**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENY AT MIGORI**

**CIVIL APPEAL NO. 140 OF 2015**

**SOUTH NYANZA SUGAR CO. LTD.....APPELLANT**

**VERSUS**

**ROBERT O. ODERO.....RESPONDENT**

***(Being an appeal from the judgment and decree by Hon. E. N. Nyagah, Senior Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 31 of 2015 delivered on 19/11/2015)***

**JUDGMENT**

1. **South Nyanza Sugar Co. Ltd,** the Appellant herein, was sued before the then Sugar Tribunal (whereafter the matter was transferred to Migori Law Courts and was admitted as **Migori Chief Magistrate's Civil Suit No. 31 of 2015** (hereinafter referred to as '**the suit'**)) by the Respondent herein, **Robert O. Odero,** over alleged breach of the Growers Cane Farming and Supply Contract entered into on 11/10/2000 (hereinafter referred to as **'the Contract'**) wherein the Appellant contracted the Respondent to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 24'B' Field No. 150C in Kanyamamba Sub-Location measuring 0.1 Hectares within Migori County.

2. The Respondent 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 the land and also supplied the cane seed and fertilizers. That, the Respondent discharged his part of the contract until the plant crop was mature and ready for harvesting which the Appellant failed to harvest thereby occasioning the Respondent loss. The Respondent prayed for compensation in respect for the loss of the three crops.

3. The Appellant entered appearance and filed a Statement of Defence dated 15/04/2008 wherein it admitted the contract but denied its breach and put the Respondent into strict proof of all his averments. The Appellant prayed for the dismissal of the suit with costs.

4. The suit was finally settled down for hearing. Both parties were represented by Counsels. The Respondent testified and adopted his statement as part of his testimony. He also produced his filed List of Documents which included the contract as exhibits. The Appellant's was represented by its Senior Field Supervisor one **Richard Muok**. Judgment was thereafter rendered in favour of the Respondent in the sum of Kshs. 42,192/= with costs and interests. It is that judgment that prompted the appeal.

5. The Appellant in praying that the appeal be allowed, and that the suit be dismissed proposed seven grounds in the Memorandum of Appeal dated 14/12/2015.

6. Directions were taken, and the appeal was disposed of by way of written submissions where only the Appellant's duly complied.

7. 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).**

8. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the Appellant.

9. It is admitted that a contract was entered by the parties herein and as pleaded. As to whether the contract was breached, the Respondent's case was that he discharged his part of the contract by ensuring that the plant crop was ready for harvesting, but it is the Appellant who failed and/or refused to harvest the crop. It is not in contention that the contract was in the category of company-developed contracts since according to the Debit Advice Slips the Appellant undertook all the preliminary steps including ploughing, furrowing and harrowing of the land. The Appellant also supplied the Respondent with seed cane and fertilizers and surveyed the land as well.

10. The Appellant was however of the contrary position. It contended that the Respondent did not discharge the said duty diligently and that the plant crop was wasted and there was nothing for delivery to the Appellant. I have carefully perused the contract which spells out the various obligations of the parties. **Clause 4** of the contract dealt with what was to happen when there was some default likely to affect the crop. It stated as follows: -

> ***'4. If either party hereto commits a breach of any term or terms of this Agreement and fails to remedy such breach within thirty (30) days from the receipts of a notice in writing to that effect given by the other party serving such notice may by a further notice in writing and dully served upon the defaulting party terminate this Agreement and the Agreement shall stand determined after completion of the then harvest and delivery of cane there from.'***

11. It was hence an express provision of the contract that upon default by any party the other party was to issue a 30 days' remedial notice and in the event of continued breach a termination notice was to follow. Having taken the position that it was the Respondent who defaulted in his contractual obligations by not taking care and properly developing the cane, it was imperative that the Appellant proved at least two issues. First, prove that it issued a remedial notice or notices to the Respondent more so to protect its investment in the crop and second, that the notice(s) were served in accordance with the contract. However, no such evidence was availed by the Appellant.

12. The foregone state of affairs leads me to the only reasonable finding, which I hereby find and hold, that the Appellant was the one in breach of its contractual obligations as alleged by the Respondent. Going by the Appellant's position that the plant crop was not properly cared for as to realize any meaningful yields, it goes without say that the Appellant never bothered to deal with the aspect of harvesting; in other words, the Appellant never harvested the plant crop.

13. Having found that it was the Appellant who breached the contract by not harvesting the plant crop after the Respondent had fully developed it to maturity, I must now consider if the Respondent was entitled to any remedy in law. I previously dealt with this aspect in the case of **Migori High Court Civil Appeal No. 138 of 2015 South Nyanza Sugar Co. Ltd vs. Hilary M. Marwa (2017) eKLR** when I expressed myself as follows: -

> *'15. I recall having dealt with this issue at length in **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited**. In that case I found that there can be no award of general damages for a claim on breach of contract. However, the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred (restitution in integrum'). The measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time the contract was made and that such damages are not at large but in the nature of special damages. I substantiated those findings with various case law. I must say that I am still of that position.'*

14. In **Migori High Court Civil Appeal No. 92 of 2015 James Maranya Mwita vs. South Nyanza Sugar Company Limited (2017) eKLR** I also dealt with how special damages ought to be ascertained in cases of contracts like the one before this Court. This is what I stated: -

> *"22. I am therefore of the very considered view that looking at the nature of the Contract and how the loss occurred, the above Appellant's averment was adequate to make a court assess the special damages accordingly. In affirming the position, the Court in the **John Richard Okuku Oloo** (supra) had the following to say:*
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> ***"In case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and which was 0.2 hectare (paragraph 3 of plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.***
>
> ***The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.***
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> ***We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof.***
>
> ***Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filling suit."***

15. I have looked at the tabulations by the trial court in the judgment and the evidence. I must agree with the court on the same save that the court was to further deduct the sum of Kshs. 2,000/= on account of furrowing charges and the cost of the cane supply as per the Debit Advices produced as exhibits by the Respondent. I will therefore review the judgment sum of Kshs. 42,192/= to Kshs. 40,192/=.

16. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

> **a) The appeal hereby partly succeeds to the extent of reviewing the sum awarded on compensation to Kshs. 40,192/=;**
>
> **b) As the appeal has partly succeeded each party shall bear its costs.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 04th day of October 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Mr. Kennedy Okong'o instructed by the firm of Okong'o Wandago & Co. Advocates for the Appellant.**

**Messrs. Kerario Marwa & Company Advocates for the Respondent.**

**Evelyne Nyauke – Court Assistant**