REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

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

CIVIL APPEAL NO. 70 OF 2019

DAN ONYANGO DWALO.....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 Principal Magistrate's Court Civil Suit No. 213 of 2016 delivered on 08/05/2019)

JUDGMENT

1. The Respondent herein, *South Nyanza Sugar Co. Ltd,* entered into an Outgrowers Cane Agreement with one *Cyprian Otieno Kadwar* on 20/06/2012 (hereinafter referred to as **'the Contract'**). The contract which commenced on 19/08/2012 entailed *Cyprian Otieno Kadwar* to grow and sell to the Respondent sugarcane at his parcel of land known as Plot No. 167 Field No. 312 measuring 2.28 Hectares in K'Otieno Sub-Location within Migori County.

2. On 11/03/2015 *Cyprian Otieno Kadwar* transferred his interest in the contract to the Appellant herein, *Dan Onyango Dwalo.* On 17/06/2015 the Appellant herein filed **Rongo Principal Magistrate's Court Civil Suit No. 213 of 2016** (hereinafter referred to as '**the suit'**). He 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.

3. The Appellant contended that he exercised good crop husbandry on the plant crop until maturity but the Respondent failed to harvest the plant crop thereby compromising the development of the ratoon cane crops thereby resulting to loss of income. He sought for compensation for the loss of the three crop cycles at Kshs. 1,710,000/= together with costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 30/08/2016. It denied the contract and any alleged breach. The Appellant was put into strict proof thereof. The Respondent further pleaded that if at all the Appellant suffered any such loss then the Appellant was the author of his own misfortunes 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* and adopted his statement as part of his evidence and also produced the documents in the List of Documents as exhibits.

6. The trial court thereafter rendered judgment where it dismissed the suit with costs on account of the principle of *force majeure*. 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 four grounds of appeal in the Memorandum of Appeal dated 27/05/2019 and filed in Court on 29/05/2019: -

1. The trial learned magistrate erred in law in determining the suit on unpleaded issues.

2. The learned trial magistrate erred in law in dismissing the suit account of force majeure when the said defence had neither been pleaded by the defence or proven to have existed either in fact or at all.

3. The learned trial magistrate erred in law and in fact in failing to properly evaluate the evidence and came to a wrong decision.

4. The learned trial magistrate exhibited bias.

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

9. The Appellant submitted that the suit was determined on the basis of a non-issue since the Respondent never pleaded and proved any events which could be interpreted as *force majeure.* The trial court was flouted for not properly evaluating the evidence and as such reached a wrong finding. The Appellant referred to several decisions in support of the appeal. He prayed that the appeal be allowed and judgment be entered in his favour.

10. The Respondent opposed the appeal. It submitted that it was not in breach of the contract as it permitted the Appellant to harvest the plant crop at maturity. It further submitted that the Appellant failed to harvest the plant crop and as such it cannot be blamed for any alleged loss to the Appellant.

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 carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

13. The crux of the dismissal of the suit was that the Respondent had proved events which constituted *force majeure.*

14. The Appellant's contention was that the foregone issue was not pleaded by the Respondent in its statement of defence. It was further contended that the Appellant was therefore denied an opportunity to challenge that evidence before court.

15. It is true the Respondent did not plead that issue of *force majeure*. At the risk of repetition, I have severally taken the legal position that in an adversarial system of litigation 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…..***
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> ***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.'***

16. **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……***
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> ***…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.***

17. 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.**

18. That being the legal position it therefore renders that the evidence at the trial to the extent that the contract was frustrated by events *force majeure* was at variance with the pleadings. That evidence cannot be legally acceptable as a basis for rejecting a claim. The issue was a non-issue.

19. Having so found I will now determine whether the suit was proved. As said the parties testified and tendered exhibits.

20. The Appellant testified that he took good care of the plant crop until it matured. He further testified that the plant crop was to be harvested when it was between 22 and 24 months old. He averred that despite repeated requests to harvest the cane the Respondent instead refused to do so. The Appellant produced letters as exhibits to that effect. He however stated that he was authorized by the Respondent to harvest the plant crop when the cane was 34 months' old.

21. On cross-examination, the Appellant admitted that he was given authority to harvest the plant crop. He stated that it was on 08/12/2015.

22. There is no doubt the Respondent did not harvest the plant crop within the timelines in the contract. I say so because of the letters the Appellant wrote to the Respondent and the report by the Agricultural Officer on the burnt cane.

23. It is a fact that when cane attains maturity, but it's not harvested that cane does not immediately dry. It takes a while before the cane finally dries up. According to the Kenya Sugar Research Foundation report on sugar cane varieties and yields within South Nyanza Sugar Company zone issued in November 2008 (which report was produced as an exhibit by the Respondent and will hereinafter refer it to as '**the Kesref Report'**) during that period several negative changes take place. For instance, the crop reverts to vegetative growth stage whereby it regenerates new shoots. The shoots derive their initial food and water from the sugar stored in the mature cane. That lowers the cane and sugar yields.

24. The Kesref Report further dealt with the effect of delay in harvesting mature cane as follows: -

> ***…. If delay is extensive (over 6 months after maturity) the cane crop dries up and no yield is attained.***

25. The contents in the Kesref Report were not challenged. Having produced it the Respondent was bound by its contents. It therefore means that the sugar content in sugar cane reduces when the cane attains maturity but is not harvested. The reduction of the sucrose content takes a period of around 5 months. By the time the cane attains 6 months' post-harvest time the cane dries up completely. That means that if the cane is harvested after it matures but before it finally dries up the experts are able to work out what the yields were at maturity.

26. *Clause 1(f)* of the contract provided that the plant crop was expected to mature not later than 24 months after planting. According to *Clause 2(a)* of the contract the commencement date was 19/08/2012. That means the plant crop was expected to mature by August 2014. Giving the mature plant crop a grace period of 6 months' post-maturity if not harvested, the crop would have finally dried up by February 2015.

27. The contract was assigned to the Appellant on 11/03/2015. By then the plant crop had dried up by February 2015. In that case therefore there was nothing the Appellant would have yielded from the plant crop even if he had harvested the cane immediately he was given the authority to do so on 08/12/2015. It also follows that the issue of the fire (although not pleaded) would not have aided the Respondent either.

28. The upshot is that there is evidence that the plant crop was maintained to maturity. That crop was however not harvested as required and dried up in the farm. Failure to harvest the plant crop at maturity was a breach of the contract on the part of the Respondent. (See **Migori High Court Civil Appeal No. 86 of 2016 Elena Olola vs. South Nyanza Sugar Co. Ltd (2018) eKLR** and **Migori High Court Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR).**

29. That therefore leads this Court to the remedies for such a breach. Settled in law, remedies in breach of contracts claims must be specifically pleaded and proved. The intention of the remedies is that claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred (*restitution in integrum'*). The measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time the contract was made and that such damages are not at large but in the nature of special damages. (See the Court of Appeal in **Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR)** , **Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai Kisumu Civil Appeal No. 239 of 1997 (UR)** among others).

30. Like any other disputes based on breach of contracts, such disputes must be weighed against the settled principles of ***remoteness, causation*** and ***mitigation***. In **Migori High Court Civil Appeal No. 74 of 2018 South Nyanza Sugar Co. Ltd vs. Rehema Joseph Nkonya** (unreported) I dealt with the applicability of the principle of mitigation in sugar disputes. I rendered myself thus: -

> ***18. 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. In this case the Respondent was entitled to the proceeds of the plant crop and the first ratoon crop yields since the pleadings claim as such.***
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> ***19. 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.***
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> **20**. ***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).***
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> **21**. ***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.***
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> **22**. ***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).***

23. ***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.***

24. ***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.…..…*

25. ***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. How then was the Respondent expected to respond to a non-issue?***

26. ***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.***

31. The above position applies in this case. The principle of mitigation of loss does not come to the aid of the Respondent in this case. The Appellant was therefore entitled to compensation in respect to the three crop cycles.

32. The Respondent produced the Yields Report developed by KESREF, its Cane Prices Schedule, its harvesting and transport charges schedule as exhibits. There was as well a Survey report on the size of the land prepared by the Respondent and produced as an exhibit. I will be guided by the said documents since the Appellant did not produce any such documents. I also note that there is no dispute on the size of the land.

33. Given that the contract was entered on 19/08/2012 then in line with *Clause 1(f)* thereof and by taking into account all the necessary deductions the Appellant was entitled to the net income of Kshs. 1,657,920/= for the three crop cycles.

34. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

a) The appeal hereby succeeds and the finding of the learned magistrate dismissing the suit with costs be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 1,657,920/=.

c) The sum of Kshs. 1,657,920/= shall attract interest at court rates from the date of filing of the Plaint;

d) The Appellant shall have costs of the suit as well as costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 11th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. odukeze@gmail.com **for** the firm of Messrs. Oduk & Company Advocates for the Appellant.

2. morongekisii@yahoo.com for the firm of Messrs. Moronge & 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