



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CIVIL APPEAL NO. 23 OF 2018

SOUTH NYANZA SUGAR CO. LTDAPPELLANT

VERSUS

ELIZABETH ATIENO ONGORO.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. M. M. Wachira Magistrate in Migori Chief Magistrate's Civil Suit No. 600 of 2015 delivered on 27/02/2018)

JUDGMENT

1. The Appellant herein, **South Nyanza Sugar Co. Ltd**, was variously sued by sugar cane farmers in respect of tax deductions. Over time more than 1000 civil suits were filed for recovery. *Migori CMCC No. 600 of 2015 Elizabeth Atieno Ongoro v. South Nyanza Sugar Co. Ltd* (hereinafter referred to as '**the suit**') was one of them.
2. The cases were consolidated. *Migori CMCC No. 986 of 2015 William O. Omega v. South Nyanza Sugar Co. Ltd* (hereinafter referred to as '**the test suit**') was the test suit. The test suit was heard. Judgment was rendered on 17/08/2017. The Appellant was found to be liable for unlawfully deducting the alleged PIT tax. The finding on liability applied to all the other cases including the suit.
3. Resulting from judgment on liability in the test suit the parties herein filed submissions in the suit. The court then decided the issue of quantum. On 27/02/2018 the court delivered a judgment in the suit and decreed the Appellant to pay Kshs. 1,022/= with interests.
4. It is however worth-noting that at the hearing of the issue of quantum there were some cases which were dismissed on account of limitation. One of them was *Migori CMCC No. 2484 of 2015 Lorna Akoth Maende v. South Nyanza Sugar Co. Ltd*. The dismissal was appealed against. That was in *Migori HCCA No. 34 of 2018*. The appeal was heard. In a judgement delivered on 30/05/2019 this Court allowed the appeal and set aside the dismissal order. The Court ordered that each of the suits be heard independently. The reason was that the suits were based on contracts and issues of limitation of time had to be separately considered.
5. Back to the suit, upon the delivery of the judgment on 27/02/2018 the Appellant herein preferred an appeal. That is the appeal subject of this judgment.
6. The Appellant proposed 8 grounds in the Memorandum of Appeal dated 13/03/2018 and filed on 14/03/2018.
7. Directions were taken and the appeal was to be disposed of by way of written submissions. Both parties duly complied. The Appellant relied on this Court's decision in *Migori HCCA No. 34 of 2018 Lorna Akoth Maende v. South Nyanza Sugar Co. Ltd*. It reiterated that the order on liability by the lower court had been set-aside. That being so, the Appellant submitted that the impugned judgment cannot stand. It argued that as the suit was not proved then the appeal ought to be allowed and the suit be dismissed with costs.
8. The appeal was opposed. The Respondent contended that the suit was proved. The Respondent further contended that the lower court relied on the evidence on record and rightly allowed the suit. She prayed that the appeal be dismissed.
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 carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

11. There is no doubt that the issue of liability was dealt with in the test suit. The lower court then adopted that finding in its judgment under appeal. In view of this Court's finding in *Migori HCCA No. 34 of 2018 Lorna Akoth Maende v. South Nyanza Sugar Co. Ltd* the finding on liability cannot stand. As a result, the finding on quantum cannot as well stand. The suit must be heard afresh where the trial court will properly address all issues in contention.

12. I have been instead urged to allow this appeal and dismiss the suit. It is argued that the suit was not proved in the first instance. I still hold the position that justice will be best served on rehearing of the suit.

13. Finally, I make the following orders: -

(a) The appeal be and is hereby allowed and the judgment delivered on 27/02/2018 in Migori CMCC No. 600 of 2015 be and is hereby set-aside;

(b) The suit shall be remitted back to the trial court for purposes of hearing;

(c) The Respondent shall bear the costs of this 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. Marvin Odero Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Appellant.

Mr. Kerario Marwa Counsel instructed by the firm of Messrs. Kerario Marwa & Co. Advocates for the Respondent.

Evelyne Nyauke – Court Assistant