REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 14 OF 2019

JOSHUA O. OPIYO..APPELLANT

VERSUS

SOUTH NYANZA SUGAR COMPANY LIMITED.............RESPONDENT

(**Being an appeal from the judgment and decree of the Senior Resident Magistrate's,**

Kisii dated 21st December 2018 Hon. S. K. Onjoro in CMCC No. 1528 of 2004)

JUDGMENT

1. The appellant **Joshua O. Opiyo** entered into a contract with the respondent on 9th March 2000 to grow and sell to it three crop cycles of sugarcane on his plot number 252C in field number 4A a parcel of land measuring 0.4 hectares within Kakmasia sub-location. He filed Civil Suit No. 1528 of 2004 for damages after the respondent neglected to harvest the 1st and 2nd ratoon crops in breach of the contract.

2. At the hearing of the matter before the trial court, the appellant adopted his written statement and list of documents which were filed on 18th August 2016. The appellant's statement read as follows:

> *"I am a farmer at Kakmasia sub-location. I entered into a contract with SONY on 9th March 2000. The contract was about farming of sugarcane. The sugarcane was to be planted in Plot No. 252 C Field No. 4A. SONY was to harvest it at 24 months on maturity for plant crop and 18 months for ratoon crop. The contract was for 5 years and 3 harvests. I weeded the farm 6 times for plant crop. SONY harvested the plant crop. I then developed ratoon I and maintained to maturity, SONY did not harvest it. It dried up. I then redeveloped the ratoon II, again, it matured but was not harvested. I expected 135 tonnes per hectare. My farm was 0.5 hectares. A tonne was being paid at Kshs. 1,730. I claim 2 crop cycles."*

3. During cross-examination, the appellant admitted that he had been given fertilizer and seeds and his land ploughed and harrowed by the respondent. He also agreed that the crop's yield of 5.5 tonnes was low and that he owed the respondent a debt of Kshs. 13,000/= being their charges.

4. The respondent's field supervisor, **Justus Otieno George**, (DW 1) confirmed that the respondent had entered into a contract with the appellant on 9th March 2000 which was to run for a period of 5 years or for 3 harvesting cycles. He testified that the appellant's plot measured 0.4 hectares and the cane price was Kshs. 1,730/= per tonne. In Kakmasia sub-location, the estimated yield for the plant crop was 66.56 tonnes per hectare and 48.76 tonnes per hectare for the ratoon crops. DW 1stated that in the appellant's case, the statutory deductions made had amounted to Kshs. 15,887.1/= and the farmer had gotten a negative pay of Kshs. 13,219/=. The expected yield for the appellant's plant crop was 26.62 tonnes but only 5.57 tonnes had been realized. DW 1 testified that the respondent had abandoned ratoon 1 due to the appellant's negligence and that the 2nd ratoon had not been developed.

5. The trial court held that the plaintiff had not made out his case. It found that since the appellant had received a negative pay from the plant crop, there would have been no incentive to develop the ratoon crops which normally produced lower yields. The court found that there was no proof that the appellant had developed the ratoon crops and dismissed his case.

6. The appellant has now preferred this appeal against that said decision. In his memorandum of appeal dated 29th January, 2019 he sets out the following grounds of appeal:

> *1) The learned trial magistrate erred in law and in fact by failing to appreciate the duties and liabilities of the parties to the contract when he came to a decision that the law yield for the plant crop excused the defendant from fulfilling the rest of the contract;*
>
> *2) The learned trial magistrate erred in law and in fact in making a determination of the suit on issues not pleaded by the parties to*

the contract;

3) The learned trial magistrate erred in law and in fact in his evaluation of the evidence and arrived at a wrong decision that the appellant had not developed ratoon 1 and/ or to appreciate that it was impossible to develop the ratoon 2 crop, ratoon 1 crop having wasted away due to failure to harvest;

4) The learned trial magistrate failed to find that the defendant respondent not having terminated the contract as provided was estopped from denying the existence of the crop(s) the subject of the contract.

7. The appellant canvassed the appeal through his written submissions dated 14th May 2019. He stated that the respondent was expected to harvest the crop thrice but had admitted that it had failed to harvest the ratoon crops which it was obligated to do. He contended that the respondent had not tendered any proof that he had failed to develop the ratoon crops or that it gave a notice that the ratoon crop was of poor quality. He dismissed the warning letter produced by the respondent as a fabrication and pointed out that it had no legal effect. The appellant further submitted that according to clause 11 (k), the respondent was expected to take corrective measures to achieve a satisfactory yield which it had failed to do.

8. On its part, the respondent submitted that the appellant had not met his evidentiary burden by failing to prove that he had developed and nurtured the 1st and 2nd ratoon crops as required. It was the respondent's case that each party had to show that they had carried out their obligations as stated in the contract and in this case, the appellant had failed to adhere to the terms and conditions of the contract.

9. The respondent further submitted that the appellant had not shown that his farm could produce 135 tonnes per cycle as he had pleaded. He had gotten a yield of 5.57 tonnes instead and still owed the respondent Kshs.13, 219/=. The respondent submitted that the appellant had been given a warning letter for failing to maintain his crop and he was therefore the one in breach of the contract and not the respondent. The respondent urged the court to dismiss the appeal with costs and uphold the trial court's decision.

10. Having re-evaluated the evidence as is required of a first appellate court, I will proceed to determine the issues arising in this appeal.

11. The first issue is whether there was a breach of the contract by the respondent. It is not in dispute that the appellant and the respondent entered into a contract on 9th March 2000 to sell and grow sugarcane on the appellant's Plot No. 252 C Field No. 4A. According to clause 1 of the agreement, the contract was to remain in force for a period of 5 years or until one plant and two ratoon crops of sugarcane were harvested whichever period was less. It is also agreed that the appellant herein cultivated the cane as agreed. Based on these admissions, the onus lay on the respondent to prove that the appellant had breached the contract.

12. The respondent argues that the appellant failed to maintain the 1st ratoon crop, which prompted it abandon the crop. It was also the respondent's position that the appellant never developed the 2nd ratoon crop. To support these facts, the respondent's witness, DW 1, produced a warning letter dated 20th November 2011 in which the respondent had warned the appellant for abandoning his 1stratoon crop. In that letter the respondent requested the appellant to state how he intended to clear the outstanding bill otherwise they would have no option but to seek legal redress.

13. Clause 4 of the contract provided;

4. If either party hereto commits a breach of any term or terms of this Agreement and fails to remedy such breach within thirty (30) days from receipts of a notice in writing to that effect given by the other party serving such notice may by a further notice in writing and duly served upon the defaulting party terminate this Agreement and the Agreement shall stand determined after completion of the then harvest and delivery of cane there from.

14. Clause 10 (g) provided;

10. The Company shall

(g.) Be entitled in the event that the Outgrower does not prepare, plant and maintain the plot and cane in accordance with the Clause 11 hereto to carry all or any such operations on the Plot which the Company shall consider necessary to ensure that the Outgrower's quota of cane of satisfactory quality will be delivered on the date in which case the Company shall further be entitled to deduct the cost of these extra operations from the payment to be made for the outgrower's cane.

15. During cross- examination, DW 1 admitted that no further action was taken against the appellant after the warning letter had been issued. He stated that it was the farmer's responsibility to maintain the plot. However, the purport of the clause 10 (g) above is that both parties shared the responsibility to maintain the plot. It is accepted that the respondent provided services to maintain the land for which the appellant was charged. According to clause 11 (e) of the contract, the respondent was required to give instructions on how to maintain the cane. There is no evidence that the appellant failed to adhere to instructions from the respondent. After the warning letter had been issued, no further action was taken to rescind the contract as per clause 4. Similarly, the respondent did not tender evidence to show that the appellant had not developed the 2nd ratoon crop. I therefore find that the respondent acted in breach of the contract by failing to harvest the 1st ratoon crop.

16. Further, it was an uncontroverted fact that the plant crop matured at 24 months and the ratoon crops at 18 months. In this case, the agreement was entered into on 9th March 2000. The appellant's statement showed that the plant crop was harvested at 17 months on 17th August 2001. Based on these facts, it is highly likely that the plant crop was harvested before it had matured and thus affected the subsequent yields.

17. The second issue is whether the remedy sought by the appellant for breach of contract is available to him. The purpose of damages for breach of contract is to place the claimant in the same position he would have been had the breach complained of not occurred. Since the respondent failed to harvest the 1st ratoon crop, it must bear the consequences of breach. I therefore find that the appellant was entitled to damages for the two crop cycles. He sought damages for breach of contract for the loss of the two crop cycles on 0.5 hectares of land at the rate of 135 tonnes per hectare and payment of Kshs. 1,730/- per tonne.

18. The respondent admitted that appellant's plot measured 0.4 hectares and the price of cane at the time was Kshs. 1,730/= per tonne. DW 1 testified that in Kakmasia sub-location, the estimated yield for the ratoon crop was 48.76 tonnes per hectare. He based this on the respondent cane yield's report. On the other hand the appellant estimated that crop would yield 135 tonnes per hectare. He based this estimate on a cane productivity report but the same did not have the estimated yield for Kakmasia sub-location where his parcel of land was located. Based on the respondent's report, the total earnings for the two ratoon crops is **Kshs. 54,265/=** made up as follows;

> *0.4 hectares x 2 crop cycles x Kshs. 1,730/= x 48.76 tonnes = 67,484/=*
> *Less Kshs.13, 219/=*

19. The upshot of the foregoing is that this appeal succeeds. The trial court's decision is set aside and substituted with a judgment for Kshs. **54,265/=.**

20. Since the appellant's claim is for special damages, he would have been entitled to interest on the claim from the date of filing suit until payment in full. The appellant filed his suit in 2004 and was heard in 2018, more than a decade later. The respondent should not be punished for the appellant's lassitude. I therefore award interest on the sum awarded from the date of the first hearing, which is 3rd September 2018 until payment in full. I also award costs of the appeal to the appellant which I asses at Kshs. 20,000/= exclusive of court fees.

Dated, **signed and delivered at Kisii this 7th day of August 2019.**

R.E.OUGO

JUDGE

In the presence of;

Appellant   Absent

Miss Ondeyo h/b Miss Anyango For the Respondent

Rael   Court clerk