



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 90 OF 2017

JOSHUA O. OJJO.....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. 350 of 2014 delivered on 04/09/2017)

JUDGMENT

1. The principal issue for determination in this matter is whether the alleged Growers Cane Farming and Supply Contract dated 28/12/2005 (hereinafter referred to as '**the Contract**') entered between the Respondent herein, **South Nyanza Sugar Co. Ltd**, and the Appellant herein, **Joshua O. Ojjo**, where the Appellant was to grow and sell to the Respondent sugarcane at the Appellant's parcel of land Plot No. 713N Field No. 88C in Kanyamgony A Sub-Location within Migori County was produced as an exhibit.
2. The Appellant contended that the Respondent had breached the contract and filed **Migori Senior Principal Magistrate's Court Civil Suit No. 350 of 2014** (hereinafter referred to as '**the suit**') on the 26/09/2014 claiming compensation for the loss of three crops, costs and interest at court rates.
3. The Respondent entered appearance and filed a Statement of Defence and Counter Claim dated 29/10/2014 denying the claim and 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 in the Counter-claim that if at all any compensation was to be made it must be subject to the sum of the cost of goods and services provided by the Respondent to the Appellant as well as the eventual cost of transport and harvesting of the cane.
4. 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 and who also adopted his Statement as part of his testimony.
5. The trial court rendered its judgment and dismissed the suit with costs on claiming that the contract document was not produced as an exhibit and as such the claim could not stand. That is the judgment subject of this appeal.
6. The Appellant in praying that the appeal be allowed, and appropriate compensation be awarded vehemently faulted the finding of the trial court.
7. Directions were taken, and the appeal was disposed of by way of written submissions where the Appellant duly complied with the filing of the submissions, but the Respondent did not despite having been accorded more time to do so.
8. The Appellant challenged the finding of the trial court vigorously and more so claiming that the court wrongly found that the contract had not been produced and yet he had filed a List of Documents which he adopted and produced the documents as exhibits. It was further submitted that even if the documents were not in the court file at the time of writing the judgment the court was duty bound to make an enquiry as to the possible whereabouts of the documents which were adopted as exhibits. The Appellant prayed that the appeal be allowed, and he be compensated accordingly.
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 and the submissions. I must acknowledge that the main issue in this appeal deals with the integrity of the court file in the suit. I have perused the suit file and noted that the List of Documents filed by the Appellant on 26/09/2014 together with the Complaint does not have the documents named therein. The list was however received and paid for. The Appellant's statement is on record. The contract seems to appear on the Record of Appeal at page 12. It bears a court stamp for 26/09/2014 alongside all the other documents as contained in the List of Documents. I have carefully looked at the court stamp and filed it like the one used in the Complaint, the List of Documents and the Statement at the time of filing of the Complaint.

11. I have as well seen the Pre-Trial Questionnaire where the parties agreed that there had been a full disclosure of all the documents by each party to the other. In a matter of this nature where the Appellant had pleaded the contract in paragraph 3 of the Complaint, the Respondent would have readily raised the issue of the absence of the contract had the same been missing as the contract was the backbone of the suit as well as the Counter-claim. The contract was also admitted by the Respondent's witness in his Statement. Further, the Respondent did not submit in the lower court after the close of the respective cases of the absence of the contract but contended the net compensation. From the totality of the evidence and documents on record, I am satisfied that the Appellant filed the List of Documents as well as the respective documents named therein on 26/09/2014 which included the contract.

12. The absence of the contract from the court record at the time of writing the judgment was to raise the court's antennae. The court was duty-bound to enquire the whereabouts of the documents which had been produced as exhibits and hence translated to the evidential record of the court. It always remains the core responsibility of any court to ensure the integrity of the court record since the accuracy of a court record bolsters the parties' confidence in the judicial system. A court ought to take any possible measure to ensure that the record is secure. In this case apart from having an administrative discussion with the staff at the Civil Registry the court would have raised the matter with the parties prior to concluding that the documents which were named in the List of Documents and produced as exhibits were not part of the evidential record of the court.

13. Had the court undertaken such an enquiry, I am certain that it would have come up with a different finding on the contract. Respectfully, the finding that the contract was not produced as an exhibit must be set-aside, as I hereby do.

14. What I now must ascertain is whether the contract was breached by the Respondent as alleged. I have carefully considered the pleadings and the evidence. The contract appears on pages 12 to 15 of the Record of Appeal. Page 12 is the cover page of the contract. Page 13 is the Schedule where the particulars of the Appellant and his land appear. Page 14 is the descriptive part of the parties to the contract and some definitions and page 15 of the contract is the execution page. The contract which appears on the Record of Appeal does not therefore support the Appellant's claim. The contract seems to be inconclusive as it lacks the parties' responsibilities on which this Court can gauge against the evidence and the pleadings. Given the state of the contract before Court which was availed by the Appellant in contending that the same was filed together with the Complaint, the same cannot in any way be an attempt to prove the claim. This Court cannot assume the terms of the contract; it can only be guided by its said terms.

15. This Court is hence unable to determine whether the Respondent was in breach of the contract. That being the case, the Appellant's claim cannot be said to have been proved. In as much as this Court has found that the contract was duly filed, the contents thereof are inadequate and not in proof of the Appellant's case. The upshot is that the Appellant's claim remains dismissed with costs. The Respondent shall have the costs of this appeal.

16. As I 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.

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