REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 118 OF 2015

GRACE M. OWINO.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. L. K. Sindani Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 148 of 2013 delivered on 24/08/2015).

JUDGMENT

1. As the appeal arising from the judgment in **Migori Chief Magistrate's Civil Suit No. 148 of 2013 (**hereinafter referred to as '**the suit**") was canvassed before this Court it came out that there was only one issue for determination and that was when the contract was entered into.

2. The Appellant alluded to having entered into a Growers Cane Farming and Supply Contract on 15/11/2007 (hereinafter referred to as '**the Contract**') with the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD,** where the Appellant was contracted to grow and sell to the Respondent sugarcane at the Appellant's parcel of land being Plot No. 377 measuring 1.4 Hectares in Field No. 41 KIIAS in Migori County.

3. The Contract was for a period of five years or until one plant crop and two ratoons of the sugarcane were harvested from the subject parcel of land whichever event occured first.

4. By a Plaint dated and evenly filed on 03/09/2013, the Appellant claimed for damages for breach of the Contract against the Respondent for failure to harvest the cane at maturity, costs and interest at court rates. The Appellant particularized the loss he suffered from the expected crop yields in the plaint.

5. The Respondent filed a Statement of Defence dated 08/10/2013 in which the Respondent denied being in breach of the contract and contended that if at all there was any breach of the contract on its part then that breach was caused by bad weather which damaged the road networks and that was beyond its control and hence it cannot be held liable.

6. The suit was fully heard where both parties were represented by Counsels. The Appellant called two witnesses whereas the Respondent called one witness. The Appellant's witnesses were the Appellant herself and an Agricultural Extension Officer while the Respondent's witness was its Field Supervisor. The trial court then delivered its judgment on 24/08/2015 where it dismissed the Appellant's claim on the ground that the contract had been entered sometimes on 08/05/2002 and not on 15/11/2007 as alleged by the Appellant such that by November 2007 the contract had terminated hence unenforceable. No assessment of the award the court would have given had the Appellant been successful was not made, however.

7. That was the judgment that necessitated the Appellant to file the appeal subject of this judgment.

8. The Appellant proposed seven grounds of appeal in the Memorandum of Appeal dated 18/09/2015 and filed in Court on 21/09/2015. The grounds were tailored as under:

> ***1. That the Learned Trial Magistrate erred in law and facts by so failing to consider the weighty evidence of the appellant as against the Respondent.***
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> ***2. That the Learned Trial Magistrate erred in law and in fact by so failing to consider that the drawer and / or the author of th Sugar Cane Agrement Book was the Respondent but not the Appellant and therefore any errors that were caused as far as the dates were concerned, were made by th Respondent but not the Appellant.***
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> ***3. The Learned Trial Magistrate erred in law and in fact in failing to consider that the Appellant and the Respondent set and subscribed their respective hands on the 15th day of November 2007 as provided in the "WITNESS CLAUSE."***
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> ***4. That the Learned Trial Magistrate erred in law and in fact in failing to cause a blame to the Respondent by failing to update the Company's Stamp to read 15th November, 2007 when it is vividly explained in the witness clause that "IN WITNESS WHEREOPF the Company by its authorized representative and the out grower have hereunder set and subscribed their respective hands the day and year herein above written.***
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> ***5. That the Learned Trial Magistrate erred in law and in fact by so considering the evidence oif the Respondent "DWI"one MUOK who was not the Respondents stamping Agent to clarity date when the Agreement was entered into and when it started being in force.***
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> ***6. The Learned Trial Magistrate erred in Law and in fact by failing to award the appellant a compensation in respect of the three (3) cycle's i.e. Plant Crop 1st Ratoon and 2nd Ratoon as vividly submitted in the appellant's submissions.***
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> ***7. The Learned Trial Magistrate erred both in Law and in fact by so deciding the case as against the Appellant's weighty evidence contrary to the Law and known legal principals by so dismissing the Appellants case."***

9. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant filed its submissions on 23/09/2016 whereas at the time of writing this judgment the record did not have the advantage of the Respondent's submissions. This Court has however reverted to the Respondent's detailed submissions tendered before the trial court.

10. In her submissions the Appellant mainly challenged the trial court's finding mainly on the argument that there was ample evidence to confirm that the contract was entered into on 15/11/2007 and not on 08/05/2002 and that the witnesses who executed the contract on behalf of the Respondent were not called to controvert the written contents of the contract. The Appellant called for the appeal to be instead allowed.

11. The Respondent on its part had taken the contrary position on the matter and in essence it supports the position taken by the trial court.

12. 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).**

13. I have carefully and keenly read and understood the proceedings and the judgment of the trial court as well as the grounds and the submissions on appeal. I have looked at the original contract document which was produced in evidence before the trial court. There is no doubt that the same relates to the parties in this appeal. It is dated 15/11/2007 on the very front page, likewise on the first page titled **'SUMMARY'** and as well as on the second page where the main contract began. The contract was duly executed and witnessed. According to the execution part of it, the contract was executed by two persons on behalf of the Respondent who only appended their signatures. Against one of the signatures there is written 3/5 (which one may also say it appears as 8/5). The contract was also executed by the Appellant and a witness; The Assistant Chief of Waware Sub-Location as well as one Stephen Okooba as the Appellant's duly appointed attorney. I have once again re-checked the contract document page after page and compared the original one with the copy in the Record of Appeal (which are similar) but respectfully did not come across the alleged date of 08/05/2002. I therefore remain at a loss as to the genesis of the alleged date of 08/05/2002.

14. I have had to revert to the evidence of the Respondent's witness. It was his evidence that the contract was executed on 06/05/2002 by the Respondent's then Agricultural Officer one Samuel Odhiambo who had retired in the year 2004 and as such could not have been the one who executed the contract later on. Again the witness did not, and was not examined, on the genesis of the date he gave to court since even that date of 06/05/2002 did not appear in the contract.

15. This Court is well aware of instances where some unscrupulous people cook up fraudulent claims in order to unjustly enrich themselves. When the Respondent decides to take a like position then it ought to be clear right from its pleadings and gather evidence in such support. Needless to say there is always no bar as to the Respondent lodging a complaint with the police. The Respondent must then endeavour to adduce such evidence in court after gathering it. In a case like this one at hand there was need to avail witnesses to reinforce the Respondent's position including those who allegedly executed the contract. I have not seen any attempt or request which was made to the trial court summoning any of the parties. The upshot therefore is that the position taken by the Respondent at the trial (despite not in its pleadings) was not proved and cannot be a basis of contradicting what clearly appears on a written document. Infact the Respondent is expressly estopped by dint of **Part VI** of the **Evidence Act**, Chapter 80 of the Laws of Kenya unless the oral evidence falls within the acceptable exceptions therein.

16. With tremendous respect to the learned trial court, the finding that the contract was entered on 08/05/2002 and not on 15/11/2007 was without any factual basis and cannot stand. That finding is hereby set aside. I also wish to add that it is also a requirement that once a suit is dismissed then the damages which would have been awarded had the suit been successful ought to be assessed.

17. The foregone now brings this Court to an analysis of what is available to the Appellant under the contract. It is well settled in law that general damages cannot be awarded on a claim anchored on a breach of contract but only special damages which must be pleaded with a degree of certainty and particularity and be specifically proved. (See the case of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013)eKLR).**

18. Paragraphs 12 and 13 of the Plaint particularizes the Appellant's claim. I however do note that the plaint as well as the contract and the evidence in its entirety did not have an indication of the cost of a tonnage of the expected yields which cost usually determines the special damages. This Court is therefore unable to calculate the special damages in this case and it is on that ground of insufficiency of the particulars tendered that the Appellant is unsuccessful in this appeal. In affirming the position the Court of Appeal 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 filling suit."

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

a) The appeal hereby succeeds and the judgment and decree in Migori Chief Magistrate's Civil Suit No. 148 of 2013 be and is hereby set aside but still the Migori Chief Magistrate's Civil Suit No. 148 of 2013 stands dismissed for want of proof of special damages accordingly;

b) The Appellant shall bear the costs of the suit as well as costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 17th day of February 2017.

A. C. MRIMA

JUDGE