



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 12 OF 2016

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

-VERSUS-

STEPHEN OTIENO SEWE..... RESPONDENT

(Being an appeal from the judgment and decree by Hon. L. N. Sindani, Resident Magistrate in Migori Senior Principal Magistrate's Civil Suit No. 70 of 2015 delivered on 27/01/2016).

JUDGMENT

1. On **03/04/2003** one **WILLIAM ODENY OGONO**, a farmer, was contracted by **SOUTH NYANZA SUGAR CO. LTD** to grow and sell to it sugarcane at his parcel of land being Plot No. 1513B measuring 0.8 Hectares in Field No. 103 Manyatta Sub-location in Suna East Location of the Migori County. For the purposes of this judgment I will henceforth refer to the said WILLIAM ODENY OGONO as '**the contracted farmer**' and the parcel of land as '**the Plot**'.
2. The contract between the contracted farmer and the Appellant herein was reduced into writing. Pursuant to Clause 1, the contract was for a period of five years or until one plant crop and two ratoon crops of sugar cane were harvested from the Plot.
3. The Plot was then prepared and cane seeds planted thereon. The main plant crop was expected to be ready for harvesting in **April 2005** which was a period of 24 months from the planting. The first ratoon harvest was expected 18 months later that is in **October 2006** and the second ratoon harvest was expected 18 months from the harvesting of the first ratoon that is sometimes in **April 2008**.
4. It however appears that the main plant crop was not harvested as expected and as such the ratoons were so compromised.
5. Be that as it may, the contract between the contracted farmer and the Appellant was formally and duly assigned on **13/12/2007** to one **STEPHEN OTIENO SEWE** with the approval of the Appellant. I will henceforth refer to the said **STEPHEN OTIENO SEWE** as '**the Respondent**'. Suffice to say by the time the contract was assigned it only had at most four months into effluxion. In other words the contract had already been in force for a period of four years and eight months.
6. On **08/04/2009** the Respondent filed a claim before the Sugar Arbitration Tribunal (hereinafter referred to as '**the Tribunal**') seeking a declaration that the Appellant had breached the contract on account of not harvesting the plant crop and the first ratoon crop. He further sought compensation for the plant crop and first ratoon crop at the value of **Kshs. 400,000/=** with interest and costs.
7. The claim was first heard by the Tribunal where the Respondent testified but did not close his case. As

a result of the repeal of the Sugar Act, which created the Tribunal, and the enactment of the Crops Act in its place the matter was transferred to the Chief Magistrate's Court at Migori for further dealing. The claim was then registered as Civil Suit No. 70 of 2015. Both represented, the parties proceeded on with the defence case before the lower court and a judgment was rendered on 27/01/2016 where the court found *inter alia* that the Respondent was only but a speculator since by the time he was assigned the contract on 13/12/2007 both the main crop and the first ratoon crop were long wasted. It was also observed that even by then the second ratoon crop would have only been four months away from maturity. The court rightly rejected to award compensation the main crop and the first ratoon crop but on account of the assignment awarded the value of the second ratoon crop at Kshs. 94,465/=.

8. The judgment prompted an appeal to this Court where by a Memorandum of Appeal filed on 25/02/2015 the Appellant proposed the following five grounds:

1. The Learned Trial Magistrate erred in both law and in fact when she awarded damages for breach of contract in the sum of Kshs. 94,465/= which was an amount had neither been pleaded in the Plaint nor proved at the trial as is required by law.

2. The Learned Trial Magistrate erred in fact when she failed to appreciate and to give due regard to the defendant's submissions and evidence entirely therefore resulting in a finding prejudicial to the Appellant.

3. The Learned Trial Magistrate erred in both law and in fact when she awarded global compensation to the Respondent in respect of crop cycles which were never developed by the Respondent and therefore never existed at all, thereby failing to take into account a relevant fact and circumstances that the Respondent was under a duty to mitigate his/her losses and in failing to apply the principle of mitigation of losses.

4. The Learned Trial Magistrate erred in both law and in fact in awarding the Respondent the 2nd Ratoon crop cycle which crop cycle the Respondent had not pleaded and or sought for in his pleadings.

5. The Learned Trial Magistrate therefore on the main decided the case against the weight of evidence, contrary to the law and known legal principles, thereby exercised his discretion wrongly when he failed to dismiss the respondent's suit inn the case below with costs.

9. Directions were subsequently taken and at the hearing the appeal was canvassed by way of oral submissions where **Mr. Nicholas Bosire**, instructed by the firm of Moronge & Company Advocates appeared for the Appellant and **Mr. Jura**, instructed by the firm of Kerario Marwa & Company Advocates appeared for the Respondent.

10. It was the Appellant's main contention that the court erred in making the award for the second ratoon crop since the same could not have been realized on two grounds. First, the Appellant's failure to harvest the crop plant had compromised the development of the ratoons and secondly, the Respondent had only prayed for two cycles' compensation that is for the crop plant and the first ratoon and not for the second ratoon.

11. The appeal was opposed. Counsel for the Respondent however conceded that the Respondent had by his claim only sought for compensation for two cycles' but argued that the court on the strength of the assignment rightly exercised its wide discretion and made the contested award.

12. 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**. Needless to say, I have carefully and keenly read and understood the proceedings and the judgment of the Tribunal and the lower court as well as the grounds and the parties' submissions on appeal.

13. In this matter, both parties agree that by the time the contract was assigned the main crop and the first ratoon crop had not been harvested in accordance with the contract. It is further agreed that the Respondent did not seek compensation for the second ratoon crop which was awarded by the court.

14. The starting point in this appeal is to determine whether the court rightly awarded the compensation for the second ratoon crop which had not been pleaded by the Respondent. It is well settled in law that parties are bound by their pleadings and that a civil court is only called to adjudicate on the matters brought before it. (See the Court of Appeal case of the **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR**). Therefore a civil court, like a caged animal, moves but within the cage. In this case the cage were the parties' pleadings. I do not think I need to belabor the point further. The long and short of it is that the lower court lacked jurisdiction to entertain a matter which was not before it for consideration. With tremendous respect to the learned magistrate, the award of Kshs. 94,465/= being the compensation for the unsought value of the second ratoon crop cannot stand in law and is hereby set-aside.

15. Since the trial court rightly found that the Respondent's claim for the compensation of the value of the main crop and the first ratoon crop could not stand in law and disallowed it and given that the Respondent did not prefer an appeal against that finding, then the entire Respondent's claim cannot stand.

16. As the appeal succeeds, this Court hereby makes the following final orders:

- a) The appeal hereby succeeds and the finding of the learned magistrate awarding the Respondent Kshs. 94,465/= as compensation for the value of the second ratoon crop be and is hereby set aside accordingly;**
- b) The Respondent's suit being Migori Chief Magistrate's Court Civil Suit No. 70 of 2015 be and is hereby dismissed with costs;**
- c) The Respondent shall bear the costs of the appeal.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of January 2017.

A. C. MRIMA

JUDGE