REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY

AT MIGORI

CIVIL APPEAL NO. 138 OF 2015

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

- versus -

HILARY M. MARWA.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. E. M. Nyaga,

Senior Resident Magistrate in Migori Chief Magistrate's

Civil Suit No. 35 of 2015 delivered on 19/11/2015).

JUDGMENT

1. This appeal raises a conglomerate of issues which I have previously considered in various appeals emanating from the wider sugar cane sector. The issues include whether damages are available in claims on breach of contract, the issue of expected yields and income thereof, pleadings and mitigation of losses.

2. The appeal traces its background to the Growers Cane Farming and Supply Contract dated 30/08/2004 (hereinafter referred to as **'the Contract'**) wherein the Appellant, **SOUTH NYANZA SUGAR CO. LTD,** contracted the Respondent **HILARY M. MARWA,** to grow and sell to it sugarcane at the Appellant's parcel of land being Plot No. 24D measuring 1.1 Hectares in Field No. 42 Moheto in Migori County. The contract was deemed to have commenced from 23/06/2005 under clause 2(a) of the contract. The Appellant admitted the existence of the contract but denied breaching its terms and contended that it was the Respondent who failed to properly maintain the crops to the required standards to warrant it harvest and mill the cane.

3. The Respondent filed a claim in the then Sugar Arbitration Tribunal (hereinafter referred to as **'the Tribunal'**) on 25/04/2008 seeking a declaration that the Appellant had breached the contract by not harvesting the plant crop when it matured, compensation for the value of the unharvested sugarcane for the plant crop and 1st ratoon crop, costs and interest from the harvesting due date. The claim was deemed amended by an order **Hon. Nyagah**, then Senior Resident Magistrate, made on 12/03/2015 whereof the Respondent claimed compensation for the value of the unharvested sugarcane for the plant crop, the 1st ratoon crop and the 2nd ratoon crop.

4. The Respondent’s case was fully heard before the Tribunal and the Appellant’s case was heard by Hon. Nyagah since the Sugar Act, which created the Tribunal, was repealed and in its place the Crops Act enacted thereby resulting to the claim, among many others, transferred to the Chief Magistrate's Court at

Migori for further dealing.

5. The lower court then rendered its judgment on 19/11/2015 and found that the Appellant had breached the contract and made various compensatory awards in respect to the plant crop, 1st and 2nd ratoon crops to the tune of Kshs. 534,208/= together with costs and interest. That is the judgment that necessitated the filing of the instant appeal.

6. The Appellant challenged the judgment variously and prayed that upon re-evaluation of the evidence, this Court be pleased to dismiss the claim with costs. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of their respective submissions and referred to various decisions of the High Court.

7. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my 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).**

8. I have carefully and keenly read and understood the proceedings and the judgment of the lower court as well as the Record of Appeal, the grounds thereof, the parties' submissions and the decisions referred thereto. I will now deal with the issues as follows.

9. As to **whether the Respondent proved the claim** as required in law, I will reiterate the position that parties are bound by their pleadings and any evidence that tends not to support the averments in the pleadings must be disregarded. The Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** clearly restated the position. The case of **G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281** also echos that position. In this case the Respondent averred by the amended Plaint that the Appellant had failed or refused to harvest the plant crop hence compromising the development of the 1st and 2nd ratoon crops resulting into loss. The Respondent testified and demonstrated that he complied with the contractual terms and the guidance of the Appellant until the plant crop was ready for harvest. That, he visited the Appellant's factory and offices and pleaded that the sugar cane was mature and ready for harvesting but there was no positive response. As the sugar cane dried up, the Respondent engaged the services of his Counsel and the claim was later filed. The Respondent called Mr. Paul Sumo (**PW2**), a retired District Crops Officer, who prepared and produced a **Crop Yield Assessment Report** on the status of the plant crop when he visited the farm on 10/06/2008. The witness stated that when he visited the farm the plant crop was overgrown as it was 37 months old and yet it ought to have been harvested when it was not more than 24 months old.

10. The Appellant having filed its pleading availed one witness. He was the Appellant's Field Supervisor and took the position that the Respondent had poorly developed the sugar cane and sold it to a jaggery on maturity. Whereas the Appellant had pleaded the contention that the Respondent had not taken proper care of the sugar cane in its Statement of Defence, it did not plead that the sugar cane was crushed to a jaggery. In line with the foregone guidance and the law, I hereby disregard the contention that the Respondent crushed the sugar cane to a jaggery.

11. The Appellant remained under a legal duty to prove that indeed the Respondent failed to take care of the sugar cane as per the contract since the Respondent had proved otherwise. On being cross-examined by Counsel for the Respondent, the witness stated that: -

> ***"At the moment I have nothing to show the cane was poorly maintained nor that it was sold to a jaggery….."***

12. The Appellant neither recalled the witness to testify further nor was any witness called to tender any

further evidence and with that evidence the Appellant closed its case.

13. According to **clause 3** of the contract, the Appellant covenanted to direct and advise the Respondent in respect to the development, maintenance, harvesting and transportation of the cane from the plot and the Respondent undertook to abide by the advice and directions from the Appellant. In the event of a breach on the part of the Respondent, the Appellant was supposed to notify the Respondent of such breach and require it to be remedied. Under **clause 6** of the contract, the Appellant reserved its right to take over the obligations of the Respondent in cases where the breach was not remedied after giving the notice or even on the Appellant's own discretion. **Clause 9** of the contract deals with service of notices.

