REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY

AT MIGORI

CIVIL APPEAL NO. 61 OF 2018

MARY A ONYANGO.....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. 95 of 2014 delivered on 25/04/2014)**

JUDGMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court vide the judgment rendered on 25/04/2014 for want of proof of the claim.

2. The Appellant herein, **Mary A. Onyango**, who filed **Rongo Principal Magistrate's Court Civil Suit No. 95 of 2014** (hereinafter referred to as '**the suit'**) pleaded that by an Outgrowers Cane Agreement entered into on 13/01/2005 (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. 222 B Field No. 172 measuring 0.3 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 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 cane crops thereby resulting to loss of income. She sought for damages for breach of the contract, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 22/04/2015 and it denied the existence of the contract and further pleaded that the Appellant suffered no loss and if at all she suffered any such loss then the Appellant was the author of her own misfortunes in that she 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 her statement as part of her 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. The court thereafter proceeded to render the judgment where it 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 three grounds in the Memorandum of Appeal dated 02/05/2018 and filed in Court on 11/05/2018: -

1. **The learned magistrate erred in law and fact in dismissing the applicant's case altogether when the only inconsistency he stated was proved by the defence was that relating to the harvesting of the plant crop.**

2. The learned trial magistrate erred in law on failing to disregard evidence led by the defendant at the defence case which evidence had not been pleaded by the defence.

3. The learned trial magistrate erred by failing to find for the appellant on quantum either for the three (3) crop cycles or the two (2) ratoon crops, never harvested and which stood as proved.

7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant duly complied, but the Respondent despite appropriate notice. The Appellant referred to several decisions in support of the appeal.

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. The appeal is largely unopposed. However, it nevertheless remains the duty of this Court to discharge its appellate role in revisiting the evidence on record, evaluating it and reach its own conclusion in the matter. The crux of the dismissal of the suit was the contradiction on the Appellant positions on the cane she developed on her land. According to the Plaint, when the plant crop and the ratoon crops were mature the Respondent refused to harvest them hence the loss. The Appellant reiterated that position in her filed statement. When the Appellant testified before court she stated that she only developed the plant crop and no more. It is those two positions that primarily led to the dismissal.

11. It is well settled 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…..**
>
> **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.'**

12. 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……**
>
> **…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.**

13. 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.** That being the legal position it therefore renders that the evidence at the trial to the extent that the Appellant did not develop the ratoon crops was at variance with the pleadings and is for rejection. It however remains that the plant crop was developed up to maturity and allegedly not harvested by the Respondent. The Respondent denied the claim and pleaded that the Appellant did not apply good crop husbandry and that there was nothing to harvest. The position however changed in evidence where DW1 stated that the plant crop was developed to maturity, harvested and paid for. DW1 also produced an alleged Appellant's statement to that end. Likewise, the Respondent is caught up in the legal web of adducing evidence at variance with the pleadings.

14. The trial court took the position that the payment for the plant crop was proved in that the statement was not challenged in any way. Respectfully, the trial court did not address itself to the foregone legal position. It is the pleading which forms the basis of one's claim which claim is then proved by evidence and not vice versa. A party which after filing its pleadings gathers evidence which is different from the averments in the pleading is always at liberty to amend the pleading otherwise such a party risks failure to prove the claim based on that evidence. A statement of a witness is not part of the pleading but part of the evidence and cannot take the position of a pleading. (See the definition of '**pleading**' in **Section 2** of the **Civil Procedure Act, Cap. 21** of the Laws of Kenya). Therefore, the evidence adduced by DWI was at variance with the defence and indeed supported the Appellant's position that she developed the plant crop cane to maturity. I find that the Respondent was in breach of the contract.

15. I have previously taken the position that in the sugar sector once a farmer proves that he/she/it developed the plant crop to maturity but the miller failed to harvest the plant crop then the farmer is entitled to the value of the expected earnings in accordance with all the crop cycles as agreed upon in the contract document. (See **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR).** I still hold that position. In this case therefore the Appellant was entitled to the earnings from the plant crop and the two ratoon crops.

16. According to the Yields Report developed by the Respondent which I will use instead of the one produced by the Appellant whose authenticity cannot be vouched for, the average expected cane yields over the whole area forming the Respondent's zones are clearly stated. In this case, since the Contract was entered in January 2005 then the plant crop was expected to be harvested sometimes in December 2006

when the cane prices were **Kshs. 2,000/= per tonne** as admitted by the Respondent and the average yields were **66.56 tonnes per hectare**. The cane prices for the ratoon crops did not change and the average yields for the ratoon crops were **48.76 tonnes per hectare**. The size of the land was agreed as 0.3 Hectares.

17. The total expected earnings for the three cycles would therefore have been **Kshs. 98,448/=.** That amount would ordinarily be subjected to the cost of inputs and services by the Respondent further to harvesting and transport expenses, but in this case there was no such evidence.

18. 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. 98,448/=.

c) The sum of Kshs. 98,448/= 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. Ezekiel Oduk Counsel instructed by the firm of Messrs. Oduk & Co. Advocates for the Appellant**.**

Messrs. Moronge & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant