REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO 40 OF 2016

PERES OGUTU OMOLLO……. APPELLANT

VERSUS

SOUTH NYANZA SUGAR COMPANY……RESPONDENT

(An appeal from the judgment and decree of C.M. Kamau (SRM) in

Rongo PMCC No 12 of 2014)

JUDGMENT

1. PERES OGUTU OMOLLO (appellant) has contested the decision where her claim for damages against **SOUTH NYANZA SUGAR COMPANY** (respondent) was dismissed for want of proof. She prays that the judgment entered in the lower court be set aside and the court to assess and award the damages she had sought.

2. The background to this appeal is that the appellant claimed to have entered into a contract with the respondent on 31st July 2006 where she was to grow and sell to it sugarcane on her land parcel **NO 1905 IN FIELD NO 172B IN KAKMASIA SUBLOCATION**. The contract was to remain in force for a period of 5 years or until one plant crop and two ratoon crops of sugar cane were harvested.

3. The plant crop and the ratoons were to be harvested at the ages of 22-24 months and i6-18 months after planting and subsequent harvest respectively. However when the plant crop and the two ratoons matured, the respondent failed to harvest them.

4. It was the appellant's contention that her plot was capable of producing an average of 135 tonnes per hectare for the plant crop and another 135 tons for the ratoon crop. Further that the rate of payment then applicable was Ksh. 2500 per ton which was given a breakdown as follows:

Expected yield for plant crop 135 tonnes x 0.3 ha x2500 = 101,250

Expected yield for 1st ratoon crop 135 tonnes x 0.3 ha x2500 = 101,250

Expected yield for 2nd ratoon crop 135 tonnes x 0.3 ha x2500 = 101,250

Total = Kshs 303,750/-

5. The respondent denied liability and pleaded on a without prejudice basis that if the appellant suffered any loss then she was the author of her own misfortunes as she failed to properly maintain her crops to the

required standards as to warrant the same being harvested.

6. In her evidence on cross examination the appellant stated that she planted the crop and the respondent supplied her with inputs such as seed cane, 2 bags of urea and 3 bags of fertilizer. Once the cane mature in February 2008, she reported the same to the respondent who never went to harvest. Consequently she did not develop the ratoon crops because the first crop dried up and she abandoned it.

7. The respondent's Senior Field Supervisor (**RICHARD MUOK**) confirmed the existence of the contract and explained that the average per acre in the area is 66.5 tonnes for the first plant crop, and 48 tonnes for the ratoons. Further that the prevailing price then was Ksh. 2200/- per ton. He also pointed out that the respondent had provided Appellant with services worth Ksh. 11431/20 cts which were recoverable from the proceeds due to the appellant. It was his contention that the cane was crushed at an undisclosed jiggery and was never availed to the respondent, so not a single crop was harvested. He denied suggestions that the respondent abandoned the cane and south to rely on an internal memo dated 23rd October 2014 from the Out growers Extension Services Manager which showed the appellant's name among the list of farmers whose cane had been crushed or abandoned.

8. The trial magistrate in his judgment observed that although the appellant claimed that her plot was 0.8 ha, she admitted on cross examination that it was 0.3ha. Further that she had reported the maturity of the crop to the respondent when it was 24 months old. The trial magistrate's interpretation of clause 3.1.2 of the contract was that the respondent had no contractual obligation to harvest the cane, and that its duty was limited to only authorizing harvest while the actual harvest was to be done by the grower upon authorization or approval by the respondent The trial court further held that such authorization or approval was not automatic but depended on the health and quality of the cane is also not automatic. The respondent was thus absolved from any blame on grounds that it was the appellant's duty to harvest the cane.

9. These findings were contested on grounds that the trial magistrate completely misinterpreted the provisions of the contract regarding the respondent's contractual duties

10. At the hearing of the appeal, **MR ODUK** submitted on behalf of the appellant that the trial magistrate gave an erroneous interpretation to the contract as the sugar industry is governed by the Sugar Act 20111 which spells out the various roles of the industry players. He faulted the trial court for only reading one clause of the contract instead of the entire document and that the court contradicted the national legislation. He referred the court to section 6(a) of the Sugar Act at Schedule II where the role of the miller is to harvest, weigh and transport the cane and this was a statutory duty which the court could not shift to the farmer.

11. MR ODUK also urge the court to consider clause (e) of the contract regarding ***force majeure*** whose meaning he stated was that if the farmer is unable to obtain fuel or harvesting equipment then the principle would apply. Counsel also referred to clause 3 (5) and 3 (8) of the contract which provides that the grower is to give the respondent access for purposes of harvesting the cane- his emphasis was that the grower's duty is to make sure the cane is available to the miller when required.

12. It was also argued that the farmer would not just appear at the factory gate with his cane as clause 3.1.8 gave the respondent the monopoly of transporting and harvesting the cane and even in instances where the cane gets burnt it must still be made available to the respondent. In the light of all these provisions it is argued that the trial court should have found clause 3.1.2 illegal as it contradicted statute, and in any event that clause had not been an issue but the trial magistrate completely went out of his way to pluck it out and give it his own interpretation.

13. MR ODUK pointed out that the defence had been restricted to claims that the appellant had failed to maintain her crops and he accused the trial magistrate of manufacturing issues which had not even been contested. In this regard counsel referred to the Nigerian case of **ADETOUN OLADEJI (NIG) LTD versus NIGERIA BREWERS PLC** where the court said that issues must be addressed only if they are before the court. It was contended that since that contractual clause was not an issue but seemed to strike

the court's interest, the trial magistrate ought to have invited the parties to address him on that clause.

14. In opposing the appeal **MR BOSIRE** urged this court to uphold the findings saying they were based on the facts presented before the court and there was nothing illegal about the contested clause as parties can contract themselves out of a statutory provision as long as it is not illegal. Counsel submitted that the farmer was required to harvest the cane as long as he gave notice to the Miller so as to enable them draw up a harvesting programme.

15. Counsel urged the court that in the event that the appeal succeeds then the court ought to take into account the sum deductable for the services rendered and to also apply the price of Ksh. 2200/- per ton. He also submitted that interest should be payable from the date of judgment in the lower court and not the date of filing suit as this was a special damages claim.

16. In reply MR ODUK submitted that one cannot contract out of a statutory regulation and further argued that the Court of Appeal in the case of **JOHN RICHARD OKUKU versus SOUTH NYANZA SUGAR COMPANY LIMITED [2013] eKLR** found in a similar claim that in a special damage claim interest accrues from the date of filing suit and not from the date of judgment.

17. I have read through the contract document, clause 3.1-3.9 addresses all the obligations placed on the Miller and clause 3.5 provides that the grower shall:

> "Take all such from the miller with respect to the development, maintenance, harvesting, and transportation of the cane from the plot".

18. On the other hand Clause 3.1.1-3.1.2 spells out the duties of the Miller. The contested clause 3.1.2 requires the Miller to:

> "Inspect the cane and determine its maturity before authorizing the grower to harvest and deliver the same to the Miller's weigh bridge"

19. On the face of it one would infer that the duty to harvest is placed on the farmer but that clause cannot be read in isolation as there is also a provision under clause 3.5 that the Miller must give directions and advise the farmer about harvesting the crop. There is no evidence that this took place.

20. Then of course there is the issue regarding provisions of the Sugar Act which it would seem MR BOSIRE did not contest. The Second Schedule of the Act gives guidelines for agreements between parties in the sugar industry and section 6 of the schedule sets out the role of the miller which is to-

> "6. (a) harvest weigh at the farm gate, transport and mill the sugarcane supplied from the growers fields…and make payments to the sugarcane growers"

21. Need I say more? The provisions of that clause were never an issue either in the pleadings or at the trial and indeed the only defence raised was that the appellant failed to properly maintain her crop. However there was no evidence of such failure and as already pointed out in the preceding paragraph there was no evidence presented that the respondent had gone and inspected the crop once it had matured and then advised the appellant regarding harvesting.

22. Taking into consideration the provisions in the Sugar Act as well as the contract document when read in whole, I am of the view that the interpretation given by the trial court regarding the respondent's obligation was erroneous and it is consequently set aside.

23. Did the appellant fail to maintain her crop? This claim is not supported by any evidence and the internal memo dated 23rd October 2009 infact confirmed that there was mature first plant crop in the field but it had been taken to an undisclosed juggery. The source of this information was not give and in the light of the foregoing, the appellant did prove her claim on a balance of probabilities

24. In working out what was due to the appellant I will be guided by the cane yield in out growers' document presented by the respondent which placed the region's yields at 66.56 tons per hectare for the first crop as the appellant did not give the court any basis for the figure suggested. The appellant also proposed a figure of Ksh. 2500 per ton whilst the respondent offered Ksh. 2200-neither party gave a basis for the respective figures and I will therefore apply the law of averages and use a figure of Ksh. 2350. This then works out as follows: Ksh.2350x66.56 tonnes x0.3ha = Ksh.46,924/80 cts for the first crop. The appellant did not plant the 1st and 2nd ratoons and is not entitled to the damages thereof.

25. As regards the interest payable on a claim for special damages, I have considered the submissions by both counsel and also taken into account the findings **Anzangalala JA** in the case of **JOHN RICHARD OKUKU OLOO versus SOUTH NYANZA SUGAR COMPANY LIMITED** (supra) which referred to a host of past decisions on the issue of special damages and held that interest on special damages would be awarded from date of filing suit-the Court of Appeal having made its pronouncement on the matter I therefore order that the appellant shall be awarded interest to be calculated from the date of filing suit until payment in full.

26. The costs of the appeal are awarded to the appellant.

27. The judgment in this matter applies ***mutatis mutandis*** to **HCCA No 39 of 2016 OGUTU KWACH versus SOUTH NYANZA SUGAR CO LTD, No 42 OF 2016 ELIZABETH A. OMOLLO versus SOUTH NYANZA SUGAR COMPANY LTD** and **No 43 OF 2016 OWIGO OCHIENG versus SOUTH NYANZA SUGAR COMPANY.**

Written and dated this 12th day of January 2017 at Homa Bay

H.A. OMONDI

JUDGE

Delivered and dated this 31st day of January, 2017 at Migori

A.C. MRIMA

JUDGE