REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 24 OF 2017

MARY ANYANGO (suing as the Administratrix of the Estate of

JARED ONYANGO ONGUKA).....APPELLANT

VERSUS

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

(**Being an appeal from the judgment and decree by Hon. C. M. Kamau, Resident Magistrate in Kehancha Resident Magistrate's Civil Suit No. 137 of 2004 delivered on 20/08/2015)**

JUDGMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court vide the judgment rendered on 20/08/2015 for lack of evidence that the ratoon crops were developed.

2. The Appellant herein, **Mary Anyango**, who filed **Kehancha Resident Magistrate's Court Civil Suit No. 137 of 2004** (hereinafter referred to as '**the suit'**) in her capacity as the Administratrix of the Estate of Jared Onyango Onguka, pleaded that by an Outgrowers Cane Agreement dated 10/05/1994 (hereinafter referred to as '**the Contract**') the Respondent herein, **South Nyanza Sugar Co. Ltd,** contracted **Jared Onyango Onguka** (hereinafter referred to as '**the deceased'**) to grow and sell to it sugarcane at the deceased's parcel of land being Plot No. 268A Field No. 67 measuring 0.5 Hectares in Kakrao Sub-Location within Migori County.

3. It was further pleaded 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. The Appellant contended that the deceased took good care of the plant crop until maturity but the Respondent failed to harvest the plant crop thereby compromising the development of the ratoon crops thereby resulting to loss of income. She sought for a declaration that the Respondent was in breach of the contract, the value of unharvested cane, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 02/11/2004 and although it admitted the existence of the contract it denied that it was in breach.

5. The suit was finally settled down for hearing where both parties were represented by Counsels. The Appellant was the sole witness who testified and produced several exhibits. The evidence of PW2 in **Kehancha Resident Magistrate's Court Civil Suit No. 80 of 2004** was adopted as part of the Appellant's evidence in the suit. Later the parties agreed and with the approval of the trial court, the Lists of Documents and Statements were deemed as exhibits and evidence respectively and the court proceeded to render the judgment. The trial court dismissed the suit with costs. It is that judgment which is the subject of this appeal.

6. The Appellant in praying that the appeal be allowed and appropriate compensation be awarded proposed the following three grounds in the Memorandum of Appeal dated 06/06/2016 and filed in Court on 07/06/2016:

> **1. The learned magistrate erred in law and fact, when he failed to consider, evaluate and balance the pleadings, evidence and submission thereby reaching to a wrong conclusion that the appellant had failed to prove that he developed the ratoon crop.**
>
> **2. The learned trial magistrate erred in law and in fact by purporting to raise the threshold of standard of proof to as level higher than that required by the law.**
>
> **3. 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. Several decisions

were referred to by the parties in support of their rival positions.

8. 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).**

9. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

10. From the judgment, the suit was unsuccessful because the Appellant failed to adduce documentary proof that the crops were developed. The court stated that: -

> **The question for determination therefore is whether the plaintiff proved that she developed the 1st and 2nd ratoon crops. No documentary proof that the crops were developed was adduced. Only proof that the plant crop was grown and harvested was presented. It is unlikely that there would not be a single document showing that the crops were developed. Therefore, the failure to avail such evidence is suspect and it lends credence to the Defendant's position that no ratoon crop was developed.**
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> **It is trite law that he who alleges must prove. The plaintiff in this case failed to prove that she developed ratoon crops which are the basis of her claim. I therefore dismiss the suit with costs.**

11. A look at the pleadings and the evidence reveal that the Appellant's claim is anchored on the allegation that the Respondent having successfully harvested the plant crop failed to harvest the first ratoon crop and as such compromised the development of the second ratoon crop. In proof of her case the Appellant relied on her oral testimony and the written statement, the Contract, the Schedule of Sugar cane prices and the Yield Assessment Report by the defunct Kenya Sugar Research Foundation. The Appellant testified that the Respondent had assisted the deceased to develop the cane by providing him with inputs and services whose costs were deducted from the proceeds of the plant crop and the deceased received a net income of Kshs. 2,000/=.

12. The Respondent did not appeal against the judgment. There is therefore no doubt that there was a contract between the parties and that the plant crop was developed up to maturity and duly harvested by the Respondent and the deceased paid his net dues. The issue which now renders settlement is whether the deceased or the Appellant, as the case may have been, developed the ratoon crops up to maturity and if so, whether the crop was harvested.

13. The Appellant testified that the first ratoon crop developed from the harvesting of the plant crop and that she took good care thereof until it matured. The Respondent contended otherwise. At this point it must be understood that the first ratoon crop usually develops once the plant crop is harvested. A ratoon crop is not planted like a plant crop but it regenerates from the previous harvested crop. In such a case it was therefore incumbent upon the Respondent to prove that the Appellant failed to take good care of the first ratoon crop which automatically regenerated on harvesting of the plant crop.

14. Clause 4 of the Contract provided for breach of the contract and what was to happen in such instances. There is no evidence that the Respondent issued any notice upon the Appellant's alleged default. The evidence which was before the trial court was hence adequate for the court to find that the Appellant took good care of the first ratoon crop until it matured. The Respondent's contention that the Appellant did not develop the first ratoon crop is hence for rejection. As the Respondent took the foregone position it is clear that it did not even bother to harvest the first ratoon crop. On a preponderance of probability, the Appellant therefore proved that Respondent failed to harvest the first ratoon crop at maturity and that the Respondent was in breach of the contract. Having failed to harvest the first ratoon crop the development of the second ratoon crop was undoubtedly compromised. Respectfully, the learned trial magistrate's finding must be interfered with.

15. Having found that it is indeed the Respondent who was in breach of the contract, this Court should hence consider the compensation to the Appellant for the two ratoon crops which is in consonance with the Contract. Such compensation is always tailored in a fashion as to put the claimant as far as possible in the same position he/she/it would have been in if the breach complained of had not occurred. That is principle encapsulated in the Latin phrase ***restitution in integrum.*** In this case, the contract was for a period of five years or until the plant crop and two ratoon crops were harvested whichever occurred first. Because of the breach, the Appellant lost the first ratoon crop and the contemplated second ratoon crop.

16. According to the guide developed through a study by the now defunct **Kenya Sugar Research Foundation,** which was succeeded by the now **Kenya Agricultural and Livestock Research Authority (KALRO),** which institution was mandated to promote, research and investigate all problems related to sugarcane and such other crops, processing into sugar and its by-products, productivity, quality, sustainability of land and all such matters ancillary (which guide was part of the Appellant's documents) for the period 1993 to 2001, the average expected cane yields over the whole area forming the Respondent's zones are clearly stated. In this case, since the plant crop was harvested sometimes in April 1996, the first ratoon crop was expected to be harvested around 22 months later; that is around February 1998 and the second ratoon was expected in December 1999. By then the average yield was **106 tonnes** per hectare and **78 tonnes** per hectare respectively.

17. The price of the cane per tonnage in February 1998 and in December 1999 was the same at **Kshs. 1,730/= per ton** as per the Price Guide developed by the Respondent which is part of the documents produced by the Appellant.

18. The total expected earnings for the two ratoon crops would then have been **Kshs. 159,160/=.** That amount would however been subjected

to the would-be harvesting and transport expenses which the Appellant calculated in her submissions at the lower court at Kshs. 60,000/= for both ratoon crops. The net amount payable to the Appellant is therefore **Kshs. 99,160/=** for which I hereby enter judgment for the Appellant as against the Respondent. This sum shall attract interest from the date of filing of the Plaint.

19. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

a) The appeal hereby succeeds and the finding of the learned magistrate dismissing the suit with costs be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. Kshs. 99,160/=;

c) The sum of Kshs. Kshs. 99,160/= shall attract interest at court rates from the date of filing of the Plaint;

d) The Appellant shall have costs of the suit 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. Marvin Odero Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant