REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY

AT MIGORI

CIVIL APPEAL NO. 15 OF 2017

CORNELLY VON ODONGO.....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. 133 of 2014 delivered on 17/01/2017)

JUDGMENT

1. Arising from the dismissal of **Rongo Senior Resident Magistrate's Court Civil Suit No. 133 of 2014** (hereinafter referred to as '**the suit'**) the Appellant herein, **Cornelly von Odongo,** preferred the appeal subject of this judgment.

2. The Appellant contended that by a Growers Cane Farming and Supply Contract dated 11/02/2004 (hereinafter referred to as **'the Contract'**) the Respondent herein, **South Nyanza Sugar Co. Ltd,** contracted the Appellant herein to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 200 Field No. 26B in Kadera Kwonyo Sub-Location measuring 0.6 Hectares within Migori County.

3. It was further contended 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 Respondent ploughed, furrowed and harrowed the Appellant's land and supplied the cane seed and fertilizers. That, the Appellant discharged his part of the contract until the cane was mature, but the Respondent failed to harvest it hence suffered loss.

4. Aggrieved by the alleged breach of the contract the Appellant filed the suit on the 04/06/2014 claiming damages for breach of contract, compensation for the loss of three crops, costs and interest at court rates from 11/02/2004.

5. The Respondent entered appearance and filed a Statement of Defence dated 30/06/2014 wherein while admitting the contract denied that it failed to harvest the plant crop and contended that the Appellant harvested the plant crop without its knowledge and did not deliver it to itself as required under the contract. The Respondent further averred that if at all the Appellant suffered any 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. It was pleaded that the court did not have the jurisdiction over the dispute and that the suit was time-barred. The Respondent prayed for the dismissal of the suit with costs.

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

7. The trial court rendered its judgment and dismissed the suit with costs on 17/01/2017 since the Appellant failed to harvest the cane and deliver it to the Respondent as required under the contract. That is the judgment subject of this appeal.

8. 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 05/02/2017 and filed in Court on 07/02/2017:

> ***1. The learned trial magistrate erred in law and in fact by completely misinterpreting the provisions 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 ended 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.

9. 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 wrongly interpreted Clause 3.1.2 of the contract, did not consider the entire contract document and the custom within 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. Th Respondent contended that the suit was rightly dismissed since the suit was not proved as the Appellant did not adduce evidence to confirm that it discharged its obligations under the contract. The issue of limitation was as well raised and relied on the persuasive decision in **South Nyanza Sugar Co. Ltd vs. Dockson Aoro Owuor Migori HCCA NO. 86 of 2015** (unreported). It was also submitted that **Section 29** of the repealed **Sugar Act** bound the parties to the contractual terms and that the Appellant was duty-bound to harvest and supply the cane to the Respondent.

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.

In anticipation……

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…….'

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 him to plant upon maturity and as a result he suffered loss and was entitled to appropriate compensation. The Respondent in its statement of defence admitted entering into the contract but denied liability. It contended that the Appellant instead harvested the cane without its knowledge and failed to deliver the cane to it thereby breaching the contract.

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

16. The Respondent tendered evidence through its Field Supervisor, **Richard Muok**, whose duties included acquiring land for and cane development, supplying farm inputs, offering technical extension services and cane inspection. He admitted the currency of the contract and contended that the cane was abandoned by the Appellant and was never availed to the Respondent and that the ratoons were not developed. He also raised the issue of limitation.

17. That was the evidence that backed the pleadings. From the pleadings it is settled that the Respondent's position in the statement of defence is not in tandem with the evidence of its witness. Whereas the Respondent pleaded in the statement of defence that the Appellant harvested the cane without its knowledge and failed to deliver the cane to it, the evidence tendered in court was that the Appellant abandoned the cane. That evidence is therefore for rejection. The main issue which was for determination by the trial court was whether the Appellant harvested the cane at maturity without the knowledge of the Respondent and failed to avail it to the Respondent. As said, the suit was determined on the alleged failure by the Appellant to deliver the cane to the Respondent. The trial court hence correctly addressed itself to the issue of determination and as such the ground fails.

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 he discharged his 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, harrowing, supplying seed cane and fertilizers. The Appellant contended that he further undertook all reasonable and required care and crop husbandry on the plant crop until maturity, but the Respondent despite repeated requests to harvest the cane, failed.

19. The Respondent is however of the contrary position. It contended that the Appellant did not discharge the said duty such that the plant crop was harvested but not availed to itself. I have 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. It appears that the Respondent did nothing when it realized that the Appellant had harvested the cane and did not avail the cane to itself. The Respondent did not even formally demand for the cost of services rendered. Without losing sight of the fact that the statement of defence was not supported by any evidence, it is not convincing that the Respondent abandoned its entire investment on the Appellant's land. The Respondent being a public institution is highly unlikely to have acted in such a lack-luster manner.

20. The analysis leads me to the only reasonable finding, which I hereby find and hold, that the Respondent did not prove that the Appellant harvested the cane but failed to avail it to itself. Conversely, there is credible evidence that the Appellant discharged his part of the obligations under the contract until the cane was mature.

21. The foregone now brings me to the question of who was duty-bound 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: -

*'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.*

22. 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)

23. 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**. I hence find and hold that the duty to harvest the cane under the contract rested with the Respondent. It seems that the Respondent did not discharge that duty.

24. Having so found, 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.'*

25. 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."***

26. The Appellant particularized his claim under paragraph 7 of the Plaint based on the acreage of 0.6 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 price was Kshs. 2,500/= per tonne in 2009, the yield for the plant crop was 61.28 tonnes per hectare and 48.69 tonnes per hectare for the ratoon crops.

27. The acreage was provided in the contract as well as the Job Completion Certificates as 0.6 Hectares. Apart from the denial in the statement of defence the Respondent did not impugn the contract which was produced by the consent of the parties. That being so, I find that the acreage was 0.6 hectares as proved by the Appellant. On the price of the cane, the Appellant proposed Kshs. 2,500/- per tonne whereas the Respondent testified that it was Kshs. 2,500/- per tonne in 2009. Since none of the parties relied on any settled guide I will adopt the price of Kshs. 2,500/- per tonne. Lastly, on the expected yield the Appellant relied on a document he claimed to be the Respondent's Sugar Cane Productivity Schedule which was also produced by consent. The figures the Respondent's witness came up with during his testimony in court did not have any sound basis. They appear to have been plucked from the sky. Since the document was not impugned and in the absence of any other such document by the Respondent, this Court will be guided by the said Productivity Schedule.

28. According to the contract the plant crop was expected to be ready for harvesting by February 2006 at most. By that time the price was Kshs. 2,500/= per tonne and according to Schedule the expected yield was 105.5 tonnes per hectare. The expected income was therefore Kshs. 158, 250/=. Out of this amount the expenses which would have been incurred by the Respondent for harvesting and transport was Kshs. 21,580/- thereby rendering a net income of **Kshs. 136,670/-**. On the ratoon crops, the Schedule did not provide for any yields. I will therefore adopt the expected yield given by the Respondent's witness as 48.69 tonnes per hectare. The total expected earnings for the two ratoon crops less the said expenses would have been **Kshs. 102,910/-.** The total earnings from the contract were **Kshs. 239,580/=** 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.

29. As I come to the end of this decision, I must deal with the issue of limitation. The Respondent contended that time began running from the time of the alleged breach, that is in 2006, when the Respondent allegedly failed to harvest the plant crop and as such the suit was to be filed by February 2012 and not in June 2014. That, the suit ought to still be dismissed hence the appeal lacks any legality.

30. I dealt with this issue in the case of **Zadock N. Danda vs. South Nyanza Sugar Company Limited Migori High Court Civil Appeal No. 11 of 2017 (2018) eKLR** where after analyzing various clauses of a contract similar to the one herein and the **Limitation of Actions Act,** Cap. 22 of the Laws of Kenya I held as follows: -

> ***'18. ……..It is on that basis that I hold the position that the cause of action could only accrue five years from the commencement of the contract unless the Respondent confirmed extension of the contract duration. In the absence of such extension in this case, I find and hold that the cause of action herein arose as from 13/08/2008 and that the Appellant was at liberty to institute competent proceedings on breach of contract up to 12/08/2014.***
>
> ***19. Therefore, having filed the suit on 04/06/2014 the Appellant was well within time and as such the contention that the suit was time-barred hereby fails.***

31. Going by such analogy the cause of action herein accrued at the expiry of the 5-year contract period which was in February 2009. The Appellant was hence within time to file a suit within 6 years from February 2009 that is by February 2015. The suit filed on 04/06/2014 was hence within the statutory timelines and the ground of limitation hereby fails.

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. 239,580/= 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 12th day of July 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. Otieno, Ragot & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant