REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY

AT MIGORI

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

CIVIL APPEAL NO. 103 OF 2019

ROBINSON HANINGTON AOMO.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Senior Resident Magistrate

in Rongo Principal Magistrate's Civil Suit No. 220 of 2016 delivered on 04/09/2016)

JUDGMENT

1. The appeal subject of this judgment mainly hinges on the effect of sale of mature cane by a contracted farmer to a third party.

2. The parties entered into a Growers Cane Farming and Supply Contract on 14/07/2011 (hereinafter referred to as **'the Contract').** The Appellant was contracted by the Respondent herein to grow and sell to the Respondent sugarcane at the Appellant's parcel of land Plot No. 172B Field No. 102 in Oloontare B Sub-Location measuring 1.65 Hectare.

3. The Appellant planted and properly maintained the plant crop. At maturity the Appellant sold the cane to a third party, *Trans Mara Sugar Co. Ltd*. The Appellant then developed the first ratoon which was harvested by the Respondent herein. The Appellant, admittedly, did not develop the second ratoon crop.

4. It seems the Respondent withheld the payment, if any, in respect of the first ratoon crop to the Appellant. The Appellant then sued the Respondent. That was in **Rongo Senior Resident Magistrate's Court Civil Suit No. 220** of **2016** (hereinafter referred to as '**the suit'**). The Appellant contended that the Respondent failed to harvest the plant crop at maturity and as a result he suffered loss. He prayed for compensation of the value the plant crop and two ratoon crops at Kshs. 2,873,475/=.

5. The suit was defended. The Respondent entered appearance and filed a Statement of Defence dated 30/08/2016. It denied the existence of the contract. The Respondent further denied any alleged breach of the contract. It put the Respondent into strict proof thereof. The Respondent also averred in the alternative that if at all there was any such breach then the Appellant was the author of his own misfortune as he failed to properly maintain his crops to the required standards or at all to warrant the same being harvested and milled. The Respondent prayed for the dismissal of the suit with costs. The parties filed their statements as well.

6. The suit was finally settled down for hearing. Both parties were represented by Counsels before the trial court. 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 (DW1) as its sole witness who also adopted his statement and produced the documents as exhibits. Parties filed written submissions at the close of their respective cases.

7. The trial court rendered its judgment on 04/09/2019. It allowed the suit and compensated the Appellant for the value of the *plant crop* at Kshs. 523,934/=. Interest was to begin from the date of judgment.

8. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and that he be compensated for the three crop cycles the Appellant proposed the following three grounds in the Memorandum of Appeal dated 12/09/2019 and filed in Court on 19/09/2019: -

> **1. The learned trial magistrate erred in law and in failing to award the appellant compensation for the loss of all 3 crop cycles, yet the appellant had proved his case on a balance of probabilities and the respondent had admitted its failure to harvest the sugar cane as contracted/ or pray for it.**
>
> **2. The trial magistrate erred in law and in fact in undercompensating the appellant by deliberately applying a low figure and yield**
>
> **3. The trial magistrate erred in law in wrongly ordering that interest do accrue on the awards from the date of the judgment.**

9. Directions were taken and the appeal was disposed of by way of written submissions. Both parties duly complied.

10. The Appellant submitted that he was entitled to compensation for the three cycles of cane in accordance with **Clause 2(a)** the contract. In construing that clause the Appellant relied on **Kisumu High Court Civil Appeal No. 20 of 2000 Martin Akama Lango vs. South Nyanza Sugar Co. Ltd** (unreported). The Appellant then relied on several decisions of this Court in seeking the said compensation. He also contended that court ignored the doctrine of *stare decisis* in not awarding interest from the filing of the suit. He prayed that the appeal be allowed and the compensation be awarded accordingly.

11. The appeal was opposed. The Respondent contended that the Appellant had admitted selling the plant crop to a third party without its consent. To the Respondent that amounted to a blatant breach of the contract. The Respondent wondered how then the trial court again awarded the Appellant the value of the plant crop which crop the Appellant had admittedly sold to a third party. Interestingly, the Respondent never appealed the judgment.

12. The Respondent submitted that the Appellant failed to prove that he developed the first ratoon crop to maturity. It also recalled that the Appellant admitted in evidence that he never developed the second ratoon crop for lack of funds.

13. The Respondent prayed for the dismissal of the appeal.

14. As the first appellate Court it is now well settled that 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).**

15. I have carefully considered the pleadings, proceedings, the impugned judgment, the appeal and the

parties' submissions. I have fully understood the gist of the appeal.

16. The existence of the contract between the parties was admitted by DW1 in evidence. I will therefore deal with the issue as to whether there was any breach of the contract and if so by whom.

17. The Appellant testified before the trial court. He adopted his statement as part of his evidence. He also produced various exhibits in support of the claim.

18. On what happened to the plant crop at maturity the Appellant stated as follows in examination-in-chief: -

> **… It matured. I informed them. They did not harvest. I wrote to them but they did not respond. I then decided to approach Trans Mara Sugar Company Limited. They agreed to harvest. They harvested it at 32 months. I was paid Kshs. 171,000/=.**
>
> **Sony sugar came when harvesting was ongoing. I told them it was too late. I then developed ratoon 1……**

19. In cross-examination the Appellant partly stated as follows: -

> **No, I did not approach SONY to rescind the contract. The contract was for 5 years. No, I did not breach the contract. The contract provided that they could not harvest after cane had exceeded 24 months for plant crop….**

20. In re-examination the Appellant had the following: -

> **Sony told me that they could not harvest cane after 24 months….**

21. The Respondent through DW1 contended that the Appellant breached the contract by poaching the plant crop and selling it to a third party. It further contended that there was no evidence of development of the first ratoon crop.

22. The contract provided for the duration. According to **Clause 2(a)** the contract period was 5 years or until one plant crop and two ratoon crops of sugar cane were harvested from the subject parcel of land whichever event occurred first.

23. Still on the duration of the contract, **Clause 2(b)(iii)** of the contract stated as follows: -

> **The duration of the agreement may by written notice be extended by the Miller at its sole discretion and without reference to the Grower.**

24. The contract also contained the parties' covenants. **Clause 3.7** provided one of the Appellant's covenants as under: -

> **Not without permission and written consent from the Miller, sell, assign, lease or part with possession of the plot and the cane.**

25. The above clauses were part of the contents of the contract. Courts have severally dealt with the aspect of the binding nature of contracts. In so doing, Courts have re-emphasized that the will and intention of the parties to a contract must prevail unless on settled exceptions.

26. The Court of Appeal in **Nairobi Civil Appeal No. 55 of 2016 Five Forty Aviation Limited vs. Erwan Lanoe (2019) eKLR** presented itself thus: -

> ***The position in law with regard to the binding nature of a contract executed willingly by the parties has now followed a well beaten path. In National Bank of Kenya Ltd versus Pipe Plastic***

Samkolit (K) Ltd & another [2011] eKLR, the Court was categorical that:

it is clear beyond para adventure, that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.

The Court in Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR, after reviewing case law on the subject reiterated as follows:

We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."

27. In **Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited, Civil Appeal No. 282 of 2004** the Court of Appeal dealt with the exceptions to the forgone general rule. The Court stated that: -

Nevertheless, courts have never been shy to interfere with or to refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract or due to contract terms that are unreasonably favoured to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case?

28. Whether the terms of a contract are unconscionable is a matter of fact. It is to be determined from case to case. Therefore, a party which seeks to be relieved from the terms of a contract must plead and prove as such.

29. In this case the Appellant did not plead that the contract was unconscionable for whatever reason. The Appellant did not prove as such as well. Infact, the Appellant did not challenge any of the provisions of the contract.

30. In its judgment the trial court attempted to fill in the gap for the Appellant. The court stated that the Appellant sold the plant crop to a third party in mitigation of loss. That was not the correct approach since that argument was not put forth by the Appellant. After all, mitigation of loss is a factual issue which must be pleaded and proved. (See the Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** and the Supreme Court in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR).**

31. On its part, the Appellant attempted to rely on a non-existent clause. He stated in cross-examination that *'the contract provided that they could not harvest after cane had exceeded 24 months for plant crop.'* The contract had no such provision. There was also no communication from the Respondent to that end.

32. The Appellant was again not forthright in what exactly happened when the plant crop was mature. In *examination-in-chief* he stated that he approached and even wrote to the Respondent on the harvesting of the plant crop but there was no response. As a result, the Appellant decided to, and so approached a third party who agreed to harvest the cane. On *re-examination* the Appellant stated that when he approached the Respondent he was informed that the Respondent could not harvest the plant crop after 24 months from planting. The two divergent positions on the same issue could not be both correct.

33. The Respondent reserved the right under **Clause 2(b)(iii)** of the contract to extend the duration of the contract. That was without any reference to the Appellant. That may explain why the Respondent was ready to harvest the plant crop when the third party was harvesting it even though it was well past the period of 24 months as provided for in the contract. However, the Appellant in his own words told the

Respondent that '…. *it was too late.'*

34. The Respondent did not hence allow the Appellant to part with the possession of the cane. The Appellant in turn allowed a third party to harvest the plant crop and even restrained the Respondent from dealing with the mature plant crop.

35. I hence find and hold that the Appellant's foregone conduct was not in sync with the terms of the contract. The Appellant breached **Clause 3.7** of the contract by parting with the possession of the cane aforesaid without the consent of the Respondent.

36. In fact, the Appellant was lucky that the suit was partially allowed and that the Respondent never cross-appealed. I would have readily allowed the Respondent's appeal and dismissed the suit in its entirety had the Respondent preferred one.

37. The upshot is that the appeal cannot succeed. It 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 through: -

1. odukeze@gmail.com Messrs. Oduk & Company 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 Judgment from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE