



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 97 OF 2016

MARY MWITA (appearing as an administratrix

of the Estate of WALTER E. MWITA(Deceased)..... APPELLANT

-versus-

SOUTH NYANZA SUGAR CO. LTD..... RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. Odenyo, Senior Principal Magistrate delivered on 05/10/2016 and an appeal from the ruling and order by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 2180 of 2015 delivered on 02/11/2016)

JUDGMENT

1. The appeal herein has two limbs arising from the judgment and a ruling of **Hon. R. Odenyo, Senior Principal Magistrate** delivered on 05/10/2016 and 02/11/2016 respectively.
2. There is one substantive issue for determination in this appeal arising from both the judgment and the ruling of the trial court. The issue is whether a Price List was among the documents produced and if so whether the trial court erred in not considering its contents. In both the judgment and the ruling the trial court declined to consider the document on the ground the same was not among the documents produced in evidence.
3. Perhaps a brief background to this appeal. The Appellant's filed a claim before the Sugar Arbitration Tribunal on 31/07/2013 in respect of an agreement her husband one **Walter E. Mwita** (now deceased) had entered with the Respondent sometimes on 04/07/2005 where the deceased was to grow and sell to the Respondent sugarcane on his Plot No. 509A measuring 2.9 Hectares in Field No. 46 in Moheto within Migori County. The agreement is the Outgrowers Cane Farming and Supply Contract which I will henceforth refer to it as '**the Contract**'. The Contract was for a period of five years or until the plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first.
4. By an Amended Complaint filed on 13/01/2016 it appears that all did not go down well in respect to the contract implementation. The Appellant contended that the Respondent had failed to harvest the plant crop thereby compromising the development of the first and second ratoon crops resulting to loss of income. She sought for a declaration that the Respondent was in breach of the contract, the value of unharvested cane, costs and interest at court rates.
5. The Respondent entered appearance and filed a Statement of Defence dated 20/08/2013 where it denied the existence of the contract and that it was in breach. The suit was then transferred from the Tribunal to the lower court for hearing. The hearing was by *viva voce* evidence where the Appellant and the Respondent's employee testified without calling any witnesses. The filed witness statements and documents by both parties were admitted as exhibits. Written submissions were filed thereafter. The trial court thereafter rendered its judgment and accordingly found that there was no evidence on the applicable prices in respect to the three crops. The court then settled for and applied the rate of Kshs. 1,730/= which had been proposed by the Respondent across the three harvests.
6. The Appellant filed a Notice of Motion on 25/10/2016 seeking review of the judgment where she pointed out that indeed she had produced a Price List prepared by the Respondent as one of her exhibits and urged the court to review its judgment in terms of the prices in the list. She annexed a copy thereof in the application. The application was not opposed by the Respondent but the court dismissed it on grounds that the price list was not part of the exhibits. That decision prompted the appeal before Court.
7. In a combined Memorandum of Appeal dated 07/11/2016 and evenly filed in Court the Appellant preferred the following four grounds: -

1. The learned magistrate erred in law and in fact, in his judgment dated 5th October, 2016 when he held that the rates of the prices applicable was not shown yet the plaintiff produced as her exhibit price list which shows the price of sugarcane as from March 1998 to February, 2012 and also adopted her statement which showed that the price ranged between 2000 -2850

dependent on the time when the cycles would have been due for harvest.

2. The learned trial magistrate erred in law and in fact, in his judgment dated 5th October, 2016 when he decided to use a price rate of Kshs. 1,700/= which was never pleaded or even submitted to the court by any party against the weight of evidence in regard to the price which was tendered by the appellant.

3. The learned trial magistrate erred in law and fact in his Ruling dated 2nd November, 2016 when he dismissed the applicant/plaintiff application for review dated 24th October, 2016 summarily without hearing the application yet the application was not even opposed by the respondents.

4. The learned trial Magistrate was biased against the appellant.

8. The Appellant prayed that: -

a) The appeal be allowed by setting aside the lower court orders and substituting them with orders that the prices which were applicable were Kshs. 2,850 for the plant crop, 1st ratoon and 2nd ratoon respectively.

b) Costs of this Appeal be in the cause.

9. Directions were taken upon the concurrence of parties that the appeal be disposed of by way of written submissions. Both parties filed their respective written submissions. On her part, the Appellant submitted that the trial court erred in not taking the price list into consideration whereas the same was on record and that she had produced it among the other documents. The Respondent contended that the price list was not part of the documents produced by the Appellant as it did not appear on the Appellant's List of Documents. The Appellant relied on the case of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** whereas the Respondent relied on that of **Delta Haulage Services Ltd v. Complast Industries Limited & Another (2015) e KLR**.

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 carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties. I will now endeavour to ascertain whether the alleged price list was part of the exhibits. The starting point is the record. In **paragraph 7(b)** of the Amended Plaint the Appellant pleaded that: -

“The Plaintiff will rely on the cane produce prices as issued from time to time by the defendant [now Respondent] to establish his loss, but in any event the price per ton at the time of the contract ranged between Kshs. 2,500 – Kshs. 2,850/=.”

12. On 16/03/2016 the Appellant filed a List of Documents before the subordinate court. The list had six documents being the Agreement Book, the Job Completion Certificate, the Debit Advice to Outgrowers, the Survey Certificate A, Limited Grant of Administration Ad Litem and Yield Assessment Report (Kesref). The price list was therefore not appearing on the list. I have carefully perused the lower court record together with that of the Tribunal but regret the way the records are. Most of the documents expected therein are not. The List of the Documents as well as the documents themselves are among those documents missing. I have only seen the List of Documents and the documents thereof in the filed Record of Appeal before this Court. On perusal of the documents I have come across a price list by the Respondent between the Yield Assessment Report and the Limited Grant. It is on page 24 of the Record of Appeal. If I may ask: Could the price list have been sneaked into the Record of Appeal? I do not think so. I say so on three grounds. The first one is that when the Appellant filed the Notice of Motion application on 25/10/2016 she annexed a copy of the price list which have a received stamp of the lower court for 27/05/2015 as one of the annexures. Secondly, when the Appellant filed her Statement before the lower court on 16/03/2016 she referred to the price list then on record. The Statement is on page 7 of the Record of Appeal. Thirdly, the dire state of the record of the lower court and the Tribunal. I therefore find that the price list had already been filed when the List of Documents was filed on 16/03/2016 and that explains why it is not appearing as one of the documents in the list.

13. Having so found, I will now deal with the issue as to whether the price list was produced as an exhibit. When the Appellant testified on 16/03/2016 before **Hon. Kemei, Chief Magistrate** (as he then was) she at one point stated as follows: -

‘...I filed my statement and list of documents to be relied upon...’

14. It is those documents the Appellant referred to in her statement and the written submissions. I note that there was no objection to the statement and the documents. Likewise, the Respondent's witness relied upon the statement and documents filed on behalf of the Respondent. I therefore find that the Appellant's documents, including the price list, were properly produced and became part of the evidential record. (See the Court of Appeal case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR**).

15. The trial court therefore erred in holding that price list was not among the documents forming part of the record because it was not appearing on the List of Documents. Had the court carefully perused the Appellant's statement it would have noted that the Appellant referred to the price list and would have endeavored to look for it. I have carefully perused the Statement of Defence, the statement of the Respondent's witness and the testimony in court and noted that the Respondent in its submissions before the trial court proposed the price of Kshs. 1,730/= per ton. That is the figure the trial court eventually adopted. But how did the Respondent arrive at that figure? The record is

silent. The trial court therefore relied of the figure of Kshs. 1,730/= without any basis. The computations based on that figure cannot therefore stand and are hereby set-aside.

16. The correct computations were to be based on the price list which was prepared by the Respondent and was not objected to in evidence. Since the trial court rightly indicated when the harvests were due in respect of the plant crop and the two ratoon crops, the price list easily gave the crop prices as at those times being Kshs. 2,200/=, Kshs. 2,500/= and Kshs. 2,850/= respectively. That would translate to **Kshs. 484,000/=** for the plant crop, **Kshs. 550,000/=** for the first ratoon crop and **Kshs. 627,000/=** for the second ratoon crop. However, all the costs and expenses incurred by the Respondent must be deducted from those figure as per the contract. From the documents exhibited the Respondent incurred costs and expenses in the preparatory stages which it was entitled to recover from the Appellant. The Respondent is also entitled to deduct transport and harvesting charges. I find those costs to be those captured by the trial court in the judgment which I will deduct from the above expected earnings. The net amount payable to the Appellant is therefore **Kshs. 1,164,840/=**. This sum shall attract interest from the date of filing of the claim before the Tribunal. (See the Court of Appeal case of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR**).

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

- a) The appeal hereby succeeds and the finding of the learned magistrate awarding the Appellant Kshs. 644,860/= is set-aside and in its place the sum of Kshs. 1,164,840/= is awarded accordingly;**
- b) The sum of Kshs. 1,164,840/= shall attract interest at court rates from the date of filing of the claim before the Tribunal;**
- d) The Appellant shall have costs of the suit as well as costs of the appeal.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of July 2017.

A. C. MRIMA

JUDGE