REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 51 OF 2018

JOSHUA O. AHANYA.....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. 80 of 2014 delivered on 27/03/2018)

JUDGMENT

1. The Appellant herein, **Joshua O. Ahanya,** filed **Rongo Resident's Magistrate's Court Civil Suit No. 80** 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 22/03/2006 (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. 476 Field No. 68 in Kakmasia Sub-Location measuring 1.2 Hectares 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 10/03/2015 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 22/04/2015 wherein it denied the contract and put the Appellant into strict proof thereof. The Respondent further averred that if at all there was any such contract then the Appellant was the author of his own misfortune as he failed to properly maintain his crops to the required standards or at all to warrant the same being harvested and milled. The Respondent further prayed that, if the court finds any breach of the contract by the Respondent, then the costs of the inputs it made in accordance with the contract be deducted otherwise 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.

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 10/04/2018 and filed in Court on 23/04/2018:

> **1. The learned trial magistrate erred in law and in fact in failing to make an award (compensate) the appellant, for the loss of the appellant's two subsequent crop cycles (ratoons) following the loss and destruction of the plant crop and the said failure was illegal and unreasonable in the circumstance.**
>
> **2. In the alternative the learned trial magistrate under compensated the appellant following the breach of the contract, which contract required the respondent to harvest the appellant's three crop cycles.**

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 he did not develop the same. He relied on previous decisions of this Court in support of the 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.***
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> ***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 1.2 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. 146,280/= hence making a total of Kshs. 292,560/= 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. Consequently, the following final orders do hereby issue: -

> **a) The appeal hereby succeeds and the finding of the learned magistrate awarding Kshs. 199,680/= be and is hereby set aside accordingly;**
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> **b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 492,240/= which amount shall attract interest at court rates from the date of filing of the Plaint;**
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> **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. Moronge & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant