



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CIVIL APPEAL NO. 41 OF 2016

JANE ADHIAMBO ATINDA.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. C. M. Kamau,

Resident Magistrate in Rongo Senior Resident Magistrate's

Civil Suit No. 2 of 2014 delivered on 05/07/2016)

JUDGMENT

1. The appeal herein arises from the dismissal of the Appellant's suit by the trial court vide the judgment rendered on 05/07/2016. By a Growers Cane Farming and Supply Contract dated 24/09/2007 (hereinafter referred to as '**the Contract**') the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD**, contracted the Appellant herein **JANE ADHIAMBO ATINDA**, to grow and sell to it sugarcane at the Appellant's parcel of land being Plot No. 108 measuring 0.6 Hectares in Field No. 9C South Kabuoch in Migori County. The Contract was however deemed to have commenced on 24/07/2007. according to Clause 2(a).
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 occurred first.
3. It appears that all did not go well as by a Plaint dated 06/09/2014 and filed on 13/11/2014, the Appellant sought for damages for breach of contract, compensation for the loss of three crops, costs and interest at court rates from 26/07/2007.
4. The Respondent entered appearance and filed a Statement of Defence dated 16/02/2015 denying the claim and averred that if at all the Appellant suffered any loss then the Appellant was the author of her own misfortune as she failed to properly maintain the crop to the required standard to warrant the crop to be harvested and milled by the Respondent.
5. The suit was fully heard where both parties were represented by Counsels. The Appellant was the sole witness who testified and adopted her Statement as part of her testimony. She also produced the documents in her List of Documents as exhibits. The Respondent called its Senior Field Supervisor as its sole witness and who also adopted his Statement as part of his testimony and produced the documents in his List of Documents as exhibits as well.
6. The trial court rendered its judgment and dismissed the suit with costs for reason that the Appellant failed to harvest the cane as required under the contract. That is the judgment subject of this appeal.

7. The Appellant in praying that the appeal be allowed and appropriate compensation be awarded proposed the following five grounds in the Memorandum of Appeal dated 20/07/2016 and filed in Court on 28/07/2016:

1. The learned trial magistrate erred in law and in fact by completely misinterpreting the provision of the contract as regards the duties and responsibilities of the Respondent to harvests the sugar cane subject matter of an outgrower agreement between the parties.

2. The learned magistrate erred in law and in fact by failing to appreciate that the duty to harvest sugar cane as in the contract between the appellant and the defendant, was a statutory as well as contractual duty and that in all circumstances of the case the statutory duty and obligations prevailed.

3. The learned magistrate erred in law and in fact in deciding on issues not raised in the trial and even then ended up deciding on the issue wrongly both against the law, contract and custom.

4. The learned trial magistrate exhibited actual and extreme bias in the suit by a adopting a guillotine approach to this suit and others then to be decided by rendering a “cut and paste judgment” to the detriment of the appellant and other litigants.

5. The learned trial magistrate erred in failing to assess the damages that would have been awarded had the appellant succeeded in the suit.

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 her part, the Appellant submitted that there was ample evidence in proof that the Respondent was in breach of the contract by not harvesting the plant crop and hence compromising the development of the ratoon crops. She wondered why the trial court chose to ignore all that evidence. The Appellant relied on the decision of **Martin Akama Lango vs. South Nyanza Sugar Co. Ltd (2013) eKLR** in support of that submission. On the submission that the trial court dealt with issues that had neither been pleaded nor tendered before it by the Respondent, the Appellant relied on the decisions of **Malawi Railways Ltd vs. Nyasulu (1998) MWSC 3** and **David Wekesa vs. Festus Ngovilo, Environment and Land Appeal No. 6 of 2014 at Kakamega**. It was also submitted that the trial court erred in not assessing damages even after dismissing the suit. The decision in **Lei Masaku vs. Kalpana Builders Ltd, Civil Appeal No. 40 of 2007 (2014) eKLR** was cited.

9. The Respondent supported the trial court's decision. In taking this Court through ‘some evidence’ allegedly adduced by the Respondent’s witness, the Respondent submitted that it issued a warning letter to the Appellant on her abandonment of the cane and urged her to take corrective measures which she failed to resulting to the cane being wasted and could not be available for harvesting.

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 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 harvest the cane and avail it to the Respondent. The court stated that: -

‘The foundation of the plaintiff’s claim is the assertion that the defendant failed in its contractual duty to harvest the subject cane. The important of clause 3.1.2 of the contract is that

the suit's foundation is built on quicksand. Simply put, the defendant cannot be blamed for failure to harvest or transport the cane. The defendant therefore did not breach the contract. The legal obligation to harvest and transport cane is contractually upon the plaintiff. According to the contract, after authorizing harvest, the defendant's responsibility for the harvested cane begins once it arrives at its weighbridge.

While the practice on the ground may well be that the company harvests, this practice is not sanctioned by the contract that was executed between the parties. Previously, Contracts between the defendant Sugar Company and growers stipulated that the company could harvest. The present contract does not so stipulated.'

12. I will first look at the pleadings. The Appellant's claim is anchored on the allegation that the Respondent failed to harvest the cane which it had contracted her to plant upon maturity and as a result she suffered loss and was entitled to appropriate compensation. The Respondent in its defence denied ever contracting the Appellant as alleged and further denied occasioning her any loss. However, on a without prejudice, the Respondent stated that if indeed the Appellant suffered any such loss, then the Appellant was the author of her own misfortune as she failed to properly maintain the crop to the required standard to warrant the crop to be harvested and milled by the Respondent.

13. On the evidence of the parties, the Appellant in her testimony reiterated the contents of her plaint. She also produced her filed written statement which corroborated her evidence as well the documents in her filed List of Documents that included the Contract, Demand letter, Cane Production Guide, Survey Certificate and a Job Completion Certification issued by the Respondent.

14. The Respondent tendered evidence through its Field Supervisor, Richard Muok, whose duties included acquiring land for and cane development, supplying farm inputs, offering technical extension services and cane inspection. He also adopted his filed written statement wherein the existence of the contract was admitted but denied that the Respondent was in breach in that the Appellant had crushed the cane to a jaggery and never developed the ratoon crops. The witness reiterated the contents of the statement in his oral testimony and produced a Price Schedule and a Cane Yield Report as exhibits.

15. That was the evidence that backed the pleadings. Whereas there is consistence in the pleading and evidence of the Appellant, the contrary is on the Respondent. While the Respondent pleaded that the Appellant failed to maintain the cane resulting to being wasted, its evidence that the plant crop was crushed to a jaggery means that indeed the cane was fully maintained until harvest. Further, by contending that the Appellant did not develop the ratoon crops, the Respondent remained alive to the fact that the development of ratoon crops can only result from a properly maintained plant crop. That therefore defeats the Respondent's own contention that the plant crop was not maintained. There is also no evidence, either in the filed witness statement or the oral testimony, to the effect that the Appellant did not properly maintain the plant crop. The averments in the Defence were therefore not supported or proved by the evidence tendered. On the contrary, the allegation that the cane was crushed to a jaggery was not only pleaded in the Defence but was also not proved in evidence. The Respondent's witness only stated so both in his oral and written evidence, but no evidence was tendered to prove it.

16. Section 107 of the Evidence Act, Chapter 80 of the Laws of Kenya places the burden of proof on the party which desires the court to give judgment in that party's favour and the incidence of burden is always on the party which would fail if no evidence at all were given on either side. (**Section 108 of the Evidence Act**). The Respondent therefore failed to prove the averments in its pleadings. Further, the allegation of the cane having been crushed to a jaggery, although not pleaded, was also not proved. I can only reiterate the firmly settled legal position that a party is always bound by its pleadings and any evidence that tend to depart from those pleadings is for rejection. (See the Court of Appeal cases of **G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281**, **The Independent Electoral and Boundaries Commission and Leonard Okemwa (Returning Officer) vs. Stephen Mule & others, Civil Appeal No. 219 of 2013**, and **Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited (2015) eKLR**).

