



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 106 OF 2017

NATHAN AYANY WAO.....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. 328 of 2014 delivered on 11/10/2017)

JUDGMENT

1. The principal issue for determination in this matter is whether the alleged Growers Cane Farming and Supply Contract entered into on 19/06/2006 (hereinafter referred to as '**the Contract**') entered between the Respondent herein, **South Nyanza Sugar Co. Ltd**, and the Appellant herein, **Nathan Ayany Wao**, where the Appellant was to grow and sell to the Respondent sugarcane at the Appellant's parcel of land Plot No. 632 Field No. 22E in East Kanyamkago 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. 328 of 2014** (hereinafter referred to as '**the suit**') on the 16/09/2014 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 dated 18/11/2014 denying the contract and the claim and averred that if at all the Appellant is successful in proving the contract then the costs of the inputs and services the Respondent incurred in aiding the Appellant ought to be reimbursed.
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 and the List of Documents as part of his testimony.
5. The trial court rendered its judgment and dismissed the suit with costs for reasons that the original 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 both parties duly complied. Whereas the Appellant challenged the judgement *in toto* the Respondent supported it.
8. 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**).
9. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal and the submissions. The crux of the appeal is on the holding of the trial court tailored in the following manner: -

'...The plaintiff produced a photocopy of the contract but did not explain where the original was. As the existence of the contract was disputed, it was incumbent on plaintiff to produce the original itself or lay a basis for producing a photocopy. That did not happen....'

10. I have perused the suit file and noted that the List of Documents filed by the Appellant on 24/09/2014 together with the Plaintiff was accompanied by the documents named therein. The Appellant's statement is also on record. One of the documents in the filed List of Documents was the contract which now appears on the Record of Appeal at pages 12 to 26. It is true the contract is a copy of the original. 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 and where the Appellant had pleaded the contract in paragraph 3 of the Plaintiff, the Respondent would have readily raised the issue of the absence of the original contract during the pre-trial conference had it really wanted to verify the availed copy. The Respondent did not raise such an issue at all.

11. In his filed statement, the Respondent's witness stated that the Respondent had not been served with a copy of the contract then on record and that the contract did not exist among its records. The Respondent did not therefore deny the existence of the contract because what was produced was a copy. The issue of the original contract document was neither raised by any party nor was it part of the pleadings before court. It hence seems that the court, on its own motion, raised and settled the issue in favor of the Respondent.

12. With tremendous respect to the trial magistrate, the finding that the contract was not proved by failure to produce the original contract document was erroneous. Since the issue was not raised by the parties in their pleadings or the suit it was wrong for the court to come up with the issue on its own motion and settle it in favour of one of the parties. That position was clearly emphasized by the Court of Appeal in **Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Sylvester Umaru Onu, JSC stated that: -

'...It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it....

It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties.'

Adereji, JSC in the same case expressed himself thus on the importance and place of pleadings: -

'....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.'

13. Adding its voice to the issue, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny of votes in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** had the following to say at **paragraph 52** thereof: -

'In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The Court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.'

14. Further, the Respondent did not oppose the production of the copy of the contract during the hearing. The Respondent was represented by Counsel and the copy of the contract document was admitted in evidence with the consent of the Respondent's Counsel. The trial court was hence in grave error in unilaterally rejecting the copy of the contract which had been produced by the parties without any objection and taking the route it did. I have no doubt in agreeing with the Appellant's Counsel that the trial court was biased against the Respondent. That finding cannot stand and is hereby set-aside. It is this Court's finding that the copy of the contract was properly produced as evidence of the agreement between the parties in the suit.

15. 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 the Record of Appeal. I have seen and noted the various obligations of both parties. The Appellant remained under the sole duty of proving the breach of the terms of the contract by the Respondent. Apart from producing the contract document, the Appellant also produced a copy of the Yields Report by the defunct Kenya Sugar Research Foundation, a copy of the repealed Sugar Act, a demand letter by his Counsels on record, the Cane Prices Schedule and specimen statements for other farmers. The Appellant's statement and his evidence before court stated that he developed the sugar cane up to maturity, but the Respondent did not harvest it. He also alleged that the Respondent supplied him with seed cane and fertilizers. And, that was it.

16. I must say that in an instance where a contract is denied both in the pleadings and the accompanying statements, the Plaintiff's antennae must be raised, and the Plaintiff must know that the onus of proof is squarely on that party. Without any form of further evidence, be it documentary or oral to demonstrate that the Appellant discharged its part of the contract, the Appellant's scanty oral evidence like in this case cannot justify the contention that it was the Respondent who was in breach of the contract. On the totality of the evidence and the documents on record, it cannot be safely said that the Appellant proved the alleged breach of the contract by the Respondent. Apart from the word of mouth by the Appellant which was controverted by the Respondent there is nothing on record to show that the Appellant, in the first

instance, discharged its part of the contract. The Appellant hence failed to prove his case on the preponderance of probabilities.

17. 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.

18. The upshot is that the appeal stands dismissed on the ground that the Appellant failed to prove the breach of contract on the part of the Respondent, the presence of the contract notwithstanding. The Appellant shall shoulder the costs of the appeal.

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