REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

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

CIVIL APPEAL NO. 174 OF 2018

BETWEEN

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

AND

PELESIA ADHIAMBO (suing as Admin of the Estate of

JOSEPH OWANO OKOMBO) .....RESPONDENT

(**Being an appeal and a cross-appeal from the judgment and decree by Hon. M. M. Wachira, Senior Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 107 of 2005 delivered on 29/11/2018)**

JUDGMENT

1. Joseph Owano Okombo (hereinafter referred to as '**the deceased'**) entered into a Growers Cane Farming and Supply Contract on 02/05/1996 (hereinafter referred to as **'the Contract'**) with the Appellant. The contract was to the effect that the deceased would grow and sell to the Appellant sugarcane at his parcel of land Plot No. 96 Field No. 8 in Kangeso Sub-Location measuring 1.0 Hectare within Migori County.

2. 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 cane was company-developed in that the Appellant provided inputs and services. The deceased then died.

3. Pelesia Adhiambo**, t**he Respondent herein, was the wife of the deceased. She was granted the administration of the estate of the deceased. Alleging breach of the contract the Respondent filed **Migori Chief Magistrate's Court Civil Suit No. 107** of **2005** (hereinafter referred to as '**the suit'**) against the Appellant.

4. The Respondent pleaded that the deceased discharged his part of the contract until the plant crop was ready for harvesting. The Appellant harvested and paid for the plant crop. The Respondent further pleaded that the deceased took good care of the first ratoon crop until it was ready for harvesting but the Appellant refused and/or failed to harvest it hence compromised the development of the second ratoon crop. As a result, loss was suffered.

5. The Respondent claimed for compensation for the loss of the unharvested two ratoon cycles of the sugar cane with costs and interest at court rates.

6. The Appellant entered appearance and filed a Statement of Defence dated 30/04/2005. It admitted the existence of the contract. However, the Appellant denied the alleged breach and put the Respondent into strict proof thereof. The Appellant further averred that if at all there was any such breach then the deceased 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 Appellant prayed for the dismissal of the suit with costs.

7. The hearing was held. Both parties were represented by Counsels. The Respondent testified and adopted her statement as part of her evidence. She also produced the documents in the List of documents as exhibits. The Appellant was represented by its Senior Field Supervisor who testified as DW1. He also adopted his statement as part of his evidence and produced documents as exhibits.

8. The trial court rendered its judgment and allowed the suit by remedying the Respondent the value of the two ratoon crops with interest

from the date of judgment.

9. The Appellant was aggrieved by the judgment. It filed an appeal. The Appellant challenged the judgment on 8 grounds. The Appellant mainly contended that the Respondent never specifically pleaded the claim, that the suit was not proved, that the court did not take into account the principle of mitigations and that interest was wrongly awarded. 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 both parties duly complied. Several decisions were rendered by the parties in support of their rival positions.

11. 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).**

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. I will now deal with the four main issues in this appeal.

14. On how pleadings ought to be drafted in a suit on breach of sugar cane contracts, the decision of the Court of Appeal at Kisumu in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** comes to play where the Learned Judges stated as follows: -

> **In the 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.** (emphasis added).

15. I therefore find that the suit was not bad in law.

16. As to whether the suit was proved, there is no doubt that the contract was entered into. The Appellant's pleadings and the witness so attests to. It was further admitted that the Respondent was assisted to develop the cane up to maturity. There was also no dispute to the fact that the Appellant harvested and paid for the plant crop. The only point of departure according to the Appellant's witness was that the Respondent failed to develop the ratoons.

17. The parties had various obligations under the contract. The Appellant, for instance, was under a duty to notify the Respondent of any breach of the contract and to call for its remedial action. That was under **Clause 6.2.** The said Clause 6.2 stated as follows:

> **The Miller shall be entitled to upon expiry of a fourteen day notice and at its own discretion and without relieving the Grower of the obligations under this agreement, in the event that the Grower does not prepare, plant and maintain the plot and the cane in accordance with his obligations under this agreement and / or instructions and advise issued by the Miller to (but not limited to) carry out such operations on the plot which the Miller shall in its sole discretion deem necessary to ensure satisfactory yield and quality.**

18. If it was true that the Respondent failed to develop the ratoons as required, then it was incumbent upon the Appellant to issue a formal notice to that effect. The notice would have pointed out the breach and called for a remedial action. That notice would have been served pursuant to **Clause 9** of the contract which stated 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. The Appellant did not issue or serve the required notice. Further, there was nothing to demonstrate the allegation that the Respondent failed to develop the ratoon crops.

20. To the contrary the Respondent testified on how the first ratoon was developed and good plant husbandry applied until the crop was ready for harvesting, but the Appellant failed to so harvest it.

21. On a balance of probability therefore the Respondent proved that the Appellant failed to harvest the first ratoon crop at maturity. That was a breach of the contract. The trial court was hence right in its evaluation of the evidence.

22. Having found that the Appellant was in breach of the contract for failure to harvest the first ratoon crop at maturity, the Respondent was entitled to compensation. On the resultant remedy for the breach I have previously held in **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** 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.

23. In this case the Respondent was entitled to the proceeds of the first and second ratoon crop yields since the pleadings claimed as such.

24. Closely related to the aspect of remedy is the issue of mitigation of loss. The issue is one which is hotly contested almost in every appeal and is pending determination at the Court of Appeal. There are divergent views by the High Court on the issue.

25. I must 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.

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** when he recently (on 21/12/2018) 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 contended that the Respondent failed to develop and exercise diligence in growing the ratoon cane crops. 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. How then was the Respondent expected to respond to a non-issue?

31. I therefore find and hold that the issue of mitigation of loss having not been raised in the suit cannot be subject of an appeal.

32. Returning to the case at hand, as said, the Respondent was hence entitled to compensation for the expected value of the two ratoon crops. That is what the trial court awarded.

33. The size of the land was not disputed. A KESREF Report on cane yield assessment report was rightly adopted as the guide for assessment of the yields. The price schedule produced by the Appellant was used by the trial court to determine the prices.

34. The court further took into account all the necessary deductions under the contract. I am satisfied that the trial court had all what was required to determine the expected income for the two ratoon crops. That is what the court so rightly did.

35. 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. The Respondent was denied the use of her money for all that period and the interest remain the sole consolation.

36. Having dealt with all issues raised in this appeal, I must find and hold, which I hereby do, that 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 through: -

1. okongowadangomigori@gmail.com Messrs. Okong'o Wandago & Company Advocates for the Appellant**.**

2. kerariom@gmail.com for Messrs. Kerario Marwa & 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