REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 88 OF 2017

MILLICENT ADHIAMBO ONDINGO.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. E. Muriuki Nyagah,

Principal Magistrate in Migori Senior Principal Magistrate's

Civil Suit No. 327 of 2014 delivered on 12/09/2017)

JUDGMENT

1. By a Plaint filed before the **Migori Senior Principal Magistrate's Court** which was registered as **Civil Suit No. 327** of **2014** (hereinafter referred to as '**the suit'**) against **South Nyanza Sugar Co. Ltd,** the Respondent herein, the Appellant herein, **Millicent Adhiambo Ondingo**, contended that by a Growers Cane Farming and Supply Contract dated 16/08/2005 (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. 1484 Field No. 75 in South Kabuoch Sub-Location measuring 2.0 Hectares within Homa Bay 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 her said land whereas the Respondent supplied the cane seed, fertilizers and other inputs. That, the Appellant discharged her 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 24/09/2014 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 dated 18/11/2014 wherein it denied the contract and put the Appellant into strict proof thereof. The Respondent further and on a without prejudice basis contended that if the contract was proved then it was entitled to the costs of its inputs and services it rendered to the Appellant.

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 her Statement as part of her testimony. She also produced the documents in her 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 03/10/2017 and evenly filed in Court: -

> ***1. The learned trial magistrate erred in law and in fact, when he failed to make an award to the plaintiff / appellant for the loss of 1st and 2nd ratoon yet the plaintiff / appellant had pleaded and proved that the defendant's failure to harvest his plant crop compromised his chances of developing his 1st and 2nd ratoons.***
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> ***2. The learned trial magistrate erred in law and in fact, when he held that the plaintiff / appellant is only entitled to nominal damages for breach of contract for Kshs. 10,000/= for failure to harvest the 1st and 2nd ratoons, yet the plaintiff / appellant had specifically pleaded and proved his loss.***

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 declining to award the proceeds from the ratoon crops and instead awarded nominal damages which were never sought for. She prayed for full compensation for all the three cycles.

8. The Respondent partly supported the judgment and partly challenged the judgment. Although the Respondent did not file any Cross-Appeal it nevertheless challenged the award of nominal damages as without any legal basis. It hence prayed for the appeal to be allowed to the extent of disallowing the award of nominal damages and that the rest of the appeal be dismissed.

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, it is true I have dealt with the issue of whether a farmer is entitled to the proceeds from the ratoon crops elsewhere. I have as well carefully considered the arguments by the Respondent herein persuading me to take a different position on the issue. The submissions are well made and may appear to be persuasive. I have reconsidered the submissions against my earlier several decisions on whether a farmer whose plant crop was not harvested by the Respondent ought only to benefit from the proceeds of the plant crop. I have as well and intently looked at the contract in this case as well as the law and case law. I have now concluded that my earlier position must prevail.

12. In coming to such a position, I must 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.***
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> ***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.***
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> ***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…'***

13. In the said case I considered and was greatly aided by the binding decision by the Court of Appeal at Kisumu in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (UR)** where the Court dealt with the issue at length and concluded that a farmer in a sugar contracts, just like the one herein, is entitled to full compensation from what he/she would have earned had the breach not been occasioned. The Court further stated that from the unique way the contracts were tailored it was possible for a Court to calculate and pronounce itself on the final awards and Courts should not unnecessarily be bogged down by the technicalities on the need for special damages to be specifically pleaded in the pleadings. I must as well state that in arriving at the said decision the Court of Appeal considered several like decisions both local and foreign.

14. In upholding my earlier position on the matter, it must be understood that I not only do so because I am bound by the decision of the Court of Appeal but that I have once again considered the matter as a whole and found that the Court of Appeal was true, fair, reasonable and realistic to the law, science and nitty-gritties in the *modus operandi* in the sugar sector. Unlike in other form of contracts, the sugar contracts are unique in that the crop cycles are not and cannot be severed. That means failure to develop or harvest a cycle automatically compromises the development of the subsequent cycle or cycles. That is how nature works and Courts should take judicial notice thereof pursuant to **Section 60(1)(m)** of the **Evidence Act, Cap. 60** of the Laws of Kenya. Further, that is the rationale behind the express provision of **Clause 2(a)** of the **Contract** which provides for the period of 5 years or until one plant crop and two ratoon crops are harvested from the subject land whichever occurs first. Courts in Kenya and beyond are all unanimous on the finding that, save for the well-settled exceptions, a party who commits a breach of a contract is liable for the full loss thereby caused to the other party or parties.

15. As to whether general damages are available to a party who suffers a breach of contract, I must also state that the issue is not new. I have considered it severally and I equally uphold my earlier finding that no general damages are available to a party in a claim on breach of contract. In **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** I stated as follows: -

> *'16. The reason as to why general damages cannot be awarded in cases of breach of a contract was explained in the case of*

Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015) eKLR *as follows:*

> ***"The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))".***

16. The trial court in the suit declined to make any award on the ratoon crops but awarded the Appellant Kshs. 10,000/= as general damages. Following the foregone discussion and with tremendous respect to the learned trial magistrate the said award is hereby set-aside.

17. 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 the Appellant the proceeds for the plant crop but declined any award for the proceeds for the ratoon crops because the Appellant did not cultivate the ratoon crops. Likewise, 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 two ratoon crops as well. That being so, the net value of the proceeds for the first ratoon crop would have been Kshs. 318,540/= and the net value of the proceeds for the first ratoon crop would have been Kshs. 422,540/=.

18. 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.

19. 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.

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

a) The appeal hereby succeeds and the finding of the learned magistrate awarding Kshs. 307,540/= be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. Kshs. 1,038,620/= 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 Respondent successfully challenged the finding of the trial court as well, 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. Okong'o, Wandago & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant