



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

(Coram: A. C. Mrima, J.)

CIVIL APPEAL NO. 41 OF 2019

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

-VERSUS-

JOHN MWIKWABE KERATO.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. O. Odenyo, Senior Principal Magistrate

in Migori Chief Magistrate's Civil Suit No. 1711 of 2016 delivered on 23/01/2019)

JUDGMENT

1. *John Mwikwabe Kerato*, the Respondent herein, filed **Migori Chief Magistrate's Court Civil Suit No. 1711 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 27/10/2011 (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. 267 Field No. 165 in Moheto Sub-Location measuring 0.69 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 rendered various services and supplied inputs to the Respondent towards the development of the cane crop.
3. The Respondent further pleaded that he discharged his part of the contract until the plant crop was ready for harvesting but instead the Appellant for no apparent reason refused and/or failed to harvest the first ratoon crop. The plant crop dried up. The Respondent posited that he suffered loss of the plant crop, first and second ratoon crops.
4. Aggrieved by the alleged breach of the contract the Respondent filed the suit. He sought for compensation for the loss.
5. The Appellant entered appearance and filed a Statement of Defence dated 02/02/2017. The Appellant denied the contract as well the alleged 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.
6. The suit was finally settled down for hearing where both parties were represented by Counsels. The Respondent 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, *Richard Muok (DW1)*, as its sole witness who adopted his statement and produced the documents as exhibits.
7. The trial court rendered its judgment on 23/01/2019. It allowed the suit and awarded Kshs. 376,975/= as compensation. That is the judgment subject of this appeal.
8. The Appellant in praying that the appeal be allowed and the suit be dismissed proposed 12 grounds in the Memorandum of Appeal dated 22/02/2019 and evenly filed in Court.
9. Directions were taken, and the appeal was disposed of by way of written submissions where the parties duly complied. They also relied on

various decisions in support of their rival positions.

10. As the first appellate Court, it is now well settled that 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**.

11. 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.

12. I will first deal with the issue of the contract in this matter. The contract was denied by the Appellant in its pleading. The Appellant also denied breaching the contract.

13. On his part the Respondent listed the contract as one of the documents in his list of documents. He also produced the contract as an exhibit. I have looked at the contract as produced.

14. The contract which is now part of the evidential record in this case contained 4 pages. The first page was the outer cover. The second page comprised of the Respondent's details and the particulars of the land. The third page comprised of the description of the parties to the contract and part of clause 1 of the contract. It had description of some three terms. The fourth page is the execution part of the contract. The contract as produced does not have the rest of the obligations of the parties thereto.

15. The basis of the suit was the allegation that the Appellant in breach of the contract failed and/or refused to harvest the cane when it was mature. The Appellant denied as such.

16. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In **National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR** the Court of Appeal at page 507 stated as follows: -

A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

17. In **Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd (2017) eKLR** the Court of Appeal further stated that: -

We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.

18. In this case not all the terms of the contract were produced in the exhibit received by the court. The terms which the parties agreed on were therefore not availed to Court. Several questions hence arise: How will a Court interrogate any alleged breach of the contract? On what basis will a Court find a party in breach in the absence of the terms of that contract?

19. As Courts are only called upon to interrogate the terms of contracts in cases of alleged breach of such contracts a Court will not be able to discharge such a duty in the absence of the terms of the contract.

20. In the impugned judgment the trial court dealt with several obligations of the parties. It eventually found the Appellant guilty of breach of the contract for not harvesting the plant crop. Surprisingly, such a term was not availed before Court.

21. From the foregone discussion I find and hold that the trial court erred in imputing imaginary terms into the contract. The position was that the parties never availed any term(s) of the contract on harvesting and the court ought to have so found.

22. The suit was hence not proved. There was no legal basis for finding the Appellant in breach of the contract.

23. The foregone finding is sufficient to dispose the appeal. A consideration of the other issues would be academic. Accordingly, the appeal is allowed and the judgment of the trial court rendered on 23/01/2019 is hereby set aside. I substitute that finding with an order dismissing the suit with costs to the Appellant. The Appellant shall as well have costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of July 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. okongowadangomigori@gmail.com for the firm of Messrs. Okong'o Wandago & Company Advocates for the Appellant.
2. Advocate685@gmail.com for the firm of Messrs. Nelson Jura & 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