REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 7 OF 2018

CAROLINE A. OBEL.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Senior Resident Magistrate in Rongo Resident's Magistrate's Civil Suit No. 149 of 2014 delivered on 23/01/2017)

JUDGMENT

1. The Appellant herein, **Caroline A. Obel,** filed **Rongo Resident's Magistrate's Court Civil Suit No. 149** of **2014** (hereinafter referred to as '**the suit'**) against **South Nyanza Sugar Co. Ltd,** the Respondent herein, claiming that by a Growers Cane Farming and Supply Contract dated 25/07/2004 (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. 1454 Field No. 111 in Kakmasia Sub-Location measuring 0.9 Hectare within Migori County.

2. The Appellant 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. That, the Respondent ploughed, furrowed and harrowed the land and also supplied the cane seed. 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 12/06/2014 claiming compensation for the loss of the unharvested sugar cane, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 16/07/2014 wherein it admitted the contract, but denied breach. It then put the Appellant into strict proof thereof. The Respondent further averred that it was the Appellant who was in breach of the contract by not observing the obligations on her part hence the loss. The Respondent further raised the issue of limitation of time and that the court had no jurisdiction and 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 her Statement as part of his testimony. She also produced the documents in her 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 partly allowed the suit by remedying the Appellant the value of the plant crop only. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed, and appropriate compensation be awarded, she proposed the following two grounds in the Memorandum of Appeal dated 19/02/2018 and filed in Court on 20/02/2018:

> **1. The learned trial magistrate erred in law and in fact in awarding the appellant compensation for only the plant crop, whereas the appellant's loss extended to three (3) crop cycles following the failure to harvest the plant crop.**
>
> **2. In the alternative, the trial magistrate's award in compensation was so inadequate and erroneous that he failed to take into consideration relevant factors and materials so as to arrive at a just and reasonable award.**

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 ratoon crops as she did not develop the same. She relied on previous decisions of this Court in support of her prayers.

8. The Respondent supported the judgment and prayed for the dismissal of the appeal. It also referred to several decisions in support of its position including of this Court.

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 have previously dealt with the issue of whether a farmer whose plant crop was not harvested was entitled to the proceeds from the ratoon crops. 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.***
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> ***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. ……'***

12. According to the Plaint, the Appellant prayed for the proceeds from the plant crop and the two ratoon crops in accordance with the contract. The trial court found that the Respondent breached the contract and awarded the Appellant the proceeds for the plant crop and declined any award for the proceeds for the ratoon crops. In fact, the trial court did not say anything on the ratoons crops. I therefore find and hold, with tremendous respect, that the learned trial magistrate erred in not making a finding on whether the Appellant was not entitled to any proceeds from the ratoon crop yields. From the foregone analysis the Appellant was entitled to the proceeds from the two ratoon crops as well.

13. The trial court calculated the proceeds for the plant crop on the basis of the size of the land as 0.9 Hectares which was agreed by both parties. The trial court further used the Respondent Cane Yields Schedule in calculating the yields for the plant crop. Since the Respondent did not file any Cross-Appeal I will likewise adopt the Schedule for the ratoon crops which settles it at 48.76 tonnes per hectare. Again, the price was agreed by the parties to be Kshs. 2,500/= hence I will adopt the same.

14. The Appellant would have earned gross income from each ratoon as Kshs. 109,710/= hence making a total of Kshs. 219,420/= for both ratoon yields. The said sum would ordinarily attract harvesting and transport charges under the contract but since no evidence was tendered to that effect I will not deduct the said sums.

15. Before I come to the end of this judgment I must point out that the Respondent in its submissions raised the issue of limitation of action, but I deliberately did not address it since the Respondent did not appeal on the issue hence the same was not a contested issue on appeal. However, my attention was drawn to the decision of **South Nyanza Sugar Company Ltd vs. Dickson Aoro Owuor (2017) eKLR** which I delivered on 17/02/2017. In that decision I found that the cause of action accrued as from the date of the breach of the contract. I however wish to put the position correct and state that I later reviewed that position in subsequent decisions and held that in view of the nature of the sugar contracts, and for further reasons tendered in the decisions, the cause of action instead accrue at the end of the contract period. (See **Migori High Court Civil Appeal No. 11 of 2017 Zadock N. Danda vs. South Nyanza Sugar Company Ltd (2018) eKLR** which decision was delivered on 10/05/2018 among others). As I have since then not changed my position on the matter, the decision in **South Nyanza Sugar Company Ltd vs. Dickson Aoro Owuor (2017) eKLR** does not reflect the prevailing position of this Court.

16. Having said so, the following final orders do hereby issue: -

> **a) The appeal hereby succeeds and the finding of the learned magistrate awarding Kshs. 122,500/= be and is hereby set aside accordingly;**
>
> **b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 341,920/= which amount shall attract interest at court rates from the date of filing of the Plaint;**
>
> **c) The Appellant shall have both the costs of the suit before the trial court and of the appeal.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 7th day of May 2019.

A. C. MRIMA

JUDGE

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

Mr. Ezekiel Oduk Counsel instructed by the firm of Messrs. Ezekiel Oduk & Co. Advocates for the Appellant**.**

Messrs. Otieno, Yogo, Ojuro & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant