REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 109 OF 2016

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

-VERSUS-

RICHARD OTIENO OMINGO.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. M. M. Wachira, Senior Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 9 of 2005 delivered on 25/10/2016)

JUDGMENT

1. **Richard Otieno Omingo,** the Respondent herein, filed **Migori Chief Magistrate's Court Civil Suit No. 9** of **2005** (hereinafter referred to as '**the suit'**) against **South Nyanza Sugar Co. Ltd,** the Appellant herein, claiming that by a Growers Cane Farming and Supply Contract entered into sometimes in 1995 (hereinafter referred to as **'the Contract'**) the Appellant contracted the Respondent herein to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 541A Field No. 98 in Kabuoro Sub-Location measuring 0.4 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 provided the Respondent with inputs and services and also supplied the cane seed. That, the Respondent discharged his part of the contract until the plant crop was ready for harvesting and that the Appellant harvested it. That, the Respondent further developed the first ratoon until maturity but the Appellant refused and/or failed to harvest it hence compromised the development of the second ratoon crop and that he suffered loss.

3. Aggrieved by the alleged breach of the contract the Respondent filed the suit on the 21/01/2005 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 admitted the contract but denied breach. It put the Respondent into strict proof thereof. The Appellant further averred that if at all there was any such breach 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 further pleaded that in the event of proof of contract then it is entitled to the costs of the inputs and services it rendered in accordance with the contract otherwise the Appellant prayed for the dismissal of the suit with costs. The parties filed their statements as well.

5. The suit was finally settled down for hearing where 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 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 allowed the suit by remedying the Respondent the value of the 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 with costs the Appellant proposed the following seven grounds in the Memorandum of Appeal dated 23/11/2016 and filed in Court on 24/11/2016: -

> **1. The learned trial magistrate erred in both law and in fact when he awarded damages for breach of contract in the sum of Kshs. 78,848/= which was an amount which had neither been pleaded nor proved at the trial as is required by law.**
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> **2. The learned trial magistrate erred in both law and in fact when he failed to take into account the proven scientific fact that sugarcane crop decreases in yield from the plant crop which yields more to the second ratoon which yields less and therefore erred when in the circumstances, he ordered the appellant to pay to the respondent, compensation on the basis of an alleged equal loss on yield in respect of each of the crop circles.**
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> **3. The learned trial magistrate erred in both law and in facts when without evidence and without finding he held that the Respondent's lost sugarcane in respect of each circle of crop when in actual fact only the plant crop which had been**

developed, had been claimed by the Respondent.

4. The learned trial magistrate erred in both law and in fact when he failed to appreciate and to give due regard to the fact that the Respondent only developed the plant crop with the assistance of the Appellant who provided in puts and carried out essential services and therefore erred in law for giving an award in respect of circles which never existed and were not even claimed by the Respondent in his pleadings.

5. The learned trial magistrate erred in both law and in fact when he awarded global compensation to the Respondent in respect of crop circles which were never developed by the Respondent and therefore never existed at all, thereby failing to take into account a relevant fact and circumstances that the Respondent was under a duty to mitigate his/her losses and in failing to apply the principle of mitigation of losses.

6. The learned trial magistrate erred in both law and in fact when after assessing damages in his judgment and awarding compensation on the basis of his such assessment, he ordered that interest on the amounts which he warded were to be calculated at court rates from the date of filing suit, as opposed to the same being calculated from the date of such assessment, thereby ending up awarding interest in an amount which was more than the award.

7. The learned trial magistrate in the circumstances therefore, and on the main decided the case against the weight of evidence, contrary to the law and known legal principles, thereby exercised his discretion wrongly when he failed to dismiss the Respondent's suit in the case below with costs.

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 awarding the value of the cane which was not pleaded and proved, that the award was not based on any evidence and that interest was to begin running from the date of judgment instead. The Appellant referred to various decisions in support of its submissions.

8. The Respondent supported the judgment and prayed for the dismissal of the appeal and also relied on various decisions as well.

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 all the issues raised in this appeal. Since I have not changed my position on any of the issues I will reiterate what I previously held in past decisions. On how pleadings ought to be drafted in a suit on breach of sugar cane contracts the decision of the Court of Appeal at Kisumu in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** comes to play where the Learned Judges stated as follows: -

In the 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.

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.

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. (emphasis added).

12. I therefore find that the suit was not bad in law.

13. As to whether the suit was proved, there is no doubt that the contract was entered into. The Appellant's witness so admitted in his statement and in his evidence before court. The Respondent's case is that he discharged his part of the contract by ensuring that the plant crop was ready for harvesting and that the Appellant harvested it. That, the Respondent developed the first ratoon drop up to maturity but the Appellant failed to harvest it thereby compromised the development of the second ratoon crop.

14. It is not in contention that the contract was in the category of company-developed contracts since the Appellant undertook all the preliminary steps including ploughing, furrowing, harrowing, supplying seed cane and fertilizers. The Respondent contended that he further

undertook all reasonable and required care and crop husbandry on the plant crop until maturity and was harvested, but the failure by the Appellant to harvest the first ratoon crop despite repeated requests.

15. The Appellant is however of the contrary position. In a turn of events, the Appellant contends in evidence that the Respondent discharged his duty of care on the first ratoon crop, but instead sold the plant crop to a jaggery. Since the issue of selling the plant crop to a jaggery was not part of the pleadings the same is for rejection. I have carefully perused the contract which spells out the various obligations of the parties. There is no evidence on how the Appellant acted in breach of the contract including any notice issued by the Appellant to that effect.

16. The analysis therefore leads me to the only reasonable finding, which I hereby find and hold, that the Appellant did not prove that the Respondent breached the contract. Conversely, there is credible evidence that the Respondent discharged his part of the obligations under the contract until the plant crop was mature and ready for harvesting and that the same was so harvested by the Appellant. There is further evidence that the Respondent developed the first ratoon crop to maturity but the Appellant failed to harvest it. The trial court was hence right in its finding that the Appellant breached the contract.

17. On the resultant remedy for the breach I have previously held in **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** that once a farmer proves that the Miller failed to harvest the plant crop at maturity then the farmer is entitled to the proceeds of the plant crop as well as the ratoon crops subject to the pleadings. Equally, when a Miller fails to harvest the first ratoon crop then the farmer is entitled to compensation for the first and second ratoon crops subject to the contract. In this case the Respondent was entitled to the proceeds of the two ratoon crop yields since the pleadings claim as such.

18. On the argument that the trial court failed to take into account the fact that yields generally decrease with the crops and that they cannot be uniform, I must first say that the issue is factual. That being so, evidence must be led to that effect. The evidence tendered on the yields was by the Appellant's Cane Yields Report and a Cane Yields Report by the defunct Kenya Sugar Research Foundation (Kesref) which were both produced as exhibits. The trial court adopted the Kesref Report as an independent report a position which I fully agree to. The Kesref Report placed the yields at the average of 87 tonnes per hectare. The trial court in its judgment settled the yields for the crops at 80 tonnes per hectare which was indeed lower than the average yields in the Kesref Report. However, since there is no cross-appeal on the issue I will not disturb the award.

19. On the issue of interest, the Court in **John Richard Okuku Oloo** (supra) settled the same. It held that interest must run from the date of filing the suit and as such the trial court did not err in making that order.

20. Having dealt with all issues raised in this appeal and there being no ground to disturb the decision of the trial court I must find and hold, which I hereby do, that the judgment is hereby affirmed and the appeal is dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 11th day of July 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 & Company Advocates for the Appellant**.**

Mr. Mwita Kerario Counsel instructed by the firm of Messrs. Kerario Marwa & Company Advocates for the Respondent**.**

Evelyne Nyauke – Court Assistant