REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

[CORAM: A. C. MRIMA, J]

CIVIL APPEAL NO. 63 OF 2019

CALEB OOKO AUKO.....APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Resident Magistrate in Rongo Principal Magistrate's Court Civil Suit No. 9 of 2014 delivered on 29/04/2019)

JUDGMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court vide the judgment rendered on 29/04/2019 for want of proof of the claim.

2. The Appellant herein, **Caleb Ooko Auko**, who filed **Rongo Principal Magistrate's Court Civil Suit No. 9 of 2014** (hereinafter referred to as '**the suit'**) pleaded that by an Outgrowers Cane Agreement entered into on 31/07/2006 (hereinafter referred to as **'the Contract'**) the Respondent herein, **South Nyanza Sugar Co. Ltd,** contracted the Appellant to grow and sell to it sugarcane at his parcel of land being Plot No. 1905A Field No. 172B measuring 0.3 Hectares in Kakmasia Sub-Location within Migori County.

3. It was 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 Appellant contended that he took good care of the plant crop until maturity but the Respondent failed to harvest the plant crop thereby compromising the development of the ratoon cane crops thereby resulting to loss of income. He sought for damages for breach of the contract, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 13/01/2015 and it denied the existence of the contract. The Appe;lant was put to strict proof.

5. The suit was finally settled down for hearing where both parties were represented by Counsels. The Appellant was the sole witness who testified and produced several exhibits and adopted his statement as part of his evidence. The Respondent was represented by its Senior Field Supervisor who testified as DW1 and adopted his statement as part of his evidence and also produced the documents in the List of Documents as exhibits. The court thereafter proceeded to render the judgment where it dismissed the suit with costs. It is that judgment which is the subject of this appeal.

6. The Appellant in praying that the appeal be allowed and appropriate compensation be awarded

proposed the following four grounds in the Memorandum of Appeal dated 14/05/2019 and filed in Court on 20/05/2019: -

> ***1. The learned magistrate erred in law and fact in entertaining matters/evidence of fact, adduced only at the trial by the defendant but which were never pleaded or even formed part of the defence pleadings.***
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> ***2. The learned trial magistrate erred in law and in fact in giving weight to a so-called memo dated 23/10/2009, which memo was a fabrication, was never properly served and did not terminate the contract or constitute a waiver of liability attaching on the defendant, and was purely for its own consumption.***
>
> ***3. The learned trial magistrate exhibited extreme basis in the suit to the extent of posing his own view/versions of evidence as the defence evidence, and which evidence was non-existent at the trial or even in the defence case or submissions.***
>
> ***4. The trial magistrate erred in law in failing to award the appellant damages for breach when the evidence on record clearly showed that the defendant had failed to make any harvest of the sugar cane on the ground, or absolve itself from the contract, by terminating the cane.***

7. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied.

8. 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).**

9. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal and the parties' submissions.

10. The trial court analyzed the evidence. It found that it was the duty of the Respondent to sanction the harvesting of the mature cane. That was under Clause 3.1.12 of the contract. The court went further to find that the Respondent discharged that duty. In finding so, it relied on the Respondent's Memo dated 23/10/2009 as proof of the Respondent's visit to the Appellant's land for purposes of carrying out an inspection of the cane.

11. The court further found *that '…the defence witness states that the farmer was notified but did not respond. I am inclined to believe him. By this evidence, the defendant demonstrates that there was a legitimate reason why the harvest was not and could not be done….'*

12. I will now look at the Memo in issue. It was an internal one. It originated from the Respondent's Outgrowers Extension Services Manager to the Outgrowers Accountant. The subject was '*Files pending for various reasons'*. The name of the Appellant appears in the Memo. All the files referred therein were remarked '*Crashed Abandoned*'.

13. The Memo did not deal with any visit to any of the plot numbers therein. As it was an internal memo it is not feasible that the same was served upon the Appellant. There is either no indication that the contents of the memo were availed to the Appellant. The allegation that the Appellant was orally notified were not proved. The allegation also offended Clauses 6 and 9 of the contract.

14. That aside, the memo gave the reason why the matters therein were pending settlement. It was either

the cane was abandoned or crashed elsewhere. In his filed statement, the Respondent's witness (DW1), stated that the Appellant crashed and abandoned the cane. In his testimony before court DW1 stated that the Appellant abandoned the cane. On cross-examination DW1 stated that the Appellant diverted the cane to a jaggery.

15. A look at the Statement of Defence is of relevance. The Respondent denied any contract with the Appellant. It called for strict proof thereof. However, in its evidence in court (through the statement and oral testimony) the Respondent took the position that the Appellant had abandoned the cane. It also stated that the cane was crashed to a jaggery.

16. It is well settled that in an adversarial system of litigation any evidence which does not support the pleadings is for rejection. That position was clearly emphasized by the Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where **Sylvester Umaru Onu, JSC** stated that: -

> ***….It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it…..***
>
> ***It is settled law that parties are bound by their pleadings……the court below was in error when it raised the issue contrary to the pleadings of the parties.'***

17. **Adereji, JSC** in the same case expressed himself thus on the importance and place of pleadings: -

> ***…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……***
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> ***…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.***

18. The Supreme Court as well added its voice on the legal position in a ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR.**

19. From the foregone, the evidence that the Appellant abandoned the cane and/or crashed it to a jaggery was at variance with the pleadings. It was for rejection.

20. By way of a further analysis, the Respondent initially held that it had no contract with the Appellant. It however admitted the existence of the contract in evidence. Even after the admission the Respondent held that the Appellant abandoned the cane and/or crashed it into a jaggery.

21. Regardless of the fact that the issues of cane abandonment and/or crashing into a jaggery were legally untenable still there was no iota of evidence of abandonment and/or crashing the cane to a jaggery.

22. With utmost respect to the learned magistrate, the Memo, which was not even directed to the Appellant, cannot be held to be such proof. The contract was very clear in cases of default. The Respondent did not take any action in accordance with the contract if it was true that the Appellant was in breach of any of the contractual terms.

23. On the other hand, the Appellant's position that he developed the plant crop to maturity was hence uncontroverted. Job Completion Certificates and Debit Advices were produced by both the Appellant and the Respondent. As rightly indicated by the trial court the duty to harvest the cane was to be preceded by several activities on the part of the Respondent. They included inspection of the cane, determination of

the maturity of the cane, preparation of the harvesting program and setting out the approximate expected time of harvesting. (See Clause 3.1.12 of the contract). Even without dealing with the duty to harvest the cane, there is ample evidence that the Respondent never complied with any of the said prerequisite obligations under the contract. The Respondent was therefore in breach of the contract.

24. Respectfully, the learned magistrate erred in relying on the Memo to find for the Respondent. The court ought to have instead directed its legal mind to the contractual provisions and the facts. The decision to dismiss the suit was hence reached without proper consideration of the law and the facts of the case. That decision must be interfered with. I so find.

25. I will now deal with the compensation to the Appellant in view of the breach. I have previously taken the position that in the sugar sector once a farmer proves that he/she/it developed the plant crop to maturity but the miller failed to harvest the plant crop then the farmer is entitled to the value of the expected earnings in accordance with all the crop cycles as agreed upon in the contract document. (See **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR).** I still hold that position. In this case therefore the Appellant was entitled to the earnings from the plant crop and the two ratoon crops.

26. According to the Survey Certificate the size of the plot was 0.2 Hectare. DWI's filed and produced statement indicated that cane prices were Kshs. 2,500/=. On the expected yields, the Appellant relied on a Report allegedly developed by the Respondent. The Respondent did not deny or object to the production of the Report. The Report provided that the expected yields in Kakmasia area were 119 tonnes per hectare for the plant crop, 29.3 tonnes per hectare for the first ratoon and 82.5 tonnes per hectare for the second ratoon crop. The gross expected earnings for the three cycles would have been Kshs. 115,400/=. The sum of Kshs. 5,122/45 must however be offset as indicated by DW1. The net earnings were Kshs. 110,287/55.

27. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

a) The appeal hereby succeeds and the finding of the learned magistrate dismissing the suit with costs be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 110,287/55.

c) The sum of Kshs. 110,287/55 shall attract interest at court rates from the date of filing of the Plaint;

d) The Appellant shall have costs of the suit as well as costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of November 2019.

A. C. MRIMA

JUDGE

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

Mr. Ezekiel Oduk Counsel instructed by the firm of Messrs. Oduk & Co. Advocates for the Appellant**.**

Messrs. Moronge & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant