



**Matunga v South Nyanza Sugar Company Limited (Civil Appeal
137 of 2018) [2019] KEHC 12492 (KLR) (11 December 2019) (Judgment)**

Neutral citation: [2019] KEHC 12492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 137 OF 2018
AC MRIMA, J
DECEMBER 11, 2019**

BETWEEN

JOSEPH OTIENO MATUNGA APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED RESPONDENT

*(Being an appeal from the judgment and decree by Hon. R. K.
Langat, Senior Resident Magistrate in Rongo Senior Resident
Magistrate's Civil Suit No. 205 of 2016 delivered on 17/09/2018)*

JUDGMENT

1. Joseph Otieno Matunga, the Appellant herein, filed Rongo Senior Resident Magistrate's Court Civil Suit No. 205 of 2016 (hereinafter referred to as 'the suit') against South Nyanza Sugar Co. Ltd, the Appellant herein. The Appellant claimed that by a Growers Cane Farming and Supply Contract entered into on 31/07/2006 (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. 438A Field No. 70B in Kakmasia Sub-Location measuring 0.8 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 Appellant further stated that the cane was company-developed. He posited 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 hence lost the plant crop. He further averred that the failure to harvest the plant crop compromised the development of the ratoon crops. The Appellant suffered loss.
3. Aggrieved by the alleged breach of the contract the Appellant filed the suit claiming compensation for the loss of the three cane cycles.



4. The Respondent entered appearance and filed a Statement of Defence dated 11/08/2016 wherein it denied both the contract and the breach and put the Appellant into strict proof thereof. The Respondent further averred the suit was premature. It also averred that the suit was devoid of proper pleadings and that it was incompetent for want of defined claim on specific damages. In the alternative the Appellant posited that if at all there was any such breach then the Appellant was the author of his own misfortune as he failed to employ the recommended crop husbandry to the extent that the cane was overshadowed and dwarfed by weeds and totally destroyed. The Respondent also declined the duty to harvest the mature cane, if any.
5. The Respondent prayed for the dismissal of the suit with costs.
6. The suit was finally settled down for hearing where both parties were represented by Counsels. The Appellant was the sole witness who testified through his wife and agent. The Respondent called one witness who testified and adopted his Statement as part of his testimony. He also produced the documents in his List of Documents as exhibits.
7. The trial court rendered its judgment and dismissed the suit with costs on the ground that the contract was not produced as an exhibit.
8. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and the dismissal be set aside the Appellant proposed the following 3 grounds in the Memorandum of Appeal dated 03/10/2017: -
 1. The learned trial magistrate erred in law and in fact in calling for proof of the contract by its production yet the said contract and the terms thereof was expressly admitted by the defendant and its existence was not contentious.
 2. The learned trial magistrate erred in law and in fact in failing to make any award in favour of the appellant yet there was sufficient and ample evidence on record to enable him do so.
 3. The learned trial magistrate placed an undue burden of proof on the appellant by raising the standard of proof beyond the required standard of a balance of probabilities.
9. Directions were taken, and the appeal was disposed of by way of written submissions where the Appellant duly complied. The Respondent did not. The Appellant challenged the finding of the trial court vigorously on the ground that the court erred since although the contract document was not produced the existence and the terms thereof was not denied. It was further submitted that the issue of duty to harvest had been settled in previous binding decisions. The Appellant also submitted that the duty to harvest was a non-issue. The Appellant referred to the decision in *Elena Olala vs. South Nyanza Sugar Company Limited Migori HCCA No. 86 of 2016* in support of its submission.
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 decision referred to by the Appellant.