14. From the state of the record, one can confirm that the Appellant did not tender any evidence to show that it ever issued any notice to the Respondent in the event it realized that the Respondent was not maintaining the cane in accordance with the contract. That being so, the contention that the Respondent failed to take proper care of the cane was not proved. The upshot is therefore that the Respondent successfully proved that it was the Appellant who breached its part of the contract. The trial Magistrate did not err in that finding.

15. Having found that it was the Appellant who breached the contract, the next issue of consideration is **whether the Respondent has any remedy(ies) in law**. I recall having dealt with this issue at length in **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited**. In that case I found that there can be no award of general damages for a claim on breach of contract. However, the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred (*restitution in integrum'*). The measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time the contract was made and that such damages are not at large but in the nature of special damages. I substantiated those findings with various case law. I must say that I am still of that position.

16. On **mitigation of loss** by the Respondent (being the farmer), this is what I held in **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Company Limited vs. Joseph O. Onyango: -**

> *21.* ***I will now look at whether the Respondent was in a position to mitigate loss in this type of a contract. As stated elsewhere above the contract was for a period of a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the farm whichever period shall be less. Therefore the success of the main plant crop determines the success of the first ratoon and likewise the success of the first ratoon determines the success of the second ratoon. In other words if the main plant crop is compromised then the ratoons will definitely be equally compromised. Hence unless the miller is in a position to foresee its failure to harvest the cane in advance and put the farmer on appropriate notice and in accordance with the Agreement, there is very little a farmer can do to salvage the situation once the miller fails to harvest the cane under the Agreement.***
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> *22.* ***Looking at the Agreement, there are several restrictive clauses such that it would not be possible for the Respondent to take any reasonable steps to mitigate the loss unless the Appellant takes the first step in informing the Respondent of its intended breach of the Agreement. The Appellant's argument that the Respondent failed to mitigate its loss cannot stand and is hereby rejected.'***

17. I am as well still of that position. In this case the Respondent pleaded for compensation in respect to the expected yields from the plant crop and the 1st and 2nd ratoon crops and he is legally entitled to.

18. As to what the Court ought to rely on in arriving at the expected yields, I have seen the Appellant's Further List of Documents filed on 19/06/2015 which introduced a Report (although incomplete) from the defunct **Kenya Sugar Research Foundation (Kesref)** on the expected yields over the entire area forming the Appellant's catchment. I have also seen a Guide developed by the Appellant to that effect. I have also seen the Report produced in evidence by PW2 which he prepared after visiting the Respondent's farm. As I have previously held in past decisions, a document filed in a matter does not

become part of the evidential record in that matter until and unless it is either produced by the consent of the parties or is subjected to the rules of evidence. (See the Court of Appeal decision of Kenneth **Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR).** In this case I have noted that of all the Reports filed it was only the one prepared by PW2 that was produced in evidence. I will stand guided by that Report. According to that Report the average expected yields is around **86 tons per acre**. The trial court in its judgment adopted an average yield of 96 tons per acre without giving any reasons for such a figure which was way beyond what was laid before it by the parties. To that end I find that the court erred in adopting the figure of 96 tons per acre without any justification. The resultant awards must be set-aside.

19. On the pricing per ton of cane, the Appellant submitted for Kshs. 2,200/= on all the crop yields. The Respondent submitted for Kshs. 2,000/= for the plant crop, Kshs. 2,500/= for the 1st ratoon crop and Kshs. 2,850/= for the 2nd ratoon crop. I have considered the **Price Schedule** prepared, filed and produced by the Appellant. It has different prices over time. The prices proposed by the Respondent are in line with those provided in the Schedule. I will adopt them for the purposes of this judgment.

20. That being the case, the Respondent is entitled to Kshs. 172,000/= for the plant crop, Kshs. 215,000/= for the 1st ratoon crop and Kshs. 245,100/= for the 2nd ratoon crop thereby amounting to **Kshs. 632,100/=.** That sum is subject to the deductions under the contract which are correctly tabulated by the Respondent to a total of **Kshs. 175,784/=.** The Respondent is therefore entitled to **Kshs. 456,316/=.**

21. On the issue of interest, I understand the position the Appellant is in going by the volume of claims against it and the need to sustain the company for future generations, but I do not agree that the interest ought to run from the date of judgment for two reasons. One, the issue of interest has been settled by the Court of Appeal in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** to run from the date of filing the claim. Two, the Appellant entered into a legally binding contract with the Respondent and even after breaching the contract and a demand made way before the claim was filed, the Appellant did not take any steps to amicably settle the claim. Maybe that was the best time to achieve what it is now praying for. Perhaps it is time for the Appellant to seriously consider alternative ways of resolving the numerous disputes it faces with farmers and only allow those incapable of settlement, for whatever reasons, to be filed in court. That way the Appellant may get some good reprieve including agreed payments schedules. As it now stands, the Respondent continues to suffer loss of income from the breach as well as lost investment opportunities. The interest therefore remains the only consolation.

22. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

a) The appeal hereby partly succeeds and the award of Kshs. 534,208/= is substituted with an award of Kshs. 456, 316/=.

b) The sum of Kshs. 456, 316/= shall attract interest at court rates from the date of filing of the claim before the Tribunal;

d) The Respondent shall have costs of the claim/suit and each party shall bear its own costs of this appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 29th day of June 2017.

A. C. MRIMA

JUDGE