REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 50 OF 2019

MARY ANYANGO ONYANGO.....APPELLANT

VERSUS

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

(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Senior Resident Magistrate

in Rongo Principal Magistrate's Court Civil Suit No. 60 of 2014 delivered on 04/03/2019)

JUDGMENT

1. The appeal subject of this judgment arose from the dismissal of the Appellant's suit by the trial court *vide* the judgment rendered on 04/03/2019. The suit was dismissed for want of proof.

2. The Appellant herein, *Mary Anyango Onyango,* filed **Rongo Principal Magistrate's Court Civil Suit No. 60 of 2014** (hereinafter referred to as **'the suit'**) against the Respondent herein, *South Nyanza Sugar Co. Ltd.* The Appellant pleaded that by an Outgrowers Cane Agreement entered into on 27/11/2008 (hereinafter referred to as **'the Contract'**) the Respondent contracted the Appellant to grow and sell to it sugarcane at her parcel of land being Plot No. 1194 Field No. 26B measuring 0.4 Hectares in Kakmasia Sub-Location within Migori County.

3. It was further pleaded that the Contract was for a period of five years or until one plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first. The Appellant contended that she took good care of the plant crop until maturity but the Respondent failed to harvest the plant crop thereby compromising the development of the ratoon cane crops thereby resulting to loss of income. She sought for compensation for the loss of the three crop cycles at Kshs. 405, 000/= together with costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 22/04/2015. It denied the contract and any breach thereof. It denied that the Appellant suffered any loss. The Appellant was put into strict proof thereof. The Respondent further pleaded that if at all the Appellant suffered any such loss then the Appellant was the author of her own misfortune in that she failed to properly maintain the sugar cane crops to the required standards or at all to warrant the same being harvested and milled as the same was uneconomical.

5. The suit was finally settled down for hearing where both parties were represented by Counsels. The Appellant was the sole witness who testified and produced several exhibits and adopted her statement as part of her evidence. The Respondent was represented by its Senior Field Supervisor who testified as *DW1* and adopted his statement as part of his evidence and also produced the documents in the List of Documents as exhibits. The court thereafter proceeded to render the judgment where it dismissed the suit with costs. It is that judgment which is the subject of this appeal.

6. The Appellant in praying that the appeal be allowed and appropriate compensation be awarded proposed the following four grounds in the Memorandum of Appeal dated 18/03/2019 and filed in Court on 19/03/2019: -

> **1. The learned magistrate erred in law and fact in entertaining matters / evidence of fact, adduced only at the trial by the defendant but which were never pleaded or ever formed part of the defence pleadings.**
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> **2. The learned trial magistrate erred in law in giving weight to a so-called warning letter dated 20/5/2010, which letter was a fabrication, was never properly served and did not terminate the contract or constitute a waiver of liability attaching on the**

defendant.

3. The trial magistrate exhibited extreme basis in the suit to the extent of posing his own view/versions of evidence as the defence evidence, and which evidence was non-existence at the trial or even in the defence case or submissions.

4. The trial magistrate erred in law in failing to award the appellant damages for breach when the evidence on record clearly showed that the defendant had failed to make any harvest of the sugar cane on the ground, or absolve itself from the contract, by terminating the same.

7. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied. The Appellant referred to several decisions in support of the appeal.

8. As the first appellate Court, 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).**

9. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the Appellant.

10. The crux of the dismissal of the suit was that the Appellant did not call evidence to prove that she developed the cane and did not call the labourer to support her case. There was also the issue of sale of the cane crop to a jaggery and also the issue of the duty to harvest the cane.

11. I will begin with the issue of whether the Appellant actually developed the cane. DW1 testified before court. In his testimony DW1 stated that *'there was a contract dated 27/11/2008. At the time we signed contract the cane was already planted. …. On 20/05/2010 the farmer deliberately decided to sell the cane to a jaggery dealer. The dealer planted his processing machine right in the cane plantation and the cane was … crushed to a jaggery. This is in contravention of clause 3.5 of the contract….'*

12. The evidence of DW1 settled the issue as to whether the cane was developed. There was no doubt that the cane was indeed developed upto maturity. The court therefore erred in not considering the evidence of DW1 on the development of the cane.

13. There was the other issue that the Appellant had diverted her cane to a third party, a jaggery. DW1 so stated in his evidence. That is a strong position and if properly relied on is capable of dismissing a claimant's claim.

14. The Appellant's response to the issue of selling the cane to a jaggery was that the issue was not correct, the issue was not pleaded by the Respondent in its statement of defence and that the Appellant was denied an opportunity to challenge that evidence before the trial court.

15. It is true the Respondent did not plead that the Appellant instead sold the cane to a third party. At the risk of repetition, I have severally taken the legal position that in an adversarial system of litigation any evidence which does not support the pleadings is for rejection. That position was clearly emphasized by the Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where **Sylvester Umaru Onu, JSC** stated that: -

….It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it…..

It is settled law that parties are bound by their pleadings……the court below was in error when it raised the issue contrary to the pleadings of the parties.'

16. **Adereji, JSC** in the same case expressed himself thus on the importance and place of pleadings: -

…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

17. The Supreme Court as well added its voice on the legal position in a ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR.**

18. That being the legal position it therefore renders that the evidence at the trial to the extent that the Appellant sold the cane to a third party was at variance with the pleadings. That evidence cannot be legally acceptable as a basis for rejecting a claim. The issue of selling the cane to a jaggery was a non-issue.

19. I must however add that the Respondent may have had a good defence against the claim, but as said, it all depends on the pleadings. The Respondent did not even attempt any amendment to the pleadings. It was therefore bound by its pleadings.

20. The Appellant adduced evidence and produced exhibits. I have weighed the respective parties' evidence. My attention was drawn to the court's finding on the alleged warning letter. The record has it that the court declined to accept the warning letter as an exhibit for want of earlier disclosure. That was on 23/01/2018. However, the court relied on the same warning letter in its judgment and found that *'In support of this position, the defendant availed a warning letter issued to the farmer. It is dated May 2010.'*

21. The approach by the trial court on the warning letter was definitely wanting. A document which is not formally produced as an exhibit does not form the evidential record and cannot be a basis of a court's finding. The Court of Appeal in **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR** clearly stated the correct legal position on production of exhibits and proof of the contents of those exhibits. The Court stated as follows: -

> ***18. …… Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record…….*** (emphasis added).

22. There was as well the issue of the Appellant not availing the harvested cane to the Respondent. In other words, the Respondent contended that the duty to harvest the cane was on the Appellant.

23. I have in previous decisions dealt with the duty to harvest mature cane in sugar contracts. In **Migori High Court Civil Appeal No. 86 of 2016 Elena Olola vs. South Nyanza Sugar Co. Ltd (2018) eKLR** I reiterated what I had earlier on held in **Migori High Court Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR** as follows: -

> ***27. Being alive ……***
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> *18. That now brings me to the finding by the trial court that the Appellant failed to adhere to **Clause 3.1.2** of the Contract in not harvesting and delivering the cane to the Respondent. A contract document must always be considered in its entirety. The good reason for that lies in the truism that clauses in a contract tend to complement one another and one risks not getting the whole intention of the parties if a consideration or reference is put on just a portion of the document. Had the learned trial court done so, it would have come across **Clause 3.1.12** which requires the Miller (Respondent) to: -*
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> > ***'Prepare the harvesting program setting out the approximate expected time of harvesting which program will be subject to changes necessitated by factors beyond the control of the Miller.'***
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> *19. A look at **Clauses 3.1.2** and **3.1.12** of the contract places a duty upon the Respondent before the actual harvesting of the cane. That duty is for the Respondent to **'inspect the cane and determine its maturity and to prepare the harvesting program setting out the approximate expected time of harvesting'.** There is no evidence that the Respondent discharged that contractual duty in the first instance. That failure, in the face of the fact that the cane had matured, can only mean that it is the Respondent who was in breach of the contract. With tremendous respect, the finding of the learned trial Magistrate that the Appellant failed to harvest and deliver the cane to the Respondent was not only unsupported by evidence but also arrived at without a full consideration of the contract and was therefore erroneous. That finding must be interfered with.*
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> 28. ***Needless to say, there are several other clauses in the contract which when cumulatively taken buttress the position that the duty to harvest the cane is the Respondent's. Further thereto, there is the Sugar Act (hereinafter referred to as 'the Act'). This Act was the applicable law by the time the contract was entered. The Act stipulated under Section 6(a) of the Second Schedule thereof, which Schedule was a creation of Section 29 of the Act, that: -***
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> > *'The role of the miller is to -*
> >
> > *(a) Harvest, weigh at the farm gate, transport and mill the sugar cane supplied from the growers' field and nucleus estate efficiently and make payments to the sugar cane growers as scheduled in the agreement.' (emphasis added)*
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> ***29. The Act being an Act of Parliament went through all the stages of law-making until it became law in Kenya. The Act can only be subordinate to the Constitution and/or may in specific and clear instances be ousted by an express provision on another Act of Parliament. In this case there is an attempt by the contract to oust the provision of the Act. The contract is an agreement between the parties herein whereas the Act is an expression of the will of the people of Kenya through Parliament. The contract is hence subordinate to the statutory legislation. Any attempt by parties to an agreement to otherwise oust the provisions of an Act of Parliament can only be void and severable as far the attempt is concerned. The contract therefore offends the express provisions of the Act in respect to the duty to harvest the cane and as such it cannot stand in the face of the Act; it must give way to the Act.***

24. I hence reiterate that the Respondent had the duty to harvest the cane at maturity under the contract in consideration. Having alleged that the Appellant sold the cane to a jaggery it then goes without say that the Respondent never harvested the cane.

25. From the record the Appellant proved her case on a balance of probability. There was evidence that the Appellant developed the cane until it attained maturity, but the Respondent failed to harvest it. There was no meaningful opposition to the claim. The court therefore erred in not finding that the suit was proved in law. The Respondent was in breach of the contract for not harvesting the cane.

26. That therefore leads this Court to the remedies for such a breach. Settled in law, remedies in breach of contracts claims must be specifically pleaded and proved. The intention of the remedies is that 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. (See the Court of Appeal in **Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR)** , **Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai Kisumu Civil Appeal No. 239 of 1997 (UR)** among others).

27. Like any other disputes based on breach of contracts, such disputes must be weighed against the settled principles of ***remoteness, causation*** and ***mitigation***. In **Migori High Court Civil Appeal No. 74 of 2018 South Nyanza Sugar Co. Ltd vs. Rehema Joseph Nkonya** (unreported) I dealt with the applicability of the principle of mitigation in sugar disputes. I rendered myself thus: -

> ***18. On the resultant remedy for the breach I have previously held in Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR that once a farmer proves that the Miller failed to harvest the plant crop at maturity then the farmer is entitled to the proceeds of the plant crop as well as the ratoon crops subject to the pleadings. Equally, when a Miller fails to harvest the first ratoon crop then the farmer is entitled to compensation for the first and second ratoon crops subject to the contract. In this case the Respondent was entitled to the proceeds of the plant crop and the first ratoon crop yields since the pleadings claim as such.***
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> ***19. Closely related to the aspect of remedy is the issue of mitigation of loss. The issue is one which is hotly contested almost in every appeal and is pending determination at the Court of Appeal. There are divergent views by the High Court on the issue.***
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> ***28. I must certainly affirm the position that disputes based on breach of contracts are subject to the principles of remoteness, causation and mitigation. I further agree with the Court of Appeal in several decisions that a party alleging breach of contract must take steps to mitigate loss (See African Highland Produce Limited vs. John Kisorio (2001) eKLR).***
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> **29.** ***The question which now arises is how should a Defendant handle the issue of mitigation of loss in a suit where the Plaintiff did not plead how it/he/she mitigated the loss? That question is factual. To me, the burden rests upon the Defendant to demonstrate how the Plaintiff ought to have mitigated the loss. Such approach must first find its basis in the pleadings. By doing so the Plaintiff would be put in sufficient notice and accorded an opportunity to challenge the evidence on mitigation of loss if need be. That is the essence of a fair trial in Article 50(1) of the Constitution.***
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> ***30. A defendant should not raise the issue of mitigation of loss on appeal at the first instance. By doing so, the issue becomes a non-issue. The issue must be pleaded and proved. (See the Supreme Court ruling in Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR and the Court of Appeal in The Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR).***
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> ***31. I have consciously taken the foregone position on the understanding that contracts are between parties and each contract must be independently scrutinized as there may be some instances where the principle of mitigation of loss may reasonably not be applicable in a dispute more so depending on the terms of such a contract.***
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> **32.** ***The foregone has been echoed by some Courts. Majanja, J. in Kisii High Court Civil Appeal No. 60 of 2017 South Nyanza Sugar Co. Ltd vs. Donald Ochieng Mideny (2018) eKLR when he recently (on 21/12/2018) rendered himself on the issue after considering several past decisions including some by yours truly and held that: -***
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> *15. Mitigation of damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (See African Highland Produce Limited vs. Kisorio (1999) LLR 1461 (CAK). Since the appellant did not contest the respondent's claim, it did not show how the respondent could mitigate the loss.*
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> *16. The appellant's arguments in support of the appeal were attractive but at the end of the day the respondent's case before the trial court was not contested and for this reason, I dismiss the appeal……*
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> ***33. In this case the issue of mitigation of loss was not pleaded by the Appellant in the statement of defence. Instead, the Appellant denied the existence of the contract. The Appellant only pleaded in the alternative that upon proof of the contract then the Respondent failed to exercise diligence in growing the cane. The Appellant unfortunately did not lead any evidence on the position. There was no mention of the issue of mitigation of loss or at all. How then was the Respondent expected to respond to a non-issue?***
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> ***34. I therefore find and hold that the issue of mitigation of loss having not been raised in the suit cannot be subject of an appeal.***

20. The above position applies in this case. The principle of mitigation of loss does not come to the aid of the Respondent in this case. The Appellant was therefore entitled to compensation in respect to the three crop cycles.

21. The Respondent in its submissions before this Court urged this Court to adopt the tonnage on plant crop at 66.56 tons per hectare and 48.76 tonnes per hectare on the ratoon crops. The Respondent further urged this Court to disregard the document produced by the Appellant on yields for want of authenticity. I have perused the document produced by the Appellant. I duly concur with the submission by the Respondent. I will hence be guided by the Respondent's proposals on the yields.

22. Given that the contract was entered in November 2008 then in line with *Clause 1(f)* thereof and by taking into account all the necessary deductions the Appellant was entitled to the net income of Kshs. 131,264/= on the three crop cycles.

23. 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 dismissing the suit with costs be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 131,264/=.

c) The sum of Kshs. 131,264/= shall attract interest at court rates from the date of filing of the Plaint;

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 11th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. odukeze@gmail.com **for** the firm of Messrs. Oduk & Company Advocates for the Appellant.

2. morongekisii@yahoo.com for the firm of Messrs. Moronge & Company Advocates for the Respondent.

3. Parties are at liberty to obtain hard copies of the judgment from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE