



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

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

CIVIL APPEAL NO. 60 OF 2019

JOSEPH ARUNGA MIGORI.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Resident Magistrate in Rongo Senior Resident Magistrate's Civil Suit No. 63 of 2014 delivered on 23/05/2018)

JUDGMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court *vide* the judgment rendered on 23/05/2018.
2. The Appellant herein, **Joseph Arunga Migori**, who filed **Rongo Senior Resident Magistrate's Court Civil Suit No. 63 of 2014** (hereinafter referred to as '**the suit**') pleaded that by an Outgrowers Cane Agreement entered into on 11/01/2007 (hereinafter referred to as '**the Contract**') the Respondent herein, **South Nyanza Sugar Co. Ltd**, contracted the Appellant to grow and sell to it sugarcane at his parcel of land being Plot No. 771 Field No. 114 measuring 0.4 Hectares in Kanyamamba Sub-Location within Migori County.
3. It was further 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 contended that he took good care of the plant crop until maturity and the Respondent harvested the crop. He further contended that he developed the first ratoon crop upto maturity, but the Respondent failed to harvest the crop thereby compromising the development of the second ratoon cane crop resulting to loss of income. He sought for the value of unharvested cane from the two ratoons, costs and interest at court rates.
4. The Respondent entered appearance and filed a Statement of Defence dated 04/05/2016 and denied the existence of the contract. It put the Appellant into strict proof thereof.
5. The suit was finally settled down for hearing where both parties were represented by Counsels. The Appellant was the sole witness who testified. He produced the documents on the list of documents as exhibits. The Respondent called its Senior Field Supervisor as its sole witness. The witness testified, produced several exhibits and adopted his statement as part of the evidence.
6. The court thereafter proceeded to render the judgment. The trial court dismissed the suit with costs. It is that judgment which is the subject of this appeal.

7. The Appellant in praying that the appeal be allowed and appropriate compensation be awarded proposed the following three grounds in the Memorandum of Appeal dated 08/04/2019 and filed in Court on 11/04/2019:

1. The learned magistrate erred in law and fact in failing to find for the plaintiff that the contract book/or agreement relied on was the defendant's own document which bore account number 215720 and not 43885 and whose characters such as serial number, stamps, signature and signatories were otherwise not disputed.

2. The learned trial magistrate failed to properly evaluate the evidence over the alleged erased account number, and improperly imputed wrong motive on the appellant.

3. The learned trial magistrate failed to appreciate that the plaintiff's case concerned account number 215720 which was not disowned or refuted by the respondent, and not the factious account number 43885, introduced into contention by the defence, in the absence of any pleadings to the effect.

8. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied.

9. As the first appellate Court, 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).

10. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal and the submissions by the parties.

11. From the judgment, the suit was unsuccessful because the Appellant failed to prove the contract between the parties. I will therefore consider whether the suit was proved.

12. According to the pleadings and the evidence the Appellant's claim is anchored on the allegation that the Respondent failed to harvest the first ratoon crop and as such compromised the development of the second ratoon cane crop. In proof of his case the Appellant relied on his oral testimony, written statement and the contract.

13. The Respondent was very categorical from the word go. It denied ever entering into any contract with the Appellant and invited strict proof.

14. The burden of proof in a civil case of this nature rests on the Appellant. This is in accordance with **Section 107 and 109 of the Evidence Act, Cap. 80** of the Laws of Kenya. The standard of proof is always on a balance of probability. (See Mbuthia Macharia v. Annah Mutua Ndwiga & Another (2017) eKLR and Bungoma Election Petition No. 4 of 2017 Levi Simiyu Makali vs. Koyi John Waluke & 2 Others (2018) eKLR).

15. Was the suit therefore proved on a balance of probability?

16. The contract was allegedly entered into on 11/01/2007. According to paragraph 4 of the Complaint the contract was registered under contract number 215720. The Complaint was not amended. The contract produced had a different account number. It was 43885. I have seen the forced erasure on the summary page of the contract. Even the plot number was changed.

17. The Respondent witness testified that all its contracts with farmers have six digits. That evidence was not controverted. The account number one on the contract has five digits.

18. The Appellant further testified that the plant crop was harvested and that he was given a statement of account and duly paid. Surprisingly, no such evidence was adduced at least in a bid to reconcile the two different account numbers in issue.

19. Without proof of the contents of the contract it becomes very hard, if not impossible, to prove liability of the part of the Respondent based on such unproved contract. In other words, the Appellant was first to discharge the evidential burden against the Respondent. Failure to do so, the Respondent did not even have to call any evidence as the case must fail. That was the case in this matter.

20. This Court is hence in sync with the decision of the trial court. The suit was not proved. Consequently, the appeal is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May, 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically: -

1. odukeze@gmail.com Messrs. Oduk & Co. Advocates for the Appellant.

2. morongekisii@yahoo.com for Messrs. Moronge & Company Advocates for the Respondent.

3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE