REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 7 OF 2019

BENJAMIN ODHIAMBO OSIANY.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR COMPANY LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. S.K

Onjoro (SRM) dated 21st day of December 2018 in CMCC No. 508 of 2004)

JUDGEMENT

1. The applicant claimed that by a written agreement dated 30th January 1993, the Respondent contracted the Appellant to grow and sell to it sugarcane on his land parcel being Plot No. 112 in plot number 167 in Kanyamamba Sub-location measuring 1.014 Hectares. The appellant alleged that the respondent neglected to collect 12 stacks of the 1stratoon crop weighing about 60 tonnes after harvesting and that the respondent also neglected harvest the 2ndratoon crop when it was mature and ready for harvesting leading to loss and waste. He claimed damages as follows;

> *a. An inquiry as to damages for breach of contract and compensation of the plaintiff for loss of sugar cane on 1.014 hectares for uncollected 60 tonnes and the ratoon 2 lost yields.*

2. The respondent denied the agreement in its defence and put the appellant to strict proof. The respondent in the alternative claim that the respondent has a policy not to cut or harvest poorly maintained cane. They also alleged that the plaintiff's plot was incapable of yielding 135 tonnes per hectare regard being had to the previous crop and 1stratoon. They Respondent also averred that the Appellant's suit was statute barred and challenged the jurisdiction of the trial court.

3. At the hearing before the trial magistrate the appellant reiterated his claim. He testified that he planted the plant crop and the same was harvested and that he was paid. He testified that he developed the 1stratoon and the respondent carried away 22 stacks leaving behind 12 stacks of cane. He testified that he planted the 2ndratoon but it was never harvested. Richard Muok (DW1) testified for the respondent and adopted his statement dated 23rd November 2017 as his evidence of examination in chief.

4. The trial court in dismissing the plaintiff's claim found as follows;

> *"I have looked at the statements and it seems that although the plaintiff denied that the 2nd ratoon was never harvested he was in fact paid for the same. Seemingly the plaintiff is not being truthful.*
>
> *The plaintiff did not provide proof that the defendant failed to collect 12 stacks after harvesting the 1st ratoon crop…. In fact it seems the plaintiff proceeded to develop the 2nd ratoon without any complaint and which again was shown by the defendant to have been harvested and the plaintiff paid for it."*

5. It is this judgment that had precipitated this appeal. As this is the first appeal, I am called upon to analyse and re-assess the evidence on record and reach my own conclusions bearing in mind that I neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

6. In summary, the grounds raised by the appellant were that the trial magistrate failed to hold that the 1st ratoon crop was partially harvested and that the trial court erred in law and in fact in holding that the plaintiff had not proved that he was entitled to compensation of the

uncollected 12 stacks of cane from the 1st ratoon. He also complained that the trial court in reaching its decision relied on altered and forged documents and therefore arrived at a wrong decision.

7. From the evidence the appellant instead of demanding that the respondent remedy the breach of failing to collect the 12 stacks of cane, accepted payment from the respondent and carried on to plant the 2nd ratoon. It is clear that the breach of contract by the respondent, if at all, occurred if it failed to collect part of the harvest from the 1st ratoon. The appellant was therefore under no obligation to continue honouring the terms of their contract once the respondent breached the terms of their agreement. Other than the oral testimony by the PW1 which was challenged by DW1, there was no proof that whole harvest from the 1st ratoon crop was never collected. Therefore I am inclined to agree with the holding of the trial court that the appellant did not on a balance of probabilities prove that the respondent neglected to collect 12 stacks of cane after the same was harvested and that it failed to pay the appellant for the uncollected cane.

8. Assuming that the appellant had proved that the respondent failed to collect and pay him for the 12 stacks of cane, the appellant would still not be entitled to claim from the respondent payment for the 12 stacks of cane. From the appellant's evidence after the respondent breached the terms of the agreement, it proceeded with planting the 2nd ratoon crop and accepted payment from the respondent as payment of the 1stratoon crop. The appellant's action to plant the 2nd ratoon plant can only be construed to mean that the plaintiff waived the breach by the 2nd defendant. Clause 4 of the contract reads as follows;

> ***"If either party hereto commits a breach of the term or terms of this agreement and fails to remedy such breach within thirty (30) days from the receipt of a notice in writing to that effect given by the other party serving such notice may by a further notice in writing and duly served upon the defaulting party terminate this agreement and the agreement shall stand determined after completion of the then harvest and delivery of the cane there from."***

9. The appellant did not serve the respondent with any such notice contemplated in *Clause 4* above and in fact received payment for the 1stratoon crop and proceeded to plant the 2nd ratoon.

10. I now turn to whether the appellant is entitled to special damages for breach of contract in regard to the 2nd ratoon crop. The appellant when pressed during cross examination confirmed that he was paid Kshs 160,694.30/= as evidenced in the statement produced by the respondent marked PEX1. The appellant did not dispute that he had received money from the respondent in regard to the 1stratoon. The respondent produced into evidence the statement showing that the appellant was paid Kshs. 109,244.65 for the 2ndratoon. The appellant alleged that the documents produced by the respondent were forged. It is trite law that the burden of proof was on the applicant to prove the allegations of forgery. In **Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others Civil Appeal No. 215 of 1996** the Court of Appeal in considering the standard of proof required where fraud is alleged had this to say-

> *"The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case."*

11. The appellant made no attempts to prove the allegation of forgery and I find no reason to dismiss the statements produced by the respondent. This appeal therefore fails with costs awarded to the Respondent.

Dated, Signed and Delivered at Kisii this 26th day of February, 2020.

A. K. NDUNG'U

JUDGE