REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. E005 OF 2024

JOSEPH ONYANGO OMARI..... APPELLANT

VERSUS

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

JUDGMENT

1. This appeal arises from the Judgment of Hon. S.N. Mutava (PM) delivered on 14.2.2024 in Rongo PMCC No. 211 of 2017.

2. The Memorandum of Appeal dated 14.2.2024 raised the following material grounds:

    a) The learned magistrate erred in law and fact in finding that the Appellant did not prove existence of a contract.
    b) The learned magistrate erred in failing to find that the Respondent was in breach of contract.
    c) The learned magistrate erred by framing issues not arising from pleadings by parties.

3. The Plaint dated 3.7.2017 claimed compensation for 3 unharvested sugarcane cycles and costs and interest.

4. The Appellant averred that on or about 2.9.2010 and 5.6.2013, the Appellant and the Respondent entered into contract where the Respondent was to harvest the sugarcane that the Appellant planted on his plot No. 433 measuring 0.26 ha, upon maturity.
5. The Respondent failed to harvest the sugarcane upon its maturity which compromised the development of the 1st and 2nd ratoons. The Appellant lost 26 tons and the price per ton was Ksh. 3,800/=.
6. The Respondent filed defence dated 8.8.2017 denying the allegations in the plaint.
7. In its judgement dated 14.2.2024, the court dismissed the suit. Aggrieved, the Appellant lodged the Memorandum of Appeal hence this appeal.

Proceedings

8. PW1 was the Appellant. He relied on his list of documents. He testified that he was a farmer. He prayed that the reliefs sought be granted. On cross examination, it was his case that the contract was dated 2.9.2010. Joseph Genga Ochar was the name on the schedule. The contract was his contract. He had not requested for consent to sell the cane. The Respondent did not harvest 3 cycles. He was not supplied with fertilizer.
9. The Respondent called DW1, John Otieno George. He was supervisor at the Respondent company. He adopted his

witness statement and produced the documents filed in court. The contract involving the Appellant was on Plot No. 433A dated 5.6.2023. On cross examination, the contract book was issued by supervisor. The farmer was the Appellant.

Analysis

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

11. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of **Mbogo and Another vs. Shah** [1968] EA 93 the court stated:

> **"...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."**

12. The duty of the first appellate court was set out in the case of **Selle and another Vs Associated Motor Board**

Company and Others [1968]EA 123, where the Judges in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

13. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

14. This court's the jurisdiction to review the evidence should be exercised with caution. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be e4xercised with caution: it is not enough that**

the appellate court might have come to a different conclusion…"

15. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions.

16. The Appellant urged the court to find that the lower court erred in dismissing his suit. This court is entitled to reevaluate by way of a retrial the pleadings and evidence at the lower court. On the proof of the allegations of breach of contract, in **Raghbir Singh Chatte v National Bank of Kenya Limited [1996] KECA 99 (KLR)** the Court of Appeal stated thus:

> **"When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given."…**
>
> **…First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe**

> **the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."**

17. The burden was with the Appellant to prove his case against the Respondent. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

18. A party who invokes the aid of the law and asserts affirmative of an issue has the burden to prove the matters in issue. In **Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:

> **"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.".**

19. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending

on the circumstances of the case. The burden of proof also rests upon any party who desires the court to believe in existence of a fact. In **Nyakwana v Ongaro [2015] KEHC 8440 (KLR)** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

20. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in **william Kabogo Gitau V George Thuo & 2 Others** [2010] KEHC 4124 (KLR)stated that:

> **"In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is**

probable than not that the allegations that he made occurred."

21. Courts have established that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Lord Nicholls of Birkenhead in **Re H and Others (Minors) [1996] AC 563, 586** held that;

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."

22. The preponderance of probabilities degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. Furthermore in **Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] KECA 616 (KLR)** the Judges of Appeal held that:

> "Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

23. With the above guide, in the instant appeal, the plaint dated 3.7.2017 claimed compensation for 3 unharvested cycles of sugarcane. This was based on the contract allegedly entered into between the Appellant and the Respondent on 2.9.2010. The said contract was not filed in court. The contract that was filed was dated 5.6.2013. There was an attempt to introduce an amendment in the Plaint by pleading two agreements. However, the Appellant, having been granted leave to file the application, did not do so. The pleadings as remained referred to the agreement of 2.9.2010, but in evidence, the agreement of 5.6.2013 was produced. It is on this basis that the court dismissed the suit as no agreement was produced to support the cause of action.

24. The Appellant pleaded that the sugarcane would yield 36 tons and price per ton was Ksh. 3,800/=.

25. What the Appellant ought to have proved was the fact that the sugarcane, having matured was not harvested and if it had been harvested and sold, it would have yielded definite amounts for the plant, 1st ratoon and 2nd ratoon.

26. In the circumstances of this case, I find no basis to interfere with the finding of the lower court. The contract of 2.9.2010 was not produced to support the cause of action. The Appellant was bound by his pleadings and no evidence at variance with the pleadings would found a cause of action. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……'"

27. The appeal is not merited.

Determination

28. In the upshot, I make the following orders:

a) The appeal is not merited and is dismissed.

b) The Respondent shall have costs of the appeal assessed at Ksh. 85,000/=.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **11th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael