



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 28 OF 2016

WILKISTA AKUMU

ADONGO.....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. 112 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 an Outgrowers Cane Agreement dated 28/03/1995 (hereinafter referred to as '**the Contract**') the Respondent herein, **SOUTH NYANZA SUGAR CO. LTD**, contracted the Appellant herein **WILKISTA AKUMU ADONGO**, to grow and sell to it sugarcane at the Appellant's parcel of land being Plot No. 1056J measuring 0.3 Hectares in Field No. 38 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 occurred first.
3. As evidenced by the filing of the Complaint 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. She 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 prove that the plant crop was not harvested and that the appellant had also failed to prove that he developed 1st and 2nd ratoons.

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 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 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. 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 crops were developed. The court stated that:-

***“The question for determination therefore is whether the plaintiff proved that she developed the ratoon crops. The documentary evidence adduced by the defence shows that the defendant had the intent to facilitate in the cultivation the 2nd ratoon crop. The defence witness statement further revealed that the 2nd ratoon crop was cultivated however the plaintiff abandoned the crop and as a result the defendant company felt it was uneconomical to continue with the said contractual relationship. I have perused the Agreement. Under its clause 5 it empowers the company to suspend its supply of services and materials to the out grower if it’s of the opinion that the next cane harvest will be insufficient to reimburse the company the monies due to it from the out grower immediately and without notice. Therefore I find that the company was not in breach.*”**

***No documentary proof was adduced to show that the 2nd ratoon was developed. It is unlikely that there would not be a single document showing that the crops were developed. Therefore, the failure to avail such evidence is suspect and it lends credence to the defendant’s position that the ratoons were never developed.*”**

***It is trite law that he who alleges must prove. The plaintiff in this case failed to establish, on a balance of probability, that she did not receive payment for the crop cycle, 1st and the 2nd ratoon or that the 2nd ratoon was cultivated on the subject parcel.”*”**

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 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. She 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. She also admitted that the harvesting and transport charges were deductible from the proceeds of the crops.

11. The Respondent on its part relied on the Defence, the statement of one Richard Muok (the Respondent's Field Supervisor), the contract, the Appellant's statement of accounts and the receipts confirming having rendered various services to and even supplied her with fertilizers as required under the contract. 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 and that it harvested the crop plant but the Appellant did not develop the first ratoon crop.

12. Having taken that position and considering the evidence of the Appellant, it was incumbent upon the Appellant to prove that the Appellant failed to develop the first ratoon crop since in cane development the first ratoon develops once the plant crop is harvested and the second ratoon crop develops once the first ratoon crop is harvested. **Clause 4** of the Contract provided for any breach of the contract and what happens in such instances. There is no evidence that the Respondent issued any notice upon the Appellant's alleged default. 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 first ratoon crop and the contemplated 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 plant crop was harvested on 21/09/1999, the first ratoon crop was expected to be harvested around 22 months later; that is for the year in 2001 and the second ratoon was expected in 2003. By then the average yield was **87 tonnes per hectare**. 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.

15. 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.

16. 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 Plaintiff;

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