REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 52 OF 2016

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT

VERSUS

DAVID O. OYUGI…….....RESPONDENT

(Being an appeal from the judgment and decree by Hon. E. M. Nyagah Magistrate in Migori Magistrate's Civil Suit No. 271 of 2014 delivered on 2/08/2016)

JUDGMENT

1. The appeal herein arose from the success of **Migori Senior Principal Magistrate's Court Civil Suit No. 271** of **2014** (hereinafter referred to as '**the suit'**) wherein the Respondent herein, **David O. Oyugi**, sued the Appellant herein, **South Nyanza Sugar Co. Ltd,** claiming that by a Growers Cane Farming and Supply Contract dated 25/01/2003 (hereinafter referred to as **'the Contract'**) the Appellant contracted the Respondent to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 143A Field No. 145 in Kajulu Sub-Location measuring 1.0 Hectare within Migori County.

2. The Respondent 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 Appellant surveyed, ploughed, furrowed and harrowed the land and also supplied the cane seed and fertilizers. That, the Respondent then discharged his part of the contract until the cane was mature where the Appellant harvested the Plant Crop and also the first ratoon crop, but later the Appellant refused, neglected and ignored to harvest the second ratoon cane crop whereof the Respondent suffered loss.

3. Aggrieved by the alleged breach of the contract the Respondent filed the suit on the 28/07/2014 claiming compensation for the loss of the unharvested sugar cane, costs and interest at court rates.

4. The Appellant entered appearance and filed a Statement of Defence dated 08/09/2014 wherein it denied the contract and put the Respondent into strict proof thereof. The Appellant further averred that if at all there was any such contract then the Respondent 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 Appellant 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 Respondent 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 Appellant 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 allowed the suit by remedying the Respondent the value of the second ratoon crop. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and the suit be dismissed, the Appellant proposed three main grounds that the suit was a non-starter for want of compliance with the law on special damage claims, that the claim was not proved and the issue of interest.

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 Respondent was entitled to the proceeds for the second ratoon crop contrary to law. The Appellant 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 will begin with the issue on the competency of the suit. It was submitted that the suit was a non-starter since it did not specifically plead the claim as required of in special damage claims. I have carefully perused the Plaint and truly noted that the Respondent did not claim a specific amount of money as compensation. The Respondent however pleaded the size of his land, the expected yields and the then prevailing cane prices. A like argument was conclusively dealt with by the Court of Appeal in **John Richard Okuku vs. South Nyanza Sugar Co. Ltd (2013) eKLR** where the Court had the following to say: -

> ***In case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and which was 0.2 hectare (paragraph 3 of plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.***
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> ***The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.***
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> ***We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof.***
>
> ***Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filling suit.***

12. I therefore find and hold that the Respondent sufficiently pleaded the claim. The ground hence fails.

13. As to whether the claim was proved, the Respondent claimed for the value of the unharvested second ratoon crop. He reiterated the position in his Statement and his *viva voce* evidence before Court. The Appellant confirmed that it had harvested the plant crop and the first ratoon crop. On the second ratoon crop the Appellant, through its witness, contended that the Respondent did not develop the second ratoon crop. It is well known in the sugar sector that once the plant crop is harvested then the first ratoon crop emerges and that the harvesting of the first ratoon crop paves way to the growth of the second ratoon crop.

14. For the Appellant to have succeeded in its position then it must have adduced evidence to show that indeed the Respondent did not take good care of the second ratoon crop till maturity. The Respondent contended that he discharged his part of the contract until the second ratoon crop was ready for harvesting, but for the Appellant. I have carefully perused the contract which spells out the various obligations of the parties. **Clauses 4, 10(g)** and **11(k)** thereof deal with what happens when there is some default on the part of the Respondent. The Appellant is required to issue a notice and after the expiry of the notice period to take over the operations of the farm as to ensure a good yield and may even exercise its right to terminate the contract.

15. Having taken the position that it was the Respondent who defaulted in his contractual obligations by not taking care and properly developing the second ratoon cane, it was imperative that the Appellant proves at least two issues. First, prove that it issued actual notice or notices to the Respondent and second, that the notice(s) were served in accordance with the contract. However, no such evidence was availed by the Appellant. There is evidence that the Respondent took good care of the plant crop and the first ratoon crop until maturity and as such it was incumbent upon the Appellant to prove the alleged breach. There being no such proof the Appellant's position fails and I do hereby find and hold that it was the Appellant who failed to harvest the second ratoon crop and as such the Appellant was in breach of the contract.

16. On the value of the unharvested cane, I note that the parties relied on different Yield Reports. The Appellant produced its own Report whereas the Respondent produced a Report developed by Kenya Sugar Research Foundation. In this matter I choose to be guided by the Report developed by the Kenya Sugar Research Foundation since it is a product of extensive research undertaken by experts in the sugar sector over a long period of time unlike the other report. Therefore expected yields for the second ratoon crop were 87 tonnes per hectare. As to the unit price of the yields at maturity, DW1 testified that the first ratoon crop was harvested on 08/08/2010 and as such the second ratoon crop was expected to be ready for harvesting by May 2012 when the prices were Kshs. 4,300/=. There being no dispute on the size of the land (as 1.0 Hectare) the expected value of the second ratoon crop was Kshs. 374,100/=. By taking into account the harvesting and transport charges the net payment would have been Kshs. 314,157/=. However, since there was no appeal or cross-appeal by the Respondent I will not disturb the judgment sum.

17. On the issue of interest, I note from the Statement of Defence that the issue was not contended by the Appellant. That was the position in the evidence tendered by DW1 and as such the issue was not one of those which were for determination before the trial court. The first time the issue arose was in the Memorandum of Appeal and was canvassed in the submissions. I would have wished to add my voice on the issue of when interest ought to run from but I do not find it worth consideration here as the issue did not emanate from the pleadings. The parties did not therefore canvass the aspect before the trial court and the court was not called to render itself on the issue. I further note that the Appellant did not even file any submissions in the lower court. I hence have no benefit of the reasoning of the trial court. (See the Supreme Court of Kenya ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** and the Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR).** The much I can do in the circumstances of this case is to reiterate the position taken by the Court of Appeal in the **John Richard Okuku's case** (supra) that the

interest do run from the filing of the suit.

18. Consequently, I find that the appeal is not merited and is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 21st day of May 2019.

A. C. MRIMA

JUDGE

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

Mr. Marvin Odero Counsel instructed by the firm of Messrs. Okong'o Wandago & Co. Advocates for the Appellant**.**

Mr. Kerario Marwa Counsel instructed by the firm of Messrs. Kerario Marwa & Co. Advocates for the Respondent.

Evelyne Nyauke – Court Assistant