REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

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

CIVIL APPEAL NO. 43 OF 2019

RICHARD GONDI OBONYO.....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 Court Civil Suit No. 712 of 2017 delivered on 30/01/2019)

JUDGMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court *vide* the judgment rendered on 30/01/2019 for want of proof of the claim.

2. The Appellant herein, *Richard Gondi Obonyo*, who filed **Rongo Senior Resident Magistrate's Court Civil Suit No. 712 of 2017** (hereinafter referred to as '**the suit'**) pleaded that by an Outgrowers Cane Agreement entered into on 13/02/2007 (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. 214C Field No. 1B measuring 0.4 Hectares in Kakmasia 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 but the Respondent failed to harvest the plant crop thereby compromising the development of the ratoon cane crops. As a result, the Appellant suffered loss of income. He sought for damages for breach of the contract, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 06/02/2018. It denied the existence of the contract and further pleaded that the Appellant suffered no loss and if at all she 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.

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 produced several exhibits and adopted his statement as part of his evidence. The Respondent was represented by its Senior Field Supervisor who testified as *DW1*. He adopted his statement as part of his evidence and also produced the documents in the List of Documents as exhibits. The court thereafter proceeded to render the judgment where it dismissed the suit with costs. It is that judgment which is the subject of this appeal.

6. The Appellant 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*".

7. 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.

8. 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).**

9. 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.

10. The appeal is largely unopposed. However, it nevertheless remains the duty of this Court to discharge its appellate role in revisiting the evidence on record, evaluating it and reach its own conclusion in the matter.

11. The crux of the dismissal of the suit was two-fold. First, there was the failure by the Appellant to respond to the allegation that the plant cane crop was duly harvested by the Respondent, weighed and the net earnings duly paid to the Appellant. The second limb was that the Appellant admitted that he did not develop the ratoon crops.

12. The Appellant vehemently challenged the impugned judgement. He submitted that the issue of alleged payment to him was a non-issue as it was not part of the Respondent's pleadings. He further submitted that the ratoon crops are not developed afresh since they regenerate from harvesting of the previous crop. The Appellant therefore faulted the trial court in finding that he did not develop the ratoon crops.

13. The legal position in respect to pleadings and evidence in an adversarial system like in our jurisdiction is well settled. In a nut shell any evidence which does not support the pleadings is for rejection. That position was clearly emphasized by the Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where **Sylvester Umaru Onu, JSC** stated that: -

> ***….It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it…..***
>
> ***It is settled law that parties are bound by their pleadings……the court below was in error when it raised the issue contrary to the pleadings of the parties.'***

14. **Adereji, JSC** in the same case expressed himself thus on the importance and place of pleadings: -

> ***…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……***
>
> ***…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.***

15. The Supreme Court as well added its voice on the legal position in a ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR.** The Court stated thus: -

> ***… in absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal position that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration……*** (emphasis added).

16. The suit was a civil claim. It was guided by *inter alia* the **Civil Procedure Act, Cap. 21** of the Laws of Kenya and the **Civil Procedures Rules, 2010**. The Appellant filed the suit alongside his statement and documents. Likewise, the Respondent filed its defence alongside its documents and the statement of DW1.

17. The defence generally denied the claim. It contended that the suit ought to be dismissed with costs for want of proof. The statement of DW1 expounded the basis of the sought for dismissal. It was that the Appellant's plant cane crop was duly harvested and yielded 17.73 tons. The Appellant was then paid a net of Kshs. 27,154/25 through NBK Awendo Branch after he signed a Job Completion Certificate on 02/11/2009.

18. The statement of DW1 further stated that *'the claim by this farmer that plant crop dried on the plot is wrong. Ratoon crops were*

abandoned and were never developed as admitted by the Plaintiff in his statement….'

19. The suit was set for pre-trial conference 20/03/2018 and thereafter fixed for hearing. DW1 testified on 14/11/2018. He reiterated the contents of his statement. He also produced several exhibits in the Respondent's List of Document as exhibits. The documents included The Appellant's final statement for the plant crop, job completion certificate for cane delivered, weighbridge ticket, debit advice for urea, job completion certificate for urea supply among others. The documents were produced as exhibits with the consent of the Appellant.

