



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 89 OF 2017

JAMES ODHIAMBO OGUTA.....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. 221 of 2015 delivered on 11/09/2017)

JUDGMENT

1. **James Odhiambo Oguta**, the Appellant herein, instituted **Sugar Arbitration Tribunal Cause No. 1503 of 2012** against **South Nyanza Sugar Co. Ltd**, the Respondent herein, on 03/12/2012 where he contended that by a Growers Cane Farming and Supply Contract dated 08/03/2004 (hereinafter referred to as '**the Contract**') the Respondent contracted the Appellant to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 467C Field No. 97B in Kakrao Sub-Location 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 Contract was self-developed where the Appellant ploughed, furrowed and harrowed his said land whereas the Respondent supplied the cane seed, fertilizers and other inputs. That, the Appellant discharged his part of the contract until the cane was mature and the Respondent harvested the plant crop. That, the Appellant further maintained the first ratoon crop which matured, but instead the Respondent failed to harvest, hence the Appellant suffered loss.
3. Aggrieved by the alleged breach of the contract the Appellant filed the suit before the Tribunal. Due to change in law the suit was transferred to the **Migori Chief Magistrates Court** and was registered as **Civil Suit No. 221 of 2015** (hereinafter referred to as '**the suit**'). The Appellant claimed compensation for the loss of the unharvested first and second ratoon crops, costs and interest at court rates.
4. The Respondent entered appearance and filed a Statement of Defence dated 28/03/2013 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 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 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. The Respondent maintained that it harvested both the plant crop and the first ratoon crop, but the Appellant did not develop the second ratoon crop.
6. The trial court rendered its judgment and partly allowed the suit by compensating the Appellant for the first ratoon crop without costs of the suit. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed, and appropriate compensation be awarded, the Appellant proposed the following four grounds in the Memorandum of Appeal dated 29/11/2017 and filed in Court on 03/10/2017:

1. The learned trial magistrate erred in law and in fact, when held that the plaintiff / appellant is not entitled to costs of the case on the ground that there was no demand notice exhibited, yet the plaintiff / appellant had served the defendant / respondent with a demand notice, and also exhibited the said demand notice in court.

2. The learned trial magistrate erred in law and in fact, when held that the plaintiff / appellant is not entitled to costs of the case on the ground that there was no demand notice served on the defendant / respondent, yet the defendant / respondent ruthlessly defendant the suit to the bitter end without admitting the claim when they were served with the sermons to enter appearance.

3. The learned trial magistrate erred in law and in fact when he failed to award the plaintiff / appellant for the 2nd ratoon loss,

yet the plaintiff had pleaded and proved that failure of the defendant / respondent to harvest the plaintiff's / appellant's 1st ratoon compromised the appellant's chances of developing his 2nd ratoon.

4. The learned trial magistrate was biased against 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 a finding that the Appellant was not entitled to the proceeds for the second ratoon crop as the Contract was not part of the record and that costs usually follow cause further to the fact that the issue of costs was not raised by any of the parties but the court on its own motion alleging that the Appellant did not produce a demand note.

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 of the second ratoon crop. The trial court declined to award the Appellant on this head on the ground that the Contract between the parties was not produced hence the court was not guided on the number of ratoon crops. I have seen a copy of a contract relating to a different farmer in the Tribunal file. There is a copy of the Contract between the parties herein in the Record of Appeal. Both copies do not bear the received stamps. The Appellant indicated the Contract as one of the documents in his List of Documents. This Court cannot therefore certainly hold that the Contract which is part of the Record of Appeal was not available at the trial.

12. On a preponderance of probability, I find that there was a Contract between the parties which is part of the Record of Appeal. The contract provided for the second ratoon crop and having awarded the Appellant the proceeds for the first ratoon crop there was no bar to the subsequent compensation on the second ratoon crop.

13. On the issue of refusal to award costs on failure by the Appellant to produce the demand notice, I agree with the Appellant that the issue was not among those presented by the parties before court for determination. Settled as it is, in an adversarial system of litigation a court is only limited to the issues presented for determination. A court which goes out of its way to craft issues and attempt to resolve them oversteps its mandate and acts without jurisdiction. The issue of non-production of a demand notice was not an issue for determination by the trial court. (See the Supreme Court ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** and the Court of Appeal decision in **The Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR**).

14. As the trial court awarded the sum of Kshs. 215,000/= for the first ratoon crop and there being no evidence that the Appellant failed to maintain the second ratoon crop as per the contract, I will likewise award a similar sum for the second ratoon crop. In any event, the Respondent never appealed against the judgment. I will also award costs.

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

a) The appeal hereby succeeds and the finding of the learned magistrate declining to award costs of the suit and the compensation for the second ratoon crop be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 215,000/= being compensation for the second ratoon crop;

c) The sums in the suit and this appeal shall attract interest at Court rate from filing of the suit before the Tribunal.

d) The Appellant shall have costs of the suit before the trial court as well as costs of the appeal.

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 Counsel instructed by the firm of Messrs. Kerario Marwa & Co. Advocates for the Appellant.

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

Evelyne Nyauke – Court Assistant