REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 71 OF 2017

SILPA ADHIAMBO BODO...APPELANT

-VERSUS-

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

(***Being an appeal from the judgment and decree by Hon. E. N. Nyagah, Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 2537 of 2015 delivered on 20/06/2017)***

JUDGMENT

1. Resulting from the dismissal of **Migori Chief Magistrate's Civil Suit No. 2537 of 2015** between the parties herein (hereinafter referred to as **'the suit'**), the Appellant herein filed this appeal against the entire judgment and the decree.

2. By a plaint dated 01/07/2015 and filed in court on 10/11/2015 the Appellant herein sued the Respondent herein on the strength of a Growers Cane Farming and Supply Contract (hereinafter referred to as **'the contract'**) entered on 27/01/2010. The Appellant averred that when she entered into the contract the cane she had planted on her Plot No. 2048 Field No. 66D within South Kabuoch Sub-Location measuring 0.6 Hectares (hereinafter referred to as **'the land'**) was 8 months old. The cane was hence self-developed. The contract was assigned Account No. 483491.

3. The Appellant further averred that it was a term of the contract that the plant crop was expected to be ready for harvesting not later than 24 months from planting and that the first ratoon crop was expected to be ready for harvesting not later than 22 months from harvesting the plant crop and that the second ratoon crop was expected to be ready for harvesting not later than 22 months from harvesting the first ratoon crop.

4. That, the Appellant fully discharged her duties under the contract and ensured that the cane was mature and ready for harvesting in April 2011, but the Respondent without any lawful justification failed and/or refused to harvest the cane thereby rendering all the cane into waste and that the development of the ratoon crops was compromised. That, the Appellant suffered loss of the expected earnings from the proceeds of the plant crop, the first ratoon crop and the second ratoon crop. She filed the suit claiming for a declaration, general damages for breach of contract, compensation for the loss of the three crops, costs and interest as from the time the contract came to an end. The Appellant filed a statement alongside the plaint and a List of Documents.

5. In a doubled-edged Statement of Defence the Respondent denied entering into the contract as alleged or at all and put the Appellant into strict proof. The Defendant further pleaded in the alternative and on a without prejudice basis to its initial position that if at all it is proved that a contract existed then it was fraudulently obtained and further the Appellant had failed to maintain the plant crop by not employing the recommended crop husbandry to the extent that the cane was overshadowed and dwarfed by weeds and destroyed and as such the cane could not be harvested. The Respondent further pleaded that the Appellant only entered into the contract for purposes of obtaining inputs and services on credit from the Respondent with a fraudulent motive not to plant the crop and later bring the suit for compensation. It prayed that the suit be dismissed with costs. The Respondent filed a statement of its representative.

6. The suit was heard where the Appellant and the Respondent's representative testified. At the close of the parties' cases Counsels filed written submissions and the trial court rendered its judgment on 20/06/2017 declining the suit for want of proof of the claim.

7. Being dissatisfied with the said judgment and decree, the Appellant preferred an appeal and filed a Memorandum of Appeal in this Court on 21/07/2017 where it raised four main grounds of appeal. The said grounds were tailored as follows:

> ***1. The Learned Trial Magistrate erred in fact and in law when he held that the plaintiff/appellant had not proved that the cane was developed to maturity in total disregard to the fact that the plaintiff/appellant had produced a contract book to prove that he developed his cane and the DW1 had also testified and admitted that the plaintiff/appellant had developed the cane before the defendant took over.***

2. The learned trial Magistrate erred I law and in fact, when he held that the documents produced did not belong to the plaintiff/appellant yet the plaintiff/appellant produced an agreement book dated 27th /1/2010 to prove that there was a contract between himself and the defendant/respondent.

3. The learned trial Magistrate erred in law and in fact when he subscribed to the defendant's/respondent's submission that the plaintiff/appellant never availed his cane to the defendant in total disregard to the provisions of the law and the said contract which provides that it is the duty of the miller/respondent to harvest and transport sugarcane to the factory for milling.

4. The learned Magistrate was biased against the appellant.

8. Directions were subsequently taken, and the appeal was heard by way of written submissions where both parties filed their respective submissions hence this judgment. The Appellant expounded on his grounds of appeal in arguing that the trial court overlooked the contract and evidence which was glaringly in favour of the suit. He variously referred this Court to the proceedings and referred to various case law some of which were rendered by this Court.

9. Opposing the appeal, the Respondent in support of the judgment submitted that the Appellant had failed to prove that he properly maintained the cane up to maturity and availed the mature cane to the Respondent and that the Appellant had failed to demonstrate that the trial magistrate was biased. The Respondent further submitted that if at all the appeal succeeds then the Appellant is entitled to compensation for only the plant crop since he never harvested the cane. The Respondent relied on various case law as well in support of its case.

10. 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).**

11. I have keenly read and understood the contents of the Memorandum of Appeal, the suit, the parties' submissions and the respective decisions tendered in support of each of the parties' cases and to me there are only two issues for determination being whether the suit was properly dismissed and if not whether the Appellant is entitled to any compensation.

12. On whether the suit was properly dismissed, the starting point are the pleadings since parties are strictly bound by their pleadings. I have already reiterated the positions taken by the parties vide their respective pleadings. The main position taken by the Respondent was that there was no contract between the parties. It however pleaded in the alternative that if at all a contract existed then it must have been fraudulently procured. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **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 Adereji, JSC 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 of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in respect to the essence of pleadings in an election petition: -

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…..'"

14. The Appellant pleaded her claim in the plaint dated 01/07/2015. It was on breach of contract. She pleaded the particulars of breach and the remedies sought. In a nutshell, the claim was that the Respondent failed to harvest the plant crop as provided for under the contract thereby compromising the development of the ratoon crops hence the loss. The Appellant filed a statement which was adopted as part of his evidence which statement reiterated the claim. She also produced various documents in support of the claim including the contract, the Yield Assessment Report by Kenya Sugar Research Foundation, Schedule of cane prices among other documents. Her oral evidence buttressed the contents of the plaint.

15. In its statement of defence, the Respondent denied knowledge of the contract and contended that if any contract existed as alleged then it must have been fraudulently procured. The Respondent further pleaded in the alternative that if at all a valid contract existed then the Appellant failed to maintain the cane according to the recommended crop husbandry and the plant crop failed, but in any event the

Respondent was not entitled to harvest the cane. It denied causing the Appellant to suffer loss.

16. The Respondent's representative one **Richard Muok** filed a statement in the suit. He admitted the existence of the contract and gave the same details of the land as the Appellant. He also listed the statutory deductions on harvesting the cane which includes harvesting charges, transport charges among others. He further stated that the expected yields were 64.53 ton per hectare for the plant crop and 50.49 tons per hectare for the ratoon crops. He gave the cane prices as Kshs. 2,850/= per ton. However, there was a prayer for dismissal of the suit as it was contended that the Appellant failed to carry out her obligations under the contract by abandoning the cane and never availed it to the Respondent.

17. In his testimony before court, the Respondent's witness restated that the cane was not availed to the Respondent and the Appellant filed the suit during the currency of the contract.

18. On whether the Appellant maintained the cane in accordance with the recommended crop husbandry, there is consensus that the contract was entered when the cane had already been developed by the Appellant. According to the Appellant the plant crop was 8 months old at the time the contract was entered. That evidence was not rebutted. It therefore means that the plant was due for harvest in the next 16 months at most. At such a time the crop must have grown passed the tender stages where a lot of maintenance is required. Further, is it possible that the Respondent entered into the contract if the cane was not viable? I suppose not. The Respondent's employees must have visited the land and were satisfied that the cane would yield value hence the contract. Since the Appellant denied the default and in view of the foregone analysis, I am unable to find that the plant crop was not maintained to the requisite standards.

19. As to the duty to harvest the cane, the contract was entered under the now repealed Sugar Act **<u>('the Act'</u>**). (See **Clause 1 (b**) thereof). **Section 29(2)** of the **Act** provided that all sugar industry agreements negotiated between growers and millers, or between growers and out growers or between millers and out growers **<u>must</u>** conform to the guidelines set out in the Second Schedule of the Act. **Guideline 6(a)** stated one of the roles of the miller as to *'harvest, weigh at the farm gate, transport and mill the sugar-cane supplied from the growers' field…..'* **Clause 3.1.2** of the contract however provided that the miller (Respondent) shall *'inspect the cane and determine its maturity before authorizing the Grower or Out grower to harvest and deliver the same to the Miller's weigh bridge.'* Clause 3.1.2 of the contract was therefore in contravention of and cannot stand in the face of the Act; it must give way to the provisions of the Act. I hence find and hold that the Respondent was under a statutory duty to harvest the cane from the land.

20. It is now clear beyond peradventure that the Respondent did not harvest the plant crop. As such the Respondent was in breach of the contract. I now respectfully find that the Learned trial magistrate erred in finding that it was the Appellant who failed to prove that he developed the cane to maturity and relied on documents not belonging to her and as such the Respondent was not in breach of the contract.

21. Having found that the Respondent was in breach of the contract then the Appellant is indeed entitled to some remedies in law. As I stated in **<u>Migori HCCCA No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR</u>** general damages are ordinarily not awarded in cases of breach of a contract as the remedy lies in the nature of special damages. The Appellant is only entitled to what he would have earned had the contract not been breached. That is the expected income for the plant crop and the two ratoon crops. Such, must be pleaded and specifically proved. Paragraph 8 of the plaint placed the claim at Kshs. 513,000/=.

