



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

(Coram: A. C. Mrima, J.)

CIVIL APPEAL NO. 44 OF 2017

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

VERSUS

JOHNSON OHURU OMWAME.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. M. M. Wachira, Senior Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 23 of 2005 delivered on 02/03/2017)

JUDGMENT

1. The Respondent herein, *Johnson Ohuru Omwame*, filed **Migori Chief Magistrate's Court Civil Suit No. 23 of 2005** (hereinafter referred to as '**the suit**') on the 04/10/2015. He averred that by a Growers Cane Farming and Supply Contract dated 09/06/1995 (hereinafter referred to as '**the Contract**') the Appellant herein, **South Nyanza Sugar Co. Ltd**, contracted him to grow and sell to it sugarcane at his parcel of land Plot No. 783 Field No. 68 in Kabuoro Sub-Location within Migori County.
2. It was alleged 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 Respondent alleged that there was a breach of the contract by the Appellant in failing to harvest the mature cane and as a result he suffered loss. He then filed the suit.
3. The suit was defended. The Appellant entered appearance and filed a Statement of Defence dated 25/02/2005. It admitted the contract but denied the alleged breach.
4. The suit was finally settled down for hearing. The Respondent tendered his evidence as the sole witness and produced the documents in his List of Documents as exhibits. The documents included the contract. The Appellant did not take part in the hearing.
5. The trial court rendered its judgment on 02/03/2017. It allowed the suit and awarded Kshs. 331, 591/80 as compensation. That is the judgment subject of this appeal.
6. The Appellant in praying that the appeal be allowed and the suit be dismissed proposed 7 grounds in the Memorandum of Appeal dated 22/03/2017 and filed in Court on 23/03/2017.
7. Directions were taken, and the appeal was disposed of by way of written submissions where the parties duly complied. They also relied on various decisions in support of their rival positions.
8. 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**).
9. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.
10. I will first deal with the issue of the contract in this matter. The contract was denied by the Appellant in its pleading. The Appellant also denied breaching the contract.

11. On his part the Respondent listed the contract as one of the documents in his list of documents. He also produced the contract as an exhibit. I have looked at the contract as produced.

12. The contract which is now part of the evidential record in this case contains 3 pages. The first page is the outer cover. The second page comprises the parties to the contract and two terms of the contract. The third page is the execution part. The contract as produced does not have the rest of the obligations of the parties thereto.

13. The basis of the suit was the allegation that the Appellant in breach of the contract failed and/or refused to harvest the cane when it was mature. The Appellant denied as such.

14. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In **National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR** the Court of Appeal at page 507 stated as follows: -

A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

15. In **Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd (2017) eKLR** the Court of Appeal further stated that: -

We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.

16. In this case save only two terms the rest of the terms of the contract between the parties are missing. The two terms in the contract as produced relate to the duration of the contract and termination of the contract. Several questions hence arise: How will a Court interrogate any alleged breach of the contract? On what basis will a Court find a party in breach in the absence of the terms of that contract?

17. As Courts are only called upon to interrogate the terms of contracts in cases of alleged breach of such contracts a Court will not be able to discharge such a duty in the absence of the terms of the contract.

18. In the impugned judgment the trial court dealt with several obligations of the parties. It eventually found the Appellant guilty of failing to 'harvest the first ratoon. This was against the terms of the agreement'. The court concluded that the Appellant was in breach of the contract. Surprisingly, none of the two terms in the agreement was on the duty to harvest the mature cane.

19. From the foregone discussion I find and hold that the trial court erred in imputing imaginary terms into the contract. The position was that the parties never availed any such terms of the contract and the court ought to have so found.

20. The suit was hence not proved. There was no legal basis for finding the Appellant in breach of the contract.

21. The foregone finding is sufficient to dispose the appeal. A consideration of the other issues would be academic. Accordingly, the appeal is allowed and the judgment of the trial court rendered on 02/03/2017 is hereby set aside. I substitute that finding with an order dismissing the suit with costs to the Appellant. The Appellant shall as well have 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. okongowadangaomigori@gmail.com for the firm of Messrs. Okong'o Wandago & Company Advocates for the Appellant.

2. kerario@gmail.com for the firm of Messrs. Kerario Marwa & 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