REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY

AT MIGORI

CIVIL APPEAL NO. 53 OF 2017

THOMAS M. MWITA.....APPELLANT

-VERSUS-

SOUTH NYANZA SUGAR CO. LTD....RESPONDENT

(Being an Appeal and a Cross-appeal from the judgment and decree

by Hon. R. Odenyo, Senior Principal Magistrate in Migori

Chief Magistrate's Civil Suit No. 243 of 2017

delivered on 29/03/2017).

JUDGMENT

1. The Appeal and the Cross-Appeal herein arose from the judgment of the trial court rendered on 29/03/2017 where the court entered judgment for the Appellant herein, **Thomas M. Mwita**, against the Respondent herein, **South Nyanza Sugar Co. Ltd.**

2. The Appellant's claim was by a Statement of Claim filed before the now defunct **Sugar Arbitration Tribunal** (hereinafter referred to as '**the Tribunal'**) which matter was later transferred to the trial court upon the dissolution of the Tribunal due to the enactment of the **Crops Act, 2013** and the repeal of the **Sugar Act, 2001**. As the claim was opposed, the matter was heard leading to the impugned judgment.

3. Both parties herein were aggrieved by the judgment. An Appeal was filed by the Appellant claiming proceeds from the second ratoon crop and a Cross-Appeal was filed by the Respondent seeking the dismissal of the Appellant's claim on grounds that the same was not proved as required in law.

4. Directions were subsequently taken, and the appeals were disposed of by way of written submissions where both parties complied and expounded on their rival positions.

5. 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).**

6. In discharging the foregone duty, I will first deal with the Cross-Appeal. The Respondent contended that the Appellant's pleadings and the evidence were contradictory, and the court erred in not dismissing the claim after it found that the Respondent had harvested the plant crop which was grossly inadequate to even cater for the costs of the services and inputs the Respondent rendered to the Appellant.

7. As to the alleged contradiction, the Appellant pleaded in his Plaint that he suffered loss of the two ratoon crops after the Respondent harvested the plant crop but failed to harvest the first ratoon crop. In his filed statement the Appellant however stated that the Respondent failed to harvest the plant crop hence compromised the development of the ratoon crops. While testifying before court the Appellant reiterated the position in the Plaint. The statement is a document not made under oath. If it is produced in evidence and its contents are not impugned, then it becomes of a higher probative value than in instances where such a document is produced in evidence, but its contents are contested. In the latter case, it is imperative for the maker thereof to be examined on the contents and possibly call for corroborative evidence on the contents of the document, if need be, otherwise the contents of such a document may have very little probative value, if any. I say so

because production of a document in a civil adversarial system is different from proof of its contents (See **Sections 35** and **36** of the **Evidence Act, Cap. 80** of the Laws of Kenya). Production of documents and proof of their contents must be clearly distinguished, and parties must remain alive to the legal parameters required in each instance.

8. In this case the statement was adopted as part of the evidence of the Appellant. The Appellant was cross-examined on the contents of the statement and it was clarified that the Respondent harvested the plant crop and not the first ratoon crop. The results of the cross-examination of the Appellant were hence in tandem with the contents of the Plaint. I hence find that the contents of the statement were clarified during cross-examination and the result was that the evidence supported the contents of the Plaint and the contradiction which was in statement was adequately reconciled. Suffice to say that had the Appellant testified that the Respondent did not even harvest the plant crop then his evidence would have been at variance with the Plaint and the claim would readily suffer the attendant consequences.

9. The Respondent contended both in the Defence and evidence that after the plant crop yields were so low that the Appellant did not develop the ratoon crops to the required standards or at all to warrant harvesting and milling. It was the evidence of **Richard Muok (DW1)** that because of the failure on the part of the Appellant to comply with the terms of the contract entered between the Respondent and the Appellant on 01/03/2004 (hereinafter referred to as '**the contract'**) the Respondent acted as per **Clause 5** of the contract which provided that: -

> ***'If at any time the Company is of the opinion that the sale proceeds of the next cane harvest of the outgrower will be insufficient to reimburse the Company with the monies then due to the company from the outgrowers then and in that case the company may immediately and without notice to the outgrower suspend the supply of services and materials to the outgrower until it is satisfied as the reimbursement of the monies aforesaid.'***

10. According to **Clause 5** of the contract once the Respondent formed an opinion that the sale proceeds of the next cane harvest will be insufficient to reimburse its input then the Respondent had the unilateral option of suspending the supply of services and materials to the Appellant until it was satisfied on its reimbursement. It therefore meant that in such cases the Respondent was only entitled to suspend its supply of the inputs to the Appellant but not to rescind the contract.

11. But what would the Respondent further do in such a scenario having already invested public money? There seems to be two possible options under the contract. One, according to **Clauses 10(g)** and **11** of the contract whenever the Appellant failed to prepare, plant and maintain the crop in accordance to the contract the Respondent would carry out any operations it considers necessary to improve the cane yield and shall deduct the cost thereof from the proceeds of the yields. Two, according to **Clause 4** of the contract the Respondent would terminate the contract and still pursue recovery of the costs of its investment. In the event the Respondent opted to terminate the contract, it must first issue a 30 days' notice in writing to the Appellant to remedy the breach and in default of compliance by the Appellant the Respondent would issue and serve another notice terminating the contract.

12. According to DW1, after the Respondent formed the opinion that the sale of the proceeds of the next cane harvest will be insufficient to reimburse its input, it opted not to supply any further services and materials to the Appellant and the Respondent took no further step. It hence means that the contract remained valid as the Respondent only acted in a manner to cushion and mitigate any possible losses from sustained poor yields. The Respondent was therefore required under **Clause 11** of the contract to harvest the first ratoon crop on maturity which it failed to do.

13. The Respondent contended that the Appellant failed to develop the ratoon crops. As I have stated in previous decisions, cane farming is unique from many other forms of farming since the development of the first ratoon crop depend on whether the plant crop is harvested. Once that happens then the first ratoon crop automatically sprouts out and grows subject to the required crop husbandry. The harvest of the first ratoon crop leads to the development of the second ratoon crop. By the Respondent confirming that it harvested the plant crop then unless it demonstrated otherwise the development of the first ratoon crop was automatic. The Respondent cannot now be heard to take the position that the first ratoon crop was not developed; that is practically impossible in the circumstances of this case.

14. The foregone unfolds that it is the Respondent who breached the contract. Given that the contract was specific on the number of the expected crop yields and in view of the breach then the Appellant was entitled to the value of the expected yields from the second ratoon crop. Respectfully, the learned trial magistrate erred in finding that the compensation for the second ratoon crop was remote and unrecoverable. I hereby set that finding aside. As the plant crop undisputedly yielded much less than what was expected, I find the approach taken by the learned trial magistrate to adopt the plant crop yield as the basis for the first ratoon crop yield as very reasonable since the Respondent did not adduce evidence of much poorer yields for the ratoon crops. I would likewise adopt the said yield even for the second ratoon crop.

15. The second ratoon crop was expected to mature by August 2009 when the price was Kshs. 2,850/= per ton. There being no dispute on the size of the farm, the expected value of the second ratoon yield was Kshs. 106,732/50 out of which the cost of the harvesting and transport charges would be deducted bringing the net income to **Kshs. 72,353/40**.

16. I must at this point state that the ground of appeal by the Appellant that the learned magistrate erred in deducting the cost of harvesting and transport charges from the award is misplaced. I say so because the Appellant himself confirmed that position in his statement as well as in his testimony at the hearing. Indeed, that is an express provision of the contract. The ground hereby fails. I as well do not find the ground that the expected yield for the first ratoon crop was to be 120 tons per hectare to be a serious one. The record is clear that the plant crop yielded only 37.45 tons which was much less than what the Appellant expected. The Appellant did not contest that yield or infer that there was any wrongdoing on the part of the Respondent may be in terms of transporting or weighing the plant crop yield. The Appellant likewise did not inform the court what he did to raise the yields almost fourfold or how he arrived at the said figure of 120 tons per hectare instead. I find the ground without any factual and legal basis and hereby also fails.

17. Having considered all the grounds of appeal in the Appeal and the Cross-Appeal, I now come to the following final findings, that: -

(a) The Appeal partly succeeds, and the Cross-Appeal is dismissed.

(b) The finding of the learned trial magistrate that the award for the second ratoon crop yield was remote and could not be compensated for is hereby set-aside and is substituted with a finding that the Appellant was entitled to the net proceeds from the yields of the second ratoon crop in line with the contract.

(c) The sum of Kshs. 51,526/= awarded to the Appellant is hereby set-aside and substituted with the sum of Kshs. 123,879/40 with interest from the date of filing the claim before Tribunal.

(d) Since the Appeal has partly succeeded and the Cross-Appeal wholly unsuccessful, each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of August 2018.

A. C. MRIMA

JUDGE

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

Mr. Kerario Marwa instructed by the firm of Kerario Marwa & Co. Advocates for the Appellant**.**

Mr. Bosire instructed by the firm of Moronge & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant