REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 292 of 2006

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

AND

DAVID OTIENO ONGACHO..... RESPONDENT

(Being an appeal from the ruling of Hon. Wewa, SRM in Kisii CMCC No.60 of 2004 delivered

on 19th April 2006 on a Preliminary Objection raised on 15th November 2005)

JUDGMENT

1. The respondent herein, David Otieno Ongacho was the plaintiff in the lower court. He filed suit seeking to be paid damages for alleged breach of contract entered into between himself and the appellant herein, South Nyanza Sugar Company on or about 6th February 1998. Under the alleged agreement, the respondent was contracted by the appellant to grow and sell to the appellant sugarcane grown on the respondent's parcel of land being plot Number 347 in field Number 61, in North Sakwa Location, Kakmasia sub location measuring 0.8 hectares. The respondent prayed for judgment against the appellant for:-

a) Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of sugar cane on 0.8 hectares of land at the rate of 135 tonnes per hectare and payment of Kshs.1730/= per tone for the expected three crops.

b) Costs of this suit.

c) Interest thereon at court rates until payment in full.

d) Any other relief this Honourable Court deems just and expedient to grant.

2. The appellant entered appearance and filed Statement of defence on 11th March 2004. The Appellant denied that it was entrusted with the development, improvement, harvesting and sale of sugarcane from Sugar cane growing and farming community around Awendo area. The appellant also denied the existence of any agreement between itself and the respondent as pleaded in the plaint or at all. It also denied that it was in breach of any duty as pleaded in the plaint. Further, the appellant averred that if there was any breach of contract, then the breach was committed by the respondent who totally failed to maintain his first crop to an extent that the cane was overshadowed and dwarfed by weeds and totally destroyed and was thus not available for any economical harvest. It was also the appellant's case that the

respondent did not inform the appellant that there was any cane to be cut and/or harvested so as to be liable for failing to harvest such cane. The appellant asked the trial court to dismiss the respondent's suit with costs, contending further that the plaint as drawn and filed was flawed and bad in law for being an affront to the rules of pleadings, otherwise gibberish and revealed no cause of action against the appellant.

3. While the case was proceeding before the trial court, and the plaintiff was being cross-examined, on the 15th November, 2005 the appellant raised a preliminary objection touching on the verifying affidavit which was alleged not to have been signed by the respondent; but by his agent. The respondent stated that he gave permission to his agent to sign the affidavit because he himself could not read.

4. The preliminary objection raised by counsel for the appellant was to the effect that there was no suit before court, since the verifying affidavit had not been sworn in accordance with **Order 7 rule 1 (2)**of the **CPR**. Counsel for the appellant urged the court to strike out the suit pursuant to **Order 7 rule 1 (3)** of the **CPR**.

5. In reply to the preliminary objection, counsel for the respondent, Mr. Oduk submitted that the contract agreement allowed the respondent's agent to sign the affidavit on behalf of the respondent, and that in the circumstances, the court should not bow to technicalities, but should do substantial justice to parties. Reliance was placed on **Amira (K) Ltd. – vs- National Irrigation Board** (post) in which it was ruled that the courts should endeavour to do substantial justice to parties instead of dealing with cases under summary procedure. It was further submitted that the defect complained of was curable as it did not go to the root of the case or the jurisdiction of the court.

6. In reply to submissions by counsel for the respondent, counsel for the appellant submitted that since the respondent had admitted that he did not personally file a verifying affidavit, the suit became a non-suit which should be struck out.

7. After carefully analyzing the submissions and the law cited to it, the trial court found the preliminary objection not merited and dismissed it with costs to the appellant.

8. The appellant was aggrieved by the said decision and brought this appeal which is predicated on the following 5 grounds:-

1. The Learned Trial Magistrate erred in law and infact in dismissing the appellant preliminary objection notwithstanding the cogent point of law raised.

*2. The Learned Trial Magistrate erred in law and in fact in failing to acknowledge the fact that under **Order VII Rule 1 (2)**of the **Civil Procedure Rules**, an affidavit verifying correctness of the averments contained in the plaint must be signed by the plaintiff.*

3. The Learned Trial Magistrate erred in law and in fact in failing to acknowledge the fact that the plaintiff having admitted at cross examination that he did not sign the verifying affidavit then, the suit was never verified with an affidavit as is mandatory in law and was thus defective and deserved striking out.

4. The Learned Trial Magistrate erred in law in not setling out points for determination and reasons for the court decision on each enumerated point.

5. The ruling and decision was against the law and the points raised before the trial magistrate.

The appellant prays that the appeal be allowed and the trial magistrate's ruling dated 19th April 2006 dismissing the preliminary objection be substituted with an order striking out the plaint dated 21st January 2004 with costs to the appellant.

9. When this appeal came up for directions, the parties' advocates agreed to prosecute the appeal by way of written submissions. The submissions together with relevant authorities were duly filed and are on the record. I have carefully read through the same. I have also carefully read through all the pleadings as filed, and have also carefully read through the proceedings and ruling of the trial court.

10. This is a first appeal and that being the case, this court is under a duty to consider both matters of fact and of law. On facts, this court, as the first appellate court, is under a duty to analyze the evidence afresh, evaluate it and arrive at its own independent conclusion, but always remembering the fact that it has no opportunity of seeing and hearing the witnesses or as is the case herein, of hearing counsel as they presented their submissions. This court has to make an allowance for this special situation of not having that privileged position of the trial court. See **Selle & another –vs- Associated Motor Boat Company Ltd. & others [1968] EA 123** and **Peters –vs- Sunday Post [1958] EA 424**.

11. In the present appeal, the issue for determination is whether the absence of a Verifying Affidavit or presence of a defective verifying affidavit should have led to the striking out of the suit by the trial court.

12. The appellant contends that the suit in the lower court should have been struck out, and avers that the trial court was wrong in dismissing the appellant's preliminary objection despite the cogent point of law it raised. Reliance was placed on the persuasive authority in the case of **Mr. Debo Kokoorin –vs- Patigi Local Government Appeal NO. CA/IL/69/2007**where the court expressed itself thus:-

"It is trite law to state that a court in which a preliminary objection is raised is duty bound to first express in writing whether it agrees with the preliminary objection or not. It is a cardinal principal of administration of justice to let a party know the fate of his application whether properly or improperly brought before the court. It would amount to unfair hearing to ignore an objection raised by a party or his counsel against any step in the proceedings."

13. Counsel thus argued that the actions by the learned trial magistrate were not only bad in law but also prejudiced the case of the appellant. In response, counsel for the respondent submitted that counsel for the appellant only made an observation touching on the verifying affidavit arising out of the answer he elicited from the plaintiff (respondent) in the course of cross examination during the trial. Counsel submitted that though the observations were not factual, the learned trial magistrate nonetheless heard both counsel on the point and gave her considered ruling dismissing the preliminary objection.

14. This court has carefully looked at the lower court record and notes that after the preliminary objection was raised, the trial court heard both counsel and thereafter gave its ruling. The court is aware that jurisdiction is everything and where an issue arises as to the jurisdiction of the trial court or as to the propriety of any pleading being before the court, the trial court must address the issue forthwith. In the instant case, the trial magistrate heard both counsel on the preliminary objection raised by the appellant and thereafter gave her considered ruling. I therefore find that the appellant's complaint as per ground 1is not well founded. The same is accordingly dismissed.

15. With regard to ground 2 of the appeal, counsel for the appellant submitted that the learned trial magistrate erred in law and fact in not observing the provisions of **Order VII Rule 1 (2)** of the **[old] CPR** which provides that **"the plaint shall be accompanied by an affidavit sown by the plaintiff verifying the correctness of the averment contained in the plaint."** Counsel submitted that in the instant case, the verifying affidavit was not sworn by the respondent himself and that based on the holding in the case of **Peninah Sanganyi –vs- Ram Hospital & 2 others [2010] e KLR**, the preliminary objection in the instant case should have been allowed and the plaint struck out. Reliance was also placed on the case of **Mulusia Land Consultants & another –vs- Industrial Development Bank Ltd. & 2 others [2005] e KLR**, where the plaint was struck out as it was said it could not stand on its own since the verifying affidavit did not comply with the provisions of **Order VII Rule 1 (2)** of the **[old]**

CPR. Further, counsel submitted with regard to ground 3 that because the respondent admitted that he did not personally sign the verifying affidavit, then the suit should have been struck out as it did not have an affidavit verifying the averments in the plaint. Reliance was placed on two cases: **Lawrence Kipchumba Yego & another –vs- Mugoya Construction & Engineering Ltd [2005] e KLR** and **Supersonic Travel & Tours Ltd & 3 others –vs- National Bank of Kenya Ltd [2005] e KLR** in which the suits were struck out for reason of defective verifying affidavit.

16. In response to the above submissions, counsel for the respondent submitted that grounds 2 and 3 of the appeal are erroneously presented, the truth being that there was indeed a verifying affidavit on the record, the only issue being that its legitimacy was challenged but not disputed or disproved. Counsel argued further that defence did not prove as a fact that the signature of the verifying affidavit did not belong to the respondent. Counsel also contended that even if it was shown that the respondent did not sign the verifying affidavit, that fact alone would not lead to the plaint being struck out. Reliance was placed on **Order VII Rule 1 (3)**of the **[old] CPR** which reads:-

"1(3) the court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule."

17. Reliance was also placed on the following cases: **Amira (K) Ltd. –vs- National Irrigation Board [2001] 2 EALR 333** where Mwera, J. refused to strike out a suit on the ground that a verifying affidavit did not state the place at which it was sworn. The court held that the omission was not a fundamental defect and that it could be overlooked.

18. And in **Masefield Trading (K) Ltd. –vs- Kibui [2001] 1 EALR 431**, Justice Hewett refused to strike out a plaint on the grounds that the verifying affidavit had been sworn by a person under a power of attorney. The learned judge held, *inter alia*, that:-

"The permissive language of order VII Rule 1 (3) of the CPR leads to the conclusion that despite its mandatory terms, a breach of Order VII Rule 1 (2) of the CPR is an irregularity which can be waived or cured."

And in **Microsoft Corporation –vs- Mitsumi Computer Garage Ltd.[2001] 2 EALR 460**, Ringera J (as he then was) refused to strike out a suit on account of a defective verifying affidavit stating his opinion as follows:-

"Rules of Civil Procedure are the handmaidens and not the mistresses of justice. They should not be elevated to a fetish. It would be elevated form and procedure to a fetish to strike out the suit on account of the defective affidavits -------. The word "may" leaves the question of whether a suit filed without a verifying affidavit should be struck out to the discretion of the Judge. A fortiori, the error is also excusable in the event of the affidavit being defective."

19. In light of the above conflicting authorities and bearing in mind the case of **DT Dobie & Company (K) Ltd. –vs- Muchina [1982] KLR 1**, where it was held that a suit should only be struck if it is so weak that it is beyond redemption and incurable by amendment, I am of the considered view that the trial magistrate was perfectly in order to dismiss the preliminary objection. In addition to the authorities cited herein, this appeal was heard at a time when the provisions of **sections 1A**and **1B**of the **CPA, Cap 21**, are in full force and effect, and these provisions go a long way in giving support to the trial magistrate's findings that courts should endeavour to do substantial justice to the parties in the matter before it. In the instant case, any irregularity in the verifying affidavit was thus curable. The respondent would be at liberty to file a fresh verifying affidavit if the affidavit on record was found to be defective. For the above reasons, grounds 2 and 3 are found to have no merit and are accordingly dismissed.

