REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 12 OF 2018

CONSOLATA ADEK AORO.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. E. Nyagah Magistrate in Migori Magistrate's Civil Suit No. 1517 of 2015 delivered on 134/02/2018)

JUDGMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court vide the judgment rendered on 15/02/2018 where the court found for the Respondent and held that the Appellant had poached her cane and sold it to a rival miller, Sukari Industries Limited.

2. The Appellant herein, **Consolata Adek Aoro**, who filed **Migori Chief Magistrates Civil Case No. 1517 of 2015** (hereinafter referred to as '**the suit'**) pleaded that by an Outgrowers Cane Agreement entered into on 28/11/2008 (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 her parcel of land being Plot No. 1192A Field No. 55E measuring 0.5 Hectares in Kakmasia 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 stated that she took good care of the plant crop until maturity and the Respondent harvested it and duly paid her net dues. However, the Appellant contended that the Respondent failed to harvest the first ratoon crop at maturity thereby compromising the development of the second ratoon crop thereby resulting to loss of income. She sought for damages for the breach of contract and the value of unharvested two ratoon cane crops, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 25/08/2015 and denied the existence of the contract and also denied that it was in breach of the alleged contract.

5. The suit was finally settled down for hearing where both parties were represented by Counsels. The Appellant solely testified in proof of her case as **PW1** whereas the Respondent was represented by its Senior Field Supervisor as its sole witness and who testified as **DW1**. DW1 adopted his statement as part of his evidence wherein he admitted the existence of the contract and produced the documents on its List of Documents as exhibits. The Appellant did not however adopt her statement as part of her evidence neither did she produce the documents listed on her List of Documents as exhibits. The suit was thereafter dismissed aforesaid.

6. Being dissatisfied with the judgment the Appellant preferred an appeal the subject of this judgment. In praying that the appeal be allowed and appropriate compensation be awarded the Appellant proposed the following five grounds as appearing 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 received a warning letter against poaching sugarcane when no evidence was tendered by the Respondent to support such receipt.***
>
> ***2. The magistrate erred in law and fact when he held that the Appellant poached her sugarcane to a rival miller - Sukari Industries while there was no credible evidence of any probative value that was adduced by the Respondent ion that regard.***
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> ***3. The magistrate erred in law and fact when he failed to appreciate the evidence by the Appellant that Ratoon 1 was never harvested by the Respondent in breach of contract and that the same dried up and wasted away.***
>
> ***4. The magistrate erred in law and fact when he disregarded the Appellant's submissions in support of her case.***
>
> ***5. The magistrate erred in law and in fact when he failed to appreciate that the Appellant proved her 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. In this analysis I will first deal with issues raised by the Respondent in its submissions in supporting the dismissal of the suit. The first salvo was that the suit was not proved because the Appellant did not produce the documents she filed in her List of Documents. This Court's decisions in **South Nyanza Sugar Co. Ltd vs. Mary A. Mwita (2018) eKLR** and Maurice **O. Okuthe vs. South Nyanza Sugar Co. Ltd (2019) eKLR** were relied upon in buttressing the submission. I have previously held in the said decisions among many others, which position I still hold, that a Witness Statement filed but not adopted as part of the evidence by the maker and documents filed in a List of Documents but not produced as exhibits do not form part of the evidential record in a suit. That was the case with the Appellant herein where she filed a statement but did not adopt it as part of her evidence and also filed a List of Documents which included a Cane Yields Report by KESREF, Cane Yield List and a Cane Produce Price List but did not produce any of the documents therein as exhibits.

11. With such a state of affairs, I would have readily found that the suit was not proved despite the admission of the contract by the Respondent and would have upheld the finding of the trial court. However, the position herein is different since DW1 adopted his statement as part of his evidence and also produced the documents in the Respondent's List of Documents as exhibits. The documents included a Warning Letter, Appellant's Final Statement for payment of Plant Crop, Cane Yields Report and a Job Completion Certificate for cane delivered. In his Statement DW1 stated the cane prices was Kshs. 2,500/= per tonne and that the yields were to be subjected to both statutory and contractual deductions. DW1 further stated that the expected cane yields within Kakmasia area were 66.56 tonnes per hectare for the plant crop and 48.76 tonnes per hectare for the ratoon crop yields. The position in this matter is hence distinguishable from the position I held in **South Nyanza Sugar Co. Ltd vs. Mary A. Mwita** (supra) and **Maurice O. Okuthe** (supra).

