



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 139 OF 2008

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTDAPPELLANTS

AND

DAVID OJWANG OKEBE & 12 OTHERSRESPONDENT

(Appeal from a Judgment and decree of the High Court of Kenya at

Kisii (D. M. Musinga, J) dated 30th April, 2008

in

KISUMU HCCA No. 247 OF 2003)

JUDGEMENT OF THE COURT

The genesis of this appeal is long and winded. The 1st to 11th respondents filed the following suits at the Senior Resident Magistrate's court, Migori, against the appellant South Nyanza Sugar Company Limited and the 12th and 13th respondents (respectively Commissioner of Police and Attorney General): SRMCC No. 136 of 2002 by David Ojwang Okebe, SRMCC No. 137 of 2002 by Peter Okello Ongongo, SRMCC No. 138 of 2002 by Patrick Achola Nyawara, SRMCC No. 139 of 2002 by Lucas Otieno Ouma, SRMCC No. 140 of 2002 by Normal Omulo Odhiambo, SRMCC No. 141 of 2002 by Tom Ogweny Onyango, SRMCC No. 142 of 2002 by Thadayo Otieno Orembu, SRMCC No. 143 of 2002 by John Onyango Opiyo, SRMCC No. 144 of 2002 by Denis Akumu Ouma, SRMCC No. 145 of 2002 by Jane A. Odera and SRMCC No. 146 of 2002 by Robert Odoyo Ochomo. The suits were similar in all respects where the 1st to 11th respondents (**“the plaintiffs”**) complained that they had been arrested upon a false charge laid against them by the appellant to agents of the 12th and 13th respondents. The plaintiffs alleged that they had been detained unlawfully and thereafter charged in court with criminal offences that were later withdrawn. They therefore prayed for general damages for false imprisonment, aggravated damages and special damages Kshs. 50,000/=, costs of the suit and interest. Appropriate defences, denying liability were duly filed by the defendants in all the suits.

SRMCC No. 136 of 2002 came for hearing before the learned Senior Resident Magistrate (Odhiambo B. F.) and the record shows that the following transpired on 4.7.2002:

“MR. KISERA:

I am praying that this suit be treated as a test suit for purposes of liability in civil case No. 137, 138, 145, 146, 144, 143, 142, 141 and 140 all of 2001.

MR. OKONGO:

No objection.

COURT:

Orders as prayed Civil case No. 136/2002 to be treated as test suit.

ODHIAMBO B. F.

S.R.M”

SRMCC No. 139 of 2002 appears to have been omitted from the above record but as will be seen from the record and even in proceedings in the appeal to the High Court all the suits including SRMCC No. 139 of 2002 were treated and no issue arises from that apparent omission.

It was then agreed between counsel for the parties, and it was so ordered by the court, that evidence tendered in the test suit apply equally to all the other suits. The matter was thereafter taken over by learned Resident Magistrate A. M. Kariuki who after a hearing found the defendants jointly liable for malicious prosecution and false imprisonment. This was on 24th September, 2003. The learned Magistrate ordered that this judgment was to apply to the other cases. The Advocates for the parties then applied to the court as follows:

“MR. KISERA:

We have agreed to take a date for judgment by which we shall have filed written submissions on quantum and annex the receipt in prove (sic) of special damages.

A. M. KARIUKI

R.M.

MR. OKONGO ADV.

That is so.

A. M. KARIUKI

R.M.

COURT: Consent entered as above stated. The same to apply to criminal (sic) case No. 136/2002 – 146/2002.

A. M. KARIUKI

R.M.”

In a brief judgment delivered by the learned Magistrate on 12th November, 2003 he found special damages of Kshs. 50,000/= as having been proved as pleaded and therefore awarded the same to the Plaintiff. He also awarded the Plaintiff general damages Kshs. 100,000/= for malicious prosecution and false imprisonment but disallowed the prayer for aggravated damages. This judgment was, as agreed by

the parties, to apply to all the other suits.

This is the concatenation of events that led to the various appeals that were filed at the High Court of Kenya, at Kisii – High Court Civil Appeal Nos. 247 of 2003, 248 of 2003, 249 of 2003, 250 of 2003, 251 of 2003, 252 of 2003, 253 of 2003, 254 of 2003, 255 of 2003, 256 of 2003 and 257 of 2003 where the plaintiffs in the subordinate court became appellants.

Civil Appeal No. 247 of 2003 was called to hearing before Musinga, J (as he then was) on 9th April, 2008 and the following is recorded:

“9/4/2008

.....

By consent, this appeal be consolidated with the following appeals – Kisii Civil Appeal No. 248, 249, 250, 251, 252, 253, 254, 255, 256 & 257 all of 2003. The outcome of this appeal to affect all the above cited appeals.”

After hearing submissions from counsel the learned judge struck out the appeal after finding that the appellant in that appeal had not filed an appeal on liability within 30 days of the decision being given. The order striking out the appeal was as agreed by counsel for the parties to apply to all the other appeals. It is the decision of Musinga, J (made on 30th April, 2008) that has provoked this appeal.

Ten (10) grounds of appeal are set out in the Memorandum of Appeal. These can be summarized thus: that the judge erred in holding that the consolidated appeals emanated from the judgement of the subordinate court in Migori SRMCC No. 136 of 2002; that the judge erred in holding that the appellants were not challenging the magistrate's findings on quantum; that the judge erred in holding that the appellants required leave to file appeals; that the judge erred in holding the appeals incompetent; that the proceedings before the magistrate were a nullity as evidence should have been led in each matter and that the judge allowed a flawed procedure that was applied by the subordinate court and thus erred in law.

