REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 101 OF 2017

HELLEN A. OGOLLA…..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 Resident's Magistrate's Civil Suit No. 38 of 2014 delivered on 10/10/2017)

JUDGMENT

1. The Appellant herein, **Hellen A. Ogolla,** filed a Plaint before the **Rongo Resident's Magistrate's Court** which was registered as **Civil Suit No. 38** of **2014** (hereinafter referred to as '**the suit'**) against **South Nyanza Sugar Co. Ltd,** the Respondent herein, and contended that by a Growers Cane Farming and Supply Contract dated 13/01/2006 (hereinafter referred to as **'the Contract'**) the Respondent contracted the Appellant herein to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 523 Field No. 210 in Kadera Lwala Sub-Location measuring 0.4 Hectare within Migori County.

2. It was further contended 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. That, the Respondent surveyed, ploughed, furrowed and harrowed the land and also supplied the cane seed, fertilizers and other inputs. That, the Appellant discharged his part of the contract until the cane was mature, but the Respondent failed to harvest it hence suffered loss.

3. Aggrieved by the alleged breach of the contract the Appellant filed the suit on the 10/10/2015 claiming compensation for the loss of the unharvested sugar cane, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 20/04/2015 wherein it denied the contract and put the Appellant into strict proof thereof. The Respondent further averred that if at all there was any such contract then the Respondent performed its part by harvesting the plant crop and the two ratoon crops when the same were mature. It was pleaded that the court did not have the jurisdiction over the dispute and that the suit was time-barred. The Respondent prayed for the dismissal of the suit with costs.

5. The suit was finally settled down for hearing. Both parties were represented by Counsels. The Appellant was the sole witness who testified and adopted her Statement as part of his testimony. She also produced the documents in her List of Documents as exhibits. The Respondent called its Senior Field Supervisor as its sole witness who also adopted his statement and produced the documents as exhibits.

6. The trial court rendered its judgment and partly allowed the suit by remedying her the value of the plant crop only. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed, and appropriate compensation be awarded proposed the following two grounds in the Memorandum of Appeal dated 24/10/2017 and filed in Court on 02/11/2017:

> **1. The learned trial magistrate erred in law and in fact in holding as he did that for the breach committed by the Respondent / Defendant, the Appellant/Plaintiff was only entitled to the award of the damages for the plant crop which holding was unreasonable in the circumstances, and the compensation therefore inadequate.**
>
> **2. The learned trial magistrate in the assessment of the award by making several deductions to the award, which deductions were neither pleaded as a set off and/or counterclaim, and the trial magistrate's said act was in contradiction of the law and public policy in that he rewarded the respondent for its breach.**

7. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied. The Appellant challenged the finding of the trial court vigorously and more so claiming that the court erred in making a finding that the Appellant was not entitled to the proceeds for the ratoon crop as she did not develop the same. She also contended that the court erred in deducting the transport and harvesting charges and prayed for full compensation for all the three cycles.

8. The Respondent supported the judgment and prayed for the dismissal of the appeal.

9. 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).**

10. 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.

11. I will first deal with the issue raised in the second ground of appeal, I must concur with the trial court. That is because the Appellant was very clear in her statement over the matter. She admitted that the Respondent had undertaken the survey of her land and ploughed, harrowed and furrowed and also supplied her with seed cane and fertilizer. She also admitted that the cost of harvesting and transporting the cane was deductible from the proceeds of the cane. That position is backed by the contract.

12. The Respondent produced various Job Completion Certificates in proof of the services rendered. The Appellant neither objected their production nor challenge their contents. I therefore find that since the Appellant admitted her indebtedness to the Respondent and did not object to the sums claimed and proved, then the sums were recoverable from the proceeds of the cane, the failure to put up a set-off or a counterclaim notwithstanding. That ground therefore fails.

13. On the first ground, it is true I have dealt with the issue of mitigation of losses elsewhere. Since I have not changed my position on the same I will reiterate what I stated in **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** as under: -

> ***'21. I will now look at whether the Respondent was in a position to mitigate loss in this type of a contract. As stated elsewhere above the contract was for a period of a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the farm whichever period shall be less. Therefore, the success of the main plant crop determines the success of the first ratoon and likewise the success of the first ratoon determines the success of the second ratoon. In other words, if the main plant crop is compromised then the ratoons will definitely be equally compromised. Hence unless the miller is in a position to foresee its failure to harvest the cane in advance and put the farmer on appropriate notice and in accordance with the Agreement, there is very little a farmer can do to salvage the situation once the miller fails to harvest the cane under the Agreement.***
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> ***22. Looking at the Agreement, there are several restrictive clauses such that it would not be possible for the Respondent to take any reasonable steps to mitigate the loss unless the Appellant takes the first step in informing the Respondent of its intended breach of the Agreement. The Appellant's argument that the Respondent failed to mitigate its loss cannot stand and is hereby rejected.***
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> ***23. I therefore find that the Respondent was entitled to the proceeds from the ratoons. The learned trial magistrate was hence right in awarding the expected proceeds of the first ratoon. The first ground fails…'***

14. According to the Plaint, the Appellant prayed for the proceeds from the plant crop and the two ratoon crops in accordance with the contract. The trial court awarded him the proceeds for the plant crop and declined any award for the proceeds for the ratoon crops on account of mitigation of losses. From the above holding the finding by the learned trial magistrate is hereby, and with utmost respect, set aside. The Appellant was entitled to the proceeds from the two ratoon crops as well.

15. The trial court calculated the proceeds for the plant crop on the basis of the agreed size of the land and the Cane Yield Schedule of the Respondent. The price adopted as Kshs. 2,000/= as suggested by the Respondent. According to the Cane Yield Schedule, the expected ratoon yields from Kadera Lwala was 49.78 tonnes per hectare. Each ratoon crop would hence yield Kshs. 39,824/=. Since the Respondent did not re-survey the land, supply seed cane again, neither did it plough, harrow or furrow the land again coupled with failure to adduce evidence of the costs of harvesting and transporting the cane, no sums shall be deductible from the proceeds of either ratoons. The Appellant was entitled to Kshs. 79,648/= as the proceeds from the two ratoon crops.

16. As I come to the end of this judgment, I must point out that the Respondent challenged the way the prayers in the Plaint were tailored and prayed that the whole suit could not stand. It also raised the issue of when interest ought to start running from. Several decisions were cited on the issues. Respectfully, I do not agree with the Respondent on those submissions. First, the Respondent did not lodge any appeal or cross-appeal against the judgment of the trial court. This Court, sitting as an appellate Court, is only duty bound to consider the grounds of appeal as contained in the Memorandum of Appeal before it. Therefore, the issues as raised by the Respondent in its submissions and at the tail-end of the appeal and without according the Appellant an opportunity to respond to, are for rejection. Second, the twin issues were long settled by the Court of Appeal in the famous case of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd Kisumu Civil Appeal No. 278 of 2010 (2013) eKLR**.

17. Consequently, the following final orders do hereby issue: -

> **a) The appeal partly hereby succeeds and the finding of the learned magistrate awarding Kshs. 40,646/= be and is hereby set aside accordingly;**
>
> **b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 120,294/= which amount shall attract interest at court rates from the date of filing of the Plaint;**

d) The Appellant shall have costs of the suit before the trial court and since the appeal partly succeeded each party shall bear its own costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 12th day of March 2019.

A. C. MRIMA

JUDGE

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

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

Messrs. Otieno, Yogo, Ojuro & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant