Chacha v South Nyanza Sugar Company Limited (Civil Appeal E020 of 2023) [2025] KEHC 7239 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEHC 7239 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E020 OF 2023

A. ONG'INJO, J

MARCH 26, 2025

BETWEEN

PETER MWITA CHACHA ..... APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED ..... RESPONDENT

JUDGMENT

1. By a Plaint dated 18th June 2018 the Appellant sued the Respondent in Rongo PMCC No. 423 of 2018 for breach of terms of agreement where the Respondent contracted the Appellant to grow and sell his sugarcane on parcel of land No. 125 B in Field N0. 153 in Mohero Sub-Location measuring 2.0Ha vide Contract Account No. 550433. The Appellant's claim was dismissed with costs in judgment delivered on 29th March 2023

2. Vide Memorandum of Appeal dated 25th April 2023 the Appellant lodged the appeal herein on the following ground:

    1. That the learned magistrate erred in law and fact by entertaining and/or regarding the defence evidence which is at variance with the statement of defence.

    2. That the learned magistrate erred in law and fact by writing judgment not based on evidence and pleadings on record.

    3. That the learned magistrate erred in law and fact by expressing her opinion in her judgment instead of making findings based on pleadings and evidence.

    4. That the learned magistrate erred in law and by disregarding the Appellant's pertinent and apt evidence, submissions and authorities cited the precedents of which she glossed over.

    5. That the learned magistrate disregarded the principle 'restitutio in integrum"

6. That the learned magistrate's interpretations of the various relevant principles of law and fact was erroneous.

3. Reasons Wherefore the Appellant prays for judgment against the Respondent for;

(a). That the court be pleased to set side the trial magistrate's judgment (and decree) and substitute the same with An appropriate award for plant crop;

(b). That the court being the first appellate court do re-evaluate the evidence on record and arrive at own independent findings;

(c). That the costs and interest thereon be borne by the Respondent.

4. The Appellant's case was that the contract between him and the Respondent was entered into on 13th October 2009 and was to remain in force for 5 years or until one plant crop and 2 Ratoon crops were harvested on the plot whichever period was the less; that the Plant Crop and Ratoon Crops were to be harvested at the age of 22_24 months and 16_ 18 months after planting and subsequent harvest respectively; that the Defendant would exercise due care during the harvest. However the Defendant failed to harvest the Plant Crop when the cane matured and was ready for harvest at 22_24 months of age ; that the cane started deteriorating as a result of which the Plaintiff suffered loss.

5. The Respondent denied liability and claimed that the Plaintiff poached the sugarcane and sold to Sukari Industries on 7th November 2015. (22 or 24 months) from 7th November 2009 would be ?

6. On the other hand the Appellant claimed he was not notified of any breaches on his part and should therefore be compensated for the 3 cycles.

7. The Trial Magistrate found that the Respondent's claim that the Appellant poached sugarcane and sold to Sukari Industries was not rebutted and therefore it is the Appellant who breached the contract and was not entitled to compensation.

8. The appeal herein was canvassed by way of written submissions.

9. The Appellant's submissions are dated 13th December2023. The Appellant's submissions are that the Respondents confirmed that there was a contract between it and the Appellant and that the cane was to be harvested at 24 months on 19th October 2013 but was not programmed for harvesting. That according to DW1 cane was poached on 7th November 2015 long after the due date for harvesting. It was submitted that it was not established if the cane was under threat of poaching or it was poached and the Trial Magistrate's finding was far fetched

10. The Appellant further submitted that the Respondent had breached the contract when it failed to harvest the sugarcane on 19th October 2012 and evidence by DW1 that cane was poached on 7th November 2015 does not hold water without the testimony of the Security Manager who was instructed to investigate of threat to and/ or poaching. That the Trial Magistrate therefore omitted the overwhelming evidence in favour of the Appellant that his sugarcane dried up up after the breach by the Respondent.

11. The Appellant submitted that he ought to have been compensated for the 3 cycles of sugarcane as per the holding of the Court of Appeal at Kisumu in Civil Appeal No 138 of 2018 between South Nyanza Sugar Company Limited V Awino Oreko where the judgment in Migori HCCA No. 18 of 2015 was overturned and it was made clear that interests on the awards starts running from the time suit is filed.

12. The Appellant submitted that he was entitled to judgment in the following terms:

1. Plant Crop 2.0 Ha x63.86 tonnes x3,800/= Kshs. 485,032

2. Ratoon 1 2.0 Ha x40.36 tonnes x3,800/= Kshs. 306,737/=

3. Ratoon 2 2.0 Ha x40.36 tonnes x3,800/= Kshs. 306,737/=

Totals Kshs. 1,098,504/=

13. The Respondents submissions are dated 3rd March 2025 and are to the effect that the finding f the Trial Magistrate was right that the Appellant poached sugarcane to Sukari Industries in breach of the contract in issue and was rightly denied compensation and said verdict should be affirmed.

14. The Respondent cited the holding in Maingi Mutisya Nzioka v Mbuki Kisavi [2014] KECA 838 (KLR), the Court of Appeal, cited and relied on its old decision in Odd Jobs v Mubia [1970] EA 476, and re-stated, thus:

> The court may base its decision on an unpleaded issue [and we would add, an imprecisely or inadequately pleaded issue] if during the course of the trial the issue has been left for the decision of the court. In this instant, the issue was left to the court's decision when the appellant addressed the court and led evidence on the issue."

15. In David Sironga Ole Tukai v Francis Arap Muge, Kiprotich Arap Kirui & Johannah Kiprono Arap Mosonik (Sued as Chairman, Secretary & Treasurer of Kapkween Farmers Co-operative Sosciety Ltd) [2014] KECA 155 (KLR), the Court of Appeal held:

> Later in Galaxy Paints Co Ltd V Falcon Guards Ltd [2000] 2 EA 385,
>
> t his Court reiterated that the issues for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination. The Court added that unless pleadings were amended, parties were confined to their pleadings.

16. The exception to the rule arises where the parties, in the course of the hearing, raise an issue that was not pleaded and leave the same to the court to decide. Hence in Odd Jobs V Mubia [1970] EA 476, Law, JA; speaking for the predecessor of this Court stated that:

> "[A] court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision." (See also Vyas Industries Ltd V Diocess Of Meru [1982] KLR 114)

Analysis And Determination

17. This being the 1st appeal this court is mandated to re-evaluate and scrutinize the evidence and judgment of the lower court afresh, and make conclusions and independent decision on whether to allow the appeal. The court does this even though it did not have the opportunity to see and hear the witnesses 1st hand. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in

mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

18. Having considered the grounds of appeal and rival submissions and having re-evaluated and scrutinized the evidence and judgment of the trial court afresh the issue that arises for determination is:_whether the Trial Magistrate erred in finding that the Appellant poached sugarcane to Transmara and was therefore not entitled to be compensated for loss suffered when the Respondent breached the contract by failing to harvest the contract sugarcane when it was mature_Whether the Appellant is entitled to be compensated for breach of contract on the part of the Respondent._Who bears the costs of the appeal.

19. The contract between the parties herein is dated 19th October 2011 and the Trial Magistrate found rightly that there was no dispute as to the existent of the said contract. The exhibit that made the Trial Magistrate find that the Appellant poached sugarcane to Sukari Industries is Exhibit D4 dated 7th November 2015. The said exhibit falls outside the contract period as the contract between the Appellant and the Respondent is dated 19th November 2011 when it should be assumed the Plant Crop was planted or there about and it was for a period of not less than 5 years from the date of the Agreement or until one plant crop or 2 Ratoons of sugarcane have been harvested from the subject parcel of land whichever event occurs first(Clause 2 a).

20. Clause 1 (f) also provides for specific period of maturity for the individual classes of crop as follows:

    Plant Crop Not later than 24 months.

    Ratoon One Not later than 22 months after harvest of plant crop.

    Ratoon two Not later than 22 months after harvest of ratoon one.

21. In consideration of the above specific timelines the Plant crop on the Appellant's farm ought to have been harvested within 24 months and not later than 19th October 2013.It is therefore apparent that the claim of threat to poach that was directed to the Security Manager to investigate was not within the period when the plant crop was supposed to be harvested. In fact as at 7th November 2015 when the claim for poaching was made the Respondent ought to have harvested Ratoon 1 which was supposed to be harvested within 22 months from the date of harvest of the Plant Crop.

22. It was therefore erroneous for the Trial Magistrate to make a finding that the Appellant poached sugarcane when the date of the alleged poaching fell outside the contract period when the plant crop was supposed to be harvested.

23. Arising from the above finding it goes without saying that the Appellant is therefore entitled to be compensated for loss suffered when the Respondent breached the terms of the contract by failing to harvest sugarcane from his farm at the appointed time.

24. From the plaint, the statements of witnesses for both parties and documentary exhibits it can easily be discerned that certain figures have been alluded to which should guide the court in arriving at appropriate compensation.

25. The contract document indicates that the Appellant's plot was 2 Ha and at paragraph 6 of the Plaint the said plot was expected to yield 63 tonnes for the plant crop at Kshs. 4,300/= per tonne and in their submissions indicated expected yield for the 2 ratoon crops at 40.36 tonnes at Kshs. 3,800/= per tonne.

26. The Respondent on the other hand claimed that denied that the Appellant's plot was 2 Ha and said it was 1.45 Ha. They also stated that they were paying contracted farmers Kshs. 3,500/= per tonne subject contractual, statutory and other deductions which included:

(a). Cost of all inputs and services, including survey, seedcane and fertilizer.

(b). Harvesting charges Kshs307/= per tonne

(c). Transport charges Kshs. 690/= per tonne

(d). Cess 1% of the total cane value

(e). Levy 1% of the total cane value

(f). Interest on the costs of input 17% p.a

27. The Appellant did not factor the deductions alluded to by the Respondent and did not dispute that such deductions should be factored in.

28. In pursuit of the Court of Appeal decision in South Nyanza Sugar Company Limited V Awino Oreko Kisumu Court of Appeal C. A. No 138 of 2017 this court finds that the Appellant was entitled to be compensated for all the 3 cycles as the contract was for a period of 5 years and the failure to harvest the plant crop compromised the development of 1st and 2nd ratoon crops.

29. This court therefore enters judgment for the Appellant in the following terms:

1. Plant Crop 2.0 Ha x63.86 tonnes x3,800/= Kshs. 485,032

2. Ratoon 1 2.0 Ha x40.36 tonnes x3,800/= Kshs. 306,737/=

3. Ratoon 2 2.0 Ha x40.36 tonnes x3,800/= Kshs. 306,737/=

Totals Kshs. 1,098,504/=

Subject to the deductions referred to by the Respondent namely:

Harvesting charges Kshs307/= per tonne

(c). Transport charges Kshs. 690/= per tonne

(d). Cess 1% of the total cane value

(e). Levy 1% of the total cane value

(f). Interest on the costs of input 17% p.a

Costs of the appeal will go to the Appellant and interest to accrue from date of filing of the suit.

Orders accordingly.

DELIVERED DATED AND SIGNED AT MIGORI THIS 26TH DAY OF MARCH, 2025.

A. ONG'INJO

JUDGE

Judgment delivered in the presence of