



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL APPEAL NO. 94 OF 2015**

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

**-VERSUS-**

**SAMWEL M. ROBI..... RESPONDENT**

**(Being an appeal from the judgment and decree by Hon. Phoebe Y. Kulecho, Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 528 of 2014 delivered on 30/04/2015)**

**JUDGMENT**

1. By a judgment delivered on 30/04/2015 the Respondent was decreed the sum of Kshs. 361,839/= being compensation for the plant crop and first ratoon crop. The Appellant appealed against the decree on the main ground that the claim was not proved since the Respondent did not prove the price of the sugar cane to enable the court arrive at any compensation.
2. The Appellant relied on **Daniel Toroitich arap Moi & Another vs Mwangi Stephen Mureithi & Another (2004) KLR** as well as **Section 3 of the Evidence Act, Cap. 80** of the Laws of Kenya for the position. The Respondent opposed the appeal.
3. Directions were taken, and the appeal was disposed of by way of written submissions where the parties duly complied.
4. 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**).
5. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal and the submissions. The full hearing of the suit was conducted at the defunct **Sugar Tribunal** before the enactment of the **Crops Act** which repealed the **Sugar Act**. The dispute was then transferred to **Migori Chief Magistrate's Court** and registered as **Civil Suit No. 528 of 2014** (hereinafter referred to as '**the suit**') and the court rendered the judgment appealed against.
6. There is no dispute on the trial court's finding that the Appellant breached the contract between the parties herein dated 30/08/2004. As said the dispute is on the price of the cane adopted by the trial court. I have perused the evidence adduced before the Tribunal by all the witnesses. None referred to the applicable cane prices and neither were the exhibits. That position led the trial court into crossroads and lamented thus '*.....In the absence of the Price List on record there is no basis for the Plaintiff submission that the cost per tonne at the material time was Kshs. 2,015 and Kshs. 2,8550/= for the plant crop and 1<sup>st</sup> ratoon respectively.*' Having said so the trial court still went ahead and adopted the proposed cane price per tonne of Kshs. 2,015/= in computing the compensation.
7. In civil litigation a party is under a duty to prove any issue it wants the court to rely on a decision. In other words, a party must not only plead an issue but must also prove it if the issue is not admitted. That is the rationale in *inter alia* **Section 107 of the Evidence Act, Cap. 80** of the Laws of Kenya. In this case the issue of the cane price was pleaded in paragraph 6 of the Statement of Claim. The Appellant specifically denied the issue in its Written Statement of Defence. The issue was hence a contested one and the Respondent was legally bound to prove it. None of the exhibits pointed to the applicable cane prices. Likewise, the evidence of the Respondent and his witness **Paul Simo (PW2)** and that of the Appellant's witness **Mike Otieno Ohaga** did not touch on the cane prices.
8. The issue of the cane prices was hence pleaded but not proved. Given that the trial court had found that no evidence was led on the cane prices then it was incumbent upon it to decline to make any award based on unproved prices. The trial court erred to the extent of adopting the very cane price which it had found to be unsubstantiated. The Appellant is therefore right in contesting the issue and the decision in **Daniel Toroitich arap Moi** (supra) is both relevant and binding on the aspect that submissions cannot take the place of evidence. The effect thereof is that the Respondent failed to prove its claim against the Appellant since there was no sufficient evidence to enable the trial court

compute any compensation.

9. The upshot is that the suit was not proved and the following final orders hereby issue: -

**a. The appeal is allowed and the finding of the trial court allowing the suit is hereby set-aside.**

**b. The suit be and is hereby dismissed for want of proof.**

**c. The Respondent shall bear the costs of the suit and of this appeal.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 23<sup>rd</sup> day of November, 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 Respondent.

**Messrs. Otieno, Yogo, Ojuro & Company** Advocates for the Appellant.

**Evelyne Nyauke** – Court Assistant