REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 21 OF 2017

PERES ANYANGO OPIYO.....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. 132 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 Anyango Opiyo**, who filed **Kehancha Resident Magistrate's Court Civil Suit No. 132 of 2004** (hereinafter referred to as '**the suit'**) pleaded that by an Outgrowers Cane Agreement entered into sometimes in 1996 (hereinafter referred to as '**the Contract**') the Respondent herein, **South Nyanza Sugar Co. Ltd,** contracted the Appellant to grow and sell to it sugarcane at his parcel of land being Plot No. 241 Field No. 5 measuring 0.8 Hectares in Kogelo South 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 she took good care of the plant crop until maturity and the Respondent harvested the crop but the Respondent failed to harvest the first ratoon crop after the Appellant had successfully grown and cared for it. That, the failure to harvest the first ratoon crop compromised the development of the second ratoon crop 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, but without calling any witnesses. Parties agreed to each file its Witness Statements, Documents and Written submissions and the court adopted that as its order. The court was to decide the matter based on the aforesaid. Whereas the Appellant complied with the order, the Respondent did not. The court nevertheless rendered itself and 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 02/05/2017:

> ***1. The learned magistrate erred in law and fact when he failed to consider, evaluate and balance the pleadings, evidence and submissions thereby reaching to a wrong conclusion that the appellant had failed to prove that he developed any 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 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.***
>
> ***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 failed to harvest the first ratoon crop and as such compromised the development of the second ratoon crops In proof of her case the Appellant relied on his written statement, the Contract, the Schedule of Sugar cane prices and the Yield Assessment Report by the defunct Kenya Sugar Research Foundation. The Appellant's testimony was not controverted by any contrary evidence since the Respondent did not file any Witness statement. The foregone coupled with the fact that the Respondent admitted the existence of the contract is *prima-facie* evidence of proof of the claim. I therefore find and hold that the Appellant proved that she took care of the first ratoon crop up to maturity but the Respondent did not harvest the crop. The Respondent therefore breached the contract.

12. The issue which now renders settlement is whether the Appellant was entitled to any compensation in such circumstances. I have previously dealt with this issue. Since I have not changed my position on the same I will reiterate what I stated in **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** 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. ……'***

13. According to the Plaint and the evidence, the Appellant rightly prayed for the proceeds from the ratoon crops in accordance with the contract. There is no dispute on the size of the land as 0.5 Hectares. The Appellant further relied on the Yields Report from the now defunct **Kenya Sugar Research Foundation,** which was succeeded by the now **Kenya Agricultural and Livestock Research Authority (KALRO)** and the Respondent's Cane Prices Schedule.

14. 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 January 1996, the plant crop was expected to be harvested sometimes in December 1997 when the cane prices were **Kshs. 1,730/= per tonne** and the average yields were **121 tonnes per hectare**. The first ratoon crop was expected to be harvested around October 1999 when the cane prices were still at **Kshs. 1,730/= per tonne** and the average yields were **85 tonnes per hectare**. The second ratoon crop was expected in July 2001 where the average yields were **53 tonnes per hectare** and the cane prices were **Kshs. 2,015/= per tonne.**

15. The total expected earnings for the three cycles would have been **Kshs. 231,590/=.** 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.

16. 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. 231,590/=.**
>
> **c) The sum of Kshs. 231,590/= 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