REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 26 OF 2016

CHARLES OWINO ONYANGO.....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 Principal Magistrate's Civil Suit No. 120 of 2004 delivered on 11/05/2016)

JUDGMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court vide the judgment rendered on 11/05/2016 for lack of evidence that the second ratoon crop was developed. By an Outgrowers Cane Agreement dated 04/01/1996 (hereinafter referred to as '**the Contract**') the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD,** contracted the Appellant herein **CHARLES OWINO ONYANGO,** to grow and sell to it sugarcane at the Appellant's parcel of land being Plot No. 393B measuring 0.5 Hectares in Field No. 23 within 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. As evidenced by the filing of the Plaint dated 21/09/2004 on 06/10/2004, it appears that all did not go down well in respect to the contract implementation. The Appellant contended that the Respondent having harvested the plant crop and the first ratoon crop failed to harvest the second ratoon crop thereby resulting to loss of income. He sought for a declaration that the Respondent was in breach of the contract, the value of unharvested cane, costs and interest at court rates.

4. The Respondent entered appearance and filed a Statement of Defence dated 02/11/2004 and although it admitted the existence of the contract it denied that it was in breach.

5. The suit was heard by way of oral evidence on the part of the Appellant and on reliance to the filed Witness statement and documents on the part of the Respondent. Parties thereafter filed written submissions. The trial court thereafter rendered its judgment and accordingly dismissed the suit with costs. It is that judgment which is the subject of this appeal.

6. The Appellant in praying that the appeal be allowed and appropriate compensation be awarded proposed the following three grounds in the Memorandum of Appeal dated 06/06/2016 and filed in Court on 07/06/2016:

> ***1. The learned magistrate erred in law and facts, when he failed to consider, evaluate and balance the pleadings, evidence and submissions thereby reaching to a wrong conclusion that***

the appellant had failed to prove that he developed 2nd ratoon.

2. The learned trial magistrate erred in law and in fact by purporting to raise the threshold of standard of proof to a level higher than that required by the law.

3. The learned trial magistrate was biased against the Appellant.

7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant duly complied with the filing of the submissions but the Respondent did not even after being indulged to do so. 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 second ratoon crop and wondered why the trial court chose to ignore all that evidence. The Appellant urged this Court to find in his favour and relied on the decision of **John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** for the award of interest from the filing of the suit.

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 carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties. From the judgment, the suit was unsuccessful because the Appellant failed to adduce documentary proof that the second ratoon crop was developed. The court stated in part that: -

"…The plaintiff in this case failed to establish, on a balance of probability, that the 2nd ratoon crop was cultivated on the subject parcel.

I therefore dismiss the suit with costs."

10. A look at the pleadings reveal that the Appellant's claim is anchored on the allegation that the Respondent having successfully harvested the plant crop and the first ratoon crop failed to harvest the second ratoon crop contrary to the contract. That position is not denied by the Respondent who according to the Witness Statement of its sole witness, Richard Muok, stated that: -

'Indeed, here was a failure to harvest caused by factors and circumstances beyond our control and was not willful as alleged.'

11. According to the Respondent, the circumstances alluded to were that the Government intended to increase the milling capacity of the plant and in readiness thereto the Respondent contracted many farmers, but the expansion was not undertaken hence the glut. The Respondent did not however plead that in its Statement of Defence. From the evidence on record, even if the Respondent had pleaded the foregone in reliance to **Clause 7** of the contract on events *force majeure,* that position could not either have saved it from liability in view of how the Clause is clearly crafted.

12. Given that in sugar development the harvest of the plant crop leads to the development of the first ratoon crop and that the harvest of the first ratoon leads to the development of the second ratoon crop, the evidence which was before the trial court was hence adequate for the court to find for the Appellant. Respectfully, the learned trial magistrate fell into error in not properly considering that evidence.

13. Having found that it is indeed the Respondent who was in breach of the contract, this Court should hence consider the compensation to the Appellant. That compensation is always tailored in a fashion as to put the claimant as far as possible in the same position he/she/it would have been in if the breach

complained of had not occurred. That is principle encapsulated in the Latin phrase ***restitution in integrum.*** In this case, the contract was for a period of five years or until the plant crop and two ratoon crops were harvested whichever occurred first. Because of the breach, the Appellant lost the expected returns from the second ratoon crop.

14. According to the guide developed through a study by the now defunct **Kenya Sugar Research Foundation,** which was succeeded by the now **Kenya Agricultural and Livestock Research Authority (KALRO),** which institution was mandated to promote, research and investigate all problems related to sugarcane and such other crops, processing into sugar and its by-products, productivity, quality, sustainability of land and all such matters ancillary (which guide was part of the Appellant's documents) for the period 1993 to 2001, the average expected cane yields over the whole area forming the Respondent's zones are clearly stated. In this case, since the first ratoon crop was harvested in July 2001, the second ratoon crop was expected to be harvested around 22 months later; that is in the year in 2003. By then the average yield was 87 tonnes per hectare when a farmer applies the best crop husbandry on the farm.

15. In this case, the Appellant during cross-examination stated that he got 55 tonnes from the plant crop and 25 tonnes from the first ratoon crop. In his own words, he expected a lesser harvest on the second ratoon crop. It may mean that the Appellant did not apply the best crop husbandry. In his submissions in this appeal, the Appellant now seeks 50 tonnes per hectare in respect to the second ratoon crop. Since it is evident that the second ratoon crop could not yield above 25 tonnes, it will be unfair to the Respondent for this Court to settle the expected yield on the second ratoon crop anywhere above 25 tonnes. That being so and there being no any other guidance, I will adopt the expected yield at 25 tonnes for the second ratoon.

16. The average price of the cane per tonnage during the currency of the contract was **Kshs. 1,730/= per ton** as per the Price Guide developed by the Respondent which is part of the documents produced by the Appellant.

17. The total expected earnings for the second ratoon crop would then be **Kshs. 43,250/=.** That amount is however subject to the would-be harvesting and transport expenses like those incurred during the first ratoon crop. According to the Appellant's Statement held by the Respondent, a total of **Kshs. 10,294/20** was deducted out of the earnings from the first ratoon crop. I will deduct a like sum herein. The net amount payable to the Appellant is therefore **Kshs. 32,955/80** for which I hereby enter judgment for the Appellant as against the Respondent. This sum shall attract interest from the date of filing of the Plaint.

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

a) The appeal hereby succeeds and the finding of the learned magistrate dismissing the suit with costs be and is hereby set aside accordingly;

b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. Kshs. 32,955/80;

c) The sum of Kshs. Kshs. 32,955/80 shall attract interest at court rates from the date of filing of the Plaint;

d) The Appellant shall have costs of the suit as well as costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of June 2017.

A. C. MRIMA

JUDGE