REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 13 OF 2017

MONICA ANYANGO MIRANDA.....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. 56 of 2014 delivered on 17/01/2017)**

JUDGMENT

1. By a Plaint filed in Rongo **Senior Resident Magistrate's Court Civil Suit No. 56 of 2014** (hereinafter referred to as '**the suit'**) on the 10/03/2015, the Appellant herein, **Monica Anyango M iranda,** claimed damages for breach of contract, compensation for the loss of three crops, costs and interest at court rates from **South Nyanza Sugar Co. Ltd,** the Respondent herein.

2. The suit was premised on an alleged Growers Cane Farming and Supply Contract dated 08/09/2005 (hereinafter referred to as '**the Contract**') wherein it was averred that the Respondent contracted the Appellant to grow and sell to it sugarcane at the appellant's parcel of land Plot No. 1228C Field No. 217 in South Kakmasia Sub-Location within Migori County.

3. It was further averred 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.

4. The Respondent entered appearance and filed a Statement of Defence dated 27/04/2015 wherein it denied the existence of the contract and pleaded in the alternative that if such a contract is proved 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.

5. The suit was finally settled down for hearing where it proceeded *exparte*. The Appellant was the sole witness who testified and adopted her Statement as part of his testimony. She also produced the documents in her List of Documents as exhibits which included the contract, a demand letter, a Can Productivity Schedule, a Survey Certificate and a Job Completion Certificate. The Respondent opted not to take part in the proceedings citing some alleged irregularities.

6. The trial court rendered its judgment and dismissed the suit with costs on 17/01/2017 on the ground that 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 five grounds in the Memorandum of Appeal dated and evenly filed on 08/02/2017: -

> **1. The learned trial magistrate erred in law and in fact by completely misinterpreting the provision of the contract as regards the duties and responsibilities of the Respondent to harvest the sugar cane subject matter of an outgrower agreement between the parties.**
>
> **2. The learned trial magistrates erred in law and in fact by failing to appreciate that the duty to harvest sugar cane as in the contract between the appellant and the defendant, was a statutory as well as contractual duty and that in all circumstances of the case the statutory duty and obligations prevailed.**
>
> **3. The learned magistrate erred in law and in fact in deciding on issues not raised in the trial and even then end ed up deciding on the issue wrongly both against the law, contract and custom.**
>
> **4. The learned trial magistrate exhibited actual and extreme bias in the suit by adopting a guillotine approach to this suit and others then to be decided by rendering a "cut and paste judgment" to the detriment of the appellant and other litigants.**

5. The learned trial magistrate erred in failing to assess the damages that would have been awarded had the appellant succeeded in the suit.

8. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions.

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 and failed to uphold the custom in the sugar industry, 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. The Respondent vehemently opposed the appeal. It contended that the duty to harvest the cane rested with the Appellant and as such the suit was properly dismissed. It also submitted that the Cane Productivity Schedule used by the Appellant was obsolete and that no compensation should be made for the ratoons which were not developed by the Appellant. It was also submitted that interest should run from the date of judgment. Counsel relied on two persuasive judicial decisions on the issues.

11. 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).**

12. 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.

13. 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.**

14. 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 she suffered loss and was entitled to appropriate compensation. The Respondent in its defence denied ever contracting the Appellant as alleged and further denied that it failed to harvest the cane as that was the duty of the Appellant. However, on a without prejudice, the Respondent stated that if indeed the Appellant suffered any such loss, then the Appellant was the author of his own misfortune as he failed to properly maintain the crop to the required standard to warrant the crop to be harvested and milled.

15. On the evidence by the parties, the Appellant in her testimony reiterated the contents of the Plaint. She also adopted her filed written statement which corroborated his evidence as well the documents in his filed List of Documents.

16. The Respondent did not tender any evidence.

17. That was the evidence that backed the pleadings. From the pleadings it is settled that one of the issues for determination by the trial court was whether the Appellant failed to develop the plant crop that it resulted into poor and uneconomical yields and thereby failed to harvest and avail the crop to the Respondent. As said, the suit was determined on the alleged failure by the Appellant to harvest and deliver the cane to the Respondent. In that case therefore the trial court rightly framed the issue for determination. The contention that the suit was decided on an unpleaded issue is without merit and is hereby dismissed.

18. 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. 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. The Respondent also supplied the Appellant with seed cane and fertilizers. The Appellant contended that he 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.

19. The Respondent was however of the contrary position. It contended that the Appellant did not discharge the said duty such that the plant crop was wasted and there was nothing for delivery to the Respondent. The Respondent however tendered no evidence in support of the pleadings. In that case the Appellant's case was majorly unopposed but still the Appellant remained under to prove her case on a balance of probabilty.

20. I have carefully perused the contract which spells out the various obligations of the parties. The contract was produced as an exhibit and as such the existence of a contract between the parties herein was proved. **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."**

21. 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.

22. This Court therefore finds it difficult to believe the allegation that the Appellant had defaulted in carrying out her obligations under the contract. Had that been the case I am sure the Respondent would not have hesitated to issue the necessary notices as provided under the contract.

23. 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.

24. But was it the responsibility of the Respondent to harvest the cane? 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: -

> 'I8. 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.

25. 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)

26. 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**.

27. 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.'*

28. 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.**
>
> **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."**

29. The Appellant particularized his claim under paragraph 7 of the Plaint based on the acreage of 0.1 hectare, the expected yield of 135 tonnes per hectare and the price of Kshs. 2,015/= per hectare. The Respondent took the position that the acreage was 0.1 hectare, the expected yield for the plant crop was 65 tonnes per hectare at a price of Kshs. 2,015/= per tonne. That, since the Appellant was not entitled to any compensation on the ratoons the expected net earnings were Kshs. 13,097/50 with interest from the date of judgment.

30. There is consensus that the acreage of the Appellant's land as well as the price. On the expected yield the Appellant relied on a document he claimed to be the Respondent's Sugar Cane Productivity Schedule. The Respondent although it did not file and produce any documents on this issue submitted that an average yield of 65 tonnes per hectare was reasonable. 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 proposal by the Respondent.

31. Since the acreage, yields and prices remained constant throughout the contract period then the Appellant would have realized Kshs. 13,097/50 per cycle hence **Kshs. 39,292/50** for the three cycles for which amount I hereby enter judgment for the Appellant as against the Respondent. This sum shall attract interest from the date of filing of the Plaint. I did not deduct any sums for the services provided by the Respondent as the Respondent never proved such.

32. 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. Kshs. 39,292/50 which amount shall attract interest at court rates from the date of filing of the Plaint;

d) 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. Okongo Wandago & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant