REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 57A OF 2017

ELISHA OTIENO OMOLLO.....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 Senior Principal Magistrate's Civil Suit No. 264 of 2014

delivered on 15/02/2017)

JUDGMENT

1. The Appellant herein, **Elisha Otieno Omollo,** filed **Migori Senior Principal Magistrate's Court Civil Suit No. 2205** of **2015** (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 30/07/2004 (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. 557B Field No. 187 in Kakrao 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 one ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first. That, the Respondent ploughed, furrowed and harrowed the Appellant's land and supplied the cane seed and fertilizers. 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 28/07/2014 claiming compensation for the loss of the unharvested sugar, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence and a Counterclaim dated 03/09/2014 wherein it denied the contract and put the Appellant into strict proof thereof. The Respondent further averred that if at all the Appellant suffered any loss then the Appellant was the author of his own misfortune as he failed to properly maintain the crop to the required standard to warrant the crop to be harvested and milled. The Respondent prayed for the dismissal of the Appellant's suit with costs. There was a counterclaim that in the event the Appellant succeeded in his claim them the cost of services rendered and inputs supplied be accordingly deducted.

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 his Statement as part of his testimony. He also produced the documents in his 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 allowed the suit. It however deducted 1/3 of the proceeds expected from the ratoon crops as expenses incurred in the development of the crops as well as the transport and harvesting charges. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed, and appropriate compensation be awarded, he proposed the following three grounds in the Memorandum of Appeal dated 27/04/2017 and filed in Court on 02/05/2017:

> ***1. The learned trial magistrate erred in law and in fact, when he without any justifiable reason deducted 1/3 purportedly as the cost of production from the appellant's award in the 1st ratoon and 2nd ratoon respectively yet none of the parties herein submitted those figures to the learned trial magistrate.***
>
> ***2. The learned trial magistrate erred in law and in fact, when vesting and transport charges from the appellant's award***

even after having held that the defendant did not harvest and/or transport the appellant's sugarcane.

3. The learned trial magistrate was biased the appellant.

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 findings not supported by the pleadings and evidence 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. On whether the transport and harvesting charges were deductible from the awards, I must concur with the trial court. That is because the Appellant was very clear in his statement when he stated as follows: -

….I am aware that the transport and harvesting charges are deductible from my proceeds…….

12. The Appellant further made similar deductions in his written submissions before the trial court. The Respondent likewise reiterated that position in its evidence before court. The ground is hereby dismissed.

13. The other ground is whether the trial court was right in deducting the value of one-third from the first ratoon harvest and the second ratoon harvest respectively on account of expenses which were likely to have been incurred by the Appellant during the cane development period. I have carefully perused the contract and the evidence and did not come across anything in support of such a finding. A court of law exercising its civil jurisdiction in an adversarial system is strictly bound by the pleadings and the evidence before it unless it takes sound judicial notice of some settled issues or matters and in which case the court must clearly so state and so substantiate. In this case the court had no basis of deducting the value of the one-third since the alleged costs was on the part of the Appellant and was not to be incurred by the Respondent. Infact the court had already rightly deducted the sums on harvesting and transport charges which were clearly proved. The deductions which were in the nature of special damages had to be proved. That was not done. The deductions were hence unsubstantiated and uncalled for. They were unfair to the farmer. To that end the court erred in law. Those findings are hereby, and with respect to the trial court, set aside.

14. The upshot is that the appeal succeeds and the deductions of 1/3 of the awards on the ratoon crops are hereby set-aside. The Appellant shall have costs of the appeal as well.

15. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 9th day of April, 2019.

A. C. MRIMA

JUDGE

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

Mr. Kerario Marwa instructed by the firm of Kerario Marwa & Co. Advocates for the Appellant**.**

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

Evelyne Nyauke – Court Assistant