Ogosi v South Nyanza Sugar Co Ltd (Civil Appeal 147 of 2022)
[2024] KEHC 3511 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3511 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 147 OF 2022

RPV WENDOH, J

MARCH 19, 2024

BETWEEN

GEORGE ODHIAMBO OGOSI ..... APPELLANT

AND

SOUTH NYANZA SUGAR CO LTD ..... RESPONDENT

(An Appeal from the Judgement and Decree of Senior Resident Magistrate, Rongo dated 9/11/2022, delivered on 29/11/2022 by Hon. R.K. Langat in PMCC No. 328 of 2018)

JUDGMENT

1. This is an appeal by George Odhiambo Ogosi (the appellant) against the judgement and decree of Hon. R.K. Langat dated 9/11/2022 and delivered on 29/11/2022. The appellant is represented by the firm of Oduk & Co. Advocates while the respondent is represented by the firm of Otieno, Yogo, Ojuro & Co. Advocates.

2. By a plaint dated 26/4/2018, the appellant sued the respondent for damages for breach of contract, costs of the suit, interest from 29/3/2011 until payment in full and any other relief.

3. The appellant pleaded that by an agreement dated 29/3/2011, the respondent contracted him to grow and sell to it sugarcane on his land parcel plot number 108D field no. 37C in Kangeso Sub - Location measuring 0.62 hectares; that the appellant duly signed the agreement and was assigned account number 482832 and planted the cane as agreed.

4. It was further pleaded that it was a term of the contract that the contract would commence on 29/3/2011 and remain in force for a period of 5 years, or until one plant crop and two ratoon crops of the sugarcane are harvested whichever period was less; that within the 5 years period or less, the plant and ratoon crop would be harvested at 22 - 24 months and ratoons and 16 – 18 months after planting and subsequent harvest respectively.

5. The appellant contended that in breach of the said agreement, the respondent harvested the plant crop but failed, refused and/or neglected to harvest the subsequent two (2) ratoon crops. The appellant particularized the damage and loss at Kshs. 418,500/=.

6. The respondent filed a defence dated 7/11/2018 denying the allegations in the plaint and it put the respondent to strict proof thereof. The respondent challenged the jurisdiction of the trial court since the claim was statute barred. The respondent denied that the appellant suffered any loss or damage and averred that no penalty is available to the appellant in contract under the Law and on the facts pleaded.

7. After the hearing, the trial court entered judgement in favour of the respondent and dismissed the appellant's suit with costs.

8. Being dissatisfied with the judgement and decree, the appellant filed a Memorandum of Appeal dated 7/12/2022 on the following three (3) grounds: -

    i. That the learned trial magistrate erred in law and in fact in failing to assess damages payable to the appellant, yet the appellant had placed before court ample evidence of prior cane yields and price payable per tonne, evidence which would have guided the trial magistrate to assess and make an award in damages;

    ii. That the trial court erred in law and in fact in failing to remedy the proved wrong which action offended the law, public policy to the effect that no wrong should be without a remedy;

    iii. That the trial court erred in law in failing to come to a finding that, however difficult the task was in making an award, the law required him to offer the remedy a wrong suffered by the appellant and not turn the appellant away.

    The appellant prayed: -

    i. That decision of the trial magistrate dated 9/11/2022 and delivered on 29/11/2022 in PMCC No. 328 of 2018 of failing to make an award in damages be set aside;

    ii. The suit be remanded back to the trial magistrate with an order that he assesses and awards damages. In the alternative, this court do assess and award the appellant damages.

    iii. There be an order of interest, the same to accrue from the date of filing suit.

    iv. Cost of this appeal and of the suit in the subordinate court be borne by the respondent.

9. Directions were taken that the appeal be canvassed by way of written submissions. It is only the appellant who complied.

10. Though the appellant had pleaded that the suit was time barred the said issue was never considered. It was alleged that the appellant Respondent failed to harvest the two ratoon crops. It means that the cause of action arose after failure to harvest the first ratoon which is estimated at 42 months which fell on 29/9/2029. The suit should have been filed within six (6) years which would be in 20/9/2020. The suit was filed on

11. The appellant submitted that failure by the trial Magistrate to award damages to him was contrary to public policy; that it is a cardinal rule that no breach of duty and injury suffered should be without a remedy; that the trial Magistrate found that there was a breach of contract but denied the appellant remedy of an award of damages. The appellant relied on the case of Okulu Gondi vs South Nyanza Sugar Co. Ltd HCCA No. 242 of 2011.

12. The appellant further submitted that there existed evidence to enable a proper assessment of damages; that in the appellant's statement, he mentioned the price at Kshs. 2,500/= per tonne which was not controverted; that the appellant's exhibit (PEXH3) was a harvesting statement showing the net income per tonne for the previous (plant crop) as Kshs. 2,646.90 and this offered a proper guideline of the expected yield. The appellant urged that this appeal be allowed.

13. I have considered the appeal, the appellant's submissions and the trial court's record and the following are the issues for determination: -

i. Whether the trial court considered the correct legal principles in dismissing the appellant's suit.

14. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123.

15. A similar holding was held in the Court of Appeal for East Africa which took the same position in Peters v Sunday Post Limited [1958] EA 424 where Sir Kenneth O'Connor stated as follows: -

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

16. The main aspect in this appeal is whether the trial court erred in failing to award damages to the appellant even after finding that there was breach of contract. The trial Magistrate found that:-

> " None of the parties produced a price list or any document to prove that the price applicable for ratoon crops was Kshs. 2,500/= as pleaded. This being a claim in the nature of special damages, this court is unable to compute the quantum as no evidence was placed before the court by the plaintiff to prove that indeed the price applicable for ratoon crops was Kshs. 2,500/=. The applicable price was denied and thus was incumbent on the plaintiff to prove the same, the claim therefore does not stand."

17. At paragraph 8 of his plaint, the appellant pleaded the particulars of loss and damage. He pleaded that the plot was capable of producing an average of 135 tonnes at the rate of Kshs. 2,500 per tonne being the price applicable then. This was a pleading for special damages.

18. The claim by the respondent was in the nature of special damages which must be specifically pleaded and proved. The Court of Appeal in Douglas Odhiambo Apel & Another v Telkom Kenya Limited Nairobi Civil Appeal No. 115 of 2006 [2014] eKLR, the Court of Appeal expressed the view that;

> " [W]e find that the learned judge was entirely correct in holding that at a formal proof requiring assessment of damages, a plaintiff is under a duty to present evidence to prove his case. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court. The need for proof is not lessened by the

fact that the claim is for special damages. Unless a consent is entered into for a specific sum, then it behooves the claiming part to produce evidence to prove special damages claims."

19. In South Nyanza Sugar Company Ltd v Fredrick Ogolla [2015] eKLR Majanja J held:-

> "It was clear then that the only indicator of the price was the pleading which the court adopted for the plant crop. I find that the price of the sugarcane was an essential element of the respondent's claim and the claim being in the nature of special damages ought to have been pleaded and proved with particularity... Although the respondent pleaded the price of sugarcane per ton, he did not prove the price hence there was no basis for making the award. Likewise, the respondent's submissions on various prices in respect of the plant crop and 1*st ratoon were not supported by any evidence. Unless there are admissions or agreed facts, submissions are not a substitute for proof of facts."

20. The appellant urged that the harvesting statement (PEXH3) shows the net income per tonne for the previous (plant crop) as Kshs. 2,646.90 and the trial Magistrate should have referred to this document as it offered a proper guideline of the expected yield. This court is not in agreement with the view of the appellant that the harvesting statement offered enough guidance. The offered price for the ratoons has to be exact and well defined at the commencement of the contract. There cannot be room for speculation by either party. There was no consensus between the parties that the price of the plant crop would apply to the ratoons. If the appellant wanted the court to make reference to the harvesting statement, he ought to have pleaded as such. It is my finding that there was no guiding document produced by the parties on the prevailing market prices of the ratoon crops. The appellant is therefore not entitled to special damages for want of proof on the expected prices for the ratoon yields.

21. Consequently, I find that the appeal has no merit and it is hereby dismissed. There will be no orders to costs since the respondent did not participate in these proceedings.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 19TH DAY OF MARCH,2024.

R. WENDOH

JUDGE

Judgment delivered in the presence of;

No appearance for the Appellant.

No appearance for the Respondent.

Emma & Phelix Court Assistants.