22. But what were the expected yields for each crop? The Appellant relied on the Yields Assessment Report developed by the defunct Kenya Sugar Research Foundation and placed each of them at 60 tons/hectare. The Respondent placed the plant crop yield at 64.53 tons/hectare and the ratoon crops at 50.49 tons/hectare. The Respondent relied on its own Cane Yields Assessment. I ruled on the issue of which assessment is applicable in such instances in the **<u>Migori HCCCA No. 10 of 2016</u>** (supra) and since I am still of that position I reiterate that: -

> ***'24………It appears that the Appellant developed its own Expected Crop Yield Schedule. That is the one on page 41 of the Record of Appeal. On the other hand, there is another one developed by the now defunct Kenya Sugar Research Foundation which I have referred to above as 'the Kesref Yields Guide'. The Kenya Sugar Research Foundation, which was succeeded by the now Kenya Agricultural and Livestock Research Authority (KALRO), was mandated to promote research and investigate all problems related to sugarcane and such other crops, processing into sugar and its by-products, productivity, quality, sustainability of land and all such matters ancillary thereto. That was the institution which in the course of discharging its said mandate came up with Kesref Yields Guide.***
>
> ***25. Looking at the guide developed by the Appellant and the one developed by the defunct Kenya Sugar Research Foundation I am inclined to accept the usage of the guide as developed the defunct Kenya Sugar Research Foundation instead. I say so because to me the Kesref Yields Guide is a product of extensive research and it also has a sound technical basis attached. On the other hand, I cannot tell of the basis upon which the Appellant came up with its guide. I therefore find that the learned trial magistrate did not err in adopting the use of the so-called Kesref Yields Guide in determining the expected crop yields for the main crop plant and the first ratoon.***

23. I will therefore be guided by the Assessment Report developed by the defunct Kenya Sugar Research Foundation. According to the contract the plant crop was ready for harvesting in April 2011. The Report gives the mean yield after a nine-year research for the area where the land is situated at 60 tons/hectare for all crop yields. I will adopt that figure herein. The Appellant submitted that the cane prices were Kshs. 4,500/= at the time the plant crop was to be harvested. The Respondent contended that the then price was Kshs. 2,850/= per ton. Guided by the Cane Prices Schedule prepared by the Respondent and produced by the Appellant and which Schedule was admitted to by the Respondent, the cane price was Kshs. 3,128/= instead. I will adopt that figure herein. Therefore, the Appellant would be entitled to Kshs. 112,608/= for the plant crop. Out of this earning, the cost of harvesting and transport must be deducted. According to the Schedules developed and used by Respondent which were produced by the Appellant and as also confirmed by the Respondent the charges will stand at Kshs. 12,600/- and 41,400/= respectively. Since the contract was entered when the cane was already 8 months old, there can be no deduction on inputs and services rendered by the Respondent. The Appellant is hence entitled to Kshs. 58,608/= for the plant crop.

24. The contract provided that the first ratoon crop was to be harvested 22 months post the plant crop harvest. That means the first ratoon

crop would have been ready for harvest in January 2013. By that time the prices were at Kshs. 4,300/= per ton. The earnings would hence be Kshs. 154,800/=. Harvesting and transport charges remain at Kshs. 12,600/- and 41,400/= respectively. The net income was Kshs. 100,800/=. The second ratoon crop was due in December 2014 where the price was Kshs. 4,300/= per ton hence translating to Kshs. 154,800/= as the income. Harvesting and transport charges remain at Kshs. 12,600/- and 41,400/= respectively. The net income was Kshs. 100,800/=. The total income under the contract was Kshs. 260,208/=.

25. On interest, the Appellant rightly prays that it runs from the date of filing of the suit and at court rates.

26. The upshot is that the following orders do hereby issue: -

> **(a) The appeal be and is hereby allowed and the judgment delivered on 20/06/2017 and the decree in Migori Chief Magistrate's Civil Suit No. 2537 of 2015 are hereby set-aside;**
>
> **(b) Judgment for the Appellant (Plaintiff in the suit) is hereby entered against the Respondent (Defendant in the suit) for Kshs. 260,208/= with interest at court rate from the date of filing of the suit;**
>
> **(c) The Respondent shall bear the costs of the suit as well as the costs of the appeal.**

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 14th day of March 2018.**

A. C. MRIMA

JUDGE

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

Mr. Jura Counsel instructed by Messrs. Kerario Marwa & Company Advocates for the Appellant.

Miss Anyango Counsel instructed by Messrs. Otieno Yogo & Company Advocates for the Respondent.

Ms. Nyauke - Court Assistant