REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 52 OF 2017

DANIEL OTIENO MIGORE.....APPELLANT

-VERSUS-

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 238 of 2015 delivered on 29/03/2017)

JUDGMENT

1. On 03/12/2012 the Appellant herein, **Daniel Otieno Migore,** filed a Claim before the then Sugar Arbitration Tribunal against the Respondent herein, **South Nyanza Sugar Co. Ltd,** over an alleged breach of contract.

2. The claim was later transferred to the Migori Chief Magistrates Court and it was registered as **Civil Case No. 238 of 2015** (hereinafter referred to as '**the suit'**). The suit was heard and by a judgment rendered on 29/03/2017 the sum of Kshs. 47,061/= was awarded to the Appellant against the Respondent.

3. Arising from the judgment was an appeal by the Appellant and a Cross-Appeal by the Respondent. The Appellant preferred the following grounds of appeal in urging this Court to make a higher monetary award: -

> ***1. The learned magistrate erred in law and fact, when he deducted harvesting and transport charges from the appellant's award even after having held that the defendant did not harvest and/or transport the appellant's sugarcane.***
>
> ***2. Learned trial magistrate erred in law and in fact when he held that the appellants farm of 1.1(Ha) could have only yielded 21 tones for the 1st ratoon yet the plaintiff pleaded, testified and proved that his 1st ratoon could have yielded 110 tomes if it was harvested.***
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> ***3. The learned trial magistrate erred in law and in fact when he declined to make award to the plaintiff for the 2nd ratoon yet the plaintiff testified and proved that failure of the defendant to harvest his 1st ratoon compromised his chances of developing the 2nd ratoon.***
>
> **4.** ***The learned trial Magistrate was biased against the appellant.***

4. The Respondent preferred three grounds on the Cross-Appeal in urging this Court to dismiss the suit with costs. The grounds are: -

> ***1. THAT the learned trial magistrate erred in law and in fact when he found in favour of the Plaintiff despite the contradictory pleadings and testimony, both oral and written.***
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> ***2. THAT the learned trial magistrate erred in law and in fact by not dismissing the Plaintiff's suit having found that the Plant crop had indeed been harvested.***
>
> ***3. THAT the learned trial magistrate erred in law and in fact by disregarding and not taking into account the evidence, testimony and submissions of the Defendant in the subordinate Court.***

5. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied and relied on various decisions on their rival positions.

6. 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).**

7. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the judgment ought to stand or otherwise I will carefully revisit the record.

8. The Appellant filed a Claim together with a Statement. According to the claim the Appellant contended that he entered into a Growers Cane Farming and Supply Contract (hereinafter referred to as '**the contract'**) with the Respondent and fully discharged his obligations until the plant crop was mature; that, the Respondent refused and/or neglected to harvest the mature cane thereby causing him to suffer losses. He then claimed for the value of the plant crop and the first ratoon crop. In his filed and adopted statement the Appellant stated in part that ***'In breach of the contract and the Sugar Act 2001, the defendant harvested my plant crop, but failed to harvest my 1st and 2nd ratoon.'***

9. At the hearing of the suit the Appellant stated that ***'…...the plant crop was partially harvested. They harvested part of the shamba. They took two trucks. Th rest of the cane was not harvested. I took care of the ratoon, but it was not harvested. I am claiming the 2 ratoons and ¾ of the plant crop. I pray for compensation for the unharvested cycles.'***

10. The Respondent denied the claim and contended that if at all the Appellant suffered loss then it was a s a result of failure by the Appellant to properly maintain the crops to the required standards and not otherwise and as such the Respondent could not be blamed for such an eventuality. The Respondent did not file any Witness Statement.

11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC 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……***
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> ***…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."***

12. The Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in respect to the essence of pleadings in an election petition: -

> ***"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…...'"***

13. Going back to the pleadings and the evidence in this matter, the evidence tendered by the Appellant does not support the pleadings. The Appellant pleaded that the Respondent had failed to harvest the plant crop and the first ratoon crop. The position changed in the statement to that the Respondent had harvested the plant crop but failed to harvest the first and second ratoon crops. That position again changed during the hearing of the suit to that the Respondent harvested only part of the plant crop and abandoned the other part as well as the ratoon crop.

14. The evidence to the effect that the Respondent only harvested part of the plant crop and that on the claim for payment for the second ratoon are for outright rejection. The effect of the remainder of the evidence is that Respondent harvested the plant crop, but not the first ratoon crop. The Respondent testified that the plant crop yielded 21.79 tons and that the income thereof did not even cover the cost of the inputs and services rendered by the Respondent to the Appellant and left an outstanding balance of Kshs. 14,937/70 which remains unsettled.

15. The trial court then awarded the Appellant compensation for the first ratoon crop which the court properly worked out the value to be Kshs. 47,061/- after correctly taking into account the cost of harvesting and transport which according to the contract would ordinarily be deducted from the gross yield income. That position was expressly admitted by the Appellant in his statement.

16. The trial court therefore arrived at the right decision. Based on the law and the evidence on record I do not see how the court can be flouted. The appeal therefore fails. The Cross-Appeal likewise cannot stand.

17. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

a) The Appeal and the Cross-Appeal are hereby dismissed accordingly;

b) Each party do bear its own costs.

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. Kerario Marwa Counsel instructed by the firm of Kerario Marwa & Co. Advocates for the Appellant**.**

Mr. Bosire Counsel instructed by the firm of Moronge & Co. Advocates for the Respondent and Cross-Appellant**.**

Evelyne Nyauke – Court Assistant