REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY

AT MIGORI

CIVIL APPEAL NO. 60 OF 2017

DUNCAN L. SHUNGUR.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. M. M. Wachira,

Senior Resident Magistrate in Migori Senior Principal Magistrate's

Civil Suit No. 338 of 2014 delivered on 18/05/2017)

JUDGMENT

1. The Appellant herein, **Duncan L. Shungur,** filed a Plaint before the **Migori Senior Principal Magistrate's Court** which was registered as **Civil Suit No. 338** of **2014** (hereinafter referred to as '**the suit'**) against **South Nyanza Sugar Co. Ltd,** the Respondent herein, and contended that by a Growers Cane Farming and Supply Contract dated 29/04/2003 (hereinafter referred to as **'the Contract'**) the Respondent contracted the Appellant herein to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 160B Field No. 18 in Ilipashire Sub-Location measuring 1.2 Hectare within Narok County.

2. 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 Appellant ploughed, furrowed and harrowed his said land whereas the Respondent supplied the cane seed, fertilizers and other inputs. That, the Appellant discharged his part of the contract until the cane was mature, but the Respondent failed to harvest it hence suffered loss.

3. Aggrieved by the alleged breach of the contract the Appellant filed the suit on the 25/09/2014 claiming compensation for the loss of the unharvested sugar, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence and Counter-Claim dated 29/10/2014 wherein it denied the contract and put the Appellant into strict proof thereof. 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 as the suit was time-barred. The Respondent prayed for the dismissal of the suit with costs. The Respondent counterclaimed for the value of its inputs and services rendered in the event the suit succeeded.

5. 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 who also adopted his statement and produced the documents as exhibits.

6. The trial court rendered its judgment and partly allowed the suit. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed, and appropriate compensation be awarded proposed the following three grounds in the Memorandum of Appeal dated 23/05/2017 and filed in Court on 31/05/2017:

> ***1. The learned trial magistrate erred in law and in fact, when he failed to award the plaintiff for the 2nd ratoon on the rational that the plaintiff was under duty to mitigate his losses by utilizing the farm in other ways rather than for five years; even after finding that it I s the defendant who breached the contract.***
>
> ***2. The learned trial magistrate erred in law and in fact, when he deducted harvesting and transport charges from the appellant's***

award in the plant crop and 1st ratoon even after having held that the defendant did not harvest and/or transport the appellant's sugarcane.

3. The learned trial magistrate was biased against the appellant.

7. 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 erred in making a finding that the Appellant was not entitled to the proceeds for the second ratoon crop as a mitigating measure which issue was not supported by the pleadings. He also contended that the court erred in deducting the transport and harvesting charges and prayed for full compensation for all the three cycles.

8. The Respondent supported the judgment and prayed for the dismissal of the appeal.

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. I will first deal with the issue raised in the second ground of appeal, I must concur with the trial court. That is because the Appellant was very clear in his statement when he stated as follows: -

'….I am aware that the harvesting and transport charges were recoverable from the proceeds of my sugarcane in each cycle…..'

12. The Appellant again reiterated the position when he was cross-examined. The Respondent likewise reiterated that position in its evidence before court. The ground is hereby dismissed.

13. On the first ground, it is true I have dealt with the issue of mitigation of losses elsewhere. Since I have not changed my position on the same I will reiterate what I stated in **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** as under: -

'21. I will now look at whether the Respondent was in a position to mitigate loss in this type of a contract. As stated elsewhere above the contract was for a period of a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the farm whichever period shall be less. Therefore, the success of the main plant crop determines the success of the first ratoon and likewise the success of the first ratoon determines the success of the second ratoon. In other words, if the main plant crop is compromised then the ratoons will definitely be equally compromised. Hence unless the miller is in a position to foresee its failure to harvest the cane in advance and put the farmer on appropriate notice and in accordance with the Agreement, there is very little a farmer can do to salvage the situation once the miller fails to harvest the cane under the Agreement.

22. Looking at the Agreement, there are several restrictive clauses such that it would not be possible for the Respondent to take any reasonable steps to mitigate the loss unless the Appellant takes the first step in informing the Respondent of its intended breach of the Agreement. The Appellant's argument that the Respondent failed to mitigate its loss cannot stand and is hereby rejected.

23. I therefore find that the Respondent was entitled to the proceeds from the ratoons. The learned trial magistrate was hence right in awarding the expected proceeds of the first ratoon. The first ground fails…'

14. According to the Plaint, the Appellant prayed for the proceeds from the plant crop and the two ratoon crops in accordance with the contract. The trial court awarded him the proceeds for the plant crop and the first ratoon crop and declined any award for the proceeds for the second ratoon crop because of mitigation of losses. From the above holding the finding by the learned trial magistrate is hereby, and with utmost respect, set aside. The Appellant was entitled to the proceeds from the second ratoon crop as well. That being so, the net value of the proceeds for the second ratoon crop would have been Kshs. 233,961/=.

15. As to whether the court was biased on the Appellant, this court cannot certainly say so. What the trial court came up with in terms of the judgment was how it understood the matter before it and exercised its judicial mind accordingly. The fifth ground also fails.

16. 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.

17. Consequently, the following final orders do hereby issue: -

a) The appeal partly hereby succeeds and the finding of the learned magistrate awarding Kshs. 342,642/= be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. Kshs. 576,603/= 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 before the trial court and since the appeal partly succeeded each party shall bear its own costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 4th 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. Moronge & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant