REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY

AT MIGORI

CIVIL APPEAL NO. 55 OF 2017

JOHNES N. MWITA.....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 Senior Principal Magistrate's

Civil Suit No. 2206 of 2015 delivered on 20/03/2017)

JUDGMENT

1. The Appellant herein, **Johnes N. Mwita,** filed a claim before the now defunct **Sugar Arbitration Tribunal** which was later transferred to and was registered as **Migori Senior Principal Magistrate's Court Civil Suit No. 2206** of **2015** (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 01/03/2004 (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. 98A Field No. 1 in Moheto Sub-Location measuring 1.0 Hectare within Migori 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 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.

3. Aggrieved by the alleged breach of the contract the Appellant filed the suit on the 31/07/2013 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 dated 20/08/2013 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.

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 four grounds in the Memorandum of Appeal dated 10/04/2017 and filed in Court on 12/04/2017:

> ***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 h e without any justifiable reason deducted 2/3 and 1/3 purportedly as costs of production 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.

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 findings not supported by the pleadings 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. On the first 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 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 sugarcane had been harvested..'

12. The Appellant reiterated that position in his *viva voce* evidence before court. The ground is hereby dismissed.

13. The third ground is so closely linked to the first one and I will consider it first. The Appellant contended that the deductions made in respect to the inputs and services were neither pleaded nor proved. The suit was based on the contract which was very clear that any expense incurred by the Respondent on the Appellant's account was to be deducted from the value of the harvested sugarcane at every cycle. The Respondent's witness stated the services the Respondent rendered to the Appellant and their respective costs. He also stated the cost of the harvesting and transport charges applicable. The statement was filed and served in time and the Appellant admitted the deductions both in his statement and evidence in court. The Appellant did not impugn the costs as tabulated by the Respondent in any way whatsoever. I therefore do not find the ground as tenable. The deductions have their firm basis in the contract and were tabulated and adopted as part of the evidence. The court did not err in allowing the said deductions. The third ground of appeal equally fails.

14. On the second ground of appeal, I have noted that the court deducted the value of one-third and two-thirds of the first ratoon harvest and the second ratoon harvest respectively. I have carefully perused the contract and the evidence and did not come across anything in support of such a finding. A court of law exercising its civil jurisdiction in an adversarial system is strictly bound by the pleadings and the evidence before it unless it takes judicial notice of some issues or matters and in which case the court must clearly so state. In this case the court had no basis in deducting the value of the one-third and two-thirds of the twin ratoon harvests respectively. To that end the court erred in law. Those findings are hereby, and with respect to the trial court, set aside.

15. As stated above the court in assessing what was due to the Appellant was to be bound by the pleadings and the evidence. In his statement of claim the Appellant pleaded for the value of the plant crop and the first ratoon crop. He only brought the issue of the second ratoon crop in his evidence. The claim of and the evidence in support of the value of the second ratoon crop could not be entertained as it never formed part of the Appellant's claim in the first instance. The court was to consider whether the value of the plant crop and first ratoon crops could be compensated as they were pleaded in the claim and in doing so the court was to strictly adhere to the contract and the evidence. Likewise, the award on the value of the second ratoon crop is hereby set-aside.

16. From the evidence on record the net value of the first ratoon crop would have instead been Kshs. 143,200/= instead of Kshs 61,333/=.

17. 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 fourth ground also fails.

18. 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.

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

a) The appeal partly hereby succeeds and the finding of the learned magistrate awarding Kshs. 66,543/= be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. Kshs. 143,200/= which amount shall attract interest at court rates from the date of filing of the claim;

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. Otieno, Yogo, Ojuro & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant.