



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 73 OF 2017

MAURICE O. OKUTHE.....APPELLANT

-VERSUS-

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

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

Senior Resident Magistrate's Civil Suit No. 85 of 2014 delivered on 11/07/2017)

JUDGMENT

1. The appeal subject of this judgment was prompted by the dismissal of **Rongo Senior Resident Magistrate's Court Civil Suit No. 85 of 2014** (hereinafter referred to as '**the suit**') on the 11/07/2017. The Appellant herein, **Maurice O. Okuthe** instituted the suit against the Respondent herein, **South Nyanza Sugar Co. Ltd**, alleging breach of Growers Cane Farming and Supply Contract dated 22/07/2005 (hereinafter referred to as '**the Contract**') where the Respondent contracted the Appellant to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 1512B Field No. 65 in South Kabuoch-Kobita Sub-Location within Migori County.

2. Through the Memorandum of Appeal dated 20/07/2017 and filed in Court on 25/07/2017 the Appellant preferred the following 5 grounds of appeal: -

- 1. The learned trial magistrate erred in law in importing into the suit issues (the duty to harvest) which had not been pleaded by either party into the proceedings while writing the judgment.***
- 2. The learned trial magistrate erred in law and in fact in finding contrary to the contract, custom and written law, that the duty to harvest sugarcane was upon the plaintiff (outgrower) and not the defendant (miller).***
- 3. The learned trial magistrate erred in law and in fact in treating written law as extrinsic evidence or parol evidence and came to a conclusion that no reasonable tribunal property guiding itself could come to.***
- 4. The learned magistrate knowingly disregarded the doctrine of stare decisis and ignored judicial precedent and principles governing the interpretation of the clause in issue, as variously held by the High Court of Kenya.***
- 5. The learned trial magistrate erred in law in failing to award the damages prayed for and/or assess the damages awardable in the event the suit had succeeded.***

3. Directions were taken, and the appeal was disposed of by way of written submissions where both parties filed quite extensive submissions and referred to many decisions in support of their rival positions. The Appellant contended that the trial court had dismissed the suit on the finding that the Appellant failed to harvest the cane and deliver it to the Respondent whereas that issue had not been raised and dealt with during the trial, that the trial court failed to be guided by the principle of judicial precedence or *stare decisis* on well settled issues of law and went on a frolic of its own and that the court erred in not assessing and awarding damages to the Appellant. The Respondent in supporting the decision of the trial court contended that the suit was time-barred, that the pleadings were at variance with the evidence and that the claim was not proved. In a rejoinder, the Appellant submitted that the issue of limitation was not raised in the suit and therefore it cannot be a basis of the appeal.

4. 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**). To that end, 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.

5. The starting point is the issue of limitation. I have confirmed that the issue was not raised in the suit. The issue is also not part of the grounds of appeal before this Court. The issue was raised for the first time on appeal and through the Respondent's written submissions. The parties as well as the trial court did not therefore express themselves on it. Guided by the respective Supreme Court and Court of Appeal binding decisions in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** and **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** the issue of limitation, having not formed part of the suit by way of pleadings or otherwise, is a non-issue and cannot be raised for the first time on appeal. The issue is hereby dismissed. I must also clarify that my finding in **Kenindia Assurance Co. Ltd vs. Otieno, Ragot & Co. Advocates (2017) eKLR** is distinguishable. In the **Kenindia Assurance's** case I was dealing with a Reference/Appeal from the Taxing Officer where the issue of limitation had not been raised and dealt with before the Taxing Officer. The reason I decided to deal with the issue was that the Taxing Officer had no jurisdiction to determine such a substantive matter. The issue fell within the exclusive preserve of the High Court. That is not the position herein. The trial court had jurisdiction to determine the issue of limitation and since the issue did not form part of the pleadings or proceedings before the trial court this Court has no jurisdiction to entertain the same at an appellate level.

6. There is also the issue as to which party had a duty to harvest the sugar cane. I find the issue to be on the same wave length as the one on limitation. The issue was not one of those issues for determination which arose from the pleadings. The Respondent's position from the Statement of Defence was that the Appellant failed to develop and maintain the sugar cane such that there were no satisfactory yields of sugar cane capable of being cost effectively harvested, transported and milled. With tremendous respect, the trial court erred in holding onto the issue of failure by the Appellant to harvest the cane to dismiss the suit.

7. However, for completeness of record I will nevertheless deal with the duty to harvest the sugar cane. I must say that I have previously and extensively dealt with the issue and since I have not changed that position I find that looking at the contract in line with the repealed **Sugar Act** and the **Regulations** made thereunder the duty to harvest the sugar cane was on the Respondent notwithstanding the provisions of the contract. This is what I stated in **Migori High Court Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR: -**

21. 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.

8. Since there is no evidence that the Appellant did not perform his duties under the contract which affected the growth and maturity of the sugar cane and given that the Respondent did not harvest the cane as required in law, I hereby find and hold that it was instead the Respondent who was in breach of the contract. Respectfully, the learned trial magistrate erred in his finding that the Appellant was in breach of the contract and that finding is hereby set-aside.

9. Having so found, I must ascertain whether the Appellant proved his claim. Three things must be proved to enable this Court assess the award payable to the Appellant (See the Court of Appeal in **John Richard Okuku vs. South Nyanza Sugar Co. Ltd Kisumu Court of Appeal Civil Appeal No. 278 of 2010**). They are the size of the land, the expected yields and the different prevailing prices at the expected harvest times for the plant crop, first ratoon crop and the second ratoon crop. The size of the land was pleaded in the Plaint dated 14/11/2014 and proved in Schedule A of the contract to be 0.6 Hectares. The expected prevailing prices was pleaded as Kshs. 2,500/=. Since the price was denied by the Respondent whom through its representative who testified as DW1 stated that ***'...Prices of the cane vary from year to year so without it, it cannot [loss] be ascertained...'***, then the Appellant was under a duty to prove, on a balance of probability, that what he proposed were the then prevailing market prices.

10. But how did the Appellant deal with the issue of the prices? From the record the Appellant filed a List of Documents dated 14/11/2014 where he introduced three documents namely the Contract, a Demand Letter and a Sugarcane Productivity Schedule. No supplementary List of Documents was filed and no other document was produced at the hearing of the suit. The upshot being that the respective prices were not proved. Having failed to avail evidence of the prevailing prices, this Court, even if it accepts the evidence of the expected yields on record, still cannot quantify the loss which the Appellant suffered as a result of the breach. I therefore find that the claim was not proved.

11. 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.

12. This Court now finds and hold that the suit was rightly dismissed, but on failure by the Appellant to prove the claim and not on the Appellant's failure to harvest the sugar cane. The appeal is hence dismissed with costs.

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. Ezekiel Oduk Counsel instructed by the firm of Oduk & Co. Advocates for the Appellant.

Mr. Marvin Odero Counsel instructed by the firm of Okon'go Wandago & Co. Advocates for the Respondent.

Evelyne Nyauke – Court Assistant