17. The Respondent's defence is hence not holding. That therefore leaves this Court with the Appellant's claim and evidence. That being so, the Appellant remain under a legal duty to prove her claim otherwise it will not see the light of the day. As stated elsewhere above, the evidence of the Appellant was in tandem with the pleading. The exhibits produced confirmed that the Appellant discharged her part of the contract until the plant crop reached harvesting.

18. That now brings me to the finding by the trial court that the Appellant failed to adhere to **Clause 3.1.2** of the Contract in not harvesting and delivering the cane to the Respondent. A contract document must always be considered in its entirety. The good reason for that lies in the truism that clauses in a contract tend to complement one another and one risks not getting the whole intention of the parties if a consideration or reference is put on just a portion of the document. Had the learned trial court done so, it would have come across **Clause 3.1.12** which requires the Miller (Respondent) to: -

'Prepare the harvesting program setting out the approximate expected time of harvesting which program will be subject to changes necessitated by factors beyond the control of the Miller.'

19. A look at **Clauses 3.1.2** and **3.1.12** of the contract places a duty upon the Respondent before the actual harvesting of the cane. That duty is for the Respondent to ***'inspect the cane and determine its maturity and to prepare the harvesting program setting out the approximate expected time of harvesting'***. There is no evidence that the Respondent discharged that contractual duty in the first instance. That failure, in the face of the fact that the cane had matured, can only mean that it is the Respondent who was in breach of the contract. With tremendous respect, the finding of the learned trial Magistrate that the Appellant failed to harvest and deliver the cane to the Respondent was not only unsupported by evidence but also arrived at without a full consideration of the contract and was therefore erroneous. That finding must be interfered with.

20. There is also the ground that the learned Magistrate erred in not assessing damages. Whereas the position is correct in respect to unsuccessful claims seeking general damages, the position in this matter is different. I have looked at the Plaintiff and the claim is one for special damages. Paragraph 7 of the Plaintiff explicitly claims for Kshs. 607,500/=. Even though the Appellant sought for general damages for breach of contract further to the compensation, it is well settled that in a claim anchored on a breach of contract, no general damages can be awarded. (See **Joseph Urigadi Kedeva vs. Ebby Kangishal Kawai Kisumu Civil Appeal No. 239 of 1997 (UR)**, **Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015)eKLR**, **Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR**, **Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR**, **Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR**) among others). The ground therefore fails. Before I finally depart from this issue I wish to clarify that I had previously found that a court in such a matter must assess damages accordingly failure to which a court fell into error. I have reconsidered that position and in light of the decisions of the Court of Appeal the now position overrides my earlier finding.

21. 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 plant crop and the contemplated two ratoon crops.

22. 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 documents filed by each of the parties) the average expected cane yield over the whole area forming the Respondent's zones from November 2008 was a maximum of 95 tonnes per acre and a minimum of 80 tonnes per acre. By

considering the incidences in farming generally, I will adopt the average of **90 tonnes per acre** in this case. The area of the Appellant's land is settled at **0.6 Ha** by the contract and the Respondent's Survey Certificate. The average price of the cane per tonnage during the currency of the contract was **Kshs. 2,200/= per ton**. The total expected earnings for the plant crop and the two ratoon crops would then be **Kshs. 356,400/=**. That amount is however subject to the expenses incurred by the Respondent during the cane development period as per Clause 7 of the contract. That position is expressly admitted by the Appellant in her testimony and who even produced a Debit Note for fertilizers supplied to her by the Respondent as part of her documents and a Survey Certificate. The Respondent contends that a total expense of al of Kshs. 33,905/80 ought to be offset from the decretal sum. Since the Appellant denied that the Respondent ploughed her land and there is no contrary evidence, I will disallow the claim on the cost of ploughing. I will instead allow the claim for seed cane supply, survey fees and fertilizer supply which translates to **Kshs. 25,792/=**. The net amount payable to the Appellant is therefore **Kshs. 330,608/=** 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.

23. 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. 330,608/=;**
- c) The sum of Kshs. 330,608/= 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 6th day of June 2017.

A. C. MRIMA

JUDGE