



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 33 OF 2016**

**COSMAS OUMA 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 Kehancha Senior Principal Magistrate's Civil Suit No. 78 of 2004 delivered on 11/05/2016)***

**JUDGMENT**

1. So surprising is the fact that the Appellant's case in the lower court in **Kehancha Senior Principal Magistrate's Civil Suit No. 78 of 2004** (hereinafter referred to as '**the suit**') took 12 years to be determined. The suit was eventually dismissed for want of proof.
2. **Cosmas Ouma Odongo**, the Appellant herein, had filed the suit and contended that the Respondent herein, **South Nyanza Sugar Co. Ltd**, was in breach of the Growers Cane Farming and Supply Contract entered into on 20/06/1994 (hereinafter referred to as '**the Contract**') wherein the Respondent contracted the Appellant to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 223'D' Field No. 162 in Alego East Sub-Location measuring 0.3 Hectares within Migori County.
3. The Respondent 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 plant crop was mature which the Respondent harvested. That, the first ratoon crop was however destroyed by fire and could not be harvested, but upon developing the second ratoon crop the Respondent failed to harvest it at maturity hence suffered loss.
4. Aggrieved by the alleged breach of the contract the Respondent filed the suit on the 15/09/2004 claiming a declaration that the Appellant was in breach of the contract, compensation for the unharvested cane, costs and interest.
5. The Appellant entered appearance and filed a Statement of Defence dated 12/10/2004 wherein it denied the contract *in toto* and put the Respondent into strict proof of all his averments. The Appellant 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 testified and only produced the contract as an exhibit. The Cane Yield Report from Kenya Sugar Research Foundation (Kesref) was only marked for identification. It however appears that the suit was part of a series with Civil Suit No. 102 of 2004 being the lead file where pursuant to an order made on 11/05/2006 a ruling in Civil Suit No. 102 of 2004 was to apply to the suit. On 05/02/2015 the Respondent's Witness Statement and a List of Documents were adopted as the Respondent's evidence and exhibits respectively, and the suit was set for judgment where the suit was eventually dismissed. It is that dismissal that prompted the appeal.
7. The Appellant in praying that the appeal be allowed, and that the Appellant be compensated proposed the following three grounds in the Memorandum of Appeal dated 06/06/2016 and filed on 07/06/2016: -

***1. The learned trial magistrate erred in law and facts, when he failed to consider, evaluate and balance the pleadings, evidence and submissions thereby reaching to a wrong conclusion that the appellant had failed to prove that he developed 12<sup>st</sup> ratoon thereby compromising the development of 2<sup>nd</sup> ratoon.***

***2. The learned trial magistrate erred in law and in fact by purporting to raise the threshold of standard of proof to a level higher than that required by the law.***

***3. The learned trial magistrate<sup>4</sup> was biased against the Appellant.***

8. Directions were taken, and the Appellant was granted leave on 06/06/2017 to file a Supplementary Record of Appeal to introduce the Respondent's List of Documents and the Respondent's Witness Statement. I have seen copies of correspondences from the Appellant's Counsel to the Respondent's Counsel requesting for copies of the said documents for compliance purposes but seems the documents were not forthcoming even after the Respondent's undertaking to so file them on 28/06/2018 when the appeal came up for further directions. Be that as it may, the appeal was disposed of by way of written submissions where both parties duly complied with each party supporting the rival position.

9. 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**).

10. 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.

11. From the record I am satisfied that a contract was entered by the parties herein and as pleaded. As to whether the contract was breached, I have perused the evidence on record. The Appellant testified that the plant crop was indeed harvested by the Respondent and he was accordingly paid for the proceeds thereof. The Appellant however did not avail any evidence to support such an allegation. Instead the Appellant produced other farmers' statements with the Respondent. It was readily expected that the Appellant would at least produce the evidence of the payment for the plant crop if not evidence of supply of inputs and services by the Respondent. That did not however happen.

12. Even if the Appellant proved breach of the contract by the Respondent, there was still the issue of the first ratoon crop cane having been burnt at no fault of the Respondent. It was incumbent upon the Appellant to avail evidence of the extent of such an event for the trial court to at least ascertain whether anything was salvaged and whether there could be any resultant reasonable expected yields. Again, that did not happen. It is of further importance to note that the Appellant was not truthful in his pleading and the Statement wherein he deliberately concealed the fact that he had been paid for the plant crop and that the first ratoon crop was destroyed by fire and instead went ahead to claim compensation for all the three cycles. The issues only came up at the hearing. A party which is not truthful cannot expect to benefit from the due process of the law since the constitutional values of integrity and transparency under **Article 10(c)** of the **Constitution** as read with **Article 159(2)(e)** of the **Constitution** disqualifies such a party from the benefit of the law.

13. I hence agree with the learned trial magistrate that the Appellant did not prove the breach of the contract and as such the suit cannot be sustained. The dismissal of the suit is hereby affirmed, and this appeal is dismissed with costs accordingly.

14. As come to the end of this judgment I must apologize to the parties for its late delivery which was caused by this Court's engagement in the hearing and determination of election petition appeals in the month of July and the August recess which followed soon thereafter.

15. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 4<sup>th</sup> day of October, 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

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

**Messrs. Okong'o, Wandago & Company** Advocates for the Respondent.

**Evelyne Nyauke** – Court Assistant