



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 11 OF 2018

JAMES A. NIALA.....APPELLANT

-VERSUS-

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. E. M. Nyagah Magistrate

in Migori Magistrate's Civil Suit No. 1519 of 2015 delivered on 13/02/2017)

JUDGMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court vide the judgment rendered on 13/02/2018 for want of proof of the contract between the parties herein.

2. The Appellant herein, **James A. Niala**, who filed **Migori Chief Magistrate's Court Civil Suit No. 1519 of 2015** (hereinafter referred to as '**the suit**') pleaded that by an Outgrowers Cane Agreement entered into so on 25/02/2012 (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. 1259(i) Field No. 28 measuring 4.21 Hectares in South Kabuoch Sub-Location within Homa Bay 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 thereby compromising the development of the ratoon crops thereby resulting to loss of income. He sought damages for the breach of contract and compensation for the value of three cane crops, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 25/08/2015 and vehemently denied the existence of the alleged contract between the parties.

5. The suit was finally settled down for hearing where both parties were duly represented by Counsels. The Appellant testified and adopted his statement as part of his evidence and also produced the documents in his List of Documents as exhibits. The documents included the contract. The Respondent's representative one Richard Muok testified and adopted his statement as his evidence. The court then rendered itself and dismissed the suit with costs. It is that judgment which is the subject of this appeal.

6. The Appellant in praying that the appeal be allowed and appropriate compensation be awarded proposed the following six grounds in the Memorandum of Appeal dated 28/02/2018 and evenly filed: -

1. The magistrate erred in law and fact when he found that the Appellant's case was premature and therefore not entitled to compensation of any sugarcane cycle.

2. The magistrate erred in law and fact when he held that the Appellant's sugarcane supply contract was fraudulent, for want of the Respondent's stamp, a matter which was never particularized as envisaged under Order 2 Rule 4(1) (a), (b), (c), (2) and 10(1) (a), (b) of the Civil Procedure Rules 2010.

3. The Magistrate erred in law and fact when he directed his mind to compare the Appellant's sugarcane supply contract with other contracts which were never adduced as evidence / exhibits herein.

4. The magistrate erred in law and fact when he held that the Appellant's sugarcane supply contract was nonexistent and not

genuine contrary to the rule of pleadings, the Evidence Act and the Law of Contracts.

5. The magistrate erred in law and fact when he disregarded the Appellant's submissions in support of his case.

6. The magistrate erred in law and in fact when he failed to appreciate that the Appellant proved his case on a preponderance of probability against the Respondent.

7. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied. Several decisions were referred to by the parties in support of their rival positions.

8. 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**).

9. 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.

10. From the judgment, the suit was unsuccessful because the Appellant failed to prove the existence of a contract between the parties. In dealing with the issue I will begin with a look at the pleadings since pleadings are the cornerstone of any civil litigation. The Appellant pleaded that the Respondent was in breach of the contract since it failed to harvest the mature plant crop. On its part the Respondent pleaded in paragraph 4 of the Statement of Defence about the contract as follows: -

No admission is made with regard to the averments contained at paragraph 4 of the Plaintiff and the Defendant calls for strict proof thereof. The defendant to the contrary avers and pleads that the plaintiff has simply accessed the defendant's standard form agreement and inserted details with the sole intent and purpose to use the same through a court process to advance fraud against the defendant as the plaintiff had no land on which he could grow sugarcane and thereafter sell the same to the defendant.

11. The Respondent's witness reiterated the foregone position in his statement and went further to demonstrate the alleged illegality visited upon the contract. There is no doubt that the Appellant was put on sufficient notice on the Respondent's position on the contract. Proof of the contract was hence one of the issues for determination. It is on record that the contract was admitted as an exhibit. That being so and in view of the position taken by the Respondent it was incumbent upon the Appellant to lead evidence in proving the genuinity and existence of the contract. Production of a document *per se* is not proof of its contents.

12. As pointed out earlier the Appellant was the sole witness. Apart from leading evidence on how he took good crop husbandry on the plant crop and the failure by the Respondent to harvest the crop at maturity the Appellant did not adduce evidence countering the position taken by the Respondent on the contract. The circumstances surrounding the non-affixation of the Respondent's seal on the contract were not exposed. Likewise, the denial that the signature on the part of the alleged Respondent's representative was not by the duly authorized officer went unchallenged. The Appellant did not endeavour to call witnesses at least the Assistant Chief of Kobita Sub-Location who signed the contract to aid the court on the execution of the contract. Even after the Respondent denied that the Appellant did not have any land on which he carried out the farming activities the Appellant did not bother to avail any title document(s) or lease document(s) or any other agreement to that effect. Further, no attempt was made for the trial court to visit the *locus quo*.

13. The upshot is that the document produced as the contract was of no probative value at all and if any, then its value was of such a negligible nature far from proof on a preponderance of probability. I therefore affirm the decision of the trial court in finding that the alleged contact between the parties was not proved.

14. The appeal is hence unmerited and is dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of May 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Odhiambo Kanyangi Counsel instructed by the firm of Messrs. Odhiambo Kanyangi & Co. Advocates for the Appellant.

Mr. Marvin Odera Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant