REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CIVIL APPEAL NO. 48 OF 2019

BETWEEN

SOUTH NYANZA SUGAR CO. LTD.…….....APPELLANT

AND

CHARLES OWINO OYOMBA……..….....RESPONDENT

(Being an appeal from the judgment and decree by Hon. M. M. Wachira, Senior Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 1655 of 2016 delivered on 19/02/2019)

JUDGMENT

1. The Respondent herein, *Charles Owino Oyomba,* filed **Migori Chief Magistrate's Court Civil Suit No. 1655 of 2016** (hereinafter referred to as '**the suit'**) against *South Nyanza Sugar Co. Ltd***,** the Appellant herein. The Respondent claimed that by a Growers Cane Farming and Supply Contract entered into on 02/09/2008 (hereinafter referred to as **'the Contract'**) the Appellant contracted the Respondent to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 886 Field No. 53B in Manyatta Sub-Location measuring 0.5 Hectare within Migori County.

2. The Respondent 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 Appellant supplied the Respondent with inputs and rendered services towards the development of the cane crop. The Respondent further pleaded that he discharged his part of the contract until the plant crop was ready for harvesting which the Appellant readily harvested and paid the Respondent the net earnings. The Appellant, it was alleged, however refused and/or failed to harvest the first ratoon crop at maturity. The first ratoon crop dried up. The Respondent posited that he suffered loss of the two ratoon crops.

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

4. The Appellant entered appearance and filed a Statement of Defence dated 10/01/2017. The Appellant denied both the existence of the contract and any breach thereof. It put the Respondent into strict proof thereof. The Appellant further pleaded that the Respondent suffered no loss and if at all he suffered any such loss then the Respondent 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 Appellant 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, *George Ochieng (DW1),* as its sole witness who adopted the statement of his colleague one *Richard Muok* which was dated 27/09/2018 as part of his evidence. He also produced the documents filed by the Appellant as exhibits.

6. The trial court rendered its judgment on 19/02/2019. The suit was allowed. The court awarded the net value of the two ratoon crops at Kshs. 167,840/= 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 15 grounds in the Memorandum of Appeal dated 15/03/2019 and evenly filed in Court.

8. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant duly complied, but the Respondent did not. In its submissions the Appellant contended that the award made by the court was not pleaded and proved. It was also submitted that the suit was not proved. Further, it was submitted that even if the suit was proved court erred by not subjecting the unsubstantiated earnings to appropriate statutory and contractual deductions. The Appellant submitted that the court erred by not taking into account the doctrine of

mitigation of loss. The issue of when interest ought to run from was also hotly argued. The Appellant referred to several decisions in support of the appeal.

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, submissions and the decisions referred to by the parties.

11. As to whether the claim was properly pleaded, I recall the Court of Appeal in **John Richard Okuku vs. South Nyanza Sugar Co. Ltd (2013) eKLR** where the Court had the following to say on pleadings in sugar disputes: -

> ***In case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and which was 0.2 hectare (paragraph 3 of plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.***
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> ***The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.***
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> ***We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof.***
>
> ***Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filling suit.***

12. All the essentials pointed out by the Court of Appeal are present in the suit. I therefore find and hold that the Respondent sufficiently pleaded the claim. The ground hence fails.

13. On whether there was breach of the contract, I have carefully gone through the analysis by the trial court. There is no dispute that there was a contract between the parties. That fact was admitted by the Appellant through the statement of Richard Muok and before court vide the evidence of DW1. It is also not disputed that the Respondent planted and maintained the plant crop to maturity. The crop was duly harvested and the Respondent paid his net dues.

14. The Respondent further testified that he maintained the first ratoon crop until it also matured but the Appellant failed to harvest the crop.

15. The Appellant's evidence in response was that the Respondent developed the first ratoon crop, but neglected to exercise any good crop husbandry over it. It was also contended by the Appellant that the Respondent allowed livestock to graze on the crop. Further, the Appellant contended that the Respondent did not develop the second ratoon crop.

16. Among the documents produced by the Appellant as exhibits was a warning letter (hereinafter referred to as '**the letter'**). The letter was issued by the Appellant. It is dated 05/05/2011. The letter was addressed to the Respondent. The letter was a complaint that the Respondent had neglected to take care of the farm and had freely left it for grazing. The letter warned that the Respondent's actions amounted to breach of the contract. The Respondent was called upon to remedy the Appellant accordingly failure to which the Appellant was ready to seek legal redress.

17. When cross-examined on the service of the letter upon the Respondent, DW1 stated as follows: -

> ***…. Letter was served by hand delivery to farmer or the chief. I can't ascertain received warning letter.***

18. **Clause 9** of the contract states as follows: -

> ***Any notice or demand by the Miller under this agreement shall be deemed to have been properly served upon the Grower if delivered to the Provincial Administration for onward transmission to the Grower or delivery by hand or sent by registered post or facsimile at the address of the Grower shown in this agreement. In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by registered post at 10 a.m. Seven (7) days following the date of posting (notwithstanding that it is returned undelivered) or if sent by facsimile on the completion of transmission. Where the notice or demand is sent by registered post it will be sufficient to prove that the notice or demand was properly addressed.***

19. I have carefully gone through the record but did not find any evidence of service of the warning letter as required under the said Clause 9. DW1 was also not sure of the service of the letter. It will therefore be without any basis for this Court to assume that service of the letter was

effected on the Respondent. I therefore find and hold that the Appellant did not serve the letter upon the Respondent.

20. The Appellant therefore did not properly and sufficiently controvert the position that the Respondent developed the first ratoon crop to maturity but the Appellant failed to harvest the crop.

21. The failure on the Appellant to harvest the mature cane was in blatant breach of the **Sugar Act, 2001** (now repealed), which was the then prevailing law and under which the contract was entered. (See **Migori High Court Civil Appeal No. 86 of 2016 Elena Olola vs. South Nyanza Sugar Co. Ltd (2018) eKLR, Migori High Court Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR** among others).

22. On a balance of probability, I find that the Respondent proved that the Appellant breached the contract by failing to harvest the first ratoon crop.

23. On the resultant remedy, 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.

24. In this case the Appellant led evidence that the Respondent failed to harvest the first ratoon crop. The court found that the Respondent was in breach of the contract. Resulting thereof it naturally yielded that the development of the second ratoon crop was compromised by the non-harvest of the first ratoon crop by the Appellant. The Respondent was therefore entitled to the proceeds of the first and second ratoon crop yields since the pleadings claimed as such.

25. On the question of mitigation of loss, 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**).

26. 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**.

27. 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).**

28. 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 Appellant 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).

29. 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.***
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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……***

30. 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. The Appellant only raised the issue for the first time in its submissions before this Court. The issue of mitigation of loss was not an issue of law but of fact. It had to trace its genesis from the Appellant's pleadings. One therefore wonders how the Respondent was expected to deal with a non-issue.

31. The trial court rightly found that there was no dispute on the size of the land. The court was also guided by the KESREF Report on the expected cane yields. It was also guided by the Appellant's cane prices schedule. Based on the information contained therein and in view of the contract provision on when the first and the second ratoons would have been ready for harvesting the court made the right assessment of the Respondent's lost returns. Contrary to the submissions by the Appellant the said sums were subjected to both the statutory and contractual deductions.

32. On the issue of interest, the Court in **John Richard Okuku Oloo** (supra) settled the same. It held that interest must run from the date of filing the suit and as such the trial court did not err in making that order. I must add that the Court of Appeal was alive to the fact that the lower court case had been filed in 1998 when it rendered its judgment in 2013 after a period of 15 years. The simple reason thereto is that it is well settled in law and has been so held over time that interest starts running from filing of suit in special damages claims like in this case.

33. The Respondent was denied the use of his money for all that period and the interest remain the sole consolation. Further, if the trial court was to otherwise find that interest ought to begin running from any other date then that was a factual issue which ought to have been pleaded and proved and the Respondent given an opportunity to respond. The argument comes too late in the day and is for rejection.

34. The upshot is that none of the grounds of appeal is successful. 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. okongowadangomigori@gmail.com for Okong'o, Wandago & Company Advocates for the Appellant.

2. kerariom@gmail.com for Kerario Marwa & 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