REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 165 OF 2018

BETWEEN

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

AND

SARAH MIDEVA AMIANI.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. O. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 336 of 2016 delivered on 31/10/2018)

JUDGMENT

1. **Serah Mideva Amiani,** the Respondent herein, filed **Migori Chief Magistrate's Court Civil Suit No. 336 of 2016** (hereinafter referred to as '**the suit'**) against **South Nyanza Sugar Co. Ltd,** the Appellant herein. The Respondent claimed that by a Growers Cane Farming and Supply Contract entered into on 15/04/2008 (hereinafter referred to as **'the Contract'**) the Appellant contracted the Respondent to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 1183 Field No. 84 in KIIAS Sub-Location measuring 0.2 Hectare within Migori County.

2. The Respondent 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 Respondent further stated that the cane was self-developed. She posited that she discharged her part of the contract until the plant crop was ready for harvesting but the Appellant refused and/or failed to harvest it hence compromised the development of the ratoon crops. The Respondent suffered loss.

3. Aggrieved by the alleged breach of the contract the Respondent filed the suit claiming compensation for the loss of the unharvested three cycles.

4. The Appellant entered appearance and filed a Statement of Defence dated 26/11/2017 wherein it denied both the contract and the breach and put the Respondent into strict proof thereof. The Appellant further averred that if at all there was any such breach then the Respondent was the author of her own misfortune as she failed to notify the Appellant when the cane was mature for harvesting.

5. The Appellant further pleaded in the alternative that if at all the suit is successful then it was entitled to the costs of services and inputs it provided to the Respondent. The Appellant also pleaded that transport and harvesting charges be offset from the gross income.

6. The Appellant prayed for the dismissal of the suit with costs.

7. The suit was finally settled down for hearing where both parties were represented by Counsels. The Respondent was the sole witness who testified and adopted her Statement as part of her testimony. She also produced the documents in her List of Documents as exhibits. The Appellant called its Senior Field Supervisor as its sole witness who also adopted his statement and produced the documents as exhibits.

8. The trial court rendered its judgment and allowed the suit by remedying the Respondent the value of the plant crop and the two ratoon crops.

9. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and the suit be dismissed with costs the Appellant proposed ten grounds in the Memorandum of Appeal dated 16/11/2018.

10. 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 on three aspects. That, the court erred in awarding the value of the cane which was not

proved, that the court failed to take mitigation of loss into account and that interest was to begin running from the date of judgment. The Appellant referred to various decisions in support of its submissions.

11. The Respondent supported the judgment and prayed for the dismissal of the appeal. She also relied on various decisions as well.

12. 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).**

13. 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.

14. On the ground as to whether the suit was proved, there is no doubt that the contract was entered into. The Appellant's witness so admitted in his statement and in his evidence before court. The witness contended that the Respondent failed to maintain the cane to maturity.

15. I must note that part of the evidence tendered by the Appellant's witness was at variance with the Statement of Defence. The Appellant pleaded that the Respondent failed to notify the Appellant when the cane had matured. However, at the trial the witness stated that the Respondent failed to maintain the cane to maturity. The Appellant even produced an alleged warning letter to that effect. The issue of failing to maintain the cane to maturity was hence a non-issue in the suit. The Appellant departed from its position in the Defence. Therefore, the evidence did not support the pleading. Such evidence is for rejection. (See the Supreme Court ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** and the Court of Appeal in **The Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR).**

16. From the record, I must state that even if the Appellant had pleaded that the Respondent failed to maintain the cane to maturity still the evidence did not support such a position. The trial court dealt with the issue of the warning letter so well.

17. On her part the Respondent contend that she discharged her part of the contract by ensuring that the plant crop was ready for harvesting and that the Appellant failed to harvest it thereby compromised the development of the ratoon crops.

18. It is not in contention that the contract was in the category of company-developed contracts since the Appellant undertook all the preliminary steps including survey, ploughing, supply of seed cane and fertilizers.

19. I have carefully perused the contract which spells out the various obligations of the parties. Apart from the allegation of failure to notify the Appellant that the cane was mature (which was not proved) there is no evidence on how the Appellant acted in breach of the contract.

20. The analysis therefore leads me to the only reasonable finding, which I hereby find and hold, that the Appellant did not prove that the Respondent breached the contract. Conversely, there is credible evidence that the Respondent discharged her part of the obligations under the contract until the plant crop was mature and ready for harvesting but the Appellant failed to harvest it. The trial court was hence right in its finding that the Appellant breached the contract.

21. On the resultant remedy for the breach, I have previously held in **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** that once a farmer proves that the Miller failed to harvest the plant crop at maturity then the farmer is entitled to the proceeds of the plant crop as well as the ratoon crops subject to the pleadings. Equally, when a Miller fails to harvest the first ratoon crop then the farmer is entitled to compensation for the first and second ratoon crops subject to the contract. In this case the Respondent was entitled to the proceeds of the plant crop and two ratoon crop yields since the pleadings claim as such.

22. The issue of mitigation of loss is one which is hotly contested almost in every appeal. The issue is pending determination at the Court of Appeal. There are divergent views by the High Court on the matter. I agree with my brother **Majanja, J.** in **Kisii High Court Civil Appeal No. 60 of 2017 South Nyanza Sugar Co. Ltd vs. Donald Ochieng Mideny (2018) eKLR** when he rendered himself on the issue after considering several decisions including some by yours truly and held that: -

> ***15. Mitigation of damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (See African Highland Produce Limited vs. Kisorio (1999) LLR 1461 (CAK). Since the appellant did not contest the respondent's claim, it did not show how the respondent could mitigate the loss.***
>
> ***16. The appellant's arguments in support of the appeal were attractive but at the end of the day the respondent's case before the trial court was not contested and for this reason, I dismiss the appeal……***

23. In this case the Appellant did not adduce any evidence on how the Respondent would have mitigated the loss.

24. On the argument that the trial court failed to take into account the fact that yields generally decrease with the crops and that they cannot be uniform, I must first say that the issue is factual. That being so, evidence must be led to that effect. The evidence tendered on the yields was by the Appellant's Cane Yields Report and a Cane Yields Report by the defunct Kenya Sugar Research Foundation (Kesref) which were both produced as exhibits. The trial court adopted the Kesref Report as an independent report a position which I fully agree with.

25. On the issue of interest, the Court of Appeal at Kisumu in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** settled the same. It held that interest must run from the date of filing the suit and as such the trial court did not err in making that order.

26. I must add that the Court of Appeal was alive to the fact that the lower court case had been filed in 1998 when it rendered its judgment in 2013. That was after a period of 15 years. The simple reason thereto is that it is well settled in law and has been so held over time that interest starts running from filing of suit in special damages claims like in this case. The Respondent was denied the use of her money for all that period and the interest remain the sole consolation. Further, if the trial court was to otherwise find that interest ought to begin running from any other date then that was a factual issue which ought to have been pleaded and proved and the Respondent given an opportunity to respond to. The argument comes too late in the day and is for rejection.

27. Having dealt with all issues raised in this appeal and there being no ground to disturb the decision of the trial court I must find and hold, which I hereby do, that the judgment is hereby affirmed and the appeal is dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of November, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Marvin Odero Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Appellant**.**

Mr. Odhiambo Kanyangi Counsel instructed by the firm of Messrs. Odhiambo Kanyangi & Company Advocates for the Respondent**.**

Evelyne Nyauke – Court Assistant