REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CORAM: A. C. MRIMA, J.

CIVIL APPEAL NO. 95 OF 2018

BETWEEN

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

AND

RICHARD O. ODHIAMBO.....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. 105 of 2015 delivered on 23/08/2018)

JUDGMENT

1. **Richard O. Odhiambo,** the Respondent herein, filed **Cause No. 1160** of **2009** before the defunct Sugar Arbitration Tribunal (which cause was later transferred to and was assigned as **Migori Chief Magistrate's Court Civil Suit No. 105** of **2015** (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 on 08/06/2004 (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. 803A Field No. 231 in Karateng 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 cane was self-developed in that the Appellant did not provide the Respondent with any inputs and services save for the supply of the cane seed. That, the Respondent discharged his part of the contract until the plant crop was ready for harvesting but the Appellant refused and/or failed to harvest it hence compromised the development of the ratoon crops and that he suffered loss.

3. Aggrieved by the alleged breach of the contract the Respondent filed the suit claiming compensation for the loss of the unharvested three cycles of the sugar cane amounting to Kshs. 500,000/= with costs and interest at court rates.

4. The Appellant entered appearance and filed a Statement of Defence dated 06/10/2009 wherein it denied both the contract and the breach and 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 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 plant crop and the first ratoon crop and declined to award the value of the second ratoon crop on account of mitigation of loss. 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 nine grounds in the Memorandum of Appeal dated 20/07/2018 in challenging the entire judgment.

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 and also failed to take mitigation of loss into account, 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, I must observe that the Respondent indeed quantified his claim to Kshs. 500,000/= in paragraph 6 of the Statement of Claim dated 17/09/2009 filed before the Sugar Arbitration Tribunal. However, even if that was not the case still 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.***
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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.*** (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 and even admitted that the Respondent developed the cane up to maturity but contend that he instead sold it to a third party. I however note that the issue of selling the cane to a third party was not part of the Appellant's pleadings. It is an issue which came up at the trial and therefore infringed the rules on pleadings and evidence. The issue of selling the plant crop to a third party 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 in **The Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR).**

14. On his part the Respondent contend that he discharged his part of the contract by ensuring that the plant crop was ready for harvesting and that the Appellant failed to harvest it thereby compromised the development of the ratoon crops.

15. 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 further contend that he undertook all reasonable and required care and crop husbandry on the plant crop until maturity, but the Appellant failed to harvest the crop despite repeated requests.

16. 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.

17. 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 but the Appellant failed to harvest it. The trial court was hence right in its finding that the Appellant breached the contract.

18. 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.

19. As the issue of mitigation of loss is one which is hotly contested almost in every appeal and is pending determination at the Court of Appeal and that there are divergent views by the High Court, I wish to further agree with my brother **Majanja, J.** in **Kisii High Court Civil Appeal No. 60 of 2017 South Nyanza Sugar Co. Ltd vs. Donald Ochieng Mideny (2018) eKLR** when he recently (on 21/12/2018) rendered himself on the issue after considering several past decisions including some by yours truly and held that: -

15. Mitigation of damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (See African Highland Produce Limited vs. Kisorio (1999) LLR 1461 (CAK). Since the appellant did not contest the respondent's claim, it did not show how the respondent could mitigate the loss.

16. The appellant's arguments in support of the appeal were attractive but at the end of the day the respondent's case before the trial court was not contested and for this reason, I dismiss the appeal……

20. With tremendous respect to my brother Judge I reiterate the foregone herein.

21. 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.

22. The trial court in its judgment adopted the figure of 87 tonnes per hectare as the yields in calculating the loss. In fact, had the trial court used the actual figures in the Kesref Report as opposed to the average the Respondent would have earned more than what was awarded. For instance, the gross income for the plant crop would have been Kshs. 244,200/= instead of Kshs. 191,000/= and that of the first ratoon crop would instead have been Kshs. 212,500/= since the cane price was at Kshs. 2,500/= at the time the first ratoon crop would have matured. Infact had the Respondent cross-appealed I wouldn't have hesitated to award what is lawfully due to him. Therefore, even though the Appellant's argument that the yields keep on decreasing with the crop yields is correct taking into account the rising cost of the cane the award herein is reasonable.

23. 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. I must add that the Court of Appeal was alive to the fact that the lower court case had been filed in 1998 when it rendered its judgment in 2013 after a period of 15 years. The simple reason thereto is that it is well settled in law and has been so held over time that interest starts running from filing of suit in special damages claims like in this case. The Respondent was denied the use of his money for all that period and the interest remain the sole consolation. Further, if the trial court was to otherwise find that interest ought to begin running from any other date then that was a factual issue which ought to have been pleaded and proved and the Respondent given an opportunity to respond. The argument comes too late in the day and is for rejection.

24. 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 19th day of September 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