South Nyanza Sugar Co. Ltd v Anyim (Civil Appeal E072 of 2022)
[2024] KEHC 2942 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2942 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E072 OF 2022

RPV WENDOH, J

MARCH 19, 2024

BETWEEN

SOUTH NYANZA SUGAR CO. LTD ..... APPELLANT

AND

FLORIA ACHIENG ANYIM ..... RESPONDENT

(An Appeal from the Judgement and Decree of Hon. R.K. Langat Principal Magistrate (PM) Rongo, dated and delivered on 28/5/2022 in Rongo PMCC No. 279 of 2017)

JUDGMENT

1. South Nyanza Sugar Co. Ltd (the appellant) commenced this appeal against the judgement and decree of the Hon. R.K. Langat (PM) dated and delivered on 28/5/2022. The appellant is represented by the firm of Okong'o Wandago & Co. Advocates while Floria Achieng Anyim (the respondent) is represented by the firm of Oduk & Co. Advocates.

2. The respondent filed a suit by a plaint dated 21/8/2017. The respondent pleaded that on 27/4/2011, she entered into a written agreement with the appellant to grow sugarcane on Plot No. 522A, Field No. 289 in Kakmasia measuring 0.48Ha. The respondent was assigned account number 26xxxx.

3. It was pleaded that it was a term of the contract that it would remain in force for a period of five (5) years or until one plant crop and two ratoon crops of sugarcane are harvested on the aforesaid plot whichever period was less; that within the 5 years period or less, the plant and ratoon crops would be harvested at 22 - 24 months and 16 - 18 months after planting and subsequent harvest respectively.

4. The respondent particularized the particularly of breach of contract by the appellant as failure to harvest the plant crop thereby compromising the growth of the 1st and 2nd ratoons. It was further pleaded that as a result of the breach, the respondent lost approximately 135 tonnes per Ha for the plant crop and for each ratoon crops; that the price per tonne applicable was Kshs. 2,500/=. The respondent

prayed for judgement against the appellant for damages for breach of contract, costs of the suit, interest and any other relief the court may deem just and expedient to grant.

5. In its defence dated 4/10/2017, the appellant denied each and every particulars of the claim as pleaded by the respondent in her plaint and put the Respondent to strict proof thereof. The appellant averred that the respondent's plot could only yield a maximum of 31.94 tonnes of sugarcane per hectare and the ratoons could have only yielded 23.40 tonnes. The appellant further averred that it was paying the sugarcane farmers Kshs. 2,200/= per tonne thereof; that the transport charges, cess and milling would have been deducted from the payment that the respondent would have received as gross yield.

6. The appellant denied the alleged loss of Kshs. 486,000/= and asked the respondent's suit be dismissed with costs.

7. The trial Magistrate delivered his judgement on 28/5/2022 and entered judgement in favour of the respondent in the sum of Kshs. 168,798/= for the plant crop and the 2 ratoon cycles. The trial court also awarded the respondent costs and interest from the date of filing the suit.

8. Being aggrieved by the said decision, the appellant commenced this appeal by a Memorandum of Appeal dated 20/6/2022 and preferred 5 grounds of appeal which can be summarized as follows: -

    1. The Learned Magistrate erred in law and in fact when he found and held that the appellant breached the contract made on 27/4/2011 by the appellant's failure to harvest the respondent's plant crop whereas the respondent did not lead evidence of the date when she planted the plant crop;

    2. The trial Magistrate erred in law and in fact when he entered judgement for the respondent for a principal sum of Kshs. 168,798/= which was not specifically pleaded or proved;

    3. That the trial Magistrate erred in law and in fact in awarding damages for the ratoon crops;

    4. That the trial Magistrate erred in law and in fact in failing to make provision for transport, harvesting charges and inputs, when he had the power and discretion to make provisions for such charges;

    5. That the trial Magistrate erred in ordering that interest on the principal be computed from the date of filing suit as opposed from the date of judgement hence he exercised his discretion wrongly.

9. The appellant prayed that the appeal be allowed and the judgement of the lower court dated 7/6/2022 be set aside and in its place an order be made dismissing the respondent's suit with costs. The appellant also prayed that interest be calculated from the date of judgement if the court were to find that damages were due and costs for the subordinate and appellate court be awarded to the appellant.

10. Directions on the appeal were taken that the appeal be canvassed by way of written submissions. Both parties complied.

11. The appellant filed in court its written submissions dated 8/11/2023 on even date. It was submitted that at the time when the contract was made, there was an already existing growing sugarcane; that it was fundamental to establish when the sugarcane was planted; that the fundamental character of the contract was the timelines for maturity and harvesting of the respective cane cycles absent of which, there was no basis for the trial court to find that there was any breach.

12. The appellant further submitted that there was no allegation, pleading or evidence that the appellant's failure to harvest the plant crop compromised the development of the two subsequent cycles; that the

finding of the trial Magistrate was speculative and not anchored in the respondent's pleadings or oral testimony. The appellant relied on the cases of Raila Amolo Odinga & Another vs IEBC & 2 Others (2017) eKLR and David Sironga Ole Tukai vs Francis Arap Muge & 2 Others (2014) eKLR.

13. The appellant contended that the award of Kshs. 131. 264/= was neither pleaded or proved and it was beyond the scope of pleadings and in excess to what the respondent was entitled to; that the trial Magistrate also erred when he failed to make provision for transportation, harvesting charges; that had the contract been performed, the respondent would not have been paid the gross proceeds of the sugarcane but the net proceeds. To support this position, the appellant relied on the findings in South Nyanza Sugar Limited vs David Odongo Odoyo Migori HCCA No. 172 of 2018 and Ezekiel Omambia Omoke vs South Nyanza Sugar Co. Ltd (2018) eKLR.

14. The appellant urged that it led evidence that it assisted the respondent to develop the cane but the subordinate court did not make allowance for such expenses which would have been deducted from the cane proceeds.

15. The respondent filed in court her written submissions dated 13/1/2023 on even date.

16. The respondent submitted that DW1 testified that the appellant offered services to the farmers including but not limited to supply of seed cane for planting and fertilizers for application on the plant crop; that DW1 testified on cross examination that the plant crop was to be harvested on 20/8/2015; that DW1 also issued a certificate of job completion.

17. It was further submitted that at paragraph 8 of the plaint, the respondent pleaded the particulars of the claim which was a total of Kshs. 486,000/= in total. The respondent relied on the cases of John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd (2013) eKLR and South Nyanza Sugar Co. Ltd vs Awino Oreko No. 138 of 2017 which held on what constitutes a special damages pleading in sugar matters.

18. On the compensation for the breach of contract, the respondent submitted that this suit was for growing, sale and harvesting of 3 crop cycles of sugarcane which the respondent lost all of them; that the cases of Adero Ojano vs South Nyanza Sugar Company Ltd (2018) eKLR and South Nyanza Sugar Co. Ltd vs Awino Oreko (supra).

19. On the deductibles, the respondent submitted that the magistrate took into account the survey and seed cane supply fees; that no harvest took place, no transport was undertaken and there was no evidence or proof of the incurred expenses incurred by the appellant.

20. The respondent submitted that interest on special damages ordinarily flow from the date of filing suit but not on the date of judgement. The respondent stated that none of the grounds of appeal are merited and the appeal should be dismissed with costs.

2.1 I have considered the appeal, both parties' submissions and the trial court's record. The following are the issues for determination: -

i. Whether the respondent proved breach of contract.

ii. Whether the respondent was entitled to damages awarded.

iii. When should interest start running.

22. 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 vs Associated Motor Boat Co. Ltd (1968) EA 123.

23. The appellant challenged the decision of the trial Magistrate based on the fact that there was no proof of when the cane was planted since the contract was signed at the time when the cane was already existing. The appellant further stated that it is only proof of when the cane was planted that it could have been said there was a breach of contract.

24. I have considered the agreement dated 27/4/2011. At the face of Schedule A, the contract is not initiated as INCC - "Initially Non - Contracted Contract." which means that it is the farmer who self-developed the farm or CD - "Company Developed which means that it is the company which developed the farm. On 4/3/2021, the respondent testified as PW1. She adopted her witness statement and produced the documents she was relying on as exhibits. She was not cross examined since Counsel for the appellant was not in court. There is no allegation in the appellant's witness statement that the cane was already planted on her land.

25. Justus Otieno George testified on behalf of the appellant as DW1. He stated that the respondent was assisted to plant the cane. To further support this, he produced the debit advice to outgrowers No. 0311994 which shows that survey was done and seed cane was supplied and a job completion certificate dated 25/5/2011 confirming that planting was done.

26. I believe that there is no possibility that the respondent would have provided seed cane and offered planting services if the cane was already existing on the farm. The only logical action which the appellant would have taken was to assess the already existing cane and come up with a report which indicates the age of the cane to determine when it was planted.

27. The initial position the appellant had on why the cane had not been harvested, was that the respondent abandoned the cane. Therefore, the argument that there already existed cane on the respondent's land is an afterthought which has arisen in this appeal and therefore not a relevant ground of appeal.

28. On cross examination, DW1 testified that there was no harvest done and there was no warning letter. This alone, is proof that the appellant is the one who breached the terms of the contract.

29. On the pleadings, at paragraph 8 of the plaint, the respondent pleaded that the she expected a both plant crop and each of the ratoons to yield 135 tonnes at a price of Kshs. 2,500/=. I find that this was a pleading of special damages.

30. On the entitlement of the damages, the failure to harvest plant crop, automatically affects the growth of the 1st and 2nd ratoons. In Kisumu Civil Appeal No. 138 of 2017 South Nyanza Sugar Company vs Awino Oreko the Court of Appeal held: -

> The contract itself was for a period of five years or until one plant crop and two ratoons were harvested on the plot, whichever period would be less. The evidence accepted by both courts below, and which has not been challenged before us, is that Sony was guilty of breach by failing to harvest the plant crop. Once the plant crop was not harvested, it dried and the ratoon crops could not grow. This was a natural consequence of the breach. It is therefore reasonably foreseeable that failure to harvest the plant crop would imperil the subsequent ratoon crop and naturally, so too, the 2nd ratoon crop. In this way a loss of the plant crop was also a loss of the two ratoon crops."

31. Being bound and guided by the finding of the Court of Appeal, I find that as a result of the breach of contract by the appellant, the respondent was entitled to compensation of the plant crop and each of the ratoons.

32. On the award of damages, the trial Magistrate considered the cane yield report prepared by the appellant. DW1 also confirmed that the cane yields in Kakmasia area, would be 66.56 per hectare for the cane and 48.76 tons per hectare for the ratoon crops. This was the figure adopted by the trial court. Both parties also agreed that the price per tonne was Kshs. 2,500/=. The trial Magistrate further took into account the costs of the survey and seed cane in computing the net award due to the respondent. The cumulative figure was Kshs. 168,798/=. I find that this was a proper finding based on the evidence produced before the trial court.

33. On the other deductions like transport, harvesting, it is the position of this court that these are matters of fact which have to be produced in evidence for them to be applicable. The appellant itself has rightly submitted that had the contract been performed, the expenses would have been taken into account and deductions made. Since the contract was not performed, it is not legally sound to make deductions actions not performed.

34. On the issue of interest, the Court of Appeal in South Nyanza Sugar Company vs Awino Oreko (supra) held: -

> The objective for awarding interest is to ameliorate the loss suffered by a party who has been kept out of use of money that would otherwise be due to him... The indubitable outcome is that interest on special damages will be from the date of filing of suit as the money would have been due to the claimant at the very least on that date. General damages, which is the product of an assessment process by the court, is due on the date when the assessment is made which is in the judgment date... The contract was then subject to the provisions of the repealed Sugar Act...the effect of paragraph 9 (1) (e) as read together with 9 (2) of the Second Schedule of the Act was that a miller who failed to pay an out grower institution within thirty days of sugar cane delivery was liable to pay interest. The spirit is to compensate the farmer by way of interest for late payment. I see no reason why the same principle should not be extended to where there is breach by the miller like here."

35. The foregone position is that the judgement and decree of the Hon. R.K. Langat dated and delivered on 28/5/2022 in PMCC No. 279 of 2017 is merited and hereby upheld.

3. The appeal is hereby dismissed with costs to the respondent.

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

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Mr. Odero for the Appellant.

No appearance for the Respondent.

Emma & Phelix Court Assistants.