REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 20 OF 2017

ZADOCK CESAS O. ONDIWA.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. C. M. Kamau,

Resident Magistrate in Kehancha Resident Magistrate's Civil Suit No. 105 of 2004 delivered on 20/08/2015)

JUDGMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court vide the judgment rendered on 20/08/2015 for lack of evidence of any developed sugar cane crop.

2. The Appellant herein, **Zadock Cesas O. Ondiwa**, who filed **Kehancha Resident Magistrate's Court Civil Suit No. 105 of 2004** (hereinafter referred to as '**the suit'**) pleaded that by an Outgrowers Cane Agreement entered into in 1997 (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. 323 B Field No. 14 measuring 0.5 Hectares in Kamwango 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 and even after the Appellant developed the first ratoon cane crop again the Respondent failed to harvest that cane thereby compromising the development of the second ratoon cane crop thereby resulting to loss of income. He sought for a declaration that the Respondent was in breach of the contract, the value of unharvested cane, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 12/10/2004 and although it admitted the existence of the contract it denied that it was in breach.

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 his statement. Later the parties agreed and with the approval of the trial court, that the Respondent was to file and rely on a List of Documents and Statements without the testimony of any witness. The court thereafter proceeded to render the judgment. The trial court 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 27/02/2017 and filed in Court on 02/05/2017:

> ***1. The learned magistrate erred in law and fact, when he failed to consider, evaluate and balance the pleadings, evidence and submission thereby reaching to a wrong conclusion that the appellant had failed to prove that he developed any crop.***
>
> ***2. The learned trial magistrate erred in law and in fact by purporting to raise the threshold of standard of proof to as level higher than that required by the law.***
>
> ***3. The learned trial magistrate was biased against the Appellant.***

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 adduce documentary proof that the crops were developed. The court stated that: -

> ***The question for determination therefore is whether the plaintiff proved that he developed the crop. No documentary proof that the crop cycles were developed was adduced by the plaintiff. On the contrary, the defendant avails evidence in form of job completion certificates and debit advices. These relate to their contract with Ochola Okello and they relate to supply of seed cane, planting, harrowing, furrowing all done between August and December 2012. These documents prove that there was a plant crop on the land at the time the plaintiff leased the land. Yet the plaintiff said that there was none and that it was he who developed the cane.***
>
> ***It is unlikely that there would not be a single document showing that the plaintiff developed or cultivated a crop. Therefore, the failure to avail such evidence is suspect and it lends credence to the defendant's position that no crop was developed or cultivated by the plaintiff.***
>
> ***It is trite law that he who alleges must prove. The plaintiff in this case failed to prove that he developed any crop. I therefore dismiss the suit with costs.***

11. A look at the pleadings and the evidence reveal that the Appellant's claim is anchored on the allegation that the Respondent failed to harvest the plant crop and the first ratoon cane crop and as such compromised the development of the second ratoon cane crop. In proof of his case the Appellant relied on his oral testimony, written statement, the Contract, the Schedule of Sugar cane prices and the Yield Assessment Report by the defunct Kenya Sugar Research Foundation. The Respondent filed the Witness statement and List of Documents which were admitted in evidence but the maker of the statement did not testify.

12. There is evidence that by the time the initial farmer Ochola Okello leased his land to the Appellant the plant crop was already on the land. The Respondent adduced documents to that effect. However, the Respondent contended that the Appellant did not take good care of the plant crop and ended up abandoning the plant crop. However, it did nothing more than making that allegation. **Clause 4** of the Contract provided for breach of the contract and what was to happen in such instances. There is no evidence that the Respondent issued any notice upon the Appellant's alleged default. The Respondent did not even challenge the Appellant during cross-examination despite such an opportunity. The Appellant's testimony was hence uncontroverted. He narrated exactly how he took care of the farm during the plant cane crop and the first ratoon cane crop seasons.

13. The evidence which was before the trial court was hence adequate for the court to find that the Appellant took good care of the plant crop and the first ratoon crop until maturity. The Respondent's contention that the Appellant did not maintain the crop to the required husbandry is hence for rejection. As the Respondent took the foregone position it is clear that it did not even bother to harvest the plant crop. On a preponderance of probability, the Appellant therefore proved that Respondent failed to harvest the plant crop and the first ratoon crop at maturity and that the Respondent was in breach of the contract. Having failed to harvest the plant crop and the first ratoon crop the development of the second ratoon crop was undoubtedly compromised. Respectfully, the learned trial magistrate's finding must be interfered with.

14. Having found that it is indeed the Respondent who was in breach of the contract, this Court should hence consider the compensation to the Appellant for the three cycles in consonance with the Contract. Such compensation is always tailored in a fashion as to put the claimant as far as possible in the same position he/she/it would have been in if the breach complained of had not occurred. That is principle encapsulated in the Latin phrase ***restitution in integrum.*** In this case, the contract was for a period of five years or until the plant crop and two ratoon crops were harvested whichever occurred first. Because of the breach, the Appellant lost all the three cycles and was entitled to compensation. (See **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR).**

15. According to the Yields Report 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 February 1997, the plant crop was expected to be harvested sometimes in January 1999 when the cane prices were **Kshs. 1,730/= per tonne** and the average yields were **112 tonnes per hectare**. The first ratoon crop was expected to be harvested around August 2000 when the cane prices were still at **Kshs. 1,730/= per tonne** and the average yields were **65 tonnes per hectare**. The second ratoon crop was expected in March 2002 where the average yields were **53 tonnes per hectare** and the cane prices were **Kshs. 2,015/= per tonne.**

16. The total expected earnings for the three cycles would have been **Kshs. 306,503/=.** That amount would ordinarily be subjected to the cost of inputs and services by the Respondent further to harvesting and transport expenses. In this case, the costs were tabulated by the Respondent's witness in his statement which amounts to a total of Kshs. 62,213/= would have been deducted from the earnings. I will hence make the said deduction thereby resulting to a net sum of **Kshs. 244,290/=.**

17. 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. 244, 290/=.

c) The sum of Kshs. 244, 290/= 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. Kerario Marwa Counsel instructed by the firm of Messrs. Kerario Marwa & 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