**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENY AT MIGORI**

**CIVIL APPEAL NO. 86 OF 2016**

**ELENA OLALA.....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 Senior Resident Magistrate's Civil Suit No. 17 of 2014 delivered on 18/10/2016)***

**JUDGMENT**

1. By a Growers Cane Farming and Supply Contract dated 14/06/2006 (hereinafter referred to as '**the Contract**') the Respondent herein, **South Nyanza Sugar Co. Ltd,** contracted the Appellant herein, **Elena Olala,** to grow and sell to it sugarcane at the appellant's parcel of land Plot No. 1456 Field No. 28 in Kabuoc-Kobita Sub-Location within Migori County.

2. 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 however commenced from 04/04/2004.

3. Aggrieved by alleged breach of the contract the Appellant filed **Rongo Senior Resident Magistrate's Court Civil Suit No. 26 of 2014** (hereinafter referred to as '**the suit'**) on the 13/11/2014 claiming damages for breach of contract, compensation for the loss of three crops, costs and interest at court rates from 04/02/2004.

4. The Respondent entered appearance and filed a Statement of Defence dated 16/02/2015 denying the claim and averred that if at all the Appellant suffered any loss then the Appellant was the author of her own misfortune as she failed to properly maintain the crop to the required standard to warrant the crop to be harvested and milled. It was pleaded in the alternative that if at all any compensation was to be made it must be subject to the sum of the cost of goods and services provided by the Respondent to the Appellant as well as the eventual cost of transport and harvesting of the cane.

5. The suit was finally settled down for hearing. Both parties were represented by Counsels. The Appellant was the sole witness who testified and adopted her Statement as part of his testimony. He also produced the documents in her List of Documents as exhibits. The Respondent called its Senior Field Supervisor as its sole witness and who also adopted his Statement as part of his testimony and produced the documents in his twin Lists of Documents as exhibits as well.

6. The trial court rendered its judgment and dismissed the suit with costs on 18/10/2016 since the Appellant failed to harvest the cane as required under the contract. That is the judgment subject of this appeal.

7. The Appellant in praying that the appeal be allowed, and appropriate compensation be awarded proposed the following seven grounds in the Memorandum of Appeal dated 26/10/2016 and filed in Court on 07/11/2016:

> ***1. The learned trial magistrate erred in law in failing to find that under the contract, the duty to harvest the sugar cane lay with the respondent/defendant being the miller.***
>
> ***2. The learned trial magistrates erred in law by misconstruing and interpreting, in isolation, and also wrongly, the tenor and the effect of the provisions of clauses 3.1.2. of the contract without taking into account the meaning of those provisions entailed in clauses 2 (a), 3.5, 3.8, 3.10, 3.13, 3.1.4., 3.1.5, 3.1.7., 3.1.9., 3.1.12., 6.3.11 and 13 and there wrongly concluded that the duty to harvest sugar cane lay on the appellant plaintiff.***
>
> ***3. The learned trial magistrate erred in law in ignoring the express statutory provision of section 6 (a) of the 2nd schedule of the Sugar Act No. 10 of 2001, which provided that the duty to harvest and transport sugar cane, inter alia, lay with the respondent (miller) and not the appellant (grower).***

***4. The learned magistrate erred in law in wrongly asserting that the provisions of the contract dated 6th December, 2005 (in this case clause 3.1.2.) ousted the provisions of the national legislation (in this case section 6 (a) of the 2nd Schedule of the Sugar Act No. 10 of 2001) and demonstrated thereby a fundamental lack of understanding of the law the policy of the law and of the Sugar Industry.***

***5. The learned trial magistrate erred in law in failing to find that clause 3.1.2. of the contract dated 6th December, 2005 read in isolation was offensive to the statute i.e. the Sugar Act and thus illegal and therefore void and severable from the contract and not merely voidable as he asserted.***

***6. In the alternative and without prejudice to the aforestated ground 5, the trial magistrate exhibited extreme and actual bias in that having been cautioned by counsel of the effects of section 6 (a) of the 2nd schedule of the Sugar Act No. 10 od 2001, the trial magistrate irrationally, prejudicially and wrongly sought to subordinate the provisions of the statute (the Sugar Act) to those of the contract dated 6th December 2005 by concluding that the parties can and did oust, by the said contract, the relevant provisions of National Legislation (the Sugar Act).***

***7. The learned trial magistrate erred in failing to assess the damages the court would have awarded had the suit been allowed.***

8. Directions were taken, and the appeal was disposed of by way of written submissions where the Appellant duly complied with the filing of the submissions, but the Respondent did not despite having been accorded more time to do so.

9. The Appellant challenged the finding of the trial court vigorously and more so claiming that the court wrongly interpreted Clause 3.1.2 of the contract, did not consider the entire contract document, determined the suit on an unpleaded issue by finding that the Appellant was in breach of the contract by not harvesting the plant crop and hence compromising the development of the ratoon crops and that the court failed to assess damages even after it had formed the judicial opinion in dismissing the suit. Counsel relied on various decisions of this Court and others in his quest to have the appeal allowed.

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. I must acknowledge that I have in the past dealt with like appeals and settled most, if not all, of the issues raised in this appeal. I will therefore benefit from such decisions since I have not changed my position on any of the issues raised in this appeal.

12. From the judgment, the suit was unsuccessful because the Appellant failed to harvest the cane and avail it to the Respondent. The court stated that: -

***'The foundation of the plaintiff's claim is the assertion that the defendant failed in its contractual duty to harvest the subject cane. The important of clause 3.1.2 of the contract is that the suit's foundation is built on quicksand. Simply put, the defendant cannot be blamed for failure to harvest or transport the cane. The defendant therefore did not breach the contract. The legal obligation to harvest and transport cane is contractually upon the plaintiff. According to the contract, after authorizing harvest, the defendant's responsibility for the harvested cane begins once it arrives at its weighbridge.***

***Where……***

***While the practice on the ground may well be that the company harvests, this practice is not sanctioned by the contract that was executed between the parties. Previously, Contracts between the defendant Sugar Company and growers stipulated that the company could harvest. The present contract does not so stipulated.'***

13. I will first deal with the fundamental ground of whether the court determined the suit on an unpleaded issue. A look at the pleadings is hence necessary. The Appellant's claim is anchored on the allegation that the Respondent failed to harvest the cane which it had contracted her to plant upon maturity and as a result he suffered loss and was entitled to appropriate compensation. The Respondent in its defence denied ever contracting the Appellant as alleged and further denied occasioning her any loss. However, on a without prejudice, the Respondent stated that if indeed the Appellant suffered any such loss, then the Appellant was the author of her own misfortune as she failed to properly maintain the crop to the required standard to warrant the crop to be harvested and milled.

14. On the evidence by the parties, the Appellant in his testimony reiterated the contents of his plaint. She also adopted her filed written statement which corroborated her evidence as well the documents in her filed List of Documents that included the Contract, Demand letter and a Cane Yield Production Guide.

15. The Respondent tendered evidence through its Senior Field Supervisor, Richard Muok, whose duties included acquiring land for and cane development, supplying farm inputs, offering technical extension services and cane inspection. He also adopted his filed written statement wherein the existence of the contract was admitted. It was also alleged that the plant crop was harvested on 13/12/2005 where 24.611 tonnes were realized against an area of 0.6 hectare and that the Appellant was paid her net earnings of Kshs. 33,740/35. It was further alleged that the Appellant then abandoned the development of the first ratoon crop and never developed the second ratoon crop. The witness

reiterated the contents of the statement in his oral testimony and relied on the twin filed Lists of Documents as exhibits.

16. That was the evidence that backed the pleadings. From the pleadings it is settled that the main issues for determination by the trial court were whether the Appellant was duly paid her worth earnings for the plant crop and whether the Appellant abandoned the development of the first ratoon crop thereby failing to avail the crop to the Respondent. As said, the suit was however determined on the alleged failure by the Appellant to harvest and deliver the cane to the Respondent.

17. It is therefore clear that the trial court determined the suit on an issue which had not been placed before it for determination. In that case, and with tremendous respect to the trial court, the finding was without any legal basis and must be interfered with. While setting the record straight on the essence of parties being bound by their pleadings and that a court can only decide on issues that arise from the filed pleadings, the Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Slyvester Umaru Onu, JSC stated that: -

> ***'….It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it…..***
>
> ***It is settled law that parties are bound by their pleadings……the court below was in error when it raised the issue contrary to the pleadings of the parties.'***

18. Adereji, JSC in the same case expressed himself thus on the importance and place of pleadings: -

> ***'….it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……***
>
> ***…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.'***

19. The foregone position was restated and reaffirmed by the Supreme Court of Kenya in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR.** I hence find that the Appellant rightly impugned the decision of the trial court in contending that the suit was determined on an issue which had not been set before the court for determination.

20. Having so found, it is now for this Court to ascertain whether the Appellant's case was proved as required in law. The Appellant's case is that she discharged her part of the contract by ensuring that the plant crop was ready for harvesting. It is not in contention that the contract was in the category of company-developed contracts since the Respondent undertook all the preliminary steps including ploughing, furrowing and harrowing of the land and supplied the Appellant with seed cane and fertilizers. The Appellant contends that she further undertook all reasonable care and crop husbandry on the plant crop until maturity, but the Respondent despite repeated requests to harvest the cane, failed.

21. The Respondent is however of the contrary position. It contends that the Appellant was fully paid Kshs. 33,740/35 being the net earnings for the plant crop. In support thereof, the Respondent relied of its Statement of Account in respect of the Appellant which was produced as an exhibit. I have carefully considered its contents. Whereas the Statement confirms that the Appellant dealt with the Respondent as per the contract and that cane harvesting for the plant crop was done sometimes in December 2006 whose net worth was Kshs. 33,740/35 and which amount was to be paid into an NBK Bank Account in Awendo, there is no evidence of the Account number neither was it proved that the money was paid to the Appellant. In any event, the Statement of Account was the Respondent's internal document which the Appellant had no role to play in its preparation. It therefore remains that the Respondent did not prove the contention that it fully paid the Appellant for the plant crop.

22. The foregone must be understood in the context that the Respondent's oral evidence and the written statement were not in tandem with the Statement of Defence. That means the oral evidence and the written statement are of no evidential strength since they are at variance with the Statement of Defence. They are and are hereby disregarded.

23. I have also carefully perused the contract which spells out the various obligations of the parties. **Clause 3** thereof stipulates the obligations of the Appellant as well as of the Respondent. **Clause 6.2** deals with what happens when there is some default on the part of the Appellant likely to affect the crop. It states as follows: -

> ***'6.2 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."***

24. It was hence an express provision of the contract that upon any default on the part of the Appellant likely to affect the crop that the Respondent was to issue a 14 days' notice to the Appellant to remedy the default. The notice was to be served upon the Appellant as provided for under **Clause 9**. There is no doubt the notice was to be in writing. Having taken the position that it was the Appellant who defaulted in his contractual obligations by not taking care and properly developing the cane, it was imperative that the Respondent proves at least two issues. First, prove that it issued actual notice or notices to the Appellant and second, that the notice(s) were served in accordance

with the contract. However, no such evidence was availed by the Respondent.

25. Another equally important issue relates to when the contract was executed. There is no dispute that the contract was executed on 14/06/2006 but it was deemed to have commenced on 04/04/2004. The execution was done 26 months post the commencement date. According to the contract the plant crop was by then mature and ready for harvesting. The question which now begs an answer is whether the Respondent entered into the contract if the plant crop, which was then fully mature, was so poorly maintained as alleged? I do not think so.

26. The analysis leads me to the only reasonable finding, which I hereby find and hold, that the Appellant was not in breach of his contractual obligations as alleged by the Respondent. Going by the Respondent's position in its pleading that the plant crop was not properly cared for as to realize any meaningful yields, it goes without say that the Respondent never bothered to deal with the aspect of harvesting; in other words, the Respondent never harvested the plant crop.

27. Being alive to the truism that the duty to harvest the cane was not contested, I will nevertheless revisit the issue for completeness of this appeal and for purposes of settling the contrast between the contract and the Sugar Act more so given that the Appellant has substantially submitted on the issue and that the issue formed part of the impugned judgment. I have in previous decisions considered the duty to harvest the cane under such a contract. Since I still hold that position I reproduce what I partly stated in the **Migori High Court Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR** thus: -

> *'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: -*
>
> ***'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.*

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: -

> ***'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)

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 i**n 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**.

30. Having found that it was the Respondent who breached the contract by not harvesting the plant crop after the Appellant had fully developed it to maturity, I must now consider if the Appellant is entitled to any remedy in law. I previously dealt with this aspect in the case of **Migori High Court Civil Appeal No. 138 of 2015 South Nyanza Sugar Co. Ltd vs. Hilary M. Marwa (2017) eKLR** when I expressed myself as follows: -

> *'15. I recall having dealt with this issue at length in **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited**. In that case I found that there can be no award of general damages for a claim on breach of contract. However, the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred (restitution in integrum'). The measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time the contract was made and that such damages are not at large but in the nature of special damages. I substantiated those findings with various case law. I must say that I am still of that position.'*

31. In **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited (2017) eKLR** I also dealt with how special damages ought to be ascertained in cases of contracts like the one before this Court. This is what I stated: -

*"22. I am therefore of the very considered view that looking at the nature of the Contract and how the loss occurred, the above Appellant's averment was adequate to make a court assess the special damages accordingly. In affirming the position, the Court in the* ***John Richard Okuku Oloo*** *(supra) had the following to say:*

> ***"In 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.***
> >
> > ***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."***

32. The Appellant particularized his claim under paragraph 7 of the Plaint based on the acreage of 1.5 hectares, the expected yield of 135 tonnes per hectare and the price of Kshs. 2,500/= per hectare. The Respondent took the position that the acreage was 0.6 hectare, the expected yield for the plant crop was 66.56 tonnes per hectare and the ratoon crops were to yield 48.76 tonnes per hectare at a price of Kshs. 2,000/= per tonne.

33. On the acreage, the Appellant pleaded 0.9 hectare in paragraph 3 of the Plaint and 1.5 hectares in paragraph 7 of the Plaint. The contract produced by the Appellant provides the area as 1.5 hectares. The acreage was inserted by hand in the contract and the Plaint was not amended. The Respondent availed a similar contract which was blank on the acreage. The Respondent's witness however contested that the acreage was 0.6 hectare. I have perused the exhibits produced but apart from the contract produced by the Appellant there is no other document which has the acreage. The contract describes the 'Plot' under Clause 1 as the land described in Schedule 'A' of the contract. Schedule A is a descriptive part of the contract with blank spaces to be filled preferably by hand. The fact that the contract produced by the Appellant had the acreage inserted by hand does not therefore raise any eyebrows. The only issue is the way the Appellant pleaded two sizes of the plot in the Plaint.

34. Looking at the Plaint and Clause 13 of the contract wholesomely I find that paragraph 3 thereof referred to the contract whose acreage was 1.5 hectares. That is the acreage the Appellant used to particularize the loss and damage she suffered in paragraph 7 of the Plaint. Since the contract produced by the Appellant was not contested and the one produced by the Respondent has no such acreage at all, I find that the Appellant proved, on the balance of probability, that the acreage of the plot was 1.5 hectares.

35. On the price of the cane, the Appellant did not provide any evidence thereof. On its part, the Respondent relied on its Cane Produce Prices Schedule which was also produced in evidence with the consent of the Appellant. I will hence be accordingly guided by that Schedule. Lastly on the expected yield the Appellant relied on a document she claimed to be the Respondent's Sugar Cane Productivity Schedule. The Respondent availed two documents on this issue. One was its Cane Yields in Out growers Schedule and the other was a Cane Yields Schedule developed by the Kenya Sugar Research Foundation. I have considered the document relied upon by the Appellant and I cannot agree to be guided by it. I say so because the document does not disclose its source; it contains some schedules on a plain paper. As such Its source cannot be verified as well as its contents. In this matter I will be guided by the Cane Yields Schedule developed by the Kenya Sugar Research Foundation since it is a product of extensive research undertaken by experts in the sugar sector over a long period of time.

36. According to the contract the plant crop was expected to be ready for harvesting by April 2006 at most. By that time the price was Kshs. 2,000/= per tonne and the expected yield was 80 tonnes per hectare. The expected income was therefore Kshs. 240,000/=. Out of this amount the expenses incurred by the Respondent for fertilizer supply, seed cane supply, transport and harvesting charges amounted to Kshs. 115,200/= thereby rendering a net income of **Kshs. 124.800/=**. The first ratoon crop was expected to be harvested in February 2008. By then the price was Kshs. 2,500/= per tonne with the other variables remaining constant. The gross earnings were Kshs. 300,000/= and upon discounting the transport and harvesting charges the net earnings stand at **Kshs. 210,000/=.** And lastly the second ratoon crop was expected to be harvested by December 2009. By then the price was Kshs. 2,850/= per tonne with the other variables likewise maintaining constancy. The net income stood at **Kshs. 252,000/=.** The total earnings from the contract were **Kshs. 586, 800/=** for which I hereby enter judgment for the Appellant as against the Respondent. This sum shall attract interest from the date of filing of the Plaint.

37. 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. 586, 800/= 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 10th day of May 2018.**

**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.**

**Messrs. Moronge & Company Advocates for the Respondent.**

**Evelyne Nyauke – Court Assistant**