REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CIVIL APEAL NO 89 OF 2019

MICHAEL SONYE AORO..... APPELLANT

VERSUS

SOUTH NYANZA CO. LTD.....RESPONDENT

(**Being an appeal from the judgment and decree of the Senior Resident Magistrate Hon. Makila dated 24th August 2018 in CMCC No. 650 of 2018)**

JUDGEMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court vide the judgment dated 24th August 2018.

2. The appellant's claim against the respondent was for breach of an agreement to purchase, harvest and transport sugarcane from Plot No. 357, Field No. 68A in Kakmasia location. The appellant averred that he grew sugarcane on his plot measuring 0.7 Ha but when the cane matured, the appellant neglected to harvest it. The appellant claims that he lost three crop cycle and suffered loss and damage. According to the appellant the plot was capable of producing an average of 135 tonnes per hectare and the rate payable was Kshs 1,730/- per tonne.

3. The suit was opposed by the respondent who entered appearance and filed their defence. They averred that the appellant failed to develop and avail the cane for milling. The respondent also advanced that the appellant's suit was statute barred having been filed outside the period of limitation without leave and the same ought to be struck out.

4. After hearing both parties the trial court found that the appellant was issued with two warning letters confirming that he was in breach of his contractual obligations and thus not entitled to any compensation.

5. It is this judgment that has precipitated the filing of this appeal challenging the trial court's finding on the following grounds;

> "1. The learned trial magistrate erred in law and in fact in deciding the suit on un-pleaded issues to it, that (sic) the Appellant was issued with two warning letters which in her finding absolved the Respondent of liability.
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> 2. The learned trial magistrate erred in law and in fact in placing reliance on documents i.e. the alleged letters dated 25/12/1999 and 21/5/2000 which either were cooked or made up purposely to defeat the defendant's claim.
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> 3. In the alternative and without prejudice to the (2) above, the learned trial magistrate erred in law and in fact by treating the said letters as being complaint with to the contract when in fact they were not and went against the letter and spirit of the contract (clause 4 and 11k).
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> 4. The learned trial magistrate failed to notice that by having an assistant chief stamp embossed on the alleged letters the act was in up letter (sic) when the contract did not during that period, require the chief's input, in such a letter."

6. Notably, the trial court proceeded to receive the evidence of PW 1 in the most unorthodox manner. I say so because ordinarily the witness was expected to adopt her statement as part of the evidence and be examined on the same. Mary Consolata Nyobel (PW 1) however, adopted the statement of Priska Auma Sonye. In my understanding, a witness statement is about facts perceived by the specific witness and it is irregular for another person to adopt that statement as their evidence. Be thus as it may, this irregularity has not been contested and the parties seem content to deal with the substantive issues of breach or lack of breach of the subject contract and I let the matter rest at that.

7. It is the appellant's testimony that the deceased, Michael Sonye Aoro had a 5 year contract with the respondent for the harvest of the plant crop and 2 ratoon crops. The respondents failed to harvest any of the 3 crop cycles.

8. Justus Otieno George (DW 1) testified that the appellant in this case harvested the plant crop for jaggery and they issued him with warning letter dated 20th December 1999. He further explained that the ratoon crop was developed but the same was abandoned necessitating a second warning letter dated 21st May 2000.

9. This being the first appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its conclusion. This position was taken in ***Selle & Another –vs- Associated Motor Boat Co. Ltd. & Others (1968) EA 123*** *where the court held as follows:*

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

10. In this case, the appellant being the plaintiff was under the obligation to prove his case on a balance of probabilities. **Section 107 (1)** of the ***Evidence Act***, **Cap 80 Laws of Kenya** provides that:

> **"Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."**

11. Kimaru J in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

12. It was the appellant's case that the respondent failed to harvest cane from the 3 crop cycles while Dw1 on the other hand gave evidence that the respondent harvested the plant crop for jaggery and abandoned the 1st ratoon crop.

13. The appellant contention is that contrary to the assertion by the respondent no notice was served on the appellant as required under the contract. The warning letters that were produced by Justus Otieno George (DW 1) and which the trial court relied on as prove of notice to the appellant for breach are challenged on ground that the contract did not provide for the embossment of such a warning with the Assistant Chief's stamp.

14. In my re evaluation of the evidence tendered at the trial court, I have had regard to the Outgrowers cane agreement. Of specific relevance is **Clause 11 k** of the **Agreement** which provides that the notification from the company to the appellant "shall have either been handed to the outgrower or his representative and acknowledged or shall have been posted to the outgrower by registered mail."

15. The evidence adduced by Justus Otieno George (DW 1) fell for short of proving that the necessary notice had been served on the appellant in the prescribed manner and hence the respondent's claim that the appellant was in breach is unsustainable.

16. The appellant's evidence clearly demonstrated that the contract was in place and that the respondent neglected to harvest the mature cane. This was not controverted as the evidence adduced by the respondent was based on notices which as found above were not served at all or in the prescribed manner as per the contract and their existence remains mere conjecture.

17. The appellant in their submissions cited the case of **South Nyanza Sugar Co. Ltd vs John Chora Omolo HCCA No. 123 of 2018** where the court held that the "*fact that the plant crop was not harvested within time provided by the agreement, consequently the appellant was in breach and its breach compromised the development of the 1st and 2nd ratoon.*"

18. I agree with the court's finding in the case of **South Nyanza Sugar Co. Ltd v Ezekiel Oduk [2019] eKLR** where the court held as follows;

> "38. Apart from the general denials in the Defence the Appellant did not adduce evidence to controvert what the Respondent alleged. **Clause 11(k)** of the Contract provided as follows: -
>
> > **Within seven days of receipt of a written notification from the Company that such operations are necessary to achieve a satisfactory yield of cane allow unimpeded access to the Company its agents employees and its equipment for the purposes of carrying out any or all operations which the Outgrower has failed to carry out in the opinion of the Company, is likely to fail to carry out.**
>
> **Provided that such notification shall have either been handed to the Outgrower or his representative and acknowledged or**

shall have been posted to the Outgrower by registered mail.

39. From the reading of the above Clause it comes out clearly that in the event there was any failure on the part of the Respondent to discharge any of his obligations under the contract, the Appellant ought to have issued a notice requiring the Respondent to remedy the default and would have served the same as provided therein. In the event of further default, the Appellant was entitled to move into the land and remedy the default. There was also **Clause 4** of the contract which provided for the termination of the contract."

19. In this instant case, the clause is replicated under clause 11 (k) in the agreement between the respondent and the appellant. There was no evidence that the appellant was given notice and that he acknowledged service of the notice or that the notice was posted to his registered mail. The respondent having failed to demonstrate that they served the notice to the appellant for breach on his part was in breach of the contract and the appellant is entitled to damages.

20. According to the agreement the appellants' field was 0.7 Ha. Dw1 testified that the prevailing rate for cane at the time was Kshs 1,558/- per ton. The cane yield report availed by the respondent reveal that the 66.56 ton per Ha was expected for the plant crop and 48.76 ton per Ha for the ratoon crops.

21. Having reached the conclusions above, I find that the appellant was entitled to the plant and two ratoon crops as follows:

Plant Crop 0.7Ha X 1,558 X 66.56 ton per Ha = Kshs. 72,590.30

1st Ratoon 0.7 Ha X 1,558 X 48.76 ton per Ha = Kshs. 55,177.65

2nd Ratoon 0.7Ha X 1,558 X 48.76 ton per Ha = Kshs. 55,177.65

TOTAL Kshs. 182,945.57

22. In conclusion, I allow the appeal and set aside the judgment and decree of the subordinate court and substitute it with a judgment for the appellant against the respondent for the sum of **Kshs. 182,945.57** together with interest at court rates from 14th July 2005 (when the suit was filed) until payment in full. The appellant shall have costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF APRIL 2021

A. K NDUNG'U

JUDGE