per ton. That, he said, translated to an income of Kshs. 14,000 per day. By the time the contract was breached, he said, the contract still had 200 days remaining. He would therefore have transported cane for another [1] Recently in **Douglas Odhiambo Apel & another vs. Telkom Kenya Ltd, C.A 115 of 2006 (2014 eKLR)**, this Court stated that: "The law on special damages is that they must be specifically pleaded and strictly proved. See **Ratcliffe Vs. Evans** [1892] 2 QB S24; **Kampala City Council Vs. Nakaye** [1972] E.A 446 and **Hahn Vs. Singh** [1985] KLR 716" 200 days earning Kshs. 14,000.00 per day and that would translate to Kshs. 2,800,000.00 that he claimed.

35. Putting aside for a moment the contention by the respondent that the weighbridge tickets that the appellant relied upon were not genuine, we are not satisfied that the appellant established an entitlement to an award for that amount. We are unable to reconcile that claim with his evidence, earlier in his testimony, when he stated that "*we had agreed that payments had to be made after every 14 days depending on the quantity of the cane transported*" and that the first payment made, for which he produced a payment voucher, was Kshs. 2,756.95. That is incompatible with his assertion that he was able to transport an average of 42 tons of cane per day.

36. And even if we were to accept, which we do not, that he would have earned Kshs. 14,000 per day, that amount would represent the gross earning. Without factoring in the cost for generating that income, it cannot be said to be the loss he suffered. On a balance of probabilities, therefore, the alleged loss was not proved.

37. However, in recognition that there is an infraction or violation of the appellant's contractual rights, we think the appellant is entitled to nominal damages [2] and award him a token amount of Kshs. 5,000.00 with interest thereon at court rates from 20th March 2014 being the date of delivery of the judgment in the High Court.

38. The result of the foregoing is that we uphold the appellant's complaint that the learned Judge erred in failing to determine that the parties had a valid contract that was breached by the respondent. There is however no basis upon which we can make an award for Kshs. 2,800,000.00 as sought.

39. As the appellant has succeeded in his appeal to the extent only of demonstrating that the lower court erred in failing to uphold his contract with the respondent, we think, he should have two thirds of the [2] See **Bamburi Portland Cement Company Ltd vs. Imranali Chandbhai Abdulhussein [1996] eKLR** costs of this appeal. He will also have the costs of the proceedings in both the lower courts based on the award of this Court.

Orders accordingly.

Dated and delivered at Eldoret this 25th day of May, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR