



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 54 OF 2017

ESTHER BUCHERE MAKI.....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. 2207 of 2015 delivered on 29/03/2017)

JUDGMENT

1. This appeal arises from the judgment rendered on 29/03/2017 where the trial court allowed the Appellant's claim at Kshs. 124,606/-. Gravelly aggrieved by the award the Appellant herein, **Esther Buchere Maki**, raised four grounds of appeal.
2. The appeal traces its background to the Growers Cane Farming and Supply Contract dated 01/09/2006 (hereinafter referred to as '**the Contract**') wherein the Appellant contended that the Respondent herein, **South Nyanza Sugar Co. Ltd**, contracted the Appellant to grow and sell to it sugarcane at the Appellant's parcel of land being Plot No. 40 measuring 0.6 Hectares in Field No. 107 Moheto in Migori County. The Respondent admitted the existence of the contract but denied breaching its terms and contended that it was the Respondent who failed to properly maintain the crops to the required standards to warrant it harvest and mill the cane.
3. The Appellant filed a claim in the then Sugar Arbitration Tribunal (hereinafter referred to as '**the Tribunal**') on 31/08/2013 seeking a declaration that the Appellant had breached the contract by not harvesting the plant crop when it matured, compensation for the value of the unharvested sugarcane for the plant crop and 1st ratoon crop, costs and interest from the harvesting due date.
4. The claim was thereafter transferred to and registered at the Migori Chief Magistrates Court as **Civil Case No. 2207 of 2015** (hereinafter referred to as '**the suit**'). The suit was fully heard, and the lower court then rendered its judgment aforesaid. That is the judgment that necessitated the filing of the instant appeal.
5. As said, the Appellant raised four grounds of appeal which were tailored as follows: -

‘1. The learned trial magistrate erred in law and in 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 The learned trial magistrate erred in law and in fact, when he without any justifiable reason deducted 1/3 and 2/3 from the appellant's award in the 1st ratoon and 2nd ratoon respectively yet none of the parties herein submitted those figures to the learned trial magistrate.

3 The learned trial magistrate erred in law and in fact, when he made deductions of inputs and services from the Appellant's award in the plant crop which were neither pleaded nor proved by the respondents.

4 The learned trial magistrate was biased against the appellant.

6. Directions were taken, and the appeal was disposed of by way of written submissions where only the Appellant filed her submissions wherein she expounded the grounds of appeal and referred to case law.

7. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my 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 -**

8. I have carefully and keenly read and understood the proceedings and the judgment of the lower court as well as the Record of Appeal, the grounds thereof, the parties' submissions and the decisions referred thereto. I will now deal with the grounds of appeal as follows.

9. On the first and third grounds, the answer lies both in the contract and the Appellant's statement that the total cost of all services rendered by and the inputs supplied by the Respondent to the Appellant together with the harvesting charges, transport charges, among other charges were deductible from the money realized from the sale of the cane. That position is expressly provided for *inter alia* under Clauses 3.3, 3.1.10, 5, 7 of the contract and the now **repealed Sugar Act** which was the guiding Act during the contract period. Further in the Appellant's statement which was adopted as part of the Appellant's evidence, the Appellant stated that **'I have no objection to costs of inputs and services as well as harvesting and transport charges being deducted on any award the court may give me, as they would in any case have been deducted if my cane had been harvested.'** The Appellant as well admitted that the Respondent had supplied her with the seed cane and fertilizer. The Appellant further so submitted before the lower court in her written submissions that the said deductions were usually offset from the cane earnings. Among the documents produced by the consent of the parties at the trial were Schedules on the harvesting and transport charges. The trial court deducted the respective costs and charges thereof in the judgment.

10. The Appellant however took a contrary position in this appeal. She contended that the said sums ought not to have been deducted since they were not specifically pleaded and proved. She relied on several judicial decisions on the issue. My position on the submission is this: Since it is settled that all costs and expenses incurred by the Respondent during the contract were recoverable and given that the said sums can be ascertained from the evidence before court, then the court remained under an obligation to render such deductions otherwise the converse will visit an injustice to the Respondent. It is only in instances where there is no such evidence placed before court that a court is estopped from allowing the deductions. That position is so well known to the Appellant who reiterated it in her statement and submissions in the lower court.

11. I have carefully perused the contract and the Schedules alongside the evidence and I am satisfied that the trial court rightly allowed the deductions. The first and third grounds hence fail.

12. On the second and fourth grounds, I must agree with the Appellant Counsel's submission that the deductions of 1/3 and 2/3 from the award in the first and second ratoon respectively were not justified. As the matter rested on the contract and the repealed Sugar Act the court was to be guided by those instruments as well as settled customs within the sugar industry. According to the trial court the basis of the said deductions was **'..... cost factors and remoteness of time'**. This Court is at a loss as to the nature of the cost that the trial court factored. On the aspect of time, if anything, the beneficiary ought to have been the Appellant who lost her income over time. The court did not elaborate how the aspect of time favored the Respondent. The deductions remain unsupported in law and there was indeed bias towards the Appellant.

13. Since there is no Cross-Appeal and in view of the foregone, the upshot is that the Appellant was entitled to the entire awards for the ratoon crops less the deductions settled in grounds one and three. As a result, and with tremendous respect to the learned magistrate, the judgment must be interfered with. Consequently, the following final orders do hereby issue: -

- a) **The appeal hereby succeeds and the award of Kshs. 124,606/= is substituted with an award of Kshs. 270, 462/=.**
- b) **The sum of Kshs. 270, 462/= shall attract interest at court rates from the date of filing of the claim before the Tribunal;**
- c) **The Respondent shall bear the costs of this 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. Kerario Marwa Counsel instructed by the firm of Kerario Marwa & Co. Advocates for the Appellant.

Messrs. Otieno, Yogo & Co. Advocates for the Respondent.

Evelyne Nyauke – Court Assistant