20. The question which now begs for an answer is whether the foregone flouted the law on pleadings and evidence. Civil practice has evolved with time. There is now a lot of emphasis, through the law and rules, for disclosure by the parties. The **Civil Procedure Rules** now make pre-trial conferences mandatory where all issues on the matter ought to be dealt with prior to the hearing. The rationale thereof was clearly stated by the Supreme Court in **Raila Amolo Odinga & Another vs. IEBC & 2 others** case (supra) being to '*ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration.'*

21. In this case the twin issues of the harvesting and payment for the plant cane crop by the Respondent and the non-development of the ratoon crops by the Appellant arose from the time the Respondent entered appearance and filed its defence and the statement of DW1. The Appellant was duly notified of the Respondent's said position. The Appellant was further supplied with all the documents which supported the position. That was long before the pre-trial conference was held.

22. As said, the hearing of the matter was preceded by the pre-trial conference. The Appellant had the opportunity of availing relevant evidence to counter the Respondent's evidence. He ought to have sought the leave of the court to avail such counter-evidence. Even if the Appellant opted not to do so at the pre-trial stage still the legal door was not shut. He was at liberty to make an appropriate application at any time.

23. I have carefully considered the Respondent's defence. In paragraph 5 thereof the Respondent averred that if the Appellant suffered any loss then the Appellant was the author of such loss. The Respondent gave its reason for such a position. It stated that it was because the Appellant failed to properly maintain the crops to the required standard or at all. By taking such a position and in light of the statement of DW1, the Respondent definitely referred to the maintaince of the ratoon crops and not the plant crop. According to the Respondent the issue of the plant cane crop was long settled.

24. Having duly reviewed the evidence and the law in this matter I come to the finding, and hereby hold, that the issue of the harvesting and payment of the proceeds from the plant cane crop by the Respondent was brought to the attention of the Appellant right from the time the Respondent entered appearance and filed its defence together with the statement of DW1 and the necessary documents. The Appellant was therefore '*fully alive to the questions that are likely to be raised*' and was accorded an '*opportunity of placing the relevant evidence before the court for its consideration.'*

25. The issue of the harvesting and payment of the proceeds from the plant cane crop by the Respondent was therefore not a new issue which was raised, for the first time, at the trial. The issue had its root in the Respondent's pleading. The legal interplay between the pleadings and evidence does not hence aid the Appellant in this case.

26. The Appellant's reaction to the issue of the harvesting and payment of the proceeds from the plant cane crop by the Respondent was perplexing. In the face of such serious allegations and production of documentary evidence the Appellant did not in any way deal with the issue. He even conceded to the production of the documents as exhibits. He also did not cross-examine DW1 on the issue and/or the documents. The Respondent's position was hence uncontroverted. To that end, the Respondent proved, on a preponderance of probability, that it had fully paid the Appellant the net proceeds from the harvest of the plant cane crop.

27. With the foregone findings, the Appellant's contention that the plant cane crop was not harvested and that it dried up on the plot failed. To me the Appellant was well aware that he had been paid for the proceeds of the plant cane crop but still put up his claim. That was dishonesty to say the least.

28. Had the Respondent not been diligent enough to avail the evidence on settlement of the plant crop then the Respondent, which is a public entity, would have been unfairly decreed to repay the sums further to the expected earnings from the ratoon crops. It is my hope that those charged with the responsibility of conducting the affairs of the Respondent will remain vigilant and weed out all false claims without exception.

29. On the ratoon crops, the Appellant partly stated in cross-examination as follows: -

I did not develop the ratoon crops

30. Having been duly paid for the plant cane crop and failed to develop (or rather maintain) the ratoon crops, his conduct disentitled the Appellant from any claim for payment on the expected earnings from the yields on the ratoon crops. The suit was not proved as required in law.

31. There was no way the suit, which was premised on dishonesty, falsehoods and trickery could have succeeded. The trial court rightly dismissed the suit with costs. Likewise, the appeal is unsuccessful. It is dismissed with costs.

32. 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