REPUBLIC OF KENYA

IN THE HIGH COURT

AT MIGORI

CIVIL APPEAL NO. 18 OF 2018

LUCAS M. NYAKOBOSA.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. R. Odenyo, Senior Principal

Magistrate in Migori Chief Magistrate's Civil Suit No. 227 of 2015 delivered on 19/02/2018)

JUDGMENT

1. The appeal herein rises two issues for determination: Whether the trial court erred in not making an award in respect to the second ratoon crop and whether the court further erred in making unpleaded deductions from the awards on the plant crop and first ratoon crop.

2. There is no dispute that the parties in this appeal entered into Growers Cane Farming and Supply Contract dated 01/09/2006 (hereinafter referred to as **'the Contract'**). The contract was a Company Developed Contract and it was in respect to the Appellant's parcel of land No. 50C Field No. 109 at Moheto Sub-Location within Migori County measuring about 0.6 Ha.

3. Alleging breach, the Appellant filed Case No. 1511 of 2012 before the now defunct Sugar Arbitration Tribunal which case was later transferred to Migori Chief Magistrate's Courts in 2015 by the operation of the law and was registered as **Civil Case No. 227 of 2015** (hereinafter referred to as '**the suit'**).

4. The suit was heard and a judgment was rendered where the court awarded the Appellant the value of the plant crop and the first ratoon crop. It is that judgment which is the subject of this appeal.

5. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions. On his part, the Appellant submitted that there was ample evidence in proof that the Respondent was in breach of the contract by not harvesting the plant crop and hence compromising the development of the first and second ratoon crops and wondered why the trial court failed to award him the value for the second ratoon crop. He also contended that the deductions had no basis in law as they were unpleaded. The Respondent supported the trial court's decision and submitted that the decision was so balanced and fair to both parties. Both parties relied on several decisions in support of their rival positions.

6. 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).**

7. 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. From the judgment, the trial court found that the Respondent herein was in breach of the contract and that the Appellant was entitled to compensation. The court then awarded the value for the plant crop and the first ratoon crop. Having so found, the court did not give any reasons why it declined the award on the second ratoon crop despite the Appellant praying for such in paragraph 6a of the Amended Statement of Claim. I must state that a court is always under a legal duty to determine any issue brought before it and that the court must also give reason(s) for any of its decisions. Respectfully, the trial court erred to the extent of not giving any reason why it declined the award on the value of the second ratoon crop regardless of whether the award was sustainable in law or not.

8. As to whether the award on the value of the second ratoon crop was sustainable in law, I have previously decided on the issue in several

decisions. I am still of the position that the value of the second ratoon crop is awardable as long as there is evidence that the farmer performed his/her part of the contract until the plant crop or the first ratoon crop was ready for harvesting but for the Company. (See **Migori High Court Civil Appeal No. 10 of 2016**, **Migori High Court Civil Appeal No. 92 of 2015, Migori High Court Civil Appeal No. 28 of 2016, Migori High Court Civil Appeal No. 26 of 2016** among others). It must also be noted that the contract herein was a Company-Developed Contract and not a Self-Developed Contrast. In the former contract the Company is under a duty to carry out all the activities on the land at its own expense (unless expressly otherwise stated in the contract) until the cane is harvested. It is only then that the Company can recoup its expenses from the value realized from the sale of the cane. The Company may however recoup its expenses from the farmer if it proves breach of the contract by the farmer.

9. Turning to the matter at hand, the court having found the Respondent in breach of the contract by not harvesting the plant crop then the Appellant was entitled to the value of the second ratoon crop as well.

10. On whether the Respondent was entitled to the deductions made, the starting point is that the contract at hand. The Contract is a Company-Developed Contract. It therefore goes without say that the Respondent is entitled to recoup all its expenses on the farm in respect to the contract implementation. However, the Respondent must confirm that it truly incurred the expenses and in this kind of contract the evidence of Job Completion Certificates and Debit Advices readily suffices. In the case of the transport and harvesting charges, the Respondent must avail evidence of the applicable rates in respect to the farm for the court to determine their respective values if the breach of the contract was on failure to harvest the cane otherwise the Respondent stands to prove its claim in the normal manner.

11. The Appellant seemed to have been so much aware of that position. During cross-examination the Appellant stated that ***'….Yes, the Defendant was to recover its costs from the proceeds….'.*** Further, the Appellant expressly so admitted and submitted before the trial court vide his written submissions filed on 24/11/2017 where he even gave the figures to be deducted and even went ahead to make the deductions in his calculations. Needless to say, the Respondent availed the evidence by way Job Completion Certificates and Debit Advices. Settled, subject to well-known exceptions, an admitted issue cannot form a basis of any determination by a court of law. I therefore find the second ground of appeal unfounded and is hereby dismissed.

12. On the value of the second ratoon crop, I will be guided by the amount of yields of 40 tons per hectare adopted by the trial court since there is no appeal on the same. Since the first ratoon crop was expected to be ready for harvesting in October 2009 then the second ratoon crop would have been ready for harvesting by July 2011 according to **Clause 1(f)** of the contract. The price then was Kshs. 4,300/= per ton according to the Cane Prices Schedule on record. The gross value would have been Kshs. 4,300/= x 0.6Ha. x 40 = Kshs. 103,200/=. From the Respondent's evidence on record on Cane transport and harvesting charges the sum of Kshs. 46,000/= is deductible thereby availing a net expected income of Kshs. 57,200/=.

13. As I come to the end of this judgment I must apologize to the parties for the late delivery of this judgment which was caused by several challenges beyond my control and my involvement in a Multi-Judge Bench matter at the High Court in Mombasa.

14. Consequently, from the foregone discourse, the following final orders do hereby issue: -

a) The appeal hereby partly succeeds. The appeal against the failure to award the value of the second ratoon crop is suit is hereby allowed whereas the appeal on the deductions is hereby dismissed;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 57,200/= being the value of expected income from the second ratoon crop; For clarity purposes, the other sums awarded in the judgment in the suit are hereby not interfered with;

c) The sum of Kshs. 57,200/= shall attract interest at court rates from the date of filing of the Claim before the Tribunal;

d) Each party to bear its costs of the appeal since the appeal has partly succeeded.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Mwita Kerario instructed by the firm of Kerario Marwa & Company Advocates for the Appellant.

Mr. Bosire instructed by the firm of Moronge & Company Advocates for the Respondent.

Evelyn Nyauke – Court Assistant