REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY

AT MIGORI

CIVIL APPEAL NO. 30 OF 2016

JOSEPH AWEKO MBOCTA.....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. 115 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 ratoon crops were developed. By a Growers Cane Farming and Supply Contract dated 04/01/1996 (hereinafter referred to as **'the Contract'**) the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD,** contracted the Appellant herein **JOSEPH AWEKO MBOCTA,** to grow and sell to it sugarcane at the Appellant's parcel of land being Plot No. 244C measuring 0.3 Hectares in Field No. 52 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 21/02/2004 on 06/10/2004, which was later amended, it appears that all did not go down well in respect to the contract implementation. The Appellant contended that the Respondent had failed to harvest the first ratoon crop thereby compromising the development of the second ratoon crop 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 reliance to the filed witness statements, documents and written submissions without calling any witnesses. 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 establish on a balance of probability that any ratoon crop was developed on the subject parcel.***
>
> *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 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 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 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. The Respondent supported the trial court's decision and submitted that there was indeed no evidence that the ratoons were developed and as such the claim could not succeed. It urged this Court to affirm the decision of the trial court.

9. 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).**

10. 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 crops were developed. The court stated that: -

> ***'The question for determination therefore is whether the plaintiff proved that she developed the ratoon crops. In regard to the 1st ratoon, no documentary proof that the crops were developed was adduced. If there was cane on the land, there would be documents to show that it was developed but such documents have not been presented. It is unlikely that there would not be a single document showing that the crops were developed. The plaintiff stated that the failure to harvest the 1st ratoon compromised the development of the 2nd ratoon, therefore the 2nd ratoon was never developed. The failure to avail evidence stating the contrary is suspect and it lends credence to the defendant's position that no ratoon crops were developed.***
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> ***It is trite law that he who alleges must prove. The plaintiff in this failed to establish, on a balance of probability, that any ratoon crop was developed on the subject parcel.'***
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> **(See judgment on page 34 of the Record of Appeal)**

11. 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 failed to harvest the first ratoon crop and as such compromised the development of the second ratoon crop contrary to the contract. In proof of his case the Appellant relied on his written statement, the contract and the Yield Assessment Report by the defunct Kenya Sugar Research Foundation. The statement reiterated the contents of the amended plaint. He also

admitted that indeed the Respondent had assisted him to develop the cane by providing him with inputs and services whose costs were recoverable from the proceeds of the plant crop. He also admitted that the harvesting and transport charges were deductible from the proceeds of the crops.

12. The Respondent on its part relied on the Defence, the statement of one Richard Muok (the Respondent's Field Supervisor), the contract and the Appellant's statement of accounts. The Respondent admits the existence of the contract. Through the witness, the Respondent equally admits that the Appellant developed the cane with its able assistance. The Respondent went further to state why the ratoon crops were not harvested as follows: -

> ***'…Sony Sugar is a state corporation and thus whatever business decision we make must be approved by the parent Ministry of Agriculture, Director of State Corporation and the Treasury.***
>
> ***The company had intended to have the factory's cane crushing capacity increased. In anticipation of expansion program and modernization of the factory, there was need to increase the cane growing area.***
>
> ***So we increased the cane area through a grant, Sugar Development Fund (SDF) from the then Kenya Sugar Authority later Kenya Sugar Board but the factory's cane crushing capacity still remains the same.***
>
> ***So there was cane glut which the mill which the Government installed in 1979 cannot mill. This is the only reason why there was a failure to harvest the crop and this farmer is one of those whose cane was never harvested at all.***
>
> **(See Page 2 of the Statement of Richard Muok)**

13. Having so clearly stated and explained why it did not harvest the cane and based on the contract and the evidence of the Appellant, it was evident that the Respondent was in breach of the contract for failure to harvest the cane on maturity. The Respondent further adduced the Appellant's statement of accounts which confirmed that indeed the Respondent had harvested the plant crop worth Kshs. 74,620/= in the month of September 1999. I also note that although the Respondent did not plead it, all the same the contents of **Clause 7** of the contract on events *force majeure* could not either have saved it from liability. 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.

14. 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 first ratoon crop and the contemplated second ratoon crop.

15. 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 yield over the whole area forming the Respondent's zones was **87 tonnes per acre.** I find the contention by the Respondent that the average tonnage was 70 tons per hectare to be without any basis and is hereby rejected. The area of the Appellant's land is settled at **0.3 Ha** by the contract and evidence. 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. Again, the Respondent's contention that the price was Kshs. 1,553/- per ton is without any foundation and is so rejected.

16. The total expected earnings for the two ratoon crops would then be **Kshs. 90,306/=.** That amount is however subject to the would-be harvesting and transport expenses which are settled at **Kshs. 36,000/=.** The net amount payable to the Appellant is therefore **Kshs. 54,306/=** 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.

17. 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. 54,306/=;

c) The sum of Kshs. Kshs. 54,306/= 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