



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[CORAM: A. C. MRIMA, J.]

CIVIL APPEAL NO. 161 OF 2016

ISAYA OJWANG ACHAR.....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 Civil Suit No. 50 of 2014 delivered on 24/10/2018).

JUDGMENT

1. The appeal subject of this judgment centres on one issue. It is whether the Respondent issued and served a warning letter to the Appellant in accordance with the contract.
2. The parties entered into a Growers Cane Farming and Supply Contract on 22/07/2004 (hereinafter referred to as '**the Contract**'). The Appellant was contracted by the Respondent to grow and sell to the Respondent sugarcane at the Appellant's parcel of land Plot No. 816C Field No. 75 in Kanyajuok Sub-Location measuring 0.5 Hectare within Migori County.
3. The contract was carried out. The plant crop and the first ratoon crop were cultivated. The Respondent then harvested them and duly paid the Appellant the value thereof. The contention which was the gist of the suit was that the Respondent failed to harvest the second ratoon crop. The Appellant claimed that he suffered loss as the crop dried up. He sued for compensation. That was in **Rongo Senior Resident Magistrate's Court Civil Suit No. 50 of 2014** (hereinafter referred to as '**the suit**').
4. The Respondent's position was that the Appellant abandoned the plot before the end of the contract. It relied on a warning letter dated 05/07/2006. It contended that the Appellant realized 24 tonnes from the plant crop and a similar yield from the first ratoon crop. That, the Appellant was paid Kshs. 1,818/35 after deductions. The Appellant then abandoned the second ratoon crop and the plot was grazed by animals.
5. Relying on the warning letter the trial court dismissed the suit. The Appellant was decreed to pay costs of the suit.
6. That was the judgment that necessitated the Appellant to file the appeal subject of this judgment.
7. Directions were taken and the appeal was disposed of by way of written submissions. Both parties duly complied. They both relied on several decisions in their rival positions.
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 considered the issue in dispute.

10. The suit was a civil claim. Pursuant to **Section 107** and **Section 109** of the **Evidence Act**, Chapter 80 of the Laws of Kenya, a party which relies on a fact must prove the existence of that fact. It is imperative to note that the Respondent averred in paragraph 7 of the Statement of Defence that the Appellant failed to develop the crop as expected under the contract.

11. The Respondent was under a duty to prove the issuance and the service of the warning letter on the Appellant. The sole Respondent's witness did not mention the letter in his filed statement. He however produced the warning letter among other documents. He reiterated the averments in the statement of defence in his testimony. He clarified that the Respondent did not terminate the contract on the basis of low yield. The reason for the termination of the contract was that the Appellant failed to maintain the crop as expected.

12. The Appellant vehemently denied receipt of the warning letter as well as the truthfulness of its contents. He also denied that he was ever in breach of the contract either as alleged or otherwise. The Appellant further maintained that it was the Respondent which was in breach of the contract by failing to harvest the second ratoon crop at maturity.

13. On the issue of receipt of the letter the Appellant referred to **Clause 9 of the Contract** and argued that the Respondent had failed to prove that the warning letter was ever served as required under the contract or at all.

14. **Clause 9** of the contract states as follows:

Any notice or demand by the Miller under this agreement shall be deemed to have been properly served upon the Grower if delivered to the Provincial Administration for onward transmission to the Grower or delivery by hand or sent by registered post or facsimile at the address of the Grower shown in this agreement. In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by registered post at 10 a.m. Seven (7) days following the date of posting (notwithstanding that it is returned undelivered) or if sent by facsimile on the completion of transmission. Where the notice or demand is sent by registered post it will be sufficient to prove that the notice or demand was properly addressed.

15. I have carefully gone through the record but did not find any evidence of service of the warning letter as required under the said Clause 9. It will therefore be without any basis for this Court to assume that service of the warning letter was effected on the Appellant. I therefore decline the Respondent's contention that it served the warning letter upon the Appellant.

16. Even if the letter would have been served pursuant to the said Clause 9, it was still the Appellant's evidence that the letter did not vitiate the contract. The Appellant contended that under **Clause 6.2** of the contract the Respondent was under a duty to remedy any breach on the part of the Appellant.

17. Clause 6.2 states as follows:

The Miller shall be entitled to upon expiry of a fourteen day notice and at its own discretion and without relieving the Grower of the obligations under this agreement, in the event that the Grower does not prepare, plant and maintain the plot and the cane in accordance with his obligations under this agreement and / or instructions and advise issued by the Miller to (but not limited to) carry out such operations on the plot which the Miller shall in its sole discretion deem necessary to ensure satisfactory yield and quality.

18. The contents of the warning letter are clear. The letter indicated how the Appellant acted contrary to the contract. It also called upon the Appellant to indicate how he was intending to clear the bills for the services rendered by the Respondent in view of the breach. The letter however did not deal with the requirements of Clause 6.2 of the contract. The Appellant was correct in that submission.

19. With tremendous respect therefore the learned trial magistrate erred in not satisfying himself that the warning letter was duly served on the Appellant. The warning letter could not hence have been the basis of disallowing the suit.

20. The Appellant contended that he maintained the crop to maturity. He however did not dispute the Respondent's averment that the plot yielded 24 tonnes both on the plant crop and the first ratoon crop. On the preponderance of probability there is evidence that the Respondent was in breach of the contract in failing to harvest the crop when it matured and as such the Appellant's suit ought to have succeeded.

21. Having found that the Appellant was entitled to judgment, the remedy available to him from the breach of contract is what the Appellant would have reasonably received as the proceeds under the contract crystallized as special damages and not damages at large or general damages. (See the Court of Appeal case of **Joseph Urigadi Kedeva vs. Ebby Kangishal Kawai Kisumu Civil Appeal No. 239 of 1997 (UR)**).

22. In this case the remedy would have been the value of the second ratoon crop yields. I will settle the yield at 24 tonnes just as on the previous crops. The price was Kshs. 2,000/= as proposed by the Respondent. The value would have been Kshs. 48,000/=.

23. On the issue of interest, the Court of Appeal in **Kisumu Civil Appeal No. 278 of 2010 John Richard Okuku Oloo v. South Nyanza Sugar Company Limited (2013) eKLR** 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. 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. 48,000/= which amount shall attract interest at court rates from the date of filing of the Plaintiff;**
- 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 instructed by the firm of Oduk & Co. Advocates for the Appellant.

Mr. Marvin Odero Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant