REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 33 OF 2019

PERES ATIENO OLUOCH (Suing as the legal and personal representative

of the estate of **GEORGE O. MBOGO.....APPELLANT**

VERSUS

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. S.K Onjoro (SRM) dated 28th day of September 2018 in CMCC No. 951 of 2004)

JUDGEMENT

1. The appellant has brought this appeal in her capacity as the legal representative of her deceased's husband's estate. She challenges the decision of the trial court to dismiss his suit by her memorandum of appeal dated 11th March 2019.

2. This being a first appeal I am obliged to reconsider the evidence, re-evaluate it and make my own conclusions, bearing in mind that I neither saw nor heard the witnesses. (See ***Peters Vs. Sunday Post Ltd [1958] E.A. 424***)

3. The plaintiff's claim was for damages for breach of a contract entered into on 7th December 1994. He claimed that he and the respondent had agreed to grow and sell sugarcane on his parcel of land being plot number 650 in field number 4, measuring 0.4 hectares within Kanyamamba Sub location. He claimed that the agreement was to remain in force for five years or until one plant crop and two ratoon crops were harvested but the respondent harvested the plant crop and failed to harvest the two ratoon crops.

4. The respondent denied the claim and pleaded *inter alia* that it was its policy not to harvest poorly maintained cane. It stated that it refused to harvest the plaintiff's cane as he had failed to employ the recommended crop husbandry.

5. When the matter came up for hearing before the trial court, the appellant adopted her statement and list of documents as her evidence. She recalled that the respondent harvested the first crop upon which her husband developed the second crop but the respondent failed to harvest it. The respondent also failed to harvest the third crop and the cane dried up and was used as manure.

6. The respondent's senior field supervisor, Richard Mouk (DW 1), also adopted his statement and list of documents as his evidence. He testified that the farmer had only realized 14.7 tonnes for his plant crop and had arrears of Kshs. 8,528.05/=

7. DW 1 testified that the contract had been signed on 7th November 1994 but the cane was planted in March 1995. At first DW 1 stated that the duration for harvest of the plant crop was between 24 to 60 months while the two ratoon crops were to be harvested after 22 months. He however conceded that the plant crop took 24 months to mature and if the plant crop was harvested at 60 months the contract would have expired.

8. The trial court agreed with the respondent's account and further held that there was no proof of cultivation of the ratoon crops. It was also the court's finding that it would not have made sense for the appellant to develop the 1st and 2nd ratoon crop having already incurred losses.

9. The parties took directions to file written submissions in support of their positions in this appeal.

10. The appellant's counsel condensed the grounds of appeal into two issues. First he faulted the trial court's finding that the plaintiff had not

developed the ratoon crops since this had already been admitted by the respondent. He argued that the respondent was obliged to harvest the subsequent crop regardless of whether the plant crop produced low yields. The low yield of the plant crop was blamed on the respondent which had harvested the crop at 48 months instead of 24 months. It was further submitted that the income from the plant crop harvest was subject to deductions such as harrowing and ploughing which were not necessarily deductible from the ratoon crops.

11. The appellant's second argument was that the issue of whether it would be a loss to harvest the ratoon crops had not been pleaded therefore the trial magistrate erred in trying the suit on unpleaded issues. This the appellant argued, was evidence of bias against the appellant who had proved that he had harvested the cane and shown that the respondent only harvested the plant crop after 4 years. He urged the court to set aside the trial court's judgment and substitute it with an award of Kshs. 186,840/=

12. The respondents for their part argued that the appellant had not met his evidentiary burden as he did not prove that he had developed and maintained the 1st and 2nd ratoon crops. It was also submitted that the appellant had not shown that his farm could yield 135 tonnes per cycle. The respondent's witness had testified that expected yield for the plant crop in Kanyamamba area was 68.87 tonnes and 50.14 tonnes per cycle for the ratoon crops. Since the appellant's plant crop had only realized a merger 14.07 tonnes the expenses incurred in maintaining the crop had outweighed the amount due to the farmer and he ended up owing the respondent Kshs. 8,528.0/= which he never settled. The respondent's witness had also testified that the plant crop having only realized 14.07 tonnes it would be impossible for the subsequent ratoon crops to yield 135 tonnes as claimed by the appellant as the plant crop was the one with the best yield.

13. As for the claim that the respondent had delayed in harvesting the plant crop, it was submitted that despite entering into the contract on 7th December 1994, by 7th July 1995, the appellant had not yet planted the cane on his farm and that he must have planted it sometime after 1995 and therefore the respondent was in time in harvesting the appellant's plant crop on 14th November 1998. The respondent urges the court to uphold the trial court's decision.

14. Upon consideration of the parties' submissions and their evidence before the trial court, the first issue arising for determination is whether there was any breach of contract by the respondent.

15. According to the trial court, the 1st and 2nd ratoon crops were never developed. The trial court's position was informed by the fact that the appellant received a negative pay of Kshs. 8,528.05 and it would not have made sense to develop the ratoon crops in light of this. In coming to this finding, the trial court failed to address itself to the agreement between the parties.

16. It was common ground that there was a contract for cultivation of sugar cane on the appellant's parcel of land which according to Clause 1 of the agreement was to last for a period of 5 years or until one plant and two ratoon crops of sugarcane were harvested whichever period was less. Clause 4 of the agreement also stipulated that if either party committed a breach of any term of the contract, the other party was required to issue a written notice to the defaulting party before terminating the contract.

17. The respondent's witness after much hesitation agreed that the plant crop matured within 24 months as claimed by the plaintiff. DW 1 also testified that the cane was initially planted in March 1995. The plaintiff's statement shows that the land was furrowed on 12 th February 1995 hence by the time the respondent harvested the plant crop on 14th November 1998, 45 months had lapsed. This delay in harvesting the plant would inevitably have compromised the yield from the ratoon crops.

18. There was also no evidence that the respondent had issued the plaintiff a notice that he was in breach of the contract by failing to maintain his cane before it unilaterally terminated the agreement. I therefore find that trial court erred in finding that the appellant had not proved her case on a balance of probabilities.

19. Since the respondent failed to harvest the ratoon crops in breach of the contract the appellant was entitled to damages. The appellant claimed damages against the respondent in the as follows;

a. *Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of the two (2) ratoon crops on 0.4 hectares of land at the rate of 135 tonnes per hectare and payment of Kshs. 1,730/= per tonne for the expected (2) ratoon crop.*

20. The appellant was required to prove her claim for special damages which must not only be specifically pleaded but also be proved with a degree of certainity.

21. The appellant proved that the respondent had failed to harvest 2 ratoon crops. There was also documentary proof that the subject parcel of land measured 0.4 hectares. The parties gave contradictory evidence on the cost of cane at the time with the appellant stating that the cane was purchased at Kshs. 1,730/= per tonne while DW 1 stated that the cane was cost Kshs. 1,553/= per tonne. I note however that the first crop was purchased at Kshs. 1,730/= and I adopt the same as the price of cane at the time.

22. As for the yield, the appellant testified that she expected 135 tonnes per hectare. She relied on the respondent's productivity report in support of her claim but the report does not support her claim that a hectare of land in her sub-location could yield 135 tonnes. Due to his expertise on the subject, I am more persuaded by DW 1's testimony that the ratoon crop in Kanyamamba sub-location was capable of producing 50.14 tonnes per hectare.

23. I therefore find that the appellant was entitled to damages of **Kshs. 69,394/=** for the two ratoon crops computed as follows;

Price x yield x acreage x crop = Total

1,730 x 50.14 x 0.4 x 2 = 69,393.76

24. For special damages, interest will normally accrue from the date of filing suit until payment in full. In this case, the suit was filed on 10th August 2004. The appellant gave evidence on 12th January 2017 more than a decade later. It would be improper to penalize the respondent for the appellant's tardiness. Interest on the award shall therefore accrue from 12th January 2017 when the appellant closed her case.

25. The upshot of the foregoing is that the appeal is allowed in the following terms;

a. The judgment of the subordinate court is hereby set aside and substituted with a judgment for Kshs. 69,394/= together with interest from 12th January 2017 until payment in full.

b. The appellant shall have the costs of this appeal.

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

A. K. NDUNG'U

JUDGE