REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 105 OF 2017

DAVID RANKAI...APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Resident Magistrate's Civil Suit No. 341 of 2014 delivered on 11/10/2017)

JUDGMENT

1. There are two grounds of appeal in the appeal subject of this judgment by the Appellant herein, **David Rankai,** after the dismissal of **Migori Chief Magistrate's Court Civil Suit No. 341 of 2014** (hereinafter referred to as '**the suit'**), a suit the Appellant had filed against the Respondent herein, **South Nyanza Sugar Co. Ltd,** on account of unharvested sugar cane.

2. The suit was premised on an alleged Growers Cane Farming and Supply Contract dated 29/05/2003 (hereinafter referred to as **'the Contract'**) between the Appellant and the Respondent herein where the Appellant was to grow and sell to the Respondent sugarcane at the Appellant's parcel of land Plot No. 160 Field No. 19 Account No. 712848 in Ilpashire Sub-Location in Trans Mara within Narok County. The alleged 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.

3. The suit was heard, and the trial court rendered its judgment and dismissed the suit with costs on the main ground that the contract was not proved for want of production of the original contract document.

4. The Appellant in praying that the appeal be allowed, and appropriate compensation be awarded proposed the said two grounds in the Memorandum of Appeal dated 08/11/2017 and filed in Court on 13/11/2017:

> ***1. The learned trial magistrate erred in law and in fact, when he held that the plaintiff had failed to prove that there was a contract between him and the defendant yet the plaintiff had produced a dully executed contract book to prove that there was a contract between him and the defendant.***
>
> ***2. The learned trial magistrate erred in law and in fact, when he failed to note that the statements of one Benard Opiyo, Joash Mola and Alloys Oketch which were filled with the other documents were specimen statements which were meant to prove yield and not the relationship of the plaintiff / appellant with the bearers of those specimen statements.***

5. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied. Counsels for the parties advanced their submissions on their rival positions and referred to various judicial decisions.

6. 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).**

7. I have certainly perused and understood the contents of the pleadings, proceedings, impugned judgment, grounds of appeal, submissions and the decisions referred to by the parties.

8. From the judgment, the suit was unsuccessful because the Appellant failed to prove the existence of the contract. The trial court, in its judgment stated that: -

> ***'The next issue to decide on is whether there was a contract. The Plaintiff stated that he has entered into a contract with a defendant in 2003. The defendant disputed that claim. Thus section 107 of the evidence act comes into play. It lied on the plaintiff to prove that there a contract. True in his filed exhibits, the plaintiff had included a photocopy of an agreement book said to have been signed by the defendant and himself. When he testified in court the plaintiff did not (produce the original contract) ensure leaving the court unsure whether or not it exists. Once the defendant had raised the issue of genuiness of the contract, the best evidence would have been the original agreement'***

9. The parties filed their respective pleadings. Further, the Appellant filed a List of Documents and his Statement. The Respondent filed a List of Documents and a Statement by its representative one **Richard Muok** who testified as **DW1**. At the hearing, the Appellant stated as follows during his examination-in-chief: -

> ***'…. In respect of this case I filed a statement and a list of documents which I would like to adopt as evidence in court….'***

10. There was no objection to the production of the documents by the Appellant. The documents were hence rightly produced by the Appellant and the documents became part of the evidential record in the suit. The documents included the contract. Therefore, in the absence of any objection by the Respondent on the production of a copy of the contract, there was no need for the original contract document. The Respondent had knowledge of the copy of the contract since inception of the suit and did not raise the issue of inspection and discovery of documents even at the pre-trial stage.

11. Be that as it may, after the undisputed production of the copy of the contract, it was still incumbent upon the Appellant to prove his case against the Respondent. The Appellant testified and took the court through the contract and how he discharged his part of the contract. He even showed his identity card in court to prove that he was the same person named in the contract. He admitted having been supplied with seed cane and fertilizer by the Respondent which costs according to the contract was to be offset from the value of the cane at harvest. He also admitted that the Respondent ploughed the land. The Appellant blamed the Respondent in not harvesting the cane when it matured and as a result he lost the plant crop and the two ratoon crops. He prayed for compensation in the suit.

12. The Respondent filed a Statement of Defence. It denied the contract and further denied being in breach thereof. On a without prejudice basis the Respondent pleaded that on proof of the contract then it was entitled to the value of the services rendered and inputs supplied to the Appellant. The statement of DW1 introduced the issue of the contract being a fraud. No such averments were made in the Statement of Defence which would have ordinarily been accompanied with particulars thereof. The issue of fraud was hence a non-issue in the suit. (See the Supreme Court ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** and the Court of Appeal decision in **The Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR).**

13. DW1 did not testify that he was the one in-charge of supervision of Ilpashire Sub-Location in Trans Mara where the Appellant land was situated. He only stated that he was a Senior Field Supervisor with the Respondent. No evidence was tendered to prove that the land did not exist in the first place. The main contention by DW1 was that the contract document could not be traced in the Respondent's records. On an equal footing, DW1 did not testify that he was the one in charge of all the Respondent's records. Further, on realizing a 'fraudulent' document having been introduced in the suit, the Respondent did not take any steps to challenge the legality thereof. The Respondent neither pleaded such fraud nor lodged a complaint with the police on the contract document. In sum, the position taken by the Respondent amounted to a general denial of the contract.

14. It is further surprising for the Respondent to claim for reimbursement of the value of its inputs and services rendered to the Appellant in a case where the Respondent was firmly sure that it never entered into the contract. The Respondent could not possibly take twin and completely opposite positions on the same matter. The Respondent was either to the take the position that the contract was non-existent and challenge it out or to admit the currency of the contract and contend its proof in law or to admit liability. The Respondent's state of affairs in the suit could not have outweighed the evidence by the Appellant. On a balance of probabilities, the Appellant proved his case against the Respondent.

15. With tremendous respect to the trial magistrate, the finding that the contract was not proved by failure to produce that original contract document was erroneous and is hereby set-aside. Since the issue was not raised by the parties in their pleadings or the suit it was erroneous for the court to come up with the issue on its own motion and settle it in favour of one of the parties. That position was clearly emphasized by the Court of Appeal in **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 Slyvester Umaru Onu, JSC stated that: -

> ***'….It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it…..***
>
> ***It is settled law that parties are bound by their pleadings……the court below was in error when it raised the issue contrary to the pleadings of the parties.'***

16. Adereji, JSC in the same case 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……***
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> ***…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.'

17. The trial court was hence biased against the Appellant. On the issue of the specimen harvest statements relied by the Appellant which were in the names of other people, the Appellant gave an explanation thereto. That, the statements were only specimen and a comparative guide on the yields and they were not meant to prove any relationship between the Appellant with the bearers thereof. That was a reasonable explanation and the trial court ought to have upheld it.

18. Having found that it was the Respondent who breached the contract by not harvesting the plant crop after the Appellant had fully developed it to maturity, I must now consider if the Appellant is entitled to any remedy in law. I previously dealt with this aspect in the case of **Migori High Court Civil Appeal No. 138 of 2015 South Nyanza Sugar Co. Ltd vs. Hilary M. Marwa (2017) eKLR** when I expressed myself as follows: -

> *'15. I recall having dealt with this issue at length in **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited**. In that case I found that there can be no award of general damages for a claim on breach of contract. However, the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred (restitution in integrum'). The measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time the contract was made and that such damages are not at large but in the nature of special damages. I substantiated those findings with various case law. I must say that I am still of that position.'*

19. In **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited (2017) eKLR** I also dealt with how special damages ought to be ascertained in cases of contracts like the one before this Court. This is what I stated: -

> *"22. I am therefore of the very considered view that looking at the nature of the Contract and how the loss occurred, the above Appellant's averment was adequate to make a court assess the special damages accordingly. In affirming the position, the Court in the **John Richard Okuku Oloo** (supra) had the following to say:*
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> > ***"In case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and which was 0.2 hectare (paragraph 3 of plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.***
> >
> > ***The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.***
> >
> > ***We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof.***
> >
> > ***Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filling suit."***

20. The Appellant particularized his claim under paragraphs 4 and 5 of the Plaint based on the acreage of 1.0 hectare, the expected yield of 150 tonnes per crop and the price of between Kshs. 2,000/= and Kshs. 3,500/- per tonne. He prayed for compensation for the plant crop and the two ratoon crops. The Respondent denied the acreage, the expected yields and the price of the cane.

21. The contract provided the acreage of the Appellant's land as 1.0 hectare. On the price of the cane the Appellant did not adduce any such evidence, but the Respondent relied on its Cane Produce Prices Schedule. I will use the said Schedule as the basis of the cane prices. Lastly on the expected yield the Appellant relied on Cane Yields Schedule developed by the Kenya Sugar Research Foundation (KESREF) whereas the Respondent relied on its Sugar Cane Productivity Schedule. I have considered both documents and I opt to guided by one developed by the KESREF. I say so because the Cane Yields Schedule developed by the KESREF is a product of extensive research undertaken by experts in the sugar sector over a long period of time.

22. According to the contract the plant crop was expected to be ready for harvesting by May 2005 at most. By that time the price was Kshs. 1,800/= per tonne. The expected yield as per the Sugar Cane Productivity Schedule by KESREF was 80 tonnes per hectare. The expected income was therefore Kshs. 144,000/=. The amount for the expenses incurred by the Respondent for ploughing, fertilizer supply, seed cane supply and the survey were not given hence not recoverable. Transport and harvesting charges amounted to Kshs. 60,900/= thereby rendering a net income of Kshs. 83,100/=. The first ratoon crop was expected to be harvested in May 2007. By then the price was Kshs. 2,200/= per tonne with the other variables remaining constant. The net earnings stood at Kshs. 115,100/=. The second ratoon crop was expected to be harvested in May 2009 when the prices were to be Kshs. 2,850/=. The net earnings stood at Kshs. 167,100/=. The total earnings from the contract were **Kshs. 365,300/=** for which I hereby enter judgment for the Appellant as against the Respondent. This sum shall attract interest from the date of filing of the Plaint.

23. 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. Kshs. Kshs. 365,300/= which amount shall attract interest at court rates from the date of filing of the Plaint;

c) The Appellant shall have costs of the suit as well as costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 08th day of August 2018.

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.

Messrs. Okong'o Wandago & Company Advocates for the Respondent**.**

Evelyne Nyauke – Court Assistant