



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 103 OF 2015

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

-VERSUS-

JOSWA OUKO MIDEGA.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. E. Muriuki Nyagah, Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 199 of 2015 delivered on 09/06/2015)

JUDGMENT

1. The Appellant herein, **South Nyanza Sugar Co. Ltd.**, was dissatisfied with the judgment in **Migori Chief Magistrate's Court Civil Suit No. 199 of 2015** (hereinafter referred to as '**the suit**') which was in favour of the Respondent herein, **Joswa Ouko Midega**, and preferred the appeal subject of this judgment. The suit had initially been filed before the defunct **Sugar Arbitration Tribunal** (hereinafter referred to as '**the Tribunal**') prior to the dissolution of the Tribunal created under the **Sugar Act** by the enactment of the **Crops Act** which repealed the **Sugar Act**.
2. The Respondent contended in the suit that by a Growers Cane Farming and Supply Contract entered into on 31/07/2007 (hereinafter referred to as '**the Contract**') the Appellant herein contracted the Respondent to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 362 Field No. 123 in Kajulu Sub-Location measuring 1.8 Hectares within Migori County.
3. 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 Respondent's land and supplied the cane seed and fertilizers. That, the Respondent discharged his part of the contract until the cane was mature, but the Appellant failed to harvest hence suffered loss.
4. Aggrieved by the alleged breach of the contract the Respondent filed the suit before the Tribunal on the 14/10/2011 claiming a declaration that the Appellant was in breach of the contract, compensation for the loss of three crops, costs and interest.
5. The Appellant entered appearance and filed a Response to Claim dated 29/01/2014 wherein it denied the contract *in toto* and put the Respondent into strict proof of all his averments. The Appellant prayed for the dismissal of the suit with costs.
6. The suit was finally settled down for hearing before the Tribunal. Both parties were represented by Counsels. The Respondent was the sole witness who testified and produced the documents in his List of Documents as exhibits. The Respondent did not call any evidence. The suit was however caught up with the change in law and eventually transferred to the lower court. It is the lower court which rendered the judgment on 09/06/2015 based on the record from the Tribunal and which judgment is the subject in this appeal.
7. The Appellant in praying that the appeal be allowed, and that the suit be dismissed proposed the following nine grounds in the Memorandum of Appeal dated 07/07/2015 and evenly filed: -

1. The learned trial magistrate erred in both law and in fact when he awarded damages for breach of contract in the sum of Kshs. 1,246,080/= which was an amount which had neither been pleaded nor proved at the trial as is required by law.

2. The learned trial magistrate erred in both law and in fact when he awarded damages for breach of contract on the basis of an alleged gross yield which was speculative and not on the basis of net loss which was the actual amount of damages suffered.

3. The learned trial magistrate erred in both law and fact when he failed to take into account the proven scientific fact that sugarcane crop decreases in yield from the plant crop, which yields more to the second ratoon which yields less and therefore erred when in the circumstances, he ordered the appellant to pay to the respondent, compensation on the basis of an alleged loss on yield, on an equal basis, in respect of all the three crop circles.

4. *The learned trial magistrate erred in both law and in facts when without evidence and without finding he held that the Respondent's plot could yield 100 tons of sugarcane per hectare in respect of the plant crop, ratoon 1 and ratoon 2 crops when in actual fact only the plant crop had been developed by the respondent.*

5. *The learned trial magistrate erred in both law and in fact when he failed to appreciate and to give due regard to the fact that the Respondent only developed the plant crop with the assistance of the Appellant who provided inputs and carried out essential services and therefore failed to take into account a relevant fact, thereby erroneously, giving an award in respect of the 1st and 2nd ratoon crops which were never developed and therefore, never existed.*

6. *The learned trial magistrate erred in both law and in fact when he awarded compensation to the Respondent in respect of the plant crop, 1st ratoon and 2nd ratoon, crop circles without regard to the principle of reasonable expectation of the parties to the effect that the respondent was to be paid only the net proceeds from only such cane as he had developed less deductions in respect of costs of inputs and services, cane harvesting and cane transport expenses which could not have ended in the farmers pockets in any event.*

7. *The learned trial magistrate erred in both law and fact when he awarded global compensation to the Respondent in respect of crop circles which were never developed by the Respondent and therefore never existed at all, thereby failing to take into account a relevant fact and circumstance that the Respondent was under a duty to mitigate his/her losses and in failing to apply the principle of mitigation of losses.*

8. *The learned trial magistrate erred in both law and fact when after assessing damages in his judgment and awarding compensation on the basis of such assessment he ordered that interest on the award were to be calculated at court rates from the date of filing suit as opposed to the same being calculated from the date of such assessment, thereby ending up awarding interest in an amount which was more than the award.*

9. *The learned trial magistrate therefore on the main decided the case against the weight of evidence, contrary to the law and known legal principles, thereby exercised his discretion wrongly when he failed to dismiss the Respondent's suit in the court below with costs.*

8. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied. The Appellant challenged the entire judgment and contended that the claim was not proved at all. That, there was no evidence of breach of the contract on its part and that no basis had been laid for the yields and prices. That, the interest awarded was outrageous. The Appellant relied on some persuasive decisions of this Court and others in its quest to have the appeal allowed.

9. The Respondent opposed the appeal and contended that the suit was rightly allowed. That, he had fully proved the claim and that the trial court did not err.

10. 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).

11. 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. The judgment framed three issues for determination being the estimated yields, the price per tonne and the actual calculations. I must state that in a matter of this nature the trial court was duty bound to first determine whether there was a contract and the breach thereof before dealing with the expected earnings. I say so since the Appellant had denied the existence of such a contract and its alleged breach and had even filed very extensive submissions on the issues. The Appellant had also cross-examined the Respondent at length as well as the Tribunal. That will hence be the starting point.

12. The Appellant did not avail any witness in the suit. The Respondent on its part testified and produced the contract, demand notice, job completion certificates issued by the Appellant, Survey Certificate, Crop Yields Report and the Cane Prices Report as exhibits. None of the exhibits were objected to. I have perused the contract and I am satisfied that it was entered by the parties herein and as pleaded. As to whether the contract was breached, I have also perused the evidence on record. The Respondent testified on how he entered into the contract and undertook all his obligations. He so proved by the production of various job completion certificates issued by the Appellant. Having examined the said documents I am satisfied, on a preponderance of probabilities, that the Respondent discharged his part of the contract.

13. The Appellant having denied the breach of the contract did not avail its evidence. It however cross-examined the Respondent. I have seen the examinations including that by the Tribunal. The import of the examinations was infact to buttress the Respondent's case. Nothing arose that would imply the absence of the contract or that the Respondent did not discharge any of his obligations under the contract. Further, the Appellant was to issue *appropriate notices* under **Clause 6** of the **Contract** in the event the Respondent was in any breach of the contractual terms. There is no such evidence. The Appellant's pleading was hence not proved. The Respondent therefore proved his case against the Appellant by demonstrating that the Appellant, without any justification, failed to harvest the cane on maturity thereby the Respondent suffered loss of expected earnings.

14. Having so found, 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.’

15. 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:

"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.

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 filing suit."

16. The Respondent particularized his claim under paragraph 6 of the Statement of Claim based on the acreage of 1.8 Hectares, the expected yield of 100 tonnes per hectare and the price of KShs. 2,800/= per tonne. The Respondent opposed the expected yields and the prices and vehemently contended that there cannot be any payment in respect of the undeveloped ratoon cycles. Before I deal further I must reiterate my earlier position that a farmer is entitled to full compensation in respect of the cycles stated in the contract and accordingly pleaded. In Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR I stated 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.

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.

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...’

17. The Respondent claimed for the proceeds from the plant crop, the first ratoon crop and the second ratoon crop. The acreage was provided for in the contract as well as in the Appellant's Survey Certificate as 1.8 Hectares. On the prices of the cane, the Respondent relied on the Appellant's applicable Cane Prices Schedule. On the yields productivity the Respondent relied on a Productivity Report by a Retired Agricultural Officer one P. M. Simo which gave an estimated yield of 180 tonnes per hectare. I must however point out that the qualifications of the said P. M. Simo are not part of the evidential record in this matter. The Respondent however pleaded an estimated yield of 100 tonnes per hectare in his pleading. This Court is alive to the fact that the defunct Kenya Sugar Research Foundation (KESREF) developed a Productivity Schedule after an extensive research on the various areas of sugar cane growing within the South Nyanza region. Given the inconsistent evidence by the Respondent I hereby take judicial notice of the Schedule by KESREF by dint of **Section 60(1)(o) of the Evidence Act, Cap. 80** of the Laws of Kenya in a bid to reconcile that inconsistency. According to the Schedule by KESREF the expected yield for the plant crop was 110.6 tonnes per hectare, the first ratoon crop would have yielded 85.1 tonnes per hectare and the second ratoon crop would have yielded 74.1 tonnes per hectare.

18. Based on the contract the plant crop was expected to be ready for harvesting by July 2009 at most. By that time the price was KShs. 2,850/= per tonne. The expected income was therefore KShs. 567,378/=. Out of this amount the expenses which would have been incurred by the Appellant for harvesting and transport was KShs. 200,640/- thereby rendering a net income of KShs. 366,738/-. The net income for the

first ratoon crop which was expected to mature in 2011 would have been Kshs. 278,507/04 and the second ratoon crop in 2013 would have yielded a net income of Kshs. 372,894/=. The total earnings from the contract were **Kshs. 1,018,139/04** for which I hereby enter judgment for the Respondent as against the Appellant. This sum shall attract interest from the date of filing of the Claim before the Tribunal.

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. 1,246,080/= be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. Kshs. 1,018,139/04 which amount shall attract interest at court rates from the date of filing of the Claim;

d) The Respondent shall have costs of the suit before the trial court and the Appellant shall have 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