REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CIVIL APPEAL NO. 158 OF 2018

BETWEEN

ISAYA OWINO MBOGO.....APPELLANT

AND

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

(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Civil Suit No. 90 of 2014 delivered on 31/10/2018)

JUDGMENT

1. **Isaya Owino Mbogo,** the Appellant herein, filed **Rongo Senior Resident Magistrate's Court Civil Suit No. 90 of 2014** (hereinafter referred to as '**the suit'**) against **South Nyanza Sugar Co. Ltd,** the Respondent herein. The Appellant claimed that by a Growers Cane Farming and Supply Contract entered into on 08/06/2004 (hereinafter referred to as **'the Contract'**) the Respondent contracted the Appellant to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 347B Field No. 64C in Kakmasia Sub-Location measuring 0.2 Hectare within Migori County.

2. The Appellant 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 contract was company developed since the Respondent supplied the Appellant with farm inputs and services including cane seed. The Appellant further pleaded that he discharged his part of the contract until the plant crop was ready for harvesting but the Appellant refused and/or failed to harvest it. The plant crop dried up. The Appellant posited that he developed the first ratoon crop. At maturity it was not harvested as well. He further posited that he suffered loss.

3. Aggrieved by the alleged breach of the contract the Appellant filed the suit. He sought for compensation on the loss of the unharvested three cycles of the sugar cane amounting to Kshs. 202,500/= with costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 27/04/2015. The Respondent denied both the existence of the contract and any breach thereof. It put the Appellant into strict proof thereof. The Respondent prayed for the dismissal of the suit with costs.

5. The Respondent filed a Notice of Preliminary Objection on the jurisdiction of the trial court. It contended that the suit was statue barred by limitation. The objection was heard and ruling rendered on 01/11/2016. The objection was overruled.

6. The suit was finally settled down for hearing where both parties were represented by Counsels. The Appellant 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.

7. The trial court rendered its judgment on 31/05/2018. The suit was dismissed with costs. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and the suit be allowed as prayed the Appellant proposed 6 grounds in the Memorandum of Appeal dated 06/04/2018.

8. Directions were taken, and the appeal was disposed of by way of written submissions. Both parties duly complied. The Appellant challenged the finding of the trial court vigorously. He submitted that the court erred in improperly handling the issue of severability of the contract which had long been settled by precedent. He further submitted that the court erred by finding that the contract was illegal and void. The Appellant relied on several decisions in support of the appeal.

9. The Respondent opposed the appeal. It supported the judgment and prayed for the dismissal of the appeal with costs. It also relied on

various decisions.

10. 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).**

11. 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.

12. The central issue on this appeal was on the duty to harvest the cane at maturity. The trial court found the existence of contract. It also found that the plant crop was planted and maintained to maturity. The court further clearly reiterated the duties of the parties in respect to harvesting. In essence, the court found that the contract placed the duty to harvest the cane on the Appellant. However, the court also noted that such a duty accrued on the Appellant after the Respondent discharged some obligations including approval of maturity of the cane for harvesting, preparing a harvesting program among others.

13. The trial court further appreciated that the contract was in conflict with the **Sugar Act** on the duty to harvest the mature cane. The **Sugar Act** placed the duty on the Miller (Respondent) whereas the contract placed the duty on the farmer (Appellant). Guided by a decision of this Court the trial court found that the provision in the contract placing the duty to harvest the cane on the Appellant to be void. The court then voided the entire contract. The court further emphasized that courts ought not to enforce illegal contracts. The learned magistrate was guided by some decisions on that finding. The suit was dismissed with costs.

14. It is the above trial court's analysis which the Appellant strenuously opposed. He further submitted that the learned magistrate deliberately refused to be bound by precedent which it did not distinguish. He reminded this Court on the doctrine of *stare decisis*.

15. The Respondent supported the trial court's analysis on the duty to harvest.

16. I have in previous decisions dealt with the duty to harvest mature cane in sugar contracts. In **Migori High Court Civil Appeal No. 86 of 2016 Elena Olola vs. South Nyanza Sugar Co. Ltd (2018) eKLR** I reiterated what I had earlier on held in **Migori High Court Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR** as follows: -

> ***27. Being alive ……***
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> *18. That now brings me to the finding by the trial court that the Appellant failed to adhere to **Clause 3.1.2** of the Contract in not harvesting and delivering the cane to the Respondent. A contract document must always be considered in its entirety. The good reason for that lies in the truism that clauses in a contract tend to complement one another and one risks not getting the whole intention of the parties if a consideration or reference is put on just a portion of the document. Had the learned trial court done so, it would have come across **Clause 3.1.12** which requires the Miller (Respondent) to: -*
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> ***'Prepare the harvesting program setting out the approximate expected time of harvesting which program will be subject to changes necessitated by factors beyond the control of the Miller.'***
>
> *19. A look at **Clauses 3.1.2** and **3.1.12** of the contract places a duty upon the Respondent before the actual harvesting of the cane. That duty is for the Respondent to **'inspect the cane and determine its maturity and to prepare the harvesting program setting out the approximate expected time of harvesting'.** There is no evidence that the Respondent discharged that contractual duty in the first instance. That failure, in the face of the fact that the cane had matured, can only mean that it is the Respondent who was in breach of the contract. With tremendous respect, the finding of the learned trial Magistrate that the Appellant failed to harvest and deliver the cane to the Respondent was not only unsupported by evidence but also arrived at without a full consideration of the contract and was therefore erroneous. That finding must be interfered with.*
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> ***28. Needless to say, there are several other clauses in the contract which when cumulatively taken buttress the position that the duty to harvest the cane is the Respondent's. Further thereto, there is the Sugar Act (hereinafter referred to as 'the Act'). This Act was the applicable law by the time the contract was entered. The Act stipulated under Section 6(a) of the Second Schedule thereof, which Schedule was a creation of Section 29 of the Act, that: -***
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> *'The role of the miller is to -*
>
> *(a) Harvest, weigh at the farm gate, transport and mill the sugar cane supplied from the growers' field and nucleus estate efficiently and make payments to the sugar cane growers as scheduled in the agreement.' (emphasis added)*
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> ***29. The Act being an Act of Parliament went through all the stages of law-making until it became law in Kenya. The Act can only be subordinate to the Constitution and/or may in specific and clear instances be ousted by an express provision on another Act of Parliament. In this case there is an attempt by the contract to oust the provision of the Act. The contract is an agreement between the parties herein whereas the Act is an expression of the will of the people of Kenya through Parliament. The contract is hence subordinate to the statutory legislation. Any attempt by parties to an agreement to otherwise oust the provisions of an Act of Parliament can only be void and severable as far the attempt is concerned. The contract therefore offends the express provisions of the Act in respect to the duty to harvest the cane and as such it cannot stand in the face of the Act; it must give way***

to the Act.

17. The foregone decisions resulted from appeals against judgments by the learned magistrate who is the same in the judgment subject of this appeal. The decisions squarely dealt with the duty to harvest and the effect of the conflict between the contract and the **Sugar Act**.

18. The doctrine of *stare decisis* is a sound doctrine in the legal profession. It breeds consistency in decisions and interpretation of the law. It also aids in building public confidence in the core mandate of the Judiciary. A Court which is bound by a precedent from a higher Court must follow that precedent. That is the doctrine of *stare decisis*. There are however settled exceptions to the doctrine. They include instances where the precedent is distinguishable, where there are contradicting precedents, where the precedent has been overturned by another precedent say of a higher Court among others.

19. In any case the Court which is called to follow a precedent must clearly demonstrate how the precedent is not binding if it desires to depart therefrom. Many a times judicial officers and even Judges come across precedents which they are of contrary views. Unless the precedent is properly demonstrated to fall within the exceptions the officer has no option but to be bound by the same. The officer may lament. The officer may also express a contrary opinion. But, at the end of it all, such an officer must uphold the doctrine of *stare decisis* and yield to the precedent unless the exclusions apply.

20. I have not seen how the learned magistrate demonstrated that the precedents were not binding on him. He clearly took a different route from the one laid by the decisions which were binding on him. With respect the learned magistrate erred.

21. As the suit was dismissed on the analysis which departed from the precedents before the trial court, that finding must be interfered with.

22. Having said so, it is the duty of this Court to ascertain whether the suit was proved. It is settled that the Respondent failed to harvest the mature plant crop. That is evidence of breach of the contract. I therefore find that the Respondent breached the contract. I must say that the allegation by the Respondent that the mature cane was sold to third parties was neither pleaded nor not proved. The assertion 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).**

23. In the face of such breach the Appellant is entitled to compensation. In **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** I found 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 Appellant was entitled to the proceeds of the plant crop and two ratoon crop yields since the pleadings claim as such.

24. I have also been called to address the issue of mitigation of loss. The issue of mitigation of loss is one which is hotly contested almost in every appeal. It is also pending determination at the Court of Appeal. There are also divergent views by the High Court. My position in previous decisions has been echoed by 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.** On 21/12/2018 the Learned Judge 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.*** (emphasis added).

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

26. This Court has also been called upon to take note 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. On one hand the Appellant produced a document entitled '*Cane Productivity Sub-Location wise*'. He alleged that it was prepared by the Respondent. On the other hand, the Respondent produced its Cane Yields Report. Given that the document produced by the Appellant is not authenticated and does not show its origin unlike the one produced by the Respondent, I will be guided by the Respondent's Cane Yields Report. I will also be guided by the sole Price Schedule produced by the Respondent.

27. The acreage is agreed by both parties to be 0.2 Ha. According to the record the plant crop was planted in April 2006. It was to mature in 22 months. That was by February 2008. The cane price then was Kshs. 2,500/=. The expected yield for the plant crop was 66.56 tonnes per hectare. The expected gross income was Kshs. 33,280/=. This figure must be subjected to the cost of the Respondent's inputs and services provided and supplied to the Appellant and proved. According to the record the amount stood at Kshs. 29,150/15. The net proceeds were Kshs. 4,129/85.

28. On the first ratoon crop, the expected yield was 48.76 tonnes per hectare. The crop was expected to be mature for harvesting in May 2009. The price then was Kshs. 2,500/=. The expected income was Kshs. 24,280/=. The second ratoon crop was expected to be ready for harvesting by August 2010. By then the expected yield was 48.76 tonnes per hectare. The price then was Kshs. 3,128/=. The expected income was Kshs. 30, 504/25. The total income lost was therefore Kshs. 58,914/10.

29. 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.

30. I have also been invited to revisit the issue of limitation. I decline the invitation. The issue is not part of the grounds of appeal. The issue was also settled in November 2016 by a ruling of the court and no appeal was preferred.

31. 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. Kshs. Kshs. 58,914/10 which amount shall attract interest at court rates from the date of filing of the Plaint;

c) 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