REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[CORAM: MRIMA, J.]

CIVIL APPEAL NO. 112 OF 2017

DAVID OMONDI NANJALA ……..APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD...RESPONDENT

(Being an appeal from the judgment and decree by Hon. E. M. Nyagah, Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 2197 of 2015 delivered on 05/12/2017)

JUDGMENT

1. The Appellant herein, **David Omondi Nanjala,** initially filed his claim against **South Nyanza Sugar Co. Ltd,** the Respondent herein, before the Sugar Arbitration Tribunal. That was on 13/01/2014. Upon the enactment of the **Crops Act** which repealed the **Sugar Act** the claim was transferred to and was registered as **Migori Chief Magistrate's Court Civil Suit No. 2197** of **2015** (hereinafter referred to as '**the suit'**).

2. In the suit, the Appellant pleaded that by a Growers Cane Farming and Supply Contract dated 01/07/2005 (hereinafter referred to as **'the Contract'**) the Respondent contracted the Appellant herein to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 896 Field No. 167 in Karateng Sub-Location measuring 0.8 Hectare within Migori County.

3. The Appellant further 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. The cane was self-developed. The Appellant discharged his part of the contract until the cane was mature and the Respondent harvested the plant crop. It however failed to harvest the first ratoon crop thereby compromising the development of the second ratoon. As a result, the Appellant suffered loss.

4. Aggrieved by the alleged breach of the contract the Appellant filed the suit claiming compensation for the loss of the unharvested sugar cane, costs and interest at court rates.

5. The Respondent entered appearance and filed a Statement of Defence dated 10/02/2014 wherein it denied the contract and put the Appellant into strict proof thereof. The Respondent further averred that if at all there was any such contract or breach thereof then the Appellant 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 Respondent prayed that the costs of the inputs it made in accordance with the contract be deducted in the event the claim succeeded otherwise the suit be dismissed with costs.

6. The suit was finally settled down for hearing. Both parties were represented by Counsels. The Appellant was the sole witness. The Respondent called its Senior Field Supervisor as its sole witness.

7. The trial court rendered its judgment and partly allowed the suit by remedying the Appellant the value of the first ratoon crop only. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed, and appropriate compensation be awarded, he proposed the following grounds in the Memorandum of Appeal dated 16/12/2017 and filed in Court on 18/12/2017:

> 1. The learned trial magistrate erred in law and fact when he failed to consider evidence and pleadings thereby reaching to a wrong conclusion that the Appellant was entitled only to the 1st ratoon and not the 1st and 2nd ratoons.
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> 2. The learned trial magistrate erred in law and fact when he failed to consider evidence and pleadings thereby reaching to a wrong conclusion that the Appellant's estimated yield was 50.1 tons whereas both parties pleaded and testified that the estimated yield was 81 tons.

3. The learned trial magistrate erred in law and in fact when he delivered judgment that was against the weight of evidence, and submissions by plaintiff.

4. The learned trial magistrate was biased against the Appellant.

8. Directions were taken, and the appeal was disposed of by way of written submissions where the Appellant duly complied. The Respondent did not file its submissions despite time to do so. The Appellant challenged the finding of the trial court vigorously and more so claiming that the court erred in making a finding that the Appellant was not entitled to the proceeds for the second ratoon crop.

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 noted from the record that the Appellant did not produce the documents in his List of Documents as exhibits. In **South Nyanza Sugar Co. Ltd vs. Mary A. Mwita (2018) eKLR** and Maurice **O. Okuthe vs. South Nyanza Sugar Co. Ltd (2019) eKLR** I found that a filed Witness Statement which is not formally adopted or documents in a filed List of Documents not formally produced do not form part of the evidential record and cannot be a basis of a decision. That was the Appellant's position in this case.

12. I have previously held in several decisions that a farmer whose plant crop was harvested by a miller, but the miller failed to harvest the first ratoon crop, that farmer is entitled to the value of both the first and second ratoon crops depending on the provisions of the contract and subject to proof that the farmer took due care of the first ratoon crop until maturity. However, given that the documents were filed but not produced in this case as exhibits I find that this Court lacks the basis to assess the value of the second ratoon crop. Had the Respondent raised the issue in this appeal I would have readily allowed the objection and dismissed both the suit and the appeal. However, that being not the case I will not disturb the judgment of the trial court.

13. I hereby find the appeal unmerited and is dismissed with no order as to costs since the Respondent never participated in the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of October 2019.

A. C. MRIMA

JUDGE

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

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

Messrs. Moronge & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant