REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 87 OF 2017

JOSEPH M. NTAIYA.....APPELLANT

VERSUS

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

(Being an appeal from the judgment and decree by Hon. E. M. Nyaga, Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 347 of 2014 delivered on 12/09/2017)

JUDGMENT

1. The Appellant herein, **Joseph M. Ntaiya,** filed **Migori Chief Magistrate's Court Civil Suit No. 347** of **2014** (hereinafter referred to as '**the suit'**) against **South Nyanza Sugar Co. Ltd,** the Respondent herein, claiming that by a Growers Cane Farming and Supply Contract dated 29/05/2003 (hereinafter referred to as **'the Contract'**) the Respondent contracted the Appellant herein to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 160D Field No. 19 in Ilipashe area in Trans Mara within Narok County measuring 1.3 Hectares.

2. The Appellant 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. That, the Respondent ploughed, furrowed and harrowed the land and also supplied the cane seed. That, the Appellant discharged his part of the contract until the plant crop was mature which the Respondent harvested. The Appellant then developed the first ratoon plant up to maturity but the Respondent failed to harvest it hence suffered loss.

3. Aggrieved by the alleged breach of the contract the Appellant filed the suit on the 25/09/2014 (with the leave of the trial court) claiming compensation for the loss of the unharvested sugar cane, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 18/11/2014 wherein it denied the contract and put the Appellant into strict proof thereof. The Respondent further averred that if at all there was any such contract then the Appellant is entitled to the costs of the services and inputs it rendered to the Appellant otherwise the Respondent prayed for the dismissal of the suit with costs.

5. The suit was finally settled down for hearing. Both parties were represented by Counsels. The Appellant 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 Respondent called its Senior Field Supervisor as its sole witness who produced the documents in the List of Documents as exhibits. The Respondent's witness conceded that the contract existed and that the Appellant developed the plant crop up to maturity and the Respondent harvested it but contended that the Appellant never developed the first ratoon crop.

6. The trial court rendered its judgment and partly allowed the suit by remedying the Appellant the value of the first ratoon crop and Kshs. 10,000/= as nominal damages for breach of the contract with interest from the date of filing of the suit. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed, and appropriate compensation be awarded, he proposed the following three grounds in the Memorandum of Appeal dated 03/10/2017 and evenly filed in Court: -

> **1. The learned trial magistrate erred in law and in fact when he failed to make an award to the plaintiff / appellant for the loss of the 2nd ratoon yet the plaintiff / appellant had pleaded and proved that the defendant's failure to harvest his 1st ratoon compromised his chances of developing his 2nd ratoons.**
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> **2. The learned trial magistrate erred in law and in fact, when he held that the plaintiff / appellant is only entitled to nominal damages for breach of contract for Khs. 10,000/= for failure to harvest the 2nd ratoon, yet the plaintiff / appellant had specifically pleaded and proved his loss.**
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> **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. The Appellant

challenged the finding of the trial court vigorously and more so claiming that the court erred in making a finding that the Appellant was not entitled to the proceeds for the second ratoon crop as he did not develop the same and by awarding nominal damages of Kshs. 10,000/=. He relied on previous decisions of this Court in support of the prayers.

8. The Respondent partly supported the judgment and contended that the award of the compensation for the first ratoon crop and nominal damages was in order but instead submitted that interest ought to instead run from the date of judgment. The Respondent relied on several decisions in support of its position.

9. 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).**

10. 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.

11. I have previously dealt with the issue of whether a farmer whose plant crop is not harvested is entitled to the proceeds from the ratoon crops or whose plant crop is harvested but not the first ratoon crop. 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.***
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> ***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.***
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> ***23. I therefore find that the Respondent was entitled to the proceeds from the ratoons. ……'***

12. According to the Plaint, the Appellant prayed for the proceeds from the two ratoon crops in accordance with the contract. The trial court however found that the Respondent breached the contract and awarded the Appellant the proceeds for the first ratoon crop only with a further award on nominal damages. From the above analysis the Appellant was also entitled to the compensation from the second ratoon crop as well.

13. As to the award of nominal damages, I have as well previously dealt with the issue and relying on the principle of *restitution in integrum* held that there cannot be an award of general damages for a claim on breach of contract. (See **South Nyanza Sugar Co. Ltd v Hilary M. Marwa (2017) eKLR**, **South Nyanza Sugar Co. Ltd v Joseph O. Onyango (2017) eKLR** among many others). The award of nominal damages cannot therefore stand and is hereby set-aside.

14. On the issue of interest, the Court of Appeal in **Kisumu Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** settled the matter by firmly stating that interest must run from the date of filing of the suit. I have not been persuaded by the Respondent's submission and the various decisions referred to that I ought to depart from that finding and hereby decline the invitation.

15. The trial court calculated the proceeds for the first ratoon crop on the basis of the size of the land as 1.3 Hectares which was agreed by both parties. The trial court further used the Kenya Sugar Research Foundation's Cane Yields Schedule in calculating the yields. The expected yields for the ratoon crop is 80 tonnes per hectare. The price of the cane for the second ratoon crop according to Respondent's Cane Price Schedule was Kshs. 2,850/- per tonne.

16. The Appellant would have earned gross income from the second ratoon of Kshs. 296,400/= which translates to a net income of Kshs. 206, 938/= upon taking into account the harvesting and transport charges.

17. Consequently, the following final orders do hereby issue: -

> **a) The appeal hereby succeeds and the finding of the learned magistrate awarding Kshs. 287,788/= be and is hereby set aside accordingly;**
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> **b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 484,726/= which amount shall attract interest at court rates from the date of filing of the suit;**
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> **c) The Appellant shall have both the costs of the suit before the trial court and of the appeal.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 08th day of August 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 & Co. Advocates for the Respondent.

Evelyne Nyauke – Court Assistant