REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 106 OF 2016

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

-VERSUS-

LEO SINDA AKELO.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. M. M. Wachira Magistrate in Migori Magistrate's Civil Suit No. 61 of 2005 delivered on 25/10/2016)

JUDGMENT

1. The appeal herein arose from the success of **Migori Senior Principal Magistrate's Court Civil Suit No. 61** of **2005** (hereinafter referred to as '**the suit'**) wherein the Respondent herein, **Leo Sinda Akelo**, sued the Appellant herein, **South Nyanza Sugar Co. Ltd,** claiming that by a Growers Cane Farming and Supply Contract entered into sometimes in 1998 (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. 283 Field No. 9 in Kamwango Sub-Location measuring 1.1 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 plant crop was mature but the Appellant refused, neglected and ignored to harvest the plant crop whereof the development of the first and second ratoon crops were compromised and the Respondent suffered loss.

3. Aggrieved by the alleged breach of the contract the Respondent filed the suit on the 26/01/2005 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 25/02/2005 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 plant crop, plant crop and the compromised ratoons. first and second ratoon crops. 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 plant crop and the compromised ratoon crops. He reiterated the position in his Statement and his *viva voce* evidence before Court. The Appellant filed a Statement of Defence wherein it denied the contract and further denied being in breach thereof. It further pleaded that if the Respondent suffered any loss then it was a result of his own making having not taken care of the plant crop well. However, the statement of DW1 admitted the existence of the contract, but introduced the issue of the Respondent having sold the cane to a jaggery. No such averments were made in the Statement of Defence which would have ordinarily been accompanied with particulars thereof and supported by way of evidence. The issue of selling the plant crop to a jaggery was hence a non-issue in the suit. (See the Supreme Court ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** and the Court of Appeal decision in **The Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR).**

14. The upshot is that the Respondent's position was not proved otherwise. The Respondent adduced evidence that supported the cause of action in the Plaint. Several Job Completion Certificates were as well produced in support of the claim. On a preponderance of probabilities, the Respondent proved his case as pleaded.

15. Having failed to harvest the plant crop the Respondent lost the expected income therefrom as well as the income from the two ratoon crops as stipulated in the contract. He was therefore entitled to compensation. The trial court assessed the compensation properly. It was guided by the Report on Cane Yields 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 and the Cane Prices Schedule produced by the Appellant. The size of the land was also proved by a Certificate of Survey to be 1.1 Ha. The court went further and deducted the sums incurred by the Appellant under the contract and entered judgement at Kshs. 260,982/=.

16. 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 (**supra**)** and the Court of Appeal in **Independent Electoral and Boundaries Commission & Ano.** (supra). 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.

17. 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 Assistan1