REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 51 OF 2017

LUCAS M. NYANKOBOSA.....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 Magistrate's Civil Suit No. 223 of 2015 delivered on 29/03/2017)

JUDGMENT

1. This is an appeal against the dismissal of the Appellant's suit before the **Migori Chief Magistrate's Law Courts** in **Court Civil Suit No. 223 of 2015** (hereinafter referred to as '**the suit'**). The suit had initially been filed before the defunct **Sugar Arbitration Tribunal** (hereinafter referred to as '**the Tribunal'**) prior to the dissolution of the Tribunal created under the **Sugar Act** by the enactment of the **Crops Act** which repealed the Sugar Act.

2. The Appellant contended in the suit that by a Growers Cane Farming and Supply Contract entered into on 30/08/2004 (hereinafter referred to as '**the Contract**') the Respondent herein, **South Nyanza Sugar Co. Ltd**, contracted the Appellant to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 50A Field No. 53 in Moheto Sub-Location measuring 1.7 Hectares within Migori County.

3. The Appellant further contended 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. That, the Respondent ploughed, furrowed and harrowed the Appellant's land and supplied the cane seed and fertilizers. That, the Appellant discharged his part of the contract until the cane was mature, but the Respondent failed to harvest hence suffered loss.

4. Aggrieved by the alleged breach of the contract the Appellant filed the suit before the Tribunal on the 03/12/2012 claiming a declaration that the Respondent was in breach of the contract, compensation for the loss of unharvested cane crops, costs and interest.

5. The Respondent entered appearance and filed a Statement of Defence dated 28/03/2013 wherein it denied the contract *in toto* and put the Appellant into strict proof of all his averments. The Respondent prayed for the dismissal of the suit with costs.

6. Resulting from the change in law the Tribunal was dissolved, and the suit was transferred to the lower court for hearing. At the hearing both parties were represented by Counsels. The Appellant was the sole witness who testified and produced the documents in his List of Documents as exhibits and adopted his statement as part of his evidence. The Respondent filed and adopted its List of Documents as exhibits and called its representative who testified. A judgment was subsequently rendered which is the subject in this appeal.

7. The Appellant in praying that the appeal be allowed, and that he be appropriately compensated proposed the following twin grounds in the Memorandum of Appeal dated 10/04/2017 and filed on 12/04/2017: -

> ***1. The learned trial magistrate erred in law and in fact, when he failed to evaluate and balance the pleadings evidence and submission by the appellant thereby reaching to a wrong conclusion that the appellant's evidence was contradictory and thereby dismissing the appellant's case yet the appellant testified in court while on oath that his plant crop was not harvested.***
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> ***2. The learned trial magistrate was biased against the appellant.***

8. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied. The Appellant challenged the entire judgment and contended that the trial court erred in dismissing the suit despite evidence to the contrary. The Appellant relied on some persuasive decision of the High Court in his quest to have the appeal allowed.

9. The Respondent opposed the appeal and contended that the suit was rightly dismissed and prayed for the dismissal of the appeal.

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

12. I will consider the first ground of appeal. The trial court was not convinced that the Appellant had proved his case because of various contradictions between the pleadings and the evidence. It is a cardinal principle in litigation that the evidence must flow from the pleadings. Any evidence which contradicts the pleadings is for rejection. (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. From the original Statement of Claim filed before the Tribunal the Appellant pleaded that the Respondent failed to harvest the plant crop which compromised the development of the first ratoon crop. He prayed for such compensation. The Appellant filed his Statement on 23/09/2015 which he adopted as part of his evidence at the trial. In the Statement the Appellant stated that the Respondent had harvested the plant crop but failed to harvest the ratoon crops. He specifically stated that he was seeking compensation for the two ratoon crops. At the hearing the Appellant again stated that the Respondent did not harvest the plant crop. It is that contradiction which led to the dismissal of the suit.

14. There is no doubt that there existed a contract between the parties. There is as well ample documentary evidence of the services and inputs the Respondent accorded the Appellant in furtherance to the contract. I can only find that the plant crop was grown and maintained to maturity since there seems to be no contrary evidence. As to whether the plant crop was harvested, I must state that a Court remains under a duty to consider and evaluate the pleadings and evidence before it and make findings thereto. The Statement was adopted by the court as part of the Appellant's evidence. The Appellant cannot therefore blow hot and cold on the same issue. Such a state of affairs must be reconciled in favour of the other party. I hence find that the plant crop was accordingly harvested. That being so, the trial court was to disallow the claim on the plant crop, but to consider whether the Appellant was entitled to any proceeds from the first ratoon crop as prayed in the pleading. The court hence erred in summarily determining the whole suit mid-way. I will now consider whether the Appellant was entitled to the proceeds on the first ratoon since the pleading did not pray for the proceeds from the second ratoon crop.

15. The Respondent contended that since the Appellant did not develop the first ratoon crop then he was not entitled to any compensation. I have by now severally dealt with this issue and I can only reproduce what I stated in **Migori High Court Civil Appeal No. 88 of 2017 Millicent Adhiambo Odingo vs. South Nyanza Sugar Co. Ltd** (unreported) thus: -

> ***'13. In the said case I considered and was greatly aided by the binding decision by the Court of Appeal at Kisumu in Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (UR) where the Court dealt with the issue at length and concluded that a farmer in a sugar contracts, just like the one herein, is entitled to full compensation from what he/she would have earned had the breach not been occasioned. The Court further stated that from the unique way the contracts were tailored it was possible for a Court to calculate and pronounce itself on the final awards and Courts should not unnecessarily be bogged down by the technicalities on the need for special damages to be specifically pleaded in the pleadings. I must as well state that in arriving at the said decision the Court of Appeal considered several like decisions both local and foreign.***
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> ***14. In upholding my earlier position on the matter, it must be understood that I not only do so because I am bound by the decision of the Court of Appeal but that I have once again considered the matter as a whole and found that the Court of Appeal was true, fair, reasonable and realistic to the law, science and nitty-gritties in the modus operandi in the sugar sector. Unlike in other form of contracts, the sugar contracts are unique in that the crop cycles are not and cannot be severed. That means failure to develop or harvest a cycle automatically compromises the development of the subsequent cycle or cycles. That is how nature works and Courts should take judicial notice thereof pursuant to Section 60(1)(m) of the Evidence Act, Cap. 60 of the Laws of Kenya. Further, that is the rationale behind the express provision of Clause 2(a) of the Contract which provides for the period of 5 years or until one plant crop and two ratoon crops are harvested from the subject land whichever occurs first. Courts in Kenya and beyond are all unanimous on the finding that, save for the well-settled exceptions, a party who commits a breach of a contract is liable for the full loss thereby caused to the other party or parties.'***

15. The Appellant was hence entitled to judgment for the proceeds of the first ratoon crop. There is no dispute that the acreage was 1.7 Hectares. According to the Yields Report by Kenya Sugar Research Foundation (Kesref) relied upon by both parties, the expected yield for the first ratoon crop was 85.1 tonnes per hectare. As the contract was entered in August 2004 then the first ratoon crop was expected to be ready by August 2008 or thereabout when the cane prices were Kshs. 2,500/= per tonne as per the Cane Prices Schedule developed by the Respondent. The net income for the first ratoon crop, that is after taking into account the harvesting and transport charges, would have been **Kshs. 271,604/=**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 Claim before the Tribunal.

16. As come to the end of this judgment I must apologize to the parties for its late delivery which was caused by this Court's engagement in the hearing and determination of election petition appeals in the month of July and the August recess which followed soon thereafter.

17. Consequently, the following final orders do hereby issue: -

> **a) The appeal hereby succeeds and the finding of the learned magistrate dismissing the suit be and is hereby set aside accordingly;**

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. Kshs. 271,604/= which amount shall attract interest at court rates from the date of filing of the Claim;

d) The Appellant shall have costs of the suit and this appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of September 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**.**

Messrs. Moronge & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant