REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 22 OF 2017

PERES ADHIAMBO ASOMA *(suing as the Administratrix*

***of the Estate of* ELIAS A. NYAMWANDA).....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. 93 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 of any developed sugar cane crop.

2. The Appellant herein, **Peres Adhiambo Asoma**, who filed **Kehancha Resident Magistrate's Court Civil Suit No. 93 of 2004** (hereinafter referred to as '**the suit'**) in her capacity as the Administratrix of the Estate of Elias A. Nyamwanda, pleaded that by an Outgrowers Cane Agreement dated 09/04/1996 (hereinafter referred to as '**the Contract**') the Respondent herein, **South Nyanza Sugar Co. Ltd,** contracted **Elias A. Nyamwanda** (hereinafter referred to as '**the deceased'**) to grow and sell to it sugarcane at the deceased's parcel of land being Plot No. 145M Field No. 22 measuring 2.8 Hectares in Kajulu 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 12/10/2004 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 Respondent was to file and rely on a List of Documents and Statements without the testimony of any witness. The court thereafter 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 29/01/2017 and filed in Court on 02/03/2017:

> ***1. The learned magistrate erred in law and fact when he dismissed the appellant case or a mere ground that the appellant did not have any job completion certificate yet it was the duty of the respondent to issue the appellant with the said job completion Certificate if any.***
>
> ***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 he developed the crop. No documentary proof that the crop cycles were developed was adduced by the plaintiff. It is unlikely and improbable that there would fail to be a single document, such as a job completion certificate, showing that the plaintiff developed or cultivated a cane crop. Therefore, the failure to avail such evidence is suspect and it tarnishes the Plaintiff's claim.***
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> ***It is trite law that he who alleges must prove. The plaintiff in this case failed to prove that as a contracted farmer, he cultivated or developed any cane crop. 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 failed to harvest the plant crop and as such compromised the development of the ratoon crops. In proof of her case the Appellant relied on her oral testimony, the written statement, the Contract, the Schedule of Sugar cane prices and the Yield Assessment Report by the defunct Kenya Sugar Research Foundation. The Respondent filed the Witness statement but unlike the Appellant the statement was not tested in cross-examination.

12. The Respondent denied that the Appellant took good care of the plant crop. However, it did nothing more than making that allegation. **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 Respondent attempted to challenge the Appellant during cross-examination but the Appellant stood the test. She narrated exactly how the farm was taken care of by the deceased and herself and even stated that the plant crop eventually got burnt, but that was when it was 35 months old; long after it had matured without trace of the Respondent to harvest the crop.

13. The evidence which was before the trial court was hence adequate for the court to find that the Appellant took good care of the plant crop until it matured. The Respondent's contention that the Appellant did not maintain the crop to the required husbandry is hence for rejection. As the Respondent took the foregone position it is clear that it did not even bother to harvest the plant crop. On a preponderance of probability, the Appellant therefore proved that Respondent failed to harvest the plant crop at maturity and that the Respondent was in breach of the contract. Having failed to harvest the plant crop the development of the ratoon crops was undoubtedly compromised. Respectfully, the learned trial magistrate's finding must be interfered with.

14. 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 three cycles 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 all the three cycles and was entitled to compensation. (See **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR).**

15. According to the Yields Report the average expected cane yields over the whole area forming the Respondent's zones are clearly stated. In this case, since the Contract was entered in April 1996, the plant crop was expected to be harvested sometimes in March 1998 when the cane prices were **Kshs. 1,730/= per tonne** and the average yields were **116 tonnes per hectare**. The first ratoon crop was expected to be harvested around January 2000 when the cane prices were still at **Kshs. 1,800/= per tonne** and the average yields were **65 tonnes per hectare**. The second ratoon crop was expected in November 2001 where the average yields were **53 tonnes per hectare** and the cane prices were **Kshs. 2,015/= per tonne.**

16. The total expected earnings for the three cycles would have been **Kshs. 1,188,530/=.** That amount would however have been subjected to the would-be harvesting and transport expenses, but no indication was tendered on the then existing rates.

17. 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. 1,188,530/=.**
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> **c) The sum of Kshs. 1,188,530/= 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