REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 39 OF 2019

BETWEEN

CALVINCE OMONDI ORIGA.....APPELLANT

AND

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

(Being an appeal from the judgment and decree by Hon. Kamau C. M. Senior Resident Magistrate in Rongo Magistrate's Civil Suit No. 217 of 2016 delivered on 23/01/2019)

JUDGMENT

1. **Calvince Omondi Origa**, the Appellant herein, filed *Rongo Principal Magistrate's Court Civil Suit No. 217 of 2016* (hereinafter referred to as '**the suit'**) against **South Nyanza Sugar Co. Ltd,** the Respondent herein. The Appellant claimed that by a Growers Cane Farming and Supply Contract entered into on 06/08/2010 (hereinafter referred to as **'the Contract'**) the Respondent contracted the Appellant to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 1238 in Field No. 246 in Kakmasia Sub-Location measuring 0.68 Hectare within Migori County.

2. The Appellant pleaded that the Contract was for a period of five years or until one plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first. The Appellant further pleaded that he discharged his part of the contract until the plant crop and the two ratoon crops were ready for harvesting, but the Respondent refused and/or failed to harvest it. The Appellant posited that he suffered loss.

3. Aggrieved by the alleged breach of the contract the Appellant filed the suit. He sought for compensation on the loss of the unharvested three crop cycles of the sugar cane with costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 30/08/2016. The Respondent denied both the existence of the contract and any breach thereof. It put the Appellant into strict proof thereof. The Respondent pleaded in the alternative that if there was any contract and that the Appellant planted any cane then the Appellant authored his own misfortune by failing to properly maintain his crops to the required standards or at all to warrant the same being harvested and milled as the same was uneconomical. The Respondent prayed for the dismissal of the suit with costs.

5. The suit was finally settled down for hearing where both parties were represented by Counsels. The Appellant was the sole witness who testified and adopted his Statement as part of his testimony. He also produced the documents in his List of Documents as exhibits. The Respondent called its Field Supervisor as its only witness as DW1. The witness testified, adopted his Statement as part of his testimony and produced the documents in the List of Documents as exhibits.

6. The trial court rendered its judgment on 23/01/2019. The suit was dismissed with costs.

7. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and that he be compensated accordingly. The Appellant proposed the following 7 grounds in the Memorandum of Appeal dated 14/02/2019 and filed on 20/02/2019. The grounds were tailored as follows: -

> **1. The learned trial magistrate erred in law and in fact in importing into the judgment the issue of illegality of the contract wholesale, when the said issue was never pleaded by any party and was never addressed or canvassed by any party to the contract or in the suit, and in the result came to a wrong conclusion.**

2. The trial magistrate erred in law in making a finding that the contract was illegal and void.

3. The trial magistrate erred in law in making a finding that the clause 3.1.2. was not severable from the contract yet

a) the principal object of the transactions ie growing and supply of the sugarcane was in the face of several other provisions in the contract ie clause 2(a), 3.5, 3.8, 3.10, 3.1.3, 3.1.4, 3.1.5, 3.17, 3.1.12, 6.3.11 and 13 was still capable of performance.

b) the parties had expressly in clause 11 of the contract (enforceability) evinced the desire to severe any provision in the agreement that is or may become invalid illegal or unenforceable and did not therefore contemplate breaking or breaching any law.

c) there existed by way of legislation guidelines to the sugar industry agreement a provision, to wit, section 6(2) of the Second Schedule of the Sugar Act No. 10 of 2001, which provision constituted a statutory severance of any offending clause such as clause 3.1.2.

4. The trial magistrate exhibited extreme and actual baisi in irrationality, prejudicially and wrongly applying a law to circumvent, nay pervert, the clear and ultimate result as would show that the appellant has proved had case on a balance of probabilities, in the face of the High Court decision of Elena Olala vs South Nyanza Sugar Co Ltd HCCA No. 86 of 2016 delivered on 10th May 2018, arising from a decision he made regarding clause 3.1.2 of the contract.

5. The learned trial magistrate erred in law in disregarding the doctrine of judicial precedent (Stare decisis) and thereby brought the practice of the law into disrepute, through a strained effort and contrived result in the judgment.

6. The trial magistrate erred in law in failing to find that the appellant would in the circumstances of the case, be entitled to compensation for all the three (3) contracted crop cycles lost on account of the breach.

7. The trial magistrate failed to adequately objectively and sufficiently evaluate the evidence on record as to come to a just and lawful finding and judgment.

8. Directions were taken, and the appeal was disposed of by way of written submissions. Both parties duly complied. The Appellant variously relied on 12 decisions in support of the appeal.

9. The Respondent opposed the appeal. It supported the judgment and prayed for the dismissal of the appeal with costs.

10. As the first appellate Court, the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This Court nevertheless appreciates 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 the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348).**

11. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

12. The trial court disallowed the suit on the ground that the contract contained an illegal clause on the duty to harvest the cane and as such the entire contract was unenforceable. Relying on the doctrine of severability the trial court referred to many decisions in finding that parties cannot freely engage in and benefit from illegalities. The court found that the contract could not be severed and was entirely void *ab initio*. It could not therefore sustain the suit.

13. The above issue was hotly contested. The Appellant faulted the trial court in not adhering to the doctrine of precedent since the duty to harvest cane in the sugar sector had long been settled by the High Court. The Respondent supported the trial court on the issue.

14. I must acknowledge the effort by the trial court in dealing with the doctrine of severability. It is a sound doctrine in contract law and has its applicability in appropriate instances.

15. The starting point when dealing with the doctrine of severability is the contract itself. If the contract provides a severability clause, then that is the binding position. (See **L'Estrange v F Graucob Ltd (1934) 2 KB 394**). If the contract is silent then reference may be made to statute law or to the intent of the parties. This position was re-affirmed by the Court of Appeal in **Nairobi Civil Appeal No. 224 of 2017 Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others (2017) eKLR** where a Five-Judge Bench had the following to say: -

136. Whether or not a contract is severable depends on the terms and conditions of the contract. Where a single contract is signed by the parties, there is a presumption of unity of contract - a presumption that the contract is indivisible and is to be performed as one. Severability turns on the intent of the parties and a court may examine extrinsic evidence - evidence outside the writing-to determine whether the parties actually intended an illegal term to be severable. If the contract makes provision for severability then it is severable; however, if the contract has no provision for severability, a court will determine if the contract is indivisible or severable. Such determination by the court will take into account amongst other things the nature of goods, services or works to be performed.

137. In this appeal, Clause 8.2 of the Contract amongst others foresees and makes provision for severability. Accordingly, we find that the contract between the Appellant and 2nd Respondent is severable in accordance with the contract itself and in law. We find no merit in the Appellant's contention that its contract with the 2nd Respondent is a single, indivisible and non-severable contract.

16. In this case, the contract provided for severability under *Clause 11*. The clause stated as follows: -

> **Each of the provisions of this agreement is severable and distinct from others and if at any time one or more of such provisions is or becomes invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.**

17. Respectfully, I must therefore find, which I hereby do, that the trial court erred in disregarding a clear provision in the contract on severability. As the contract spoke for itself, there was no need to import interpretation and purported intention of the parties. The court's analysis may have been of great use had the contract been silent on severability.

18. Given that the court rightly found that the duty to harvest the case was on the Respondent under the repealed **Sugar Act** then it turns out that the clause in the contract anchoring the duty to harvest the cane on the Appellant was void and severable. That duty squarely rests on the miller. Therefore, the Respondent breached the contract in failing to harvest the cane.

19. In the face of such breach the Appellant was entitled to compensation. In **Migori High Court Civil Appeal No. 92 of 2015 James Maranya vs. South Nyanza Sugar Co. Ltd (2017) eKLR** I dealt with the issue of the remedies in breach of contracts. This is what I stated: -

> 16. ***.... It is well settled in law that general damages cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai Kisumu Civil Appeal No. 239 of 1997 (UR) emphatically expressed itself thus:***
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> *.....As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract.....*
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> 17. ***The reason as to why general damages cannot be awarded in cases of breach of a contract was explained in the case of Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015) eKLR as follows:***
>
> *The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR).*

20. Further, in **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** I found that once a farmer proves that the Miller failed to harvest the plant crop at maturity then the farmer is entitled to the proceeds of the plant crop as well as the ratoon crops subject to the pleadings. Equally, when a Miller fails to harvest the first ratoon crop then the farmer is entitled to compensation for the first and second ratoon crops subject to the contract.

21. The foregone is however subject to the legal position that disputes based on breach of contracts are subject to the principles of ***remoteness, causation*** and ***mitigation***.

22. I have previously discussed the applicability of the principle of mitigation of loss in sugar contracts in **Migori High Court Civil Appeal No. 74 of 2018 South Nyanza Sugar Co. Ltd vs. Rehema Joseph Nkonya** (unreported). I stated thus: -

> ***20. …… I further agree with the Court of Appeal in several decisions that a party alleging breach of contract must take steps to mitigate loss (See African Highland Produce Limited vs. John Kisorio (2001) eKLR).***
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> ***21. The question which now arises is how should a Defendant handle the issue of mitigation of loss in a suit where the Plaintiff did not plead how it/he/she mitigated the loss? That question is factual. To me, the burden rests upon the Defendant to demonstrate how the Plaintiff ought to have mitigated the loss. Such approach must first find its basis in the pleadings. By doing so the Plaintiff would be put in sufficient notice and accorded an opportunity to challenge the evidence on mitigation of loss if need be. That is the essence of a fair trial in Article 50(1) of the Constitution.***
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> ***22. A defendant should not raise the issue of mitigation of loss on appeal at the first instance. By doing so, the issue becomes a non-issue. The issue must be pleaded and proved. (See the Supreme Court ruling in Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR and the Court of Appeal in The Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR).***

23. I have consciously taken the foregone position on the understanding that contracts are between parties and each contract must be independently scrutinized as there may be some instances where the principle of mitigation of loss may reasonably not be applicable in a dispute more so depending on the terms of such a contract.

24. The foregone has been echoed by some Courts. Majanja, J. in Kisii High Court Civil Appeal No. 60 of 2017 South Nyanza Sugar Co. Ltd vs. Donald Ochieng Mideny (2018) eKLR when he recently (on 21/12/2018) rendered himself on the issue after considering several past decisions including some by yours truly and held that: -

> *15. Mitigation of damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (See African Highland Produce Limited vs. Kisorio (1999) LLR 1461 (CAK). Since the appellant did not contest the respondent's claim, it did not show how the respondent could mitigate the loss.*
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> *16. The appellant's arguments in support of the appeal were attractive but at the end of the day the respondent's case before the trial court was not contested and for this reason, I dismiss the appeal.…..…*

25. In this case the issue of mitigation of loss was not pleaded by the Appellant in the statement of defence. Instead, the Appellant denied the existence of the contract. The Appellant only pleaded in the alternative that upon proof of the contract then the Respondent failed to exercise diligence in growing the cane. The Appellant unfortunately did not lead any evidence on the position. There was no mention of the issue of mitigation of loss or at all. How then was the Respondent expected to respond to a non-issue?

26. I therefore find and hold that the issue of mitigation of loss having not been raised in the suit cannot be subject of an appeal.

23. I am still of the foregone position. The principle of mitigation of loss in this case equally does not aid the Respondent as it comes late in the day. It was not an issue before the trial court.

24. Having so found, the Appellant was therefore entitled to compensation for the three cane crops.

25. The compensation is dependent on the size of the land, the expected crop yields and the cane prices at the expected harvest time. In this case, a Survey Certificate B was produced as an exhibit. It settled the size of the land as 0.68 Ha. On the yields, a Report by Kenya Sugar Research Foundation (KESREF) was produced as an exhibit. On the cane prices, a Price Schedule was produced by the Respondent.

26. According to *Clause 1(f)* of the contract, the plant crop would have been ready for harvesting any time from July 2012. The first ratoon crop would have been ready for harvesting any time from May 2014 and the second ratoon crop would have been ready for harvesting any time from February 2016.

27. There is also evidence on record that the Respondent supplied the Appellant with various services and inputs. The cost thereof must be subjected to the gross earnings. The net earnings from the three cycles would therefore be Kshs. 463,735/=.

28. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

a) The appeal hereby succeeds and the finding of the learned magistrate dismissing the suit with costs be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 463,735/=.

c) The sum of Kshs. 463,735/= shall attract interest at court rates from the date of filing of the Plaint;

d) The Appellant shall have costs of the suit as well as costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 16th day of March 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Oduk, Counsel instructed by the firm of Oduk & Co. Advocates for the Appellant.

Mr. Bosire, Counsel instructed by the firm of Messrs. Moronge & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant