Nyangala v South Nyanza Sugar Company Ltd (Civil Appeal 15 of 2023) [2024] KEHC 17250 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 17250 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 15 OF 2023

RPV WENDOH, J

MAY 30, 2024

BETWEEN

SAMSON ODHIAMBO NYANGALA .... APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD .... RESPONDENT

(n Appeal from the Judgement and Decree of Hon. R.K. Langat Principal Magistrate (PM) Rongo, dated and delivered on 30/3/2023 in Rongo PMCC No. 422 of 2018)

JUDGMENT

1. This appeal is against the judgement and decree of Hon. R.K. Langat (PM) dated and delivered on 30/3/2023 commenced by Samson Odhiambo Nyangala (the appellant).
2. The appellant filed a suit by a plaint dated 23/8/2018. It was pleaded that on 26/7/2013, he entered into a written agreement with South Nyanza Sugar Company Limited (the respondent) to grow sugarcane on Plot No. 524, in Field Number 303 in Kogelo West Sub Location measuring 1.0 hectares and was assigned account number 149937.
3. It was pleaded that it was a term of the contract that the contract 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 is 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 appellant particularized the breach of contract by the respondent as failure to harvest the plant crop thereby compromising the development of the 1st and 2nd ratoon crop (s); deliberately and recklessly refusing to give consent to the appellant to dispose of the developed sugarcane to 3rd parties in an open market; deliberately neglecting to harvest the cane hence leading to drying up of the cane in the farm and failure to grant authority to the appellant to harvest when it was mature.

5. The appellant further pleaded that for the aforesaid reasons, he lost 135 tones of the plant crop and 135 tones of the 1st and 2nd ratoon crops; that the price per ton was Kshs. 4,300/=. The appellant prayed for judgement against the respondent for compensation for the three unharvested crop cycles, costs of the suit, interest at court rates and any other relief the court may deem just and expedient to grant.

6. In its defence dated 5/2/2018, the respondent denied each and every particulars of the claim as pleaded by the appellant in his plaint and put him to strict proof thereof. The respondent averred that if the appellant suffered any loss, the same was due to the appellant's misfortunes by failing to notify the respondent that the cane had matured to warrant the same to be harvested. The respondent prayed the appellant's suit be dismissed with costs.

7. The trial Magistrate delivered his judgement on 30/3/2022, in favour of the appellant in the sum of Kshs. 59,761.94/= being payment for the plant crop. The trial court also awarded the appellant 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 23/8/2018 and preferred 3 grounds of appeal which can be summarized as follows: -

    1. The Learned Magistrate erred in law and in fact in reaching the decision that the appellant was not entitled to damages in respect of the 1st and 2nd ratoon;

    2. The trial Magistrate erred in law and in fact in deducting harvesting and transport charges from the appellant's final award while no evidence was tendered that such costs were incurred hence reaching a wrong conclusion.

9. The appellant prayed that the appeal be allowed and an order for damages be made in favor of the appellant for the 1st and 2nd ratoons together with costs and interest from the date of filing suit, judgement on the statutory deduction be set aside and the same be substituted with a sum of Kshs,. 144, 027.84/= being the award allowed by the court for plant crop before the deduction, any other order and costs of this appeal be awarded to the appellant.

10. Directions on the appeal were taken that the appeal be canvassed by way of written submissions. It is only the appellant who complied by filing written submissions dated 25/4/2023. I have duly considered the submissions.

11. 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.

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

    a. Whether the appellant should have been compensated the 1st and 2nd ratoons.

    b. Whether the findings on the deductions by the trial Magistrate was justified.

13. There is no dispute that a contract for the planting and harvesting of the ratoon crops existed between the parties.

14. It is now a settled principle that the failure to harvest plant crop, automatically affects the growth of the 1st and 2nd ratoons. It is also settled that a farmer will automatically be entitled to damages of the 1st

and 2nd ratoon crops. In *South Nyanza Sugar Company Limited v Owino Oreko* (Civil Appeal No. 138 of 2017) (2022) KECA 570 (KLR) (24 June 2022) (Judgment) 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."

15. 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 both the ratoons crops.

16. The trial Magistrate considered that plant crop should have been harvested on or before 26/7/2015. Each of the ratoon crops ought to have been harvested after 22 months. Therefore, the first ratoon should have been harvested on or before 26/4/2017. The second ratoon should have been harvested 22 months after harvest of the 1st ratoon which is on or before 26/1/2019. According to the price list produced by the respondent, which was also adopted by the trial court, the cost of the sugarcane as of 15/4/2017 was Kshs. 4,310/= per tonne. The yields report produced by the respondent puts the expected yields for the ratoon crops at 51.16 tonnes/Ha.

17. However, there is no price list indicating the price list of the 2nd ratoon. This being a pleading of special damages, there has to be proof of the same produced. The Court of Appeal in *Douglas Odhiambo Apel & Another v Telkom Kenya Limited* Nairobi Civil Appeal No. 115 of 2006 (2014) eKLR, 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."

18. 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 1st ratoon were not supported by any evidence. Unless there are admissions or agreed facts, submissions are not a substitute for proof of facts.

19. From the foregone, the conclusion is that in as much as the appellant is entitled to compensation for the two ratoons crops, failure to prove the prevailing and/or market prices for the 2nd ratoon at the time of harvest, disentitles them to damages of the 2nd ratoon.

20. On the deductions made, this court has taken the position that the costs for harvesting and transport are matters of fact which must be proved in law. The respondent having failed to harvest the plant crop, it cannot be expected that the same should be deducted from the final computation. The appellant has conceded that the only inputs supplied by the respondent were seed cane and fertilizer. The findings on the deduction of harvest and transport charges is hereby set aside.

21. The final computation on what the appellant is entitled to is as follows:-

Plant Crop

0.69 Ha × 65.23 tons/ha × 3,200 = Kshs. 144, 027.84/=.

Less

Survey - Kshs. 276/=.

DAP - Kshs. 7, 100/=.

Seed Cane - Kshs. 35, 025.50/=.

Total - Kshs. 104,626.34/=.

1st Ratoon

0.69 Ha × 51.16 tons/ha × 4, 310 = 152, 144.72/.

Total - Kshs. 256,771.06/=

22. The foregone position is that the appeal partially succeeds. The judgement and decree of the Hon. R.K. Langat dated and delivered on 30/3/2023 in PMCC No. 422 of 2018 is hereby set aside in the following terms:-

a. The appellant is entitled to damages for both the plant crop and the 1st ratoon.

b. The appellant is awarded damages on the plant crop and 1st ratoon a total of Kshs. 256,771.06/= (see tabulation above).

c. The interest on the award of Kshs. 256,771.06/= will run from the date of filing suit.

d. The Appellant is awarded costs of the suit and half costs of this appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 30TH DAY OF MAY, 2024.

R. WENDOH

JUDGE

Judgment delivered in the presence of;

No appearance for the Appellant.

No appearance for the Respondent.

Emma & Phelix - Court Assistants.