REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 32 OF 2016

PETER N. ODUNDO…….....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. 131 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 241/10/1997 (hereinafter referred to as '**the Contract**') the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD,** contracted the Appellant herein **PETER N. ODUNDO** to grow and sell to it sugarcane at the Appellant's parcel of land being Plot No. 302B measuring 0.4 Hectares in Field No. 122 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, 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 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 and contended *inter alia* that the yield was uneconomical to harvest hence it acted within the contract.

5. The suit was heard by way of adopting the witness statements, the documents and the written submissions which both parties complied with. 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 but according to the Witness Statement of its sole witness, Richard Muok, the Respondent took the defence that:-

"It is clear that the Defendant did not breach the contract but it was uneconomical for the farmer to maintain such a plot as witnessed in the yields realized in plant crop and ratoon 1 which were below average."

11. According to the Respondent, the plant crop was harvested on 06/01/1994 and 7.11 tonnes were realized and that the income thereof was not able to defray the expenses incurred by the Respondent as that translated to **negative Kshs. 806/40.** The first ratoon crop was harvested on 01/10/1995 and realized 5.6 tonnes and the Appellant was paid **Kshs. 1,846/65.** According to the Respondent's own estimates, those yields were against the expected yields within the Manyatta Sub-location of 63 tonnes per hectare from the plant crop and 42 tonnes per hectare from the first ratoon. That being so, the Respondent did not see any economic justification to inject more of its resources whose likely recovery was very minimal if at all possible and pursuant to Clause 5 it suspended any further dealings with the Appellant.

12. The Appellant did not deny the proceeds from the plant crop and the first ratoon crop. The second ratoon crop was hence due for harvesting in 1997. 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. On average and subject to applying good crop husbandry, in 1994 the plant crop was expected to yield 75.9 tonnes per hectare, in 1995 the first ratoon crop was expected to yield 96.2 tonnes per hectare and in 1997 the second ratoon crop was expected to yield 97.2 tonnes per hectare.

13. When the yields realized from the plant crop and the first ratoon crop are compared with what was expected from the guide developed by KALRO or the estimates developed by the Respondent, one thing stands out. The yields were too far below what was reasonably expected upon the application of good crop husbandry. There is therefore every good reason for the Respondent's plea in its Defence that the crop was poorly maintained, neglected and/or abandoned. It is hence clear that what was expected from the second ratoon crop was well below 5 tonnes per hectare which would translate to an amount **less than Kshs. 6,920/=.** That amount would then be subject to the expenses incurred by the Respondent.

14. The foregone discourse makes this Court find that indeed the Respondent was justified in suspending its dealings on the Appellant's farm. That was in consonance with **Clause 5** of the contract which allowed the Respondent to do so without any notice to the Appellant. The Respondent was hence not in breach of the contract.

15. As to the reason put forth by the trial court on the dismissal of the suit that there was no evidence that the second ratoon crop was developed, I may say that given the practice in sugar development that 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 finding that the second ratoon was not developed after finding that the first ratoon crop was indeed developed, harvested and paid for was, with tremendous respect, erroneous. That finding is hereby set-aside.

16. I will therefore substitute the reason for dismissing the suit with the finding that the Respondent was not in breach of the contract. Consequently, the appeal is unsuccessful and is hereby dismissed. As the Appellant did not realize anything meaningful from his crop, I order that each party do bear its own costs of the suit as well as of the appeal.

Orders accordingly.

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

A. C. MRIMA

JUDGE