The appeal came before us for hearing on 24th April 2013. Learned counsel Mrs. A. A. Aron appeared for the appellant while learned counsel Mr. Omondi Kisera appeared for the 1st to 12th respondents and learned counsel Mr. J. E. N Maroro appeared for the 13th respondent. Miss Aron submitted that the learned judge was wrong to uphold the findings on award of damages when no evidence was led in support thereof for each case. It was counsels' view that each plaintiff should have testified in proof of loss for an award of damages to follow.

Mr. Maroro supported the appeal and submitted that findings on liability had not been contested by the appellant. The appellant had, in any event, according to counsel, not pursued the appeal on quantum at the High Court.

Mr. Kisera in opposing the appeal submitted that there was no competent appeal before the High Court as 81 days had elapsed between the date of judgement of the subordinate court on liability and lodging of the appeal to the High Court. Counsel submitted further that there was no appeal on the issue of quantum as counsel for the appellant had abandoned that issue at the High Court.

We have in this judgement set out relevant parts of the proceedings and orders before the subordinate court and at the High Court showing how the parties consented at every stage to the manner proceedings were to be taken. The appellant complains as a ground of appeal before us that the judge erred in holding that the consolidated appeals emanated from the judgement of the subordinate court already referred to. And yet as we have already shown the parties on 4th July, 2002 applied and were allowed to consolidate the suits on the issue of liability and a test suit was selected as agreed by the parties. The parties decided, and this was approved by the court, that evidence tendered in the test suit do apply to all the other suits.

When the appeals came for hearing before the High Court the parties applied, and the court agreed, that the appeals be consolidated. The court ordered upon the application of the appellants and the respondents that the outcome of the appointed appeal would affect all the consolidated appeals.

It is also urged as a ground of appeal that the judge erred in holding that the appellants were not challenging appeals on quantum. Counsel who appeared for the appellant in the High Court is recorded on 9th April, 2008 as stating:

“... I do not wish to challenge the issue of quantum of damages...”

This is a clear and unequivocal statement and we do not believe counsel for the appellant is, with respect, serious to pursue this line of argument.

Judgment on liability was delivered by the trial magistrate on 24th September 2003. This was in the presence of counsel for all parties. The various appeals to the High Court which we have referred to were filed on 15th December, 2003. This was clearly out of time and in contravention of Section 79G of the Civil Procedure Act which provides the time for filing appeals from subordinate courts to the High Court as 30 days from the date of the decree or order appealed from excluding the time certified by the subordinate court as requisite for preparation of the decree or order. The learned judge was right in holding that the appeals were an abuse of the process of the court.

On the ground taken that the judge erred in holding that the appellants required leave to file appeals we found no basis or substance in the complaint as it is not on record and was not urged before us.

The appellants have argued that the magistrate should have taken evidence in each case to arrive at an award of damages and thus the judge should have interfered with that part of the subordinate courts proceedings and record. We have shown in this judgement that immediately after the subordinate court entered judgement on liability the parties applied for a judgement date on the issue of quantum and chose to file written submissions and annex documents in proof of the claim for special damages.

The procedure adopted by the subordinate court was a course chosen by the parties themselves. The court endorsed the wishes of the parties. Parties are in civil proceedings at liberty to agree and enter consents including on how proceedings are to be conducted. The parties are at liberty to do this as long as it is within the parameters allowed in law. They will thereafter be estopped from denying validity of such agreement. Indeed Section 67 (2) Civil Procedure Act provides:

“No appeal shall lie from a decree passed by the court with the consent of the parties.”

In **Brooke Bond Liebig (T) Ltd v Mallya [1975] EA 266** the respondent sued the appellant for damages for wrongful dismissal. During the hearing a compromise was entered into signed by both parties, their advocates and the judge. The respondent then demanded more than was due under the compromise and when this was refused applied by motion for a review of the agreement. The judge set aside the consent on the ground that the parties had not agreed together. It was held that a consent judgement may only be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement.

In **Ismail Sunderji Hilrani v Noorall Esmail Kassam [1952], 19 EACA 131** it was held that a compromise of a disputed claim made bona fide is a good consideration and the court can only interfere with it in circumstances which would afford good ground for varying or rescinding a contract between the parties. See also **Flora Wasike v Destino Wamboko [1982 -88] I KAR 625** where in addition to the above holdings the court held that an advocate has ostensible authority to compromise a suit or consent to judgment, so far as the opponent is concerned.

We have shown in this judgement that the advocates for the parties in this appeal consented to the procedure adopted by the trial magistrate and later by the High Court on the first appeal. The trial court and the High Court allowed the parties to consolidate the suits and later the appeals and choose test suit and test appeal. There was no misdirection on the part of the courts at all and the parties were entitled to

the procedure they chose but they were then bound by the decisions reached following upon the consents the parties had entered.

Judgement on liability was delivered on 24th September, 2003. No valid appeal was filed within 30 days as was required by Section 79 G of the Civil Procedure Act. There was no appeal on the issue of quantum as the appellant had stated clearly that it did not wish to pursue that aspect of the matter.

We can see no valid complaint by the appellant in this appeal. The appeal has no merit and is accordingly dismissed with costs to the 1st to 11th respondents. The 1st to 11th respondents will also have costs of the first appeal and of the trial court.

Dated and Delivered at Kisumu this 14th day of June 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR