REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CIVIL APPEAL NO. 105 OF 2016

SOUTH NYANZA SUGAR CO. LTD...............................APPELLANT

-VERSUS-

ZEDEKIAH YOGO MBUYI..RESPONDENT

(Being an appeal from the judgment and decree by Hon. M. M. Wachira, Senior

Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 57 of 2005 delivered on 25/10/2016)

JUDGMENT

1. The Respondent herein, **Zedekiah Yogo Mbuyi,** filed *Migori Chief Magistrate's Court Civil Suit No. 57 of 2005* (hereinafter referred to as '**the suit'**) against **South Nyanza Sugar Co. Ltd,** the Appellant herein. He claimed that by a Growers Cane Farming and Supply Contract entered into sometimes in 1996 (hereinafter referred to as **'the Contract'**) the Appellant contracted the Respondent herein to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 2491 Field No. 7 in East Sakwa Sub-Location measuring 0.4 Hectare within Migori County.

2. The Respondent 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. That, the Appellant provided the Respondent with inputs and services and also supplied the cane seed. That, the Respondent discharged his part of the contract until the plant crop was ready for harvesting. The Appellant harvested it. That, the Respondent developed the first ratoon until maturity but the Appellant refused and/or failed to harvest it hence compromised the development of the second ratoon crop and that he suffered loss.

3. Aggrieved by the alleged breach of the contract the Respondent filed the suit on the 27/01/2005 claiming compensation for the loss of the unharvested sugar cane, costs and interest at court rates.

4. The Appellant entered appearance and filed a Statement of Defence dated 16/11/2005 wherein it denied the contract and the breach. It put the Respondent into strict proof thereof. The Appellant further averred that the Respondent in collusion with its dishonest employees falsely generated the Appellant's standard form agreement book, filled in false and fraudulent entries purposely to defraud the Appellant.

5. The Appellant prayed for the dismissal of the suit with costs. The parties filed their statements as well.

6. The suit was finally settled down for hearing where both parties were represented by Counsels. The Respondent was the sole witness who testified and adopted his Statement as part of his testimony. He however did not produce the documents in his List of Documents as exhibits. The Appellant called its Senior Field Supervisor as its sole witness. The witness did not adopt his statement as part of his evidence. He however produced the documents as exhibits.

7. The trial court rendered its judgment and allowed the suit by remedying the Respondent the value of the first and second ratoon crops. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and the suit be dismissed with costs the Appellant proposed the following 7 grounds in the Memorandum of Appeal dated 23/11/2016 and filed in Court on 24/11/2016: -

> **1. The learned trial magistrate erred in both law and in fact when he awarded damages for breach of contract in the sum of Kshs. 78,848/= which was an amount which had neither been pleaded nor proved at the trial as is required by law.**
>
> **2. The learned trial magistrate erred in both law and in fact when he failed to take into account the proven scientific fact that sugarcane crop decreases in yield from the plant crop which yields more to the second ratoon which yields less and therefore erred when in the circumstances, he ordered the appellant to pay to the respondent, compensation on the basis of an alleged**

equal loss on yield in respect of each of the crop circles.

3. The learned trial magistrate erred in both law and in facts when without evidence and without finding he held that the Respondent's lost sugarcane in respect of each of each circle of crop when in actual fact only the plant crop which had been developed, had been claimed by the Respondent.

4. The learned trial magistrate erred in both law and in fact when he failed to appreciate and to give due regard to the fact that the Respondent only developed the plant crop with the assistance of the Appellant who provided in puts and carried out essential services and therefore erred in law for giving an award in respect of circles which never existed and were not even claimed by the Respondent in his pleadings.

5. The learned trial magistrate erred in both law and in fact when he awarded global compensation to the Respondent in respect of crop circles which were never developed by the Respondent and therefore never existed at all, thereby failing to take into account a relevant fact and circumstance that the respondent was under a duty to mitigate his/her losses and in failing to apply the principle of mitigation of losses.

6. The learned trial magistrate erred in both law and in fact when after assessing damages in his judgment and awarding compensation on the basis of his such assessment, he ordered that interest on the amounts which he warded were to be calculated at court rates from the date of filing suit, as opposed to the same being calculated from the date of such assessment, thereby ending up awarding interest in an amount which was more than the award.

7. The learned trial magistrate in the circumstances therefore, and on the main decided the case against the weight of evidence, contrary to the law and known legal principles, thereby exercised his discretion wrongly when he failed to dismiss the Respondent's suit in the case below with costs.

8. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied. The Appellant challenged the finding of the trial court vigorously and more so claiming that the court erred in awarding the value of the cane which was not pleaded and proved, that the award was not based on any evidence and that interest was to begin running from the date of judgment instead. The Appellant referred to various decisions in support of its submissions.

9. The Respondent supported the judgment and prayed for the dismissal of the appeal and also relied on various decisions as well.

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. I have previously dealt with all the issues raised in this appeal. Since I have not changed my position on any of the issues I will reiterate what I previously held in past decisions. On how pleadings ought to be drafted in a suit on breach of sugar cane contracts the decision of the Court of Appeal at Kisumu in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** comes to play where the Learned Judges stated as follows: -

> ***In the case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and which was 0.2 hectare (paragraph 3 of plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.***
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> ***The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.***
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> ***We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof.***
>
> ***Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filling suit.*** (emphasis added).

13. I therefore find that the suit was not bad in law.

14. As to whether the suit was proved, there is no doubt that the contract was entered into. The Appellant's witness so admitted before court. The Respondent's case is that he discharged his part of the contract by ensuring that the plant crop was ready for harvesting and that the Appellant harvested it.

15. The Appellant denied the Respondent’s averments. The Appellant in particular denied that any ratoon crops were developed. It contended that the Respondent was acting in cahoots with fraudsters to defraud the Appellant. It put the Respondent into proof of the claim. It also contended that the Respondent abandoned the plant crop. The Appellant further pleaded that as a result of the abandonment there was no cane of economic value to be harvested and milled.

16. The Appellant however fell short of adducing evidence in support of its position. In particular, there was no evidence that the Appellant invoked Clause 4 of the contract. The Appellant did not also prove the allegation of fraud.

17. The foregone unveils the Respondent’s position that the Appellant failed to harvest the cane as true. That was a breach of the contract. The trial court therefore did not err in that finding.

18. As regards the compensation, I will first address the issue of the Respondent’s List of Documents which was filed but the documents were not produced as exhibits.

19. I have previously dealt with such a state of affairs 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 held in the said decisions that a Witness Statement filed but not adopted as part of the evidence by the maker and documents filed in a List of Documents but not produced as exhibits do not form part of the evidential record in a suit. They cannot be a basis of a decision.

20. But, what was the position of the Appellant on documents? The Appellant’s witness was DW1 who testified on 23/08/2016. He produced 2 exhibits. They were a Cane Yields Report by Kesref as Exhibit 1 and a Cane Prices Schedule as Exhibit 2.

21. The record therefore had the contract, the Cane Yields Report and the Cane Prices Schedule as exhibits. The contract which was produced by consensus had the size of the land as 0.4 Ha. With such documents on record the position in this matter is hence distinguishable from the position I held in **South Nyanza Sugar Co. Ltd vs. Mary A. Mwita** (supra) and **Maurice O. Okuthe** (supra).

22. With such evidence on record the trial court awarded the expected income from the first and second ratoon crops. That was what the Respondent had prayed for. The claim was proved. The court relied on the exhibits produced by the Appellant in assessing the income.

23. The trial court therefore arrived at a right award. I will not disturb the award.

24. 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.

25. Having dealt with all issues raised in this appeal and there being no ground to disturb the decision of the trial court I must find and hold, which I hereby do, that the judgment is hereby affirmed and the appeal is dismissed with costs.

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. Mwita Kerario Counsel instructed by the firm of Messrs. Kerario Marwa & Company Advocates for the Respondent**.**

Evelyne Nyauke – Court Assistant