REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CIVIL APPEAL NO. 44 OF 2019

BETWEEN

MORAA ELIZABETH ITIRA.....APPELLANT

AND

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

(Being an appeal from the judgment and decree by Hon. C. M. Kamau, then Resident Magistrate in Rongo Senior Resident Magistrate's Civil Suit No. 711 of 2017 delivered on 30/01/2019)

JUDGMENT

1. The Appellant herein, *Moraa Elizabeth Itira,* filed *Rongo Senior Resident Magistrate's Court Civil Suit No. 711 of 2017* (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 30/07/2012 (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. 46G Field No. 205 in Moheto Sub-Location measuring 6.48 Hectares 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 contract was company developed since the Respondent supplied the Appellant with farm inputs and services including cane seed. The Appellant further pleaded that he discharged his part of the contract until the plant crop was ready for harvesting but the Respondent refused and/or failed to harvest it. The plant crop dried up. He posited that he suffered loss of the three crop cycles.

3. Aggrieved by the alleged breach of the contract the Appellant filed the suit. He sought for compensation for the loss.

4. The Respondent entered appearance and filed a Statement of Defence dated 06/02/2018. The Respondent denied both the existence of the contract and any breach thereof. It put the Appellant into strict proof thereof. The Respondent further pleaded that the Appellant suffered no loss and if at all he suffered any such loss then the Appellant was the author of his own misfortune in that he failed to properly maintain the sugar cane 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 Senior Field Supervisor as its sole witness who also adopted his statement and produced the documents as exhibits.

6. The trial court rendered its judgment on 30/01/2019. The suit was allowed. The court awarded the net value of the plant crop at Kshs. 950,407/= with interest and costs.

7. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and appropriate compensation be awarded proposed the following five grounds in the Amended Memorandum of Appeal dated 19/11/2019 and filed in Court on 21/11/2019: -

> **1.The learned magistrate erred in law and fact by entertaining and/or regarding the defence which is at variance with the averments of pleadings.**
>
> **2. The learned trial magistrate erred in law and in fact by not entering judgment for the appellant for ratoon 1 and ratton**

11 crops cycles despite the overwhelming evidence.

3. The learned trial magistrate erred in law and in fact by departing from the precedent laid in Migori HCCA No. 41 of 2016, JANE ADHIAMBO ATINDA vs. SOUTH NYANZA SUGAR CO LTD.

4. The learned magistrate erred in law and in fact by being inconsistent and/.or contradicting in his judgment and ended up denying the appellant what could have been compensation for ratoons 1 and ratoon 11 crop cycles

5. The learned trial magistrate disregarded the principle "*restitutio in intergrum*".

8. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant duly complied, but the Respondent did not despite appropriate notice. The Appellant referred to several decisions in support of the appeal.

9. 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).**

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

11. The central issue on this appeal was whether the Appellant was entitled to any award on the ratoon crops. I have dealt with the issue on several other occasions. 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 and the pleadings.

12. In this case the Appellant led evidence that the Respondent failed to harvest the plant crop. The court found that the Respondent was in breach of the contract. Resulting thereof it naturally yielded that the development of the ratoon crops was compromised by the non-harvest of the plant crop by the Respondent. The Appellant was therefore entitled to the proceeds of the plant crop and the two ratoon crop yields since the pleadings claimed as such and the Appellant heavily submitted on the issue before the trial court and even availed binding decisions.

13. I certainly affirm the position that disputes based on breach of contracts are subject to the principles of ***remoteness, causation*** and ***mitigation***. 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**).

14. 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**.

15. 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).**

16. 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. I have also previously held that the manner in which the standard sugar contracts are drafted leave no room to the farmer to do anything in mitigating losses even in cases of breach. In this case for instance *Clause 2(b)(iii)* of the contract gave the Respondent the sole power and discretion to extend the contract period without reference to the Appellant. (See **Migori High Court Civil Appeal No. 10 of 2016** case (supra).

17. 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** 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.

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……

18. In this case, and as said, the issue of mitigation of loss was not pleaded by the Respondent in the statement of defence. Instead, the Respondent denied the existence of the contract. The Respondent only pleaded in the alternative that upon proof of the contract then the Appellant failed to exercise diligence in growing the cane. The Respondent 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 Appellant expected to benefit from a non-issue?

19. The court found the Respondent in breach of the contract. That finding was not appealed against. In the face of such breach the Appellant is entitled to compensation for the two ratoon crops as well.

20. The trial court rightly found that there was no dispute on the size of the land. The court was also guided by the Respondent's own cane yields report and the cane prices schedule. Based on the information contained therein and in view of the contract provision on when the first and the second ratoons were due the Appellant expected a net income of Kshs. 1,088,871/=.

21. I have also noted that the sum awarded by the trial court for the plant crop was not subjected to transport and harvesting charges. However, since there is no cross-appeal on the issue I rest it at that.

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

a) The appeal hereby succeeds to the extent that the learned magistrate failed to award the Appellant the expected income from the two ratoon crops;

b)The award of Kshs. 950,407/= by the trial court is hereby substituted with an award of Kshs. 2,039,278/= with interest at court rates from the date of filing of the suit;

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

Orders accordingly.

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

A. C. MRIMA

JUDGE

Judgment delivered electronically: -

1. **capisomolo@yahoo.com** for Gembe & Company Advocates for the Appellant.

2. **morongekisii@yahoo.com** for 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