



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 103 OF 2016

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

-VERSUS-

POLLINE A. ODIWUOR.....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. 63 of 2015 delivered on 08/12/2016)

JUDGMENT

1. The Respondent herein, **Polline A. Odiwuor**, filed **Migori Chief Magistrate's Court Civil Suit No. 63 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 1997 (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. 430E Field No. 15 in Kamwango 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 her part of the contract but the Appellant failed to harvest the first and second ratoon crops and as such she suffered loss.
3. Aggrieved by the alleged breach of the contract the Respondent filed the suit on the 26/01/2016 claiming compensation for the loss of the unharvested ratoon crops, 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 thereof and put the Respondent into strict proof. The Appellant further averred that if at all there was any such loss then the Respondent was the author of her own misfortune as she failed to properly maintain her 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. 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 her Statement as part of her testimony. She also produced the documents in her List of Documents as exhibits. The Respondent instead prayed for the value of three crops including the plant crop. 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 and the first two 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 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. 77,573.20 which was an amount which had neither been pleaded nor proved at the trial as is required by law.

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 the 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.

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 the Respondent only developed the plant crop with the assistance of the Appellant who provided inputs 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 circumstance that the Respondent was under a duty to mitigate his / her losses and 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 awarded 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 persuaded 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 filing suit. (emphasis added).

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

13. As to whether the suit was proved, the Respondent pleaded in the Amended Plaint dated 20/07/2005 for the value of the first and second ratoon crops. That was so reiterated in the Respondent's statement dated 01/01/2016. When the Respondent testified before court she instead stated that the plant crop was not harvested by the Appellant at maturity and prayed for the value of all the three crops being the plant crop and the two ratoon crops. The Amended Plaint was however not further amended.

14. A look at the pleading and the evidence on the part of the Respondent reveals a variance between the two. Whereas the Respondent prayed for compensation for only the ratoon crops in the pleading she instead sought for compensation for three crops in evidence and stated that she did not develop the ratoon crops. The Respondent as well did not aver what happened to the plant crop in the pleading, but only brought up the issue in evidence where she stated that the plant crop was not harvested at maturity. The aspect of the plant crop was therefore a non-issue in the suit and by the Respondent raising it at the trial that was tantamount to denying the Appellant an opportunity to counter the

same. As the evidence of the plant crop is foreign to and did not support the pleading, it is therefore for rejection. (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**).

15. Having rejected the evidence on the plant crop, the record is hence silent on what happened to the plant crop and that raises several unanswered questions including whether the plant crop was developed up to maturity, whether it was harvested and if so by who among others. What the record is clear about is the uncontroverted fact that the Respondent did not develop the first ratoon crop. With such a position how then could the suit based on a claim on the ratoon crops (which crops were admittedly not developed) succeed? I find and hold that in view of the state of the record the Respondent fell short of properly pleading her claim in the Plaintiff and proving it by evidence. The upshot is that the claim was not proved and respectfully the trial court erred in entering judgment against the Appellant on the unpleaded plant crop and unproved first ratoon.

16. Consequently, the appeal succeeds and the judgment rendered on 08/12/2016 be and is hereby set aside and is substituted with an order dismissing the suit with costs. The Appellant shall also have costs of the appeal.

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 Odera 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