12. Having so found, I will now deal with the second issue as to whether the contract was breached. The existence of the contract between the two parties was admitted. Despite the consensus the Appellant was still under a duty to prove her case and the starting point was the Plaint. The Appellant averred that the Respondent only harvested the plant crop and not the first ratoon cane crop at maturity hence the loss. The Respondent conceded that indeed it harvested the plant crop cane. In paragraph 7 of the Statement of Defence the Respondent took the position that the Appellant had properly taken care of the plant crop cane until it matured and that the Respondent harvested it, but that was not the position with the first ratoon crop cane which the Appellant failed, refused or neglected to develop and maintain hence there was no sugar cane which was availed to the Respondent to harvest.

13. The Respondent however introduced the issue of the Appellant having poached and sold the first ratoon crop cane to a rival miller not in its Statement of Defence but in DW1's statement. The issue of poaching was hence not among the issues which emanated from the pleadings. I have on a number of occasions taken the position that issues which do not emanate from the pleadings cannot form a basis for determining that matter. 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…..***
>
> ***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.'***

14. **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.***

15. That was the case with the issue of poaching. However, even if the issue was properly before the trial court for determination still the same could not have stood the test of proof. I say so in reference to the Warning Letter which was alleged issued by the Respondent. The Letter was produced as an exhibit. Be that as it may, it was incumbent upon the Respondent to prove that it complied with the contract on the service of the Letter upon the Appellant given that the Appellant denied receipt of such a letter in her testimony. **Clause 9** of the contract is on Notices and was tailored in the following manner: -

Any notice or demand by the Miller under this agreement shall be deemed to have been properly served upon the Grower if delivered to the Provincial Administration for onward transmission to the Grower or delivery by hand or sent by registered post or facsimile at the address of the Grower shown in this agreement. In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by registered post at 10:00a.m seven (7) days following the date of posting (notwithstanding that it is returned undelivered) or if sent by facsimile on the completion of transmission. Where the notice or demand is sent by registered post it will be sufficient to prove that the notice or demand was properly addressed.

16. I have with care perused the record and did not see any evidence of service of the letter in issue by any of the prescribed ways. Even when DW1 stated that the letter was hand delivered to the Appellant he did not have any proof thereof despite admitting that the Respondent was ISO Certified. The issue of service of the warning letter was therefore not proved and, with tremendous respect to the learned trial court, settling the issue in favour of the Respondent was, but an error both in fact and in law.

17. The Respondent did not adduce any evidence in support of its position in the Statement of Defence to the effect that the Appellant failed to take good crop husbandry on the first ratoon crop cane. In fact, the Respondent's assertion that the Appellant poached and sold the cane to a rival miller negated the very foundation of the Statement of Defence. That therefore yielded the position that the Appellant's contention in the Plaint and the evidence was not proved otherwise. I hence find and hold that the Respondent was in breach of the contract by failing to harvest the first ratoon cane crop at maturity and as such compromised the development of the second ratoon cane crop thereby occasioning loss to the Appellant.

18. The issue which now renders settlement is whether the Appellant was entitled to any compensation in such circumstances. I have previously dealt with this issue. Since I have not changed my position on the same I will reiterate what I stated in **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** as under: -

21. I will now look at whether the Respondent was in a position to mitigate loss in this type of a contract. As stated elsewhere above the contract was for a period of a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the farm whichever period shall be less. Therefore, the success of the main plant crop determines the success of the first ratoon and likewise the success of the first ratoon determines the success of the second ratoon. In other words, if the main plant crop is compromised then the ratoons will definitely be equally compromised. Hence unless the miller is in a position to foresee its failure to harvest the cane in advance and put the farmer on appropriate notice and in accordance with the Agreement, there is very little a farmer can do to salvage the situation once the miller fails to harvest the cane under the Agreement.

22. Looking at the Agreement, there are several restrictive clauses such that it would not be possible for the Respondent to take any reasonable steps to mitigate the loss unless the Appellant takes the first step in informing the Respondent of its intended breach of the Agreement. The Appellant's argument that the Respondent failed to mitigate its loss cannot stand and is hereby rejected.

23. I therefore find that the Respondent was entitled to the proceeds from the ratoons. ……

19. According to the Plaint and the evidence, the Appellant rightly prayed for the proceeds from the two ratoon cane crops in accordance with the contract. (See the Court of Appeal decision in **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd Kisumu Civil Appeal No. 278 of 2010 (2013) eKLR**.) There is no dispute on the size of the land as 0.5 Hectares. Since the Appellant did not produce her documents as exhibits I will be guided by parties' evidence and the documents produced by the Respondent. DW1 testified that the ratoon cane crops would yield a maximum of 48.76 tons per hectare. That position was corroborated by the Respondent's Cane Yields Report on record. I will hence settle for the said yields in both ratoon cycles. The Respondent further contended that the prices for the cane yields was Kshs. 2,500/= per tonne.

20. The total expected earnings for the two cycles would have been **Kshs. 121,900/=.**

21. 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. 121,900/=.

c) The sum of Kshs. 121,900/= 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 23rd 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 Odero Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant