



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CIVIL APPEAL NO. 151 OF 2018

BETWEEN

SOUTH NYANZA SUGAR CO. LTDAPPELLANT

AND

ELIJA JODWAR MACHORI.....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. 1866 of 2015 delivered on 27/09/2018)

JUDGMENT

1. One of the hotly contested issues in this matter is whether the contract which was admitted by the Appellant in its pleadings was the one produced by the Respondent in evidence.
2. To sufficiently deal with the said issue I will have a brief look at the background of this appeal. *Elija Jodwar Machori* (hereinafter referred to as '**the Respondent**') filed **Migori Chief Magistrate's Court Civil Suit No. 1866 of 2015** (hereinafter referred to as '**the suit**') against *South Nyanza Sugar Co. Ltd* (hereinafter referred to as '**the Appellant**').
3. The Respondent claimed that by a written agreement entered into on 22/02/2012 (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. 719 Field No. 103C in Wasweta II Sub-Location measuring 1.1 Hectare within Migori County.
4. 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. That, the cane was company-developed in that the Appellant provided the Respondent with inputs and services. That, the Respondent discharged his part of the contract until the plant crop was ready for harvesting but the Appellant refused and/or failed to harvest it hence compromised the development of the ratoon crops and that she suffered loss.
5. Aggrieved by the alleged breach of the contract the Respondent filed the suit claiming compensation for the loss of the unharvested three cycles of the sugar cane with costs and interest at court rates.
6. The Appellant entered appearance and filed a Statement of Defence dated 02/09/2015 wherein it admitted entering into an agreement with the Respondent as pleaded by the Respondent. The Appellant however denied breach of the contract and put the Respondent into strict proof thereof. The Appellant prayed for the dismissal of the suit with costs.
7. The Respondent testified and produced a copy of the contract as an exhibit. In cross-examination the Respondent admitted that the contract he had produced was not signed by the Appellant's representatives. The Appellant testified through its Senior Field Supervisor as its sole witness. It denied execution of the contract which was produced as an exhibit.
8. The trial court rendered its judgment and allowed the suit by remedying the Respondent the value of the plant crop and the two ratoon crops with interest from the date of filing suit.
9. The Appellant was aggrieved by the decision. It challenged the judgment on 9 grounds. The Appellant prayed that the appeal be allowed and the suit be dismissed with costs.
10. Directions were taken, and the appeal was disposed of by way of written submissions where only the Appellant complied. Several

decisions were rendered by the Appellant in support of its position.

11. 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**).

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

13. The Respondent produced the documents in his List of Documents as exhibits. He had listed 6 documents. However, he ended up producing only three documents. They were the demand notice, the agreement book and the research document from Kenya Sugar Research Foundation. The Respondent did not produce any job completion certificates, debit advice notes or the assessor's report although he had listed them in the list of documents.

14. The Respondent therefore wholly relied on the contract in proof of his claim. There is no doubt the contract was produced as an exhibit. That exhibit was contested to the extent that it was not the one which the Appellant executed. The contract was not executed by the duly designated representatives of the Appellant. The contract was not even executed by the Respondent either. It only bore a stamp and signature of the Chief of Suna North Location. As said, the Chief did not testify.

15. The foregone is the status of the contract. *Could the contract produced as an exhibit on record be the one entered into by the parties as admitted in their pleadings?* The Respondent pleaded in paragraph 4 of the Plaintiff that he 'entered into written agreement with the defendant'.

16. The Appellant pleaded as follows in paragraphs 4 and 5 of the Statement of Defence: -

4. It is admitted that there is a Sugar Industry agreement dated 22nd February 2012 as was then required between a miller and a grower within the meaning of section 29 of the Sugar Act, No. 10 of 2001 since then repealed.

5. The defendant shall rely on the terms and conditions of the said agreement in defence of the plaintiff's claim herein.

17. The admission by the Appellant was to the effect that it entered into an agreement with the Respondent on 22/02/2012 under the **Sugar Act No. 10 of 2001**. The Appellant however stated categorically that it will rely on the contract it so executed in defence to the Respondent's claim.

18. The point of departure between the parties herein was whether the contract which was produced by the Respondent as an exhibit was indeed the same contract executed by the parties on 22/02/2012. Whereas the Respondent answered in the affirmative, the Respondent answered to the contrary.

19. Production of a document as an exhibit is different from proof of the contents of that document. A document may even be produced by the consent of the parties, but that is still far from proof of its contents. Even after the production of a document and its admission as an exhibit, if the contents therein or part thereof are disputed then such disputed contents are subject to proof. If the disputed contents are not proved, then such contents remain as such; unproved, despite the mutual production of the document.

20. The Court of Appeal in **Kenneth Nyaga Mwigie v Austin Kiguta & 2 others (2015) eKLR** clearly stated the correct legal position on production of exhibits and proof of the contents of those exhibits. The Court stated as follows: -

18. Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record..... (emphasis added).

21. Applying the foregone to this case, the production of the contract by the consent of the parties did not translate to proof of its contents. The Appellant objected to the contract on the basis that it was not the agreement it had entered into with the Respondent. The contract was hence disproved.

22. The Respondent was under a duty to prove that indeed the contract which was produced as an exhibit was the one which the parties executed on 22/02/2012. That is in line with **Section 109** of the **Evidence Act, Cap. 80** of the Laws of Kenya which states that: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

23. The contract which was produced as an exhibit was not signed by the Respondent. It was also not signed by the representatives of the Appellant. The contract was only signed by a Chief who did not testify.

24. The Respondent was clear in his pleading when he stated that he '*entered into written agreement with the defendant on the 22/02/2012*'. However, that written agreement was not the contract which was produced as an exhibit for the simple reason that the contract was not executed by either of the parties herein.

25. The upshot is that the agreement which the parties herein entered into on 22/02/2012 was not produced in court either as an exhibit or otherwise. The Respondent did not also produce any other evidence pointing to the alleged relationship between the Appellant and himself.

26. There was therefore no basis upon which the Respondent's claim would have succeeded. Respectfully, the trial court erred in finding that there was a binding contract between the parties herein and that the contents thereof were proved in favour of the Respondent.

27. The suit was not proved as required in law. The appeal is hereby allowed. The judgment of the trial court in **Migori Chief Magistrate's Court Civil Suit No. 1866 of 2015** is hereby set-aside and substituted with an order dismissing the suit with costs to the Appellant.

28. 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. soodingoadvocate@gmail.com for Odingo & 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