REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 27 OF 2016

JOHN OGOLA NYANJWA...APPELLANT

-VERSUS-

SOUTH NYANZA SUGAR CO. LTD...RESPONDENT

*(**Being an appeal from the judgment and decree by Hon. C. M. Kamau, Resident Magistrate in Kehancha Resident Magistrate's Civil Suit No. 86 of 2004 delivered on 11/05/2016).***

JUDGMENT

1. This is an appeal against the dismissal of the Appellant's suit by the trial court vide the judgment rendered on 11/05/2016. By an Outgrowers Cane Agreement dated 31/03/1993 (hereinafter referred to as **'the Contract'**) the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD,** contracted the Appellant herein **JOHN OGOLA NYANJWA,** to grow and sell to it sugarcane at the Appellant's parcel of land being Plot No. 563 measuring 0.9 Hectares in Field No. 151 North Lwala in Migori County.

2. 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 occured first.

3. By a Plaint dated 09/08/2004 and filed on 15/09/2004, the Appellant sought for a declaration that the Respondent was in breach of the contract for failure to harvest the cane at maturity, compensation for unharvested cane, costs and interest at court rates.

4. The Respondent filed a Statement of Defence dated 12/10/2004 denying the claim and averred that if at all the Appellant suffered any loss then the Appellant was the author of his own misfortune as he failed to properly maintain the crop to the required standard so as to warrant the crop to be harvested and milled by the Respondent. The Respondent as well raised the issue of limitation of action.

5. The suit was fully heard where both parties were represented by Counsels. The Appellant was the sole witness. The Respondent who did not call any witness relied on the filed Statement of its Senior Field Supervisor and the documents filed in support of its case. From the evidence adduced before the trial court, the contract is not denied by either parties. It also remains undisputed that the Respondent had supplied all the requirements to the Appellant under the contract and even harvested the plant crop and paid the Appellant the value thereof less its expenses. It therefore came out that the Appellant’s claim in essence was for the value of the alleged unharvested first and second ratoon crops. The trial court delivered the judgment upon the parties filing their respective submissions. The court dismissed the suit with costs on the ground that the Appellant had failed to produce any documents in proof that he ever developed the ratoon crops.

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

7. The Appellant proposed three grounds of appeal in the Memorandum of Appeal dated 06/06/2016 and filed in Court on 07/06/2016. In essence the Appellant contended that the trial court failed to consider, evaluate and balance the evidence and submissions thereby reaching to a wrong conclusion and that the court in error raised the standard of proof. The Appellant prayed that the appeal be allowed and he be awarded the appropriate compensation.

8. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions. On his part the Appellant submitted that there was ample evidence in proof that the Respondent was in breach of the contract by not harvesting the first ratoon crop and hence compromising the development of the second ratoon crop. The Appellant relied on the decisions of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** in support of the appeal.

9. The Respondent supported the trial court's decision. In taking this Court through the evidence as adduced, the Respondent submitted that the Appellant had pleaded that the Respondent never harvested the cane at all but changed course and adduced evidence that the Respondent harvested and paid for the plant crop but failed to harvest the first ratoon crop thereby compromising the development of the second ratoon crop without amending his pleadings. It was submitted that in the face of such variance the suit could not stand.

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 will first consider the effect of pleadings which are at variance with the evidence adduced. It is not in dispute that the Appellant pleaded that the Respondent had failed to harvest the plant crop thereby rendering the Appellant to suffer loss and that even when the Appellant made formal demand for compensation, the Respondent failed to honour that demand and as a result the Appellant filed the suit. That is clear in paragraphs 4, 5, 6 and 7 of the Plaint. Those averments were verified by an affidavit of the Appellant. It is also not in dispute that when the Appellant testified he stated that indeed the Respondent had harvested the plant crop and even paid him Kshs. 300,000/= less the deductions for the expenses the Respondent incurred on behalf of the Appellant. The Appellant produced a Bank Statement to confirm that.

12. The important of proper pleadings in a civil claim cannot be over-emphasized. That is because it is by the pleadings that a cause of action or defence is presented and the rival party, in an adversarial system like the one in our jurisdiction, is called upon to respond thereto. The provisions of **Order 2** and **Order 7** of the **Civil Procedure Rules** speak for themselves. The rival party then proceeds to present its response or defence based on what is presented as a cause of action. Needless to say such a rival party goes ahead to prepare for the hearing of the case based on the contents of the pleadings including deciding which witness(es) to present before the trial court. When it therefore happens that a party, without notice or amending its pleadings, awaits for the hearing and by the time it is adducing oral testimony it changes its cause of action, then that is not a less serious issue. I say so because such a departure amounts to ambushing the rival party and definitely poses a challenge on the line of defence or response the party which prepared itself by relying on the pleadings find itself in. Such a change may even call for the amendment of pleadings and change of witness(es) to be presented before court. That state of affairs is not permissible in law.

13. Courts have dealt with this issue severally and to me it is firmly settled. Just to mention a few, in the case of **G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281** the Court of Appeal emphasized that a defendant must clearly raise by its pleadings all matters which show the suit not to be maintainable. The Court of Appeal again, but differently constituted, in the case of **The**

Independent Electoral and Boundaries Commission and Leonard Okemwa (Returning Officer) vs. Stephen Mule & others, Civil Appeal No. 219 of 2013 while citing with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) Limited v. Nigeria Breweries PLC SC 91/2002**, had the following to say: -

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

14. The foregone position was re-affirmed in the case of **Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited (2015) eKLR.**

15. There is however one aspect of the record which, although it was not raised by the parties is worth looking into as to ascertain if the above position may change. The issue relates to a party filing and serving the rival party with a Witness Statement which although at variance with the pleadings is in tandem with the oral testimony. In this case it was the Statement of the Appellant. I have carefully perused the record and have noted that the Statement, despite filing and service, was not adopted or produced as part of the evidence of the Appellant. The legal position of such a Statement is that it is not part of the evidential record of the court. (See the Court of Appeal case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR).** However, even if the said Statement was properly adopted or produced as part of the evidence, to me that would still not cure but it would instead confirm the departure from the pleadings and compound the confusion on the exact cause of action in the case.

16. Since the Appellant was bound by its pleadings and in view of its unwarranted departure therefrom, the Appellant was not entitled to any judgment in his favour. The suit was hence properly dismissed although the trial court arrived at that finding on different grounds which I would have looked at had the suit passed the test of the pleadings and evidence adduced.

17. As I come to the end of this judgment, I wish to state that, from the evidence on record, and subject to settling the issue of limitation in favour of the Appellant, had the foregone issue of the pleadings been also settled in favour of the Appellant, the Appellant would have been entitled to judgment for *inter alia* compensation in respect of the first and second ratoon crops as so provided for in the contract.

18. The appeal is therefore unsuccessful and is hereby dismissed with costs.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of May 2017.

A. C. MRIMA

JUDGE