REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CIVIL APPEAL NO. 101 OF 2019

BETWEEN

TRANS MARA SUGAR CO. LTD .....APPELLANT

AND

DANIEL CHORE ONYONI.....RESPONDENT

AND

CIVIL APPEAL NO. 03 OF 2020

(As a Cross-Appeal)

BETWEEN

DANIEL CHORE ONYONI.....CROSS-APPELLANT

AND

TRANS MARA SUGAR CO. LTD .....CROSS-RESPONDENT

(Being an Appeal and a Cross-appeal from the judgment and decree by Hon. M. M. Wachira Resident Magistrate in Migori Magistrate's Civil Suit No. 901 of 2016 delivered on 27/08/2019)

JUDGMENT

Background:

1. The parties herein agreed that the decision in *Migori High Court Civil Appeal No. 132 of 2019 Trans Mara Sugar Co. Ltd vs. Ben Kangwaya Ayiemba* (unreported) shall apply *mutatis mutandis* to this matter in respect of the Court's finding on the duty to harvest and transport the mature cane, on whether the contract was breached and the remedies.

2. In this case the parties were in agreement that they entered into a Sugar Cane Growing and Supply Contract on 25/06/2011. I will henceforth refer it to as '**the Contract**'. According to the contract the Respondent was contracted by the Appellant to grow and sell to it sugarcane at the Respondent's parcel of land in Nyaramba Sub-Location Getenga Location within Kisii County (hereinafter referred to as '**the farm'**).

3. Sometimes in 2016 the Respondent instituted *Migori Chief Magistrate's Court Civil Suit No. 901 of 2016* (hereinafter referred to as '**the suit'**) against the Appellant. The suit was on compensation from alleged breach of the contract.

The Suit:

4. The Respondent pleaded that the Contract was for a period of six years or until one plant crop and two ratoon crops of the sugarcane were harvested from the farm whichever event occurred first. The Respondent further pleaded that he discharged his part of the contract until the plant crop was ready for harvesting but the Appellant failed and/or neglected to harvest it.

5. The Respondent posited that the plant crop dried up on the farm and the development of the ratoon crops was compromised. He contended that he suffered loss as a result of the failure on the part of the Appellant to harvest the mature sugar cane from the farm.

6. The Respondent averred that the Appellant breached the contract by failing and/or refusing to harvest the mature plant cane crop. He sought damages for breach of the contract with costs and interest at court rates.

7. The Appellant entered appearance and filed a Defence. The Appellant however denied both the existence of the contract and any alleged breach thereof. It put the Respondent into strict proof thereof. The Appellant pleaded in the alternative that if there was any contract then the Respondent was the one who breached it for failure to harvest and deliver the sugar cane to the Appellant's weighbridge at the appropriate time. The Appellant prayed for the dismissal of the suit with costs.

8. 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 Appellant called one witness. He was one *Nathan Nyakweba* (DW1) who was an independent contractor. He used to harvest mature cane for the farmers and avail the cane to the Appellant's weigh bridges.

9. The trial court rendered its judgment on 27/08/2019. The suit was allowed and the Respondent awarded the proceeds for the plant crop and the first ratoon crop at Kshs. 437,920/= with costs and interest from the date of filing of the suit.

The Appeals:

10. Both parties were aggrieved by the judgment. The Appellant filed *Civil Appeal No. 101 of 2019* whereas the Respondent filed *Civil Appeal No. 03 of 2020*.

11. The Appellant raised 11 grounds of appeal in challenging the entire judgment. The Appellant contested the trial court's finding on the duty to harvest the cane, on the finding that the cause of action was properly pleaded and proved, on awarding compensation for the undeveloped first ratoon crop, in using incorrect cane prices, in misapplying the law hence delivered a *per incuriam* decision, reliance on a Yields Report by Kenya Sugar Research Foundation (KESREF) which was not part of the record and that the court failed to deduct the transport and harvesting charges from the decretal sum.

12. The Respondent challenged the judgment essentially on one ground. It was that the court erred by wrongly relying on the principle of mitigation of loss in declining to make an award for the second ratoon cane crop.

13. Directions were taken. The parties proposed and the Court agreed that the appeals be heard by way of written submissions. Civil Appeal No. 101 of 2019 became the main appeal and Civil Appeal No. 03 of 2020 was the Cross-Appeal. Both parties filed their respective submissions and referred to several decisions. They also highlighted on the written submissions virtually.

14. In support of the main appeal the Appellant submitted strongly that the trial court erred by rewriting the contract instead of interpreting it. It was urged that the contract was clear in Clause 10(c) that the Respondent, as the farmer, had the duty to harvest and deliver any mature cane crop under the contract to the Appellant as the miller. However, the court set aside that clause and relied on the **Sugar Act, No. 10 of 2001** (hereinafter referred to as '**the Sugar Act**') to introduce another new term unknown to the parties. The new term placed the duty to harvest the cane on the Appellant in a case where the Appellant remained unaware of the state of the Respondent's cane. It was contested that the finding flouted the settled legal position on freedom of contract.

15. The Appellant referred to 8 decisions in support of the position that a court cannot rewrite a contract between parties. The decisions included **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR**, **Securicor Courier (K) Ltd vs. Benson David Onyango & Another (2008) eKLR**, **Samuel Kamau Macharia vs. Daima Bank Ltd (2008) eKLR**, **Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited (2014) eKLR** among others.

16. It was further submitted that the only instance where a court may interfere with a contract between parties was when there was evidence that the contract was illegal, void, voidable or unconscionable. The Appellant submitted that none of the vitiating factors was proved in this case. The decision in **Stanley Kamere & 26 Others vs. National Housing Corporation & 2 Others (2015) eKLR** among two other decisions were cited in support of the submission.

17. The Appellant also submitted that the provisions of the **Sugar Act** could not override the freedom of parties to a contract. It was submitted that the **Sugar Act** was void to the extent of interfering with the freedom the parties to the contract and that was the reason it was repealed. The Appellant also faulted the trial court in relying on the **Sugar Act** during a time when the law was long repealed by the enactment of the **Crops Act, 2013**.

18. The Appellant further faulted the trial court in finding it in breach of the contract. Riding on the argument that the duty to harvest the cane was on the Respondent, the Appellant submitted that the court failed to find that there was no blameworthiness on its part. It relied on the decision in **Hadley vs. Baxendale** (without citation) and several Latin maxims including *action non reum facit, nisi mens sit rea, commodum ex injuri su non habere debet* and *injuria propria non cadet in beneficium facientis*.

19. On the remedies sought, the Appellant submitted that the Respondent sought general damages for breach of the contract which remedy was not available in law. Several decisions were referred to on that legal principle.

20. The Appellant vehemently submitted that the suit was not proved even if it was duty-bound to harvest the cane. It was submitted that the size of the land was not proved, the prevailing cane prices were not availed and that there was no evidence on the projected cane yields. The

court was also faulted in not deducting the harvesting and transport costs among other statutory deductions under the contract even after wrongly finding the Appellant in breach.

21. According to the Appellant, and without admitting liability, had the court taken into account the foregone deductions the award would have instead been Kshs. 117,623/=.

22. The cross-appeal appeal was opposed. The Appellant contended that the Respondent was not entitled to any proceeds on the second ratoon crop. It was the Appellant's position that the Respondent ought to have mitigated the loss by selling the cane to another miller. Reference to some persuasive decisions was made.

23. The Appellant then prayed that the appeal be allowed with costs, the suit be accordingly dismissed and the cross-appeal be as well dismissed with costs.

24. The Respondent opposed the main appeal and supported his cross-appeal. He submitted that the cause of action was properly pleaded. He relied on **John Richard Okuku vs. South Nyanza Sugar Co. Ltd (2013) eKLR**.

25. It was also submitted that the dispute was proved as required in law. According to the Respondent there was on record evidence on the size of the land, the yields and the cane prices.

26. On the duty to harvest and transport the cane, the Respondent contended that the duty was on the Appellant. The Respondent submitted that Clause 10(c) of the contract only provided for the Respondent's duty to offer the cane for delivery upon maturity to the Appellant. That was not the same as harvesting and transporting the cane by the Respondent.

27. On such ambiguity this Court was urged to note that the contract was a standard form contract wholly and fully prepared by the Appellant. The Respondent was only called upon to execute the same. The Respondent submitted that had the Appellant wanted to place the duty to harvest and transport the cane on the Respondent then the Appellant would have so expressly stated and with much clarity. On that score the Court was called upon to find that Clause 10(c) of the contract could only be interpreted in favour of the Respondent.

28. The Court was further called upon to note that the contract was entered into during the currency of the **Sugar Act** which placed the duty to harvest and transport cane on the millers. In any event it was submitted that where parties to a contract cannot agree on the interpretation of the terms of their contract then the provisions of the relevant statute apply. In this case the statute was the now repealed **Sugar Act**. A persuasive decision was referred to in support.

29. On mitigation of loss, it was submitted that the issue ought to fail since it was neither pleaded nor proved in the suit but only came up on appeal. Several persuasive decisions were referred to.

30. Responding to the issue of not making the deductions, the Respondent submitted that the court did not err since the Appellant neither pleaded as such nor tendered any evidence as the basis of the alleged deductions. It was submitted that the Appellant's attempt to introduce the evidence on the alleged deductions in its written submissions on appeal was an act in futility and far too late in the day.

31. The Respondent hence prayed that the main appeal be dismissed with costs and that the cross-appeal be allowed with costs.

Analysis and Determinations:

32. 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).**

33. 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.

34. I will henceforth deal with the issues as follows: -

(i) The duty to harvest and transport mature cane:

35. As stated above the parties agreed that the Court's finding on this issue in *Migori High Court Civil Appeal No. 132 of 2019 Trans Mara Sugar Co. Ltd vs. Ben Kangwaya Ayiemba* do apply to this appeal.

36. In the said appeal I held that the Appellant had the duty to harvest and transport the mature cane from the Respondent's farm. That is this Court's finding in this appeal as well.

(ii) Whether the contract was breached:

37. This issue was answered in the affirmative in *Migori High Court Civil Appeal No. 132 of 2019 Trans Mara Sugar Co. Ltd vs. Ben Kangwaya Ayiemba*.

38. I so find herein.

(iii) Whether the suit was proved as required in law:

39. The suit was civil in nature. **Sections 107, 108** and **109** of the **Evidence Act**, Cap. 80 of the Laws of Kenya placed the incidence of burden of proof on the party which desired the court to find in its favour. That burden was on the Respondent.

40. In discharging the said burden, the Respondent was called upon to prove his case on a balance of probability. According to the Plaint the cause of action was the failure by the Appellant to harvest and transport the mature plant cane crop.

41. The Respondent testified and adopted his statement as part of his evidence. He also produced exhibits including the contract, demand letter, KALRO Report on yields and a schedule of cane prices.

42. The Respondent stated that he planted the plant cane crop and applied the required plant husbandry until the cane matured. The Appellant's witness, DW1, did not dispute the position. The contention was on the duty to harvest and transport the cane.

43. With such a state of affairs, there is evidence to the effect that the Respondent proved his case on a preponderance of probability. The cause of action was hence proved in law.

(iv) Remedies:

44. I also dealt with this issue in *Migori High Court Civil Appeal No. 132 of 2019 Trans Mara Sugar Co. Ltd vs. Ben Kangwaya Ayiemba.*

45. From the analysis in the said appeal I find that the cause of action in the suit was sufficiently pleaded in the amended plaint.

46. Likewise, the Respondent herein was entitled to compensation for the plant crop, the first ratoon crop and the second ratoon crop.

47. The matter however did not end there. The Respondent was still under a legal duty to prove the size of the land, the expected yields and the cane prices.

48. There was no dispute on the size of the farm. 0.7 Hectares. Page 5 of the contract also provided the size of the farm as such. On the expected yields, the Respondent relied on a report by the Kenya Agricultural and Livestock Research Organization (KALRO) within Trans Mara zone between 2013 and 2014. The report was on the yields for the years 2013 and 2014 and it was based on statistics from the Sugar Directorate as in 2015.

49. I must point out that in his List of Documents the Respondent also listed a Yields Report by Kenya Sugar Research Foundation (KESREF) prepared in November 2008 as one of the documents he intended to rely on in the suit. The report was on expected yields within the general South Nyanza region.

50. It is also important to take note of the fact that the Appellant filed a List of Documents. Among the documents listed therein were a Sugar Report on average yield and productivity of sugar factories in Kenya and a Report on contract sugarcane farming and farmers' income in the Lake Victoria Basin. However, none of those documents were formally produced as exhibits. They did not therefore form part of the evidential record in the suit.

51. The Sugar Report on average yield and productivity of sugar factories in Kenya, the Report on contract sugarcane farming and farmers' income in the Lake Victoria Basin and the KESREF Report were however not produced as exhibits, but the KALRO Report. Those documents did not therefore form part of the evidential record in the suit. The Court of Appeal in **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR** held that: -

> ***24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification……***

52. The KALRO Report was the only evidence adduced in the suit on yields. The Report was by an independent party and resulted from series of research in the sugar industry over time. The report stated that the average yields were between 69 and 92 tonnes per hectare for the two years.

53. On the cane prices the Respondent produced a schedule of prices as an exhibit. The schedule gave comparative cane prices as offered by the Appellant and another entity (Sukari) between 2010 and 2015. The report was produced in evidence with the concurrence of the Appellant. The contents thereof were not challenged in cross-examination. On a balance of probability, the schedule settled the issue of the cane prices.

54. According to page 1 of the contract, the plant crop was planted in January 2010. In respect to Clause 1 of the contract the plant crop was expected to mature and in any event be harvested not later than February 2012. The first ratoon crop would have been ready for harvesting not later than January 2014. The second ratoon crop would have been ready for harvesting not later than December 2015.

55. The KALRO report however gave the expected yields for only two years; that is 2013 and 2014. The report was silent on the expected yields in the other years. The record did not have any other evidence on the expected yields other than the KALRO Report.

56. In this case the Report could only be relied on in respect to the expected yields for the first ratoon crop whose harvesting was around January 2014. The report did not provide for the expected yields for years 2012 and 2015 which time the harvests for the plant crop and the second ratoon crop respectively were due. A Court is only able to compute the compensation based on the size of the farm, the expected yields and the then prevailing prices. If one of them is missing the claim turns out to be unproved.

57. Accordingly, the expected a gross income for the first ratoon crop was Kshs. 228,690/=.

58. On the issue of deductions, I reiterate the finding in *Migori High Court Civil Appeal No. 132 of 2019 Trans Mara Sugar Co. Ltd vs. Ben Kangwaya Ayiemba* that none were pleaded and/or proved.

Conclusion:

59. Having dealt with the issues raised in this appeal, the following final orders do hereby issue: -

a) The appeal by the Appellant, Trans Mara Sugar Company Limited, is partly allowed.

b) The award of Kshs. 437,920/= is hereby revised to Kshs. 228,690/=. The sum shall attract interest at Court rates from the filing of the suit.

c) The cross-appeal by the Respondent, Daniel Chore Onyoni, be and is hereby dismissed with costs.

d) The Appellant shall also have one-half of the costs of the main appeal.

Orders accordingly.

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

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. ronaldoyagi@rediffmail.com for the firm of Messrs. Oyagi, Ong'uti, Magiya & 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