20. In ground 4 of the appeal, appellant's complaint is that the learned trial magistrate erred in law in not setting out the points for determination and reasons for the court decision on each enumerated point and that this error of omission on the part of the learned trial magistrate amounts to injustice. Ground 5 was to the effect that the decision of the trial court was against the law and the points raised before the trial magistrate. Counsel submitted that the trial magistrate's ruling and judgment were not in any way influenced by either the law or the points raised before her at the trial. On the above grounds, counsel submitted that what the learned trial court did amounted to repugnancy of justice.

21. In response to the appellant's submissions on grounds 4 and 5, counsel for the respondent submitted that the record clearly shows that the preliminary objection on the want of affidavit or proper affidavit was appropriately set out and dealt with by the trial court as can be seen at pages 20 and 21 of the Record of Appeal. As regards ground 5, counsel submitted that this ground is a mere repetition of grounds 2 and 3 and that the same ought to be struck out. Finally, counsel submitted that there is no valid appeal before this court because while the ruling of the trial magistrate on the preliminary objection was delivered on 19th April 2006, the ruling appealed from as per the Memorandum of Appeal is stated to be dated 14th March 2006. Further it was contended that the Record of Appeal does not contain a certified copy of the order appealed from and that such an omission is fatal to the appeal. Reliance on this point was put on **Order 42 rule 2** of the **CPR, 2010** which reads:-

"Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed."

Counsel also submitted that the respondent was not invited to take part during directions.

22. I shall start with the last point that the respondent was not invited to take part during directions. Clearly, the record of 28th October 2010 shows that the Respondent's counsel, Mr. Oduk, was represented by Mr. Moracha advocate who took part in the directions. The contention by counsel for the respondent that the respondent was not invited to take part in the directions is therefore rejected as being without basis.

23. Now, back to grounds 4 and 5 of the appeal. I have carefully perused the record of the lower court as well as the ruling of the trial court. Upon perusal and consideration, I do agree with counsel for the respondent that the only point raised on the preliminary objection namely the want of a verifying affidavit signed by the respondent herein was appropriately set out by the trial court and on pages 20 and 21 of the Record of Appeal, the trial court dealt with the issue. On page 20, the trial court set out the issue for determination, set out the submissions by parties, considered the provisions of **Order VII Rule 1 (2)** and **(3)** of the **[old] CPR** and concluded that in her considered opinion, the defect that formed the basis of the preliminary objection was an irregularity which could be cured or waived and did not amount to a nullity.

24. I am therefore satisfied from the reasons given above that ground 4 and 5 of the appeal have no merit. The two grounds are accordingly dismissed.

25. I also note that a certified copy of the order appealed from was not filed together with the Memorandum of Appeal, nor was any attempt made thereafter by the appellant to file the same. The provisions of **Order 42 Rule 2** of the **CPR**are couched in mandatory terms and the appellant had to comply with it. The order filed with the Memorandum of Appeal as reflected at pages 48 and 49 of the Record of Appeal is irrelevant. The appellant ought to have filed a Supplementary Record of Appeal after filing the amended Memorandum of Appeal on 30th September 2011, and having failed to do so, the

appeal as filed was fatally defective.

26. In the premises and for the reasons above given, I find that this appeal is devoid of any merit. The same is accordingly dismissed with costs to the respondent.

27. Finally, the delay in delivering this judgment is very much regretted. The same was caused by the court's involvement in other pressing judicial work and particularly the hearing and determination of the more than125 boundary disputes filed against the Independent Electoral and Boundaries Commission between the months of May and July 2012.

Dated and delivered at Kisii this 25th day of October, 2012

RUTH NEKOYE SITATI
JUDGE.

In the presence of:
Mr. Ojiro (present) for Appellant
Mr. Oduk (absent) for Respondent
Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE