South Nyanza Sugar Company Ltd v Agutu (Civil Appeal 31 of 2019)
[2022] KEHC 14135 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 31 OF 2019

RPV WENDOH, J

OCTOBER 13, 2022

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD ..... APPELLANT

AND

CONSOLATA ACHIENG AGUTU ..... RESPONDENT

(An Appeal from the Judgement of the Hon. R.K. Langat (RM) at Rongo in CMCC No. 150 of 2016) JUDGMENT)

JUDGMENT

1. The appellant, South Nyanza Sugar Company Limited preferred the instant appeal dated January 24, 2019 against the judgement and decree of the Hon RK Langat (RM) dated and delivered on December 30, 2019. The appellant is represented by the firm of Otieno Yogo & Co Advocates. The respondent, Consolata Achieng Agutu, is represented by the firm of Kerario Marwa & Co Advocates.

2. By a plaint dated January 13, 2016, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for damages for breach of contract, cosst of the suit, interest from May 13, 2010 and any other relief. It was the respondent's case that by an agreement dated May 13, 2010, the appellant contracted her to grow and sell to it sugarcane on her land parcel being plot number 33 in K/Masia Sub - Location measuring 0.4 hectares; that the respondent was assigned account number 264937 and she planted the cane as agreed. It was the respondent's further case that the agreement would commence on May 13, 2010 and remain in force for a period of five (5) years or until one plant crop and two ratoon crops of cane are harvested on the plot whichever period shall be less.

3. It was contended that in breach of the said agreement, the appellant failed to harvest the cane when the same was mature and ready for harvesting leading to waste and loss. For the aforementioned reasons, the respondent alleged that she suffered loss and expected profit from the three-crop cycles.

The respondent further pleaded that the plot was capable of producing an average of 40 tonnes and the rate of payment applicable then was Kshs 3,128/=per tonne.

4. The appellant filed a statement of defence dated February 16, 2016. The appellant denied the existence of the contract or that it failed to harvest any plant or ratoon crops. The appellant further averred that it was its policy not to cut or harvest poorly maintained cane; that the respondent failed to employ the recommended husbandry to the extent that the cane was overshadowed and dwarfed by weeds and totally destroyed, hence it was entitled contractually, not to harvest. The appellant urged the trial court to dismiss the suit.

5. The suit was heard by way of via viva voce evidence on July 31, 2017. The respondent testified in support of her case while the appellant defended its case through Richard Muok. At the end of the hearing, the trial court found in favour of the respondent and awarded the respondent Kshs 205, 296.90 together with costs of the suit and interest to run from the date of filing suit.

6. The appellant was aggrieved by the trial court's decision and filed the instant appeal on the following four (4) grounds as follows: -

    i. The trial magistrate erred in law and in fact in failing to find that the respondent was not entitled to interest from the date of filing suit;

    ii. The trial magistrate erred in law and in fact by failing to take into account the fact that the respondent had failed to file his case within time and to cut out and remove burnt cane to allow for the ratoons to develop;

    iii. The trial magistrate erred in law and in fact by wrongly evaluating the evidence on record and hence coming to a wrong conclusion;

    iv. The trial magistrate erred in law and in fact in failing to evaluate the duties of parties in the agreement signed between the parties.

7. The appellant prayed that this appeal be allowed and the judgement of the lower court be set aside and in its place an order be made dismissing the respondent's suit with costs.

8. Directions on the appeal were taken that the appeal be canvassed by way of written submissions and both parties complied. I have duly considered the rival positions taken by both parties.

9. This being the first appellate court, it has the 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. See the decision in *Selle & Another vs Associated Motorboat Co Ltd (1968) EA 123*.

10. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another (1988) eKLR* where the Court of Appeal held:-

> ' An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution.'

11. I have carefully considered the memorandum of appeal, record of appeal and the parties' submissions. The issues for determination are: -

    i. Whether the respondent proved breach of contract.

    ii. Whether the appellant was entitled to damages.

    iii. When should interest start to run?

12. On the first issue, the appellant submitted that the respondent failed to prove the breach of contract by failing to adduce evidence in the form of photos of mature cane and an expert report, therefore, breaching clause 3(3.8) of the agreement. The appellant further submitted that the respondent failed to avail the ratoon crops thereby breaching clause 3.1.2 of the agreement. It was also submitted that the respondent admitted in his testimony that the appellant had assisted her in developing the cane and the same should have been deducted.

13. The appellant submitted that the duty to harvest the cane rested on the respondent and relied on the case of *Philip Okoth Matuga vs South Nyanza Sugar Co Limited Civil Case No 97 of 2012*. In the event this court disagreed with the appellant's submissions, the appellant urged this court to find that the respondent failed to mitigate its loss and relied on the case of *African Produce Ltd vs Kisorio Civil Appeal No 264 of 1999*.

14. The suit was based on the contract entered into between the parties dated May 13, 2010. The terms thereof were that the harvest of the plant crop was to be done not later than 24 months, the 1st ratoon not later than 22 months after the harvest of the plant crop and the 2nd ratoon not later than 22 months after the harvest of the 1st ratoon. The respondent testified that she was supplied with the fertilizer and cane seedlings. The appellant did not controvert this assertation but faulted the respondent for failing to avail the crop to the appellant.

15. On the duty to harvest, it is now well settled that the duty rests with the miller to harvest (appellant herein). The parties entered into the contract when the *Sugar Act* was operational. The place of statues in contractual agreements was discussed by the Court of Appeal in the case of *Njogu & Company Advocates v National Bank of Kenya Limited (2016) eKLR* where it was held:-

> Any contract that contravenes a statute is illegal and the same is void, ab initio and is therefore unenforceable. The logical conclusion of this finding would be that the contract between the appellant and the respondent regarding the payment of legal fees is unenforceable.'

16. Similar findings were found by Mrima J in the case of *Civil Appeal No 41 of 2016 Jane Adhiambo Atinda vs South Nyanza Sugar Co Ltd (2017) eKLR* which is persuasive to this court. Section 29 of the *Sugar Act* provides for sugar agreements. Under section 6 (a) of the second schedule, it provides the duty of the miller as follows:-

> harvest, weigh at the farm gate, transport and mill the sugarcane supplied from the growers' fields and nucleus estates efficiently and make payments to the sugar-cane growers as specified in the agreement;'

17. Having found that the appellant did provide the seedlings and the fertilizers, the duty to harvest fell upon it; it therefore follows that the appellant ought to have taken the initiative to harvest the plant crop not later than 224 months from the date of the agreement as per the terms of the contract. The appellant failed to fulfil this part of its obligation and therefore it cannot be heard to say that it is the

respondent who failed to fulfil her part of the contract. Supposing the appellant went to the plot to harvest the sugar cane as required, it would have been easy to establish whether or not the respondent had planted and taken care of the plant cane to the required standard. It is an impossible task which the appellant now wants to place on the respondent to have proved its case through photographs as proof that it planted the plant crop. It is the finding of this court that it is the appellant who breached the terms of the contract. The respondent proved its case on the allegations of breach of contract.

18. In finding in favour of the respondent, the trial court relied on the decision Civil Appeal No 10 of 2016 *South Nyanza Sugar Co Ltd vs Joseph O Onyango* where Mrima J found that failure to harvest the plant crop hindered the development of the ratoons. Therefore, a farmer is entitled to compensation to the same. This court adopts the same position. The trial magistrate relied on the report from appellant on the prevailing cane prices at that time. I find that the magistrate did not err in finding in favour of the respondent on the reliefs sought.

19. On the statutory deductions, the appellant faulted the trial court for failing to deduct them from the damages awarded. The statutory deductions which the appellant has listed herein are related to the harvesting, transportation and other levies. If the plant crop was not harvested in the first instance, there is no justification in expecting that the deductions should apply. The deductions to be applied are a matter of fact which should be proved first. I find that the trial magistrate did not err in disallowing the deductions to be applied. The only applicable deductions in this instance would have been the input of the fertilizer and seedlings which were supplied to the respondent if at all the appellant produced the receipts in the trial court to prove the same.

20. On the issue of interest, it is trite law that in awarding interest, it is a matter of discretion. The respondent submitted that the nature of the claim is that of a liquidated amount and it is in the nature of special damages. Therefore, interest should be awarded from the date of filing the suit. The respondent relied on the findings of Mrima J in *Millicent Adhiambo Odingo vs South Nyanza Sugar Co Ltd Migori HCCA No 88 of 2017* and *Edward Kennedy Alolo vs South Nyanza Sugar Co Ltd HCCA No 87 of 2016*. In both cases, the learned judge held that in cases of this nature, the interest should run from the date of filing the suit. The Court of Appeal in the case of *John Richard Okuku Oloo vs South Nyanza Sugar Co Ltd Civil Appeal No 278 of 2010* also found that interest should run from the date of filing the suit. I see no need to depart from the same.

21. The upshot therefore is that the appeal is devoid of merit and the same is dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 13TH DAY OF OCTOBER, 2022.

R WENDOH

JUDGE

Judgment delivered in the presence of;

Mr Odhiambo for the Appellant.

Mr Bunde for the Respondent.

Nyauke Court Assistant.