12. It is true the Appellant did not produce the documents in his List of Documents as exhibits. He also did not adopt the statement as part of his testimony. Both the documents and the statement did not form part of the evidential record in the suit. There is also no doubt that the existence of the contract was admitted by the Respondent. The Respondent's witness so stated in his statement as well as before court. The witness relied on the documents he produced to suggest the expected yields, the size of the land in issue as well as the respective cane prices.
13. The trial court correctly handled the issue of selling the cane to jaggery. It was a non-issue as it did not find its basis from the pleadings. Therefore, the evidence of the Appellant was largely uncontroverted.
14. The trial court dismissed the suit as the contract was not produced as an exhibit. The court found itself in a dilemma on how it was to determine the issue of who was to harvest the cane. The court expressed the position that it was to follow what the parties agreed in the contract and given its absence then the suit could not stand.
15. Contrary to the position taken by the Appellant, the duty to harvest was not a non-issue. It was raised in paragraph 8 of the Statement of Defence. I also agree that the parties were at liberty to agree on how the duty to harvest the cane was to be discharged. I have severally held that regardless of what the parties would generally agree in the contract, such contracts were subject to the Sugar Act. For instance, in *Elena Olala vs. South Nyanza Sugar Company Limited* (supra) I dealt with the issue of the duty to harvest the cane as agreed by the parties vis-à-vis the provisions of the Sugar Act. I found that the duty to harvest was solely on the Miller regardless of what the contract provided. That is the position herein.
16. Having so found, it follows that the trial court did not necessarily require the contract to resolve who was duty bound to harvest the cane. Respectfully, the order dismissing the suit must be interfered with. I must however say that the unavailability of the contract remained an issue especially on areas where the parties did not concur.
17. But was the suit proved? The upshot of the Respondent's evidence is that it did not controvert the Appellant's evidence. There was no evidence to support the position taken by the Respondent in its pleadings inter alia that the Appellant did not employ the recommended crop husbandry to the extent that the cane was overshadowed and dwarfed by weeds and totally destroyed. The alleged Memo from the Outgrowers Extension Services Manager to the Outgrowers Accountant although produced did not aid the Respondent. I say so because it was an internal document from one department to another. Furthermore, there was no evidence of service of the Memo to the Appellant.
18. To the contrary, the Appellant contended that he discharged his part of the contract by ensuring that the plant crop was ready for harvesting and that the Appellant failed to harvest it thereby compromised the development of the ratoon crops. There was hence evidence that the Respondent breached the contract by failing to harvest the mature plant crop.
19. On the resultant remedy for the breach, I have previously held in Migori High Court Civil Appeal No. 10 of 2016 *South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango* (2017) eKLR 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. I must however clarify that in that case the contract document was produced as an exhibit and it provided for the period of the contract, the expected number of crop yields among many other issues.
20. As stated in this case the contract document was not produced. The evidence on the duration of the contract was stated by the Respondent's witness to be 5 years. That was in his evidence before court.



21. The Survey Certificate confirmed the size of the land to be 0.1 hectare. The Respondent produced its Yields Schedule and Cane Prices Schedule. According to the Yields Report the expected yield for the plant crop was 66.56 tonnes per hectare whereas that for the ratoon crop was 48.76 tonnes per hectare.
22. There was however the issue of the period within which the plant crop was expected to be ready. The record was silent. That being the position one cannot reasonably tell how many crops the Appellant was expected to harvest within the period of 5 years. The issue was factual and evidence ought to have been tendered in support. The Appellant failed to prove the issue. It would therefore be without any basis to assume that the Appellant expected three crops within the contractual 5 years.
23. I would have readily dismissed the appeal for non-proof of the suit. However, the Respondent's witness stated in his statement that the plant crop was sold to a jaggery. That means the plant crop was cultivated to maturity. I will therefore only award the expected earnings for the plant crop. The price shall not be the one in the Cane Prices Schedule as it is not known when the plant crop was to be ready for harvesting as to ascertain the then prevailing price. I will adopt Kshs. 2,000/= as suggested by the Respondent witness in his statement. The expected gross earnings were Kshs. 13,310/=. The sum of Kshs. 10,942/= was deductible being the cost of the services and inputs availed by the Respondent to the Appellant. The net income was Kshs. 2,368/=.
24. On the basis of the foregone I hereby make the following final orders: -
 - a) The appeal hereby succeeds and the finding of the learned magistrate dismissing the suit is hereby set aside accordingly;
 - b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 2,368/=.
 - c) The sum of Kshs. 2,368/= shall attract interest at court rates from the date of filing of the suit;
 - d) The Appellant shall have both the costs of the suit as well as the costs of the appeal.Orders accordingly.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 11TH DAY OF DECEMBER, 2019.

A. C. MRIMA

JUDGE

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

No appearance - Mr. Oduk Counsel instructed by the firm of Messrs. Oduk & Company Advocates for the Appellant.

No appearance - Mr. Emukhule Counsel instructed by the firm of Messrs. Otieno Yogo Onjuro & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant

