REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CIVIL APPEAL NO. 65 OF 2019

STEPHEN ODHIAMBO OPUODHO.....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 Civil Suit No. 212 of 2016 delivered on 08/05/2019)

JUDGMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court *vide* the judgment rendered on 08/05/2019.

2. The Appellant herein, **Stephen Odhiambo Opuodho**, who filed **Rongo Senior Resident Magistrate's Court Civil Suit No. 212 of 2016** (hereinafter referred to as '**the suit'**) pleaded that by an Outgrowers Cane Agreement entered into on 22/02/2008 (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. 1096 Field No. 83B measuring 0.8 Hectares in Kamwango 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 and even after the Appellant developed the first ratoon cane crop again the Respondent failed to harvest that cane thereby compromising the development of the second ratoon cane crop thereby resulting to loss of income. He sought for the value of unharvested cane, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 30/08/2016 and denied the existence of the contract. It put the Appellant into strict proof thereof.

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. The Respondent called its Senior Field Supervisor as its sole witness. The witness testified, produced several exhibits and adopted his statement as part of the evidence.

6. The court thereafter proceeded to render the judgment. The trial court dismissed the suit with costs. It is that judgment which is the subject of this appeal.

7. The Appellant in praying that the appeal be allowed and appropriate compensation be awarded proposed the following five grounds in the Memorandum of Appeal dated 15/05/2019 and filed in Court on 20/05/2019:

> ***1. The learned magistrate erred in law in finding that the Plaintiff's sugar cane crop was not maintained as required on suspect, insufficient and no evidence or at all,***
>
> ***2. The learned trial magistrate erred in law in unreasonably calling for "documentary proof" of development of the sugar cane crop on the appellant's farm, whereas farming/husbandry in essence is not a documented undertaking, and the finding was in effect unreasonable and erroneous.***
>
> ***3. The learned trial magistrate erred in failing to take into account that under the contract, the Respondent was obliged to develop the sugar cane in case the appellant failed to do so, and charge it to the appellant, and the respondent could not therefore absolve itself from responsibility.***

4. The learned trial magistrate erred in law in failing to find that the contract was on a self developed farm with existing cane which the respondent failed to harvest when due and ready as agreed in the contract and the evidence of lack of sugar cane on the ground was as superfluous as it was erroneous.

5. The learned trial magistrate erred by failing to assess damages as may have been awarded.

8. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied.

9. 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).**

10. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal and the submissions by the parties.

11. From the judgment, the suit was unsuccessful because the Appellant failed to prove that he actually developed the cane to maturity. I will therefore consider whether the suit was proved.

12. According to the pleadings and the evidence the Appellant's claim is anchored on the allegation that the Respondent failed to harvest the plant crop and the first ratoon cane crop and as such compromised the development of the second ratoon cane crop. In proof of his case the Appellant relied on his oral testimony, written statement and the Contract.

13. The Respondent through its witness admitted the existence of the contract at the hearing. The point of departure was however that the Appellant did not develop his farm at all and the Respondent could not even supply the cane seed. The Respondent denied liability.

14. The burden of proof in a civil case of this nature rests on the Appellant. This is in accordance with **Section 107** and **109** of the **Evidence Act, Cap. 80** of the Laws of Kenya. The standard of proof is always on a balance of probability. (See **Mbuthia Macharia v. Annah Mutua Ndwiga & Another (2017)** eKLR and **Bungoma Election Petition No. 4 of 2017 Levi Simiyu Makali vs. Koyi John Waluke & 2 Others (2018) eKLR).**

15. Was the suit therefore proved on a balance of probability?

16. The Appellant testified that when he entered into the contract with the Respondent he had long planted the cane. The Appellant did not state when he planted the cane. *Clause 2(a)* of the Contract was a provision to cater for instances where a contract is signed after the planting of the cane. That clause was not duly completed as expected.

17. The Appellant did not call any other evidence to buttress his case. In a case of this nature upon proof of execution of a contract a farmer has a duty to prove that he/she complied with the terms of the contract, but the Respondent. That burden can only be proved by way of evidence on a balance of probability.

18. The Respondent put the Appellant to task from the word go. It was incumbent upon the Appellant to adduce appropriate evidence to prove his case. I am at the moment not sure whether the Appellant really planted the plant crop. If so, when?

19. Without proof of planting and taking care of at least the plant crop it becomes very hard, if not impossible, to prove liability of the part of the Respondent. In other words, the Appellant was first to discharge the evidential burden against the Respondent. Failure to do so, the Respondent did not even have to call any evidence as the case must fail. That was the case in this matter.

20. This Court is hence in sync with the decision of the trial court. The suit was not proved. Consequently, 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. odukeze@gmail.com Messrs. Oduk & Co. 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 Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE