REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 80 OF 2017

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

-VERSUS-

EZEKIEL ODUK.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 54 of 2015 delivered on 26/07/2017)

JUDGMENT

Introduction and Background:

1. The Appellant herein, **South Nyanza Sugar Co. Ltd,** was dissatisfied with the judgment in **Migori Chief Magistrate's Court Civil Suit No. 54 of 2015** (hereinafter referred to as '**the suit'**) which was in favour of the Respondent herein, **Ezekiel Oduk,** and preferred the appeal subject of this judgment. The suit had initially been filed before the High Court at Kisii prior to the establishment of this Court station. It was then transferred to this Court where it was again transferred to the Magistracy for hearing and determination.

2. The Respondent contended in the suit that by a Growers Cane Farming and Supply Contract entered into on 10/10/1994 (hereinafter referred to as **'the Contract'**) the Appellant herein contracted the Respondent to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 199C Field No. 105 in I/Pasgure Sub-Location measuring 10.7 Hectares.

3. The Respondent 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 ploughed, furrowed and harrowed his land and the Appellant surveyed the land, supplied the cane seed and fertilizers. That, the Respondent discharged his part of the contract until the cane was mature, but the Appellant failed to harvest hence suffered loss.

4. Aggrieved by the alleged breach of the contract the Respondent filed the suit before the High Court on 14/07/2005 claiming *inter alia* damages for breach of the contract. The Appellant entered appearance and filed a Statement of Defence dated 04/08/2008 wherein it denied the contract *in toto* and put the Respondent into strict proof of all his averments. The Appellant prayed for the dismissal of the suit with costs.

5. The suit was finally settled down for hearing before the trial Magistrate. Both parties were represented by Counsels. The Respondent was the sole witness who testified and produced the documents in his List of Documents as exhibits. The Appellant did not call any evidence. The lower court rendered the judgment on 26/07/2017 which judgment is the subject of this appeal.

The Appeal:

6. The Appellant in praying that the appeal be allowed, and that the suit be dismissed proposed the following seven grounds in the Memorandum of Appeal dated 22/08/2017 and filed on 24/08/2017: -

> ***1. The learned trial magistrate erred in law and fact in holding that the Appellant had abandoned its contest of the jurisdiction of the court to hear and determine the matter and in failing to find that the court lacked the jurisdiction to hear and determine the suit.***
>
> ***2. The learned trial magistrate erred in fact and in law in holding that the suit was not barred under the statute of limitations.***
>
> ***3. The findings of the learned trial magistrate were based on facts that were inconsistent with the Respondent's case as pleaded and therefore did not support his case***

4. The learned trial magistrate made an award of damages that were too remote in the circumstances.

5. The learned trial magistrate ought to have dismissed the Respondent's claim on account of the Respondent's mischief and abuse of the Court process for failure to file the Amended Plaint, pay court fees thereon and serve the same upon the Respondent.

6. The learned trial magistrate erred in law and in fact awarding interest as she did in her judgment.

7. The findings of the trial court wee against the weight of the evidence as the case was not proved to the required standard.

7. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied. The parties thereafter highlighted on their submissions.

8. The Appellant in challenging the entire judgment contended that the trial court had no jurisdiction. It raised the issue of jurisdiction in two-fold. First, that the court had no jurisdiction as the suit ought to have been filed before the Sugar Arbitration Tribunal (hereinafter referred to as '**the Tribunal'**) under the repealed **Sugar Act No. 10** of **2001** (hereinafter referred to as '**the Act'**) and second, that the suit was time-barred. The Appellant contended that despite the issues having been clearly raised in the pleadings the court did not decide on the same hence erred in law. The Appellant also contended that the suit was not proved as required in law. That, there was no evidence of any contract executed by the parties and no breach of any contract had been demonstrated. That, the evidence taken in totality did not prove the suit. It was further contended that the court failed to take into account the fact that the Respondent ought to have mitigated losses and the suit was fatally defective for want of clarity and since leave to amend had been granted but the Respondent failed to amend the suit, a dismissal was the only appropriate order in the circumstances of the case.

9. The Appellant relied on the decisions in **Speaker of the National Assembly v Karume [1990-1994] EA 546, Republic v National Environmetal Management Authority [2011] eKLR, Alice Mweru Ngai v Kenya Power & Lightining Co Ltd [2015] eKLR, Milkah N. Masungo v Robert Mwembe & 2 Others [2012]eKLR, Republic v Public Procurement Administrative Review Board & Another exparte Tearchers Service Commisison [2015]eKLR, Penina Omolo Matunga v South Nyanza Sugar Company Ltd [2015], Michael Maina Nderitu v Kenya Power & Lighting Co Ltd & Another [2013]eKLR, Kenya Electrical Trade & Allied Workers Union v Kenya Power & Lighting Co Ltd [2015]eKLR, Thuranira Karauri v Agnes Ncheche [1997]EKLR** and **Bosire Ogero v Royal Media Service [2015]EKLR** on the twin aspects of jurisdiction. On mitigation of losses, the Appellant relied on the decisions in **Kenya Power &Lighting Co Ltd v Henry Wafula Masibayi [2013]eKLR, Fidelity International Imports Ltd v Central Bank of Kenya & Another [2003]1 EA 56 and Penina Omolo Matunga v South Nyanza Sugar Co Ltd(supra)** and on the failure to amend the Plaint the Appellant relied on the decisions **Kenya Airports Authority v Mitu Bell Welfare Society & 2 Others [2016]eKLR, Republic v Public Procurement and Administrative Review Board & Another [2016] eKLR, Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009[eKLR and Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mawkio & 3 Others [2015]eKLR.**

10. The Respondent opposed the appeal and contended that the Courts had jurisdiction to deal with the matter and that the suit was not time-barred. It was also contended that the suit was properly proved as required in law and that the trial court did not err.

11. On the issue of jurisdiction, the Respondent relied on the decision in **South Nyanza Sugar Co Ltd v Isaiah Owino Lawi HCCA No. 159 of 2006,** South Nyanza Sugar Co Ltd v Paul N. Lila HCCA Bo. 161 of 2005**, Zadock N. Danda v South Nyanza Sugar Co Ltd HCCA No. 11 of 2017**and **Martin Akama Lango v South Nyanza Sugar Co Ltd HCCA No. 20 of 2000.** As to proof of the suit, the Respondent relied on **Adongo v South Nyanza Sugar Co Ltd HCCA No. 28 of 2016, Jane Atinda v South Nyanza Sugar Co Ltd HCCA No. 41 of 2016** and **John Richard Okuku Oloo v South Nyanza Sugar Co Ltd Civil Appeal No. 278 of 2010**.

Analysis and Determinations:

12. 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).**

13. 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. I will deal with the various issues raised in this appeal under the following sub-headings: -

(i) Jurisdiction:

14. The starting point must be the issue of jurisdiction. As raised, jurisdiction is two-fold. The first limb is whether the conventional High Court had the jurisdiction at the filing of the suit. The contract was contended to have been entered sometimes on 10/10/1994. By then **the Act** was not in place. However, **the Act** was in place when the suit was filed on 14/07/2005. The question is therefore whether the Respondent was to comply with the provisions of **the Act** and instead file the suit before the Tribunal and not the High Court.

15. Before the commencement of the Act on 01/04/2002, the sugar sector in Kenya was regulated by the **Kenya Sugar Authority Order of 1973**. That law did not provide for any dispute resolution mechanism. It was until when **the Act** came into force that the Tribunal was established. Prior to that, disputes in the sugar sector were freely litigated in the Courts.

16. **Section 29(1)** of **the Act** provided for the **Sugar Industry Agreements**. It stated as follows: -

> **(1) There shall be, <u>for the purposes of this Act</u>, agreements to be known as the sugar industry agreements negotiated between growers and millers, growers and out-grower institutions, and millers and out-grower institutions.**(emphasis added)

17. As the above agreements were for the purposes of implementing **the Act**, it is obvious that such did not include any agreements made before **the Act** came into being. Of essence is also **Section 31(1)** of **the Act** which provided as follows: -

> **There is established a tribunal to be known as the Sugar Arbitration Tribunal for the purpose of arbitrating <u>disputes arising between any parties under this Act</u>.** (emphasis added).

18. I have carefully gone through **the Act** and did not come across any provision for resolution of disputes before **the Act** was enacted. It is therefore crystal clear that the Tribunal was meant to **<u>only</u>** deal with disputes between parties under **the Act**. Since it is contended that the contract between the parties herein was entered in 1994, then the Tribunal had no role to play into the dispute herein as the parties did not contract under **the Act**. **The Act** could not apply retrospectively. I therefore echo the words my Lordship **Musinga, J.** (as he then was) in **<u>South Nyanza Sugar Co. Ltd vs. Isaiah Owino Lawi Kisii HCCA No. 159 of 2006</u>** thus: -

> ***I have carefully perused the record of appeal. It appears to me that that outcome of the application before the trial court depended on whether the Sugar Act, 2001 was applicable in interpreting the contract that was entered into on 11th April, 1996. The simple answer is "NO." The reason was well articulated by the learned trial magistrate that the Act came into operation on 1st April, 2002 and its provisions cannot apply retrospectively. The aforesaid agreement contains an arbitration clause at paragraph 13 but the same does not have any link with the Sugar Act, 2001. The Act established the Sugar Arbitration for purposes of arbitrating disputes arising between any parties under the Act and not otherwise. The provisions of that Section cannot be relied upon in determining disputes in contracts that were entered into long before the Act was enacted. This appeal must therefore fail and I dismiss the same with costs to the respondent.***

19. I hence find and hold that the High Court had the jurisdiction to deal with the dispute and that the objection lacked any legal leg to stand on.

20. On whether the suit was statute-bared by limitation, I must say that I have previously dealt with the issue and held that sugar contracts are different from other forms of contracts. To understand that differential context one must appreciate how sugar farming is undertaken. It all starts with the planting of the cane seed. At maturity, when the first harvest (usually referred to as 'the plant crop') is harvested that gives way to the regeneration of the second cycle of the cane (usually referred to as 'the first ratoon crop'). That cycle once harvested gives way to another one and it so continues depending on the application of the best agricultural husbandry on the cane crop. It is for that reason the sugar contracts usually specify the crop cycles and as such a farmer is in a position to know of the expected earnings from the contracted cycles.

21. Therefore, if the plant crop is not harvested then the chances of the farmer reaping from the ratoon crops or the contracted cycles, as the case may be, are certainly curtailed and the farmer loses all the expected proceeds of the cane crops. In other words, when the plant crop is not harvested then the farmer cannot develop the first ratoon crop and the subsequent ratoon crops as well. It is for that reason that I have always been of the considered position in sugar contracts, that in any instance of breach unless the breach is remedied, the farmer is entitled to be compensated for all pending cane crop cycles under the contract and as such the limitation of time starts running from the end of the contract period. That is because if the farmer is to be compensated for the loss occasioned in the entire contract period on one hand and on the other hand time starts running from the breach, then the farmer shall benefit twice; from the breach of the contract and from the use of the land as the contract will be deemed to have been terminated. Another reason is that under the sugar contracts the miller has the sole discretion to extend the contract period and to only notify the farmer of its decision. Therefore, despite breach the miller can extend the contract period and take care of any loss occasioned to a farmer.

22. From the foregone, given that the contract was allegedly entered into 10/10/1994 and it was for a period of 5 years, then the limitation time started running from 09/10/1999. That being so, the Respondent had up to 08/10/2005 to file the suit. As the suit was filed on 14/07/2005 then it was within time and the objection on limitation of time is for rejection.

23. The upshot is that the ground of jurisdiction fails on its twin-fold and is hereby dismissed.

(ii) <u>The effect of the intended amendment of the Plaint:</u>

24. The Appellant raised another preliminary issue which I must determine as well. It was contended that the Respondent sought for leave to amend the Plaint and in his own words and on oath stated that if the amendment was not allowed then the suit could not stand. That, despite the grant of the leave to amend the Plaint the Respondent did not so act. The Appellant hence submitted that the state of affairs left the suit for dismissal as it did not meet the required threshold in law.

25. It is true the Respondent sought for leave to amend the Plaint and he was so allowed but did not effect the intended amendment. The amendment was contained in the Draft Amended Plaint which aimed at deleting prayer (a) of the Plaint and replacing it with prayer (aa). **Prayer (a)** sought for '*Damages for breach of contract*' while **Prayer (aa)** sought '*Compensation and/or Payment of Kshs. 11,939,595/= only, on account of breach of contract (details in terms of paragraph 10 hereof)*.

26. Paragraph 10 of the Plaint tabulated how the claim of Kshs. 11,939,595/= was arrived at. In fact, the intended amendment referred expressly to the said paragraph 10 of the Plaint. It can hence be deduced that Prayer (a) of the Plaint and the intended Prayer (aa) are substantively one and the same. I have also noted that the Plaint was filed by one firm of Advocates and the amendment was sought by another firm of Advocates and it was based on the understanding of the Court of Appeal in the famous case of **<u>John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd Kisumu Civil Appeal No. 278 of 2010 (2013) eKLR</u>**. Going by that decision, the Plaint was valid as drafted. In fact, the High Court in that decision had struck out a Plaint on the ground that the special damages were not specifically and

properly pleaded and the Court of Appeal held that it was possible for the Court to calculate the special damages from the way the Plaint was tailored even without particularization of the loss. In this case, Paragraph 10 of the Plaint went ahead and even particularized the damages to Kshs. 11,939,595/=.

27. Another key observation is that Prayer (a) of the Plaint sought for Damages for the breach of the contract. What most likely crossed the mind of the subsequent Counsel must have been the presumption that the prayer (a) sought for General Damages. But, to me Damages includes Special Damages and/or General Damages. It is not right for a party to presume that whenever a prayer for damages is sought in a suit then it must out rightly refer to general damages. It may also refer to Special Damages depending on the circumstances of the case. In light of **Article 159(2)(d)** of the **Constitution** one must take into account the subject of and the manner in which a Plaint is drafted to reach a conclusion on what exactly the prayers are about. A Court must endeavor to discharge substantive justice instead. However, I am not lost on the need for clear and precise pleadings.

28. Having said so, I must find and hold, which I hereby do, that the Plaint was validly drafted and the failure to amend it did not in any way negatively impact on it. The ground also fails.

(iii) <u>On whether the claim was proved:</u>

29. One of the issues I must deal with here is **whether there was any Contract** between the parties. The Respondent contended that indeed there was and produced the one dated 10/10/1994. I have carefully perused the same and as contended by the Appellant the same was not executed by the Appellant. The Respondent, an Advocate of the High Court of Kenya, instead appended his thumb print. It was however signed by a Chief. In a nutshell, the Appellant vehemently contended that the document was highly suspicious, a fraud, a misrepresentation, not binding and could not be relied on to find the existence of any contract between the parties.

30. The Respondent explained why he did not instead sign the document he presented in evidence. He stated in evidence that the execution of the document was in the farm and at that particular time no one had a pen. He had the only option of appending his thumbprint and he so did. The Respondent further stated in evidence that the Appellant later executed the document and availed him his copy which copy he forwarded to the Appellant during negotiations, and in good faith, but surprisingly the Appellant did not return it to him.

31. From the record, the Respondent's evidence was not controverted. Apart from filing the Statement of Defence the Appellant did not file any Witness Statement(s) neither did it endeavor to apply to re-open its case which had been closed by the trial court and adduce evidence. Simply put, the Appellant was comfortable with that state of affairs. Further, all the documents produced by the Respondent as exhibits were not objected to despite the Appellant filing of a Notice of Non-Admission of Document.

32. Apart from the Contract document the Respondent produced other documents in support of his case. One of them was an Agreement between the Respondent and a Company for hire of a Bulldozer machine for purposes of preparing the farm. A letter by the Appellant dated 08/09/1994 on supply of cane seed to the Respondent was also produced. There was also the Appellant's Physical Cane Survey Report (hereinafter referred to as '**<u>the Report'</u>**). The Report was prepared by a Field Assistant one **Mr. R. Siparo** on 01/10/1998. It was in respect to the Ilpashe Sub-Location and was addressed to the Supervisor one **Mr. A. Onyango**. It contained details of the Appellant's contracted farmers within that subject area, the sizes of their respective lands, the cane variety, the expected yields, the age of the cane crop, among other details. The Report had the Respondent as one of the contracted farmers who had two parcels of land within the area. It also had the following instructions:

> ***This format will be filled by the F/Assist with total accuracy on monthly basis screened by the Supervisor. The age of the standing cane must be compared to ages in the record. Cycle must be entered correctly and whether fallow, rejected, abandoned, grazed, jiggery must be entered.***

33. The Appellant contended that the Report was unauthenticated and was not generated by itself. The Appellant however did not object to the production of the Report. Further, the Appellant's Counsel did not cross-examine the Respondent on the contents and whereabouts of the Report. It must always be remembered that submissions cannot take the place of evidence. The issue of the Report having not been generated by the Appellant and it not being authentic were never part of the evidence or at all. The Appellant's submissions on the Report are therefore not grounded on any evidential basis and are for rejection. I find and hold that the Report was generated by the Appellant and it reflected the Appellant true record of its contracted farmers in the subject area. Those farmers included the Respondent.

34. There is also the issue of the several letters written by the Respondent to the Appellant. The Appellant did not deny that the Respondent wrote the letters to it. That being so, one wonders why the Appellant did not just write one letter to the Respondent and put its position clear – ***You are not one of our contracted farmers and have no business dealing with you!*** The Appellant in fact wrote to the Respondent and confirmed the contract between itself and the Respondent when the Respondent had requested for the cane seed. The Appellant did not even controvert the Respondent's evidence that the parties were engaged in negotiations over the matter. The letters spoke for themselves. There was as well the evidence by the Respondent on what happened to the executed contract document. That, his executed copy of the contract was forwarded to the Appellant during the negotiations and in good faith but the Appellant retained it. The Respondent also gave a reasonable explanation as to why he instead affixed his mark instead on the contract. The Respondent further explained that the contents of the executed contract were the same as those contained in the contract document he produced in evidence as Exhibit 1. He also explained the variances on the Account Numbers and Plot Numbers in the various documents he produced. All that evidence was not challenged in any way. It hence means that no amount of submissions can change that evidential position more so given that the Respondent was not even cross-examined on most of the issues.

35. I have as well noted in paragraph 8 of the Defence that the Appellant admitted that *'…its standard form contracts books for out growers cane development contains express clauses similar to the one pleaded by the Plaintiff at paragraph 5 of the Plaint….'*

36. Having carefully reviewed the record I am satisfied that the Respondent was one of the Appellant's contracted farmers as pleaded and that although the duly executed copy of the contract document was not produced in evidence the terms in which the Appellant and the

Respondent contracted are similar to those contained in Exhibit 1.

37. On the alleged **breach of the contract**, the starting point is the Plaint. The Respondent averred that he took good care of the cane crop from planting of the seed cane up to maturity, but the Appellant failed to harvest the cane despite repeated reminders. He also clarified that it was the Appellant who supplied him with the seed cane at planting. He testified that the cane overgrew on the farm until it was 56 months old when it caught fire, but nevertheless the Appellant harvested it and managed to recoup all its expenses for services rendered and inputs supplied leaving a credit balance of Kshs. 35,873/=.

38. Apart from the general denials in the Defence the Appellant did not adduce evidence to controvert what the Respondent alleged. **Clause 11(k)** of the Contract provided as follows: -

> ***Within seven days of receipt of a written notification from the Company that such operations are necessary to achieve a satisfactory yield of cane allow unimpeded access to the Company its agents employees and its equipment for the purposes of carrying out any or all operations which the Outgrower has failed to carry out in the opinion of the Company, is likely to fail to carry out.***
>
> ***Provided that such notification shall have either been handed to the Outgrower or his representative and acknowledged or shall have been posted to the Outgrower by registered mail.***

39. From the reading of the above Clause it comes out clearly that in the event there was any failure on the part of the Respondent to discharge any of his obligations under the contract, the Appellant ought to have issued a notice requiring the Respondent to remedy the default and would have served the same as provided therein. In the event of further default, the Appellant was entitled to move into the land and remedy the default. There was also **Clause 4** of the contract which provided for the termination of the contract.

40. The Appellant did not adduce any such evidence neither did it terminate the contract. It hence means that the Respondent fully discharged his obligations under the contract until the plant crop was mature for harvesting at the age of 22-24 months' post planting. As it is settled that the Appellant instead harvested the cane at the age of 56 months' post planting it goes without say that the Appellant was in breach of its duty to harvest the plant crop under the contract. I also find that the issue of the cane getting burnt shortly before harvesting took place long after the breach had persisted for over 30 months thereby the defence of frustration as raised by the Appellant does not lie.

41. Having found that the Appellant breached the contract by failing to harvest the plant crop, I must now consider if the Respondent was entitled to any remedy in law. I previously dealt with this aspect in the case of **Migori High Court Civil Appeal No. 138 of 2015 South Nyanza Sugar Co. Ltd vs. Hilary M. Marwa (2017) eKLR** when I expressed myself as follows: -

> *'15. I recall having dealt with this issue at length in **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited**. In that case I found that there can be no award of general damages for a claim on breach of contract. However, the 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. I substantiated those findings with various case law. I must say that I am still of that position.'*

42. In **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited (2017) eKLR** I also dealt with how special damages ought to be ascertained in cases of contracts like the one before this Court. This is what I stated: -

> *"22. I am therefore of the very considered view that looking at the nature of the Contract and how the loss occurred, the above Appellant's averment was adequate to make a court assess the special damages accordingly. In affirming the position, the Court in the **John Richard Okuku Oloo** (supra) had the following to say:*
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> ***"In case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and which was 0.2 hectare (paragraph 3 of plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.***
>
> ***The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.***
>
> ***We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof.***
>
> ***Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filling suit."***

43. The Respondent particularized his claim under paragraph 10 of the Plaint based on the acreage of 3.6 Hectares, the expected yield of 215 tonnes per hectare and the price of Kshs. 1,730/= per tonne. The Respondent opposed the expected yields and vehemently contended in paragraph 17 of the Defence that the average optimum yield of sugar cane within its well-maintained fields within that zone between the

years 1994 – 1998 averaged 60 tonnes per hectare.

44. Before I deal further I must deal with the issue of mitigation of losses as raised by the Appellant. The Appellant filed a Statement of Issues dated 25/11/2014, but it did not raise the issue of mitigation of losses. The issue was not also raised in the Defence. As the issue was only brought up at the submissions stage, it is not for determination since it never resulted from the pleadings. (See: **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR).**

45. However, since I have previously dealt with the issue in other decisions and I have not changed my mind on it, I will state that a farmer is entitled to full compensation in respect of the cycles stated in the contract and accordingly pleaded and that the issue of mitigation of loss does not apply in the unique circumstances of the sugar contracts. In **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** I stated 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.***
>
> ***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.***
>
> ***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…***

46. The Respondent claimed for the proceeds from the plant crop, the first ratoon crop and the second ratoon crop. The Respondent stated in the Plaint that the acreage was 10.7 Hectares. The same acreage appeared in the Appellant's Statement for the Respondent as well as in the Report. I find that the size of the land was proved to be 10.7 Hectares. On the yields productivity the Respondent relied on a Productivity Schedule allegedly prepared by the Appellant and settled on 215 tonnes per hectare. The Appellant did not avail any evidence save it pleaded that the yields were 60 tonnes per hectare at most. I take a very great exception to the alleged Cane Productivity Schedule produced by the Respondent since it does not have pointer that it belonged to the Appellant. Its authentication cannot be vouched. I opt to be guided by the Report which although the farm was visited when the cane was 38 months' post planting the estimated yield was stated as 176 tonnes per hectare. By that time the cane had overgrown by 14 months. I will hence settle for the expected yields at 176 tonnes per hectare. On prices, the Respondent pleaded and testified that during the contract period the prices were Kshs. 1,730/=. The Appellant did not deny such in the Defence. I will hence settle for the said price.

47. As the size of the land, the expected yields and the prices remained constant during the contract period then the Respondent was entitled to Kshs. 3,257,936/= from the plant crop. As admitted by the Respondent, the Appellants costs of inputs and services rendered were to be deducted from the respective proceeds. The Respondent produced the Statement which indicated that the net proceeds to the Respondent was Kshs. 35,873/= and total deductions of Kshs. 849,076/90. I will therefore deduct the sum of Kshs. 849,076/90 from the gross of Kshs. 3,257,936/= thereby leaving a net balance of Kshs. 2,408, 859/10 as the proceeds from the plant crop payable to the Respondent. As the Appellant did not adduce any evidence on what was to be deducted from the proceeds of the ratoon crops, this Court cannot speculate and therefore find that the Respondent was entitled to the full sum of Kshs. Kshs. 3,257,936/= for each of the two ratoons. The net proceeds to the Respondent was hence Kshs. 8,924,731/10 which figure is hereby substituted with that of Kshs. 11,939,595/= awarded by the trial court.

Conclusion:

48. As come to the end of this judgment I must apologize to the parties for its late delivery which was caused by events beyond my control.

49. I have also noted that despite the Plaint being clear on the amount of money claimed, there was serious under-assessment of court fees. I hereby direct the Deputy Registrar of this Court to ensure that all the due fees are demanded and paid before any execution is commenced.

50. In the end the following final orders do hereby issue: -

> **a) The appeal hereby partly succeeds and the finding of the learned magistrate awarding Kshs. 11,939,595/= be and is hereby set aside accordingly;**
>
> **b) Judgment is hereby entered for the Respondent as against the Appellant for Kshs. 8,924,731/10 which amount shall attract interest at court rates from the date of filing of the Plaint;**
>
> **c) The Respondent shall have the costs of the suit before the trial court and since the appeal has 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. David Otieno Counsel instructed by the firm of Messrs. Otieno, Ragot & Co. Advocates for the Appellant**.**

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

Evelyne Nyauke – Court Assistant