South Nyanza Sugar Co. Ltd v Migori (Civil Appeal E028 of 2021) [2024] KEHC 4132 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4132 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E028 OF 2021

RPV WENDOH, J

APRIL 25, 2024

BETWEEN

SOUTH NYANZA SUGAR CO. LTD .... APPELLANT

AND

JOSEPH ARUNGA MIGORI .... RESPONDENT

(An Appeal from the Judgement and Decree of Hon. M.O. Obiero (SPM) dated and delivered on 24/9/2020 in Migori CMCC No. 1277 of 2016)

JUDGMENT

1. Joseph Arunga Migori (the respondent) commenced this appeal against the judgement and decree of the Hon. M. O. Obiero (SPM) dated and delivered on 24/9/2020. The respondent is represented by the firm of Odingo & Co. Advocates while South Nyanza Sugar Co. Ltd (the appellant) is represented by the firm of Okong'o Wandago & Co. Advocates.

2. This appeal arises from the proceedings in the lower court which were commenced by the respondent. The respondent filed a suit by a plaint dated 20/6/2016. The respondent pleaded that on 3/8/2007, he entered into a written agreement with the appellant to grow sugarcane on Plot No. 42 Field No. 12 situated at K/Masia Sub Location, Awendo Sub - County within Migori County. The respondent stated that he was assigned account number 264023.

3. The respondent pleaded that it was a term of the agreement that it was to remain in force for a period of 5 years until the plant crop or the two ratoons are harvested whichever period was less. It was further pleaded that the plant crop would be harvested at the age of not less than 24 months and 22 months for the ratoons. The respondent contended that he developed the 1st ratoon but the appellant failed to harvest the same.

4. The respondent pleaded that the plot could yield a mean average of 38 tonnes per hectare and one tonne was valued at Kshs. 2,500/=. The respondent's claim was for the loss of the 1st and 2nd ratoons, costs of the suit, interest and any other relief which the court deemed fit.

5. The appellant entered appearance and filed a statement of defence dated 22/6/2017 in which he denied the allegations in the plaint and in particular the loss of the estimated expected yield of 38 tonnes of sugarcane from each of the three (3) crop cycles. The appellant generally put the respondent to strict proof.

6. The matter proceeded for hearing. The respondent testified as PW1. The appellant did not call any witnesses to prosecute its defence. The trial Magistrate delivered his judgement on 24/9/2020 and found merit in the respondent's case. He awarded the respondent Kshs. 113, 577.20 as compensation for the two ratoon cycles, costs of the suit and interest.

7. Being dissatisfied with the judgement and decree of the trial court, the appellant commenced this appeal and preferred 8 grounds of appeal in its memorandum of appeal dated 15/4/2021 which can be summarized as follows: -

   a. The learned trial Magistrate erred in law and in fact in failing to find that the claim before him was not proven in law and in failing to dismiss the suit for bad pleadings;

   b. That the trial court erred when it awarded the respondent damages in the sum of Kshs. 113,577.20/= for breach of contract, when there was no proof of such damages having been suffered by the respondent in consequence of that breach of contract, on the basis only of estimated yields and losses which were speculative;

   c. The trial court erred when it awarded the respondent compensation for the 1st and 2nd ratoon whilst the respondent never developed the 2nd ratoon crop.

8. The appellant prayed for:-

   i. The respondent's suit in the lower court be dismissed.

   ii. The compensation (damages) due to the respondent be re – assessed.

   iii. Costs of the lower court suit and appeal be awarded to the appellant.

   iv. Interest be calculated from the date of judgement if the court finds that damages are due.

   Directions on the appeal were taken that the appeal be canvassed by way of written submissions. None of the parties complied. I have considered the grounds in the appeal and the record in the trial court.

   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.

9. The issues for determination which arise therefrom are:-

   a. Whether the respondent proved his case.

   b. Whether the respondent was entitled to damages of the two ratoon crops.

10. It is not disputed that the appellant did not call witnesses in support of its case. In Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu (2012) eKLR, Odunga, J (as he was then) held as follows on the consequences of failure by a party to call evidence: -

> What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated: -
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> "Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

11. Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

12. Be that as it may, the standard of proof still lies on the respondent to prove his case on a balance of probabilities before the court can make any favorable orders on his behalf.

13. The respondent's case is that he developed the 1st ratoon which was not harvested thereby affecting the growth of the 2nd ratoon. He pleaded that the cane was planted on Plot No. 42 Field No. 12 situated at K/Masia Sub Location, Awendo Sub - County within Migori County. The expected yield was to be 38 tonnes.

14. A perusal of the documents produced shows that the respondent did not lead evidence to show how he concluded that the expected tonne was to be 38 tonnes. The trial court used an average of 32 tonnes to calculate the expected yields. The proceedings shows that the respondent produced a cane yield report (PEXH 4) but I have not been able to trace the said report.

15. This being a claim for special damages, it is trite law that the same must be specifically pleaded and proven. The Court of Appeal in Douglas Odhiambo Apel & Another vs 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."

16. In South Nyanza Sugar Company Ltd vs 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 1st ratoon were not supported by any evidence. Unless there are admissions or agreed facts, submissions are not a substitute for proof of facts.

17. From the foregone, it is my finding that the particular yields for the ratoon crops were not proven and there was no basis for finding that the yield would have been 32 tonnes. The finding was made in error and is hereby set aside.

18. Therefore, the judgement and decree of the Hon. M.O. Obiero dated and delivered on 24/9/2020 in Migori CMCC No. 1277 of 2016 is hereby set aside.

    The appeal is merited with costs to the appellant.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 25TH DAY OF APRIL, 2024.

R. WENDOH

JUDGE

Judgment delivered in the presence of;

No appearance for the Appellant.

No appearance for the Respondent.

Emma Court Assistants.