Maroa v South Nyanza Sugar Company Limited (Civil Appeal E022 of 2023) [2025] KEHC 6746 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 6746 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E022 OF 2023

A. ONG'INJO, J

MARCH 27, 2025

BETWEEN

JOSEPH OBARA MAROA ..... APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED ..... RESPONDENT

JUDGMENT

1. By a Plaint dated 18th June 2018 the Appellant sued the Respondent in Rongo PMCC No. 424 of 2018 for breach of terms of agreement where the Respondent contracted the Appellant to grow and sell his sugarcane on parcel of land No. 48 in Field N0. 223 in Mohero Sub-Location measuring 7.12 Ha vide Contract Account No. 55xxxx.

2. The Appellant's claim was allowed partially where the Trial Magistrate found that there was indeed a breach of contract by the Respondent/Defendant when they refused to harvest the plant crop. The Trial Magistrate however found that there was no evidence that the Ratoons 1 and 2 were ever developed and the Appellant cannot be compensated for what he did not lose.

3. The Trial Magistrate also dismissed the Respondent's claim for deductions for transport,harvesting and Cess on the ground that expenses were not incurred and could not be claimed. She further found that there was no evidence the Appellant's plot was 7.12 Ha and relied on the Respondent's evidence that the Appellant's plot was 0.39Ha instead of 7.12 Ha. The Trial Magistrate entered judgement for Kshs. 79648/= plus interest at 3% as per clause 5.2 from date of filing together with exemplary damages of Kshs. 30,000/= with costs and interest on costs from the date of judgment till payment in full.

4. Being aggrieved by the judgment and decree of the Trial Magistrate the Appellant vide Memorandum of Appeal dated 25th April 2023 lodged the appeal herein on the following ground:

    1. That the learned magistrate erred in law and fact by entertaining and/or regarding the defence evidence which is at variance with the statement of defence.

2. That the learned magistrate erred in law and fact by writing judgment not based on evidence and pleadings on record.

3. That the learned magistrate erred in law and fact by expressing her opinion in her judgment instead of making findings based on pleadings and evidence.

4. That the learned magistrate erred in law and by disregarding the Appellant's pertinent and apt evidence, submissions and authorities cited the precedents of which she glossed over.

5. That the learned magistrate disregarded the principle 'restitutio in integrum"

6. That the learned magistrate's interpretations of the various relevant principles of law and fact was erroneous.

5. Reasons Whereforethe Appellant prays for judgment against the Respondent for;

(a). That the court be pleased to set side the trial magistrate's judgment (and decree) and substitute the same with An appropriate award for plant crop;

(b). That the court being the first appellate court do re-evaluate the evidence on record and arrive at own independent findings;

(c). That the costs and interest thereon be borne by the Respondent.

6. The Appellant's case was that the contract between him and the Respondent was entered into on 25th September 2012 and was to remain in force for 5 years or until one plant crop and 2 Ratoon crops were harvested on the plot whichever period was the less; that the Plant Crop and Ratoon Crops were to be harvested at the age of 22-24 months and 16-18 months after planting and subsequent harvest respectively; that the Defendant would exercise due care during the harvest. However the Defendant failed to harvest the Plant Crop when the cane matured and was ready for harvest at 22-24 months of age ; that the cane dried up and thereby depriving the development of Ratoons 1 and 2. The Appellant in his statement said he had carried out weeding and general nurturing of the sugarcane and expected at least 63 tonnes per hectare at Kshs. 4,300/= per tonne. He prayed to be compensated for the loss suffered for the 3 cycles together with costs and interest.

7. The Respondent through its Field Officer Justus Otieno George DW1 confirmed that the Appellant and the Respondent entered into an agreement but the Appellant did not carry out the 1st and 2nd harrowing and also failed to furrow and the Respondent did not supply the cane crop. He said that the Job Completion Certificate he produced in court as Exhibit 7 belonged to Sabina Atieno and not the Appellant.

8. The appeal herein was canvassed by way of written submissions.

9. The Appellant's submissions are dated 13th December2023. The Appellant's submissions are that the Respondents confirmed that there was a contract between it and the Appellant and that the cane was to be harvested at 24 months on 19th October 2013 but was not programmed for harvesting. That according to DW1 cane was poached on 7th November 2015 long after the due date for harvesting. It was submitted that it was not established if the cane was under threat of poaching or it was poached and the Trial Magistrate's finding was far fetched

10. The Appellant further submitted that the Respondent had breached the contract when it failed to harvest the sugarcane on 19th October 2012 and evidence by DW1 that cane was poached on 7th November 2015 does not hold water without the testimony of the Security Manager who was instructed to investigate of threat to and/ or poaching. That the Trial Magistrate therefore omitted the

overwhelming evidence in favour of the Appellant that his sugarcane dried up up after the breach by the Respondent.

11. The Appellant submitted that he ought to have been compensated for the 3 cycles of sugarcane as per the holding of the Court of Appeal at Kisumu in Civil Appeal No 138 of 2018 between South Nyanza Sugar Company Limited v Awino Oreko where the judgment in Migori HCCA No. 18 of 2015 was overturned and it was made clear that interests on the awards starts running from the time suit is filed.

12. The Appellant submitted that he was entitled to judgment in the following terms:

    1. Plant Crop 2.0 Ha x63.86 tonnes x3,800/= Kshs. 485,032

    2. Ratoon 1 2.0 Ha x40.36 tonnes x3,800/= Kshs. 306,737/=

    3. Ratoon 2 2.0 Ha x40.36 tonnes x3,800/= Kshs. 306,737/=

    Totals Kshs. 1,098,504/=

13. The Respondents submissions dated 3rd March 2025 in response to the appeal and in support of their Cross Appeal dated 3rd April 2024 and agreed with the Trial Magistrate that there was no need to compensate the Appellant for 1st and 2nd ratoon crops as there was no evidence that the Respondent's failure to harvest the Plant Crop compromised the development of the 1st and 2nd ratoon crops. That it was also not pleaded and proved that the Appellant developed the the 1st ratoon crop and same was not harvested and he went on to develop the 2nd ratoon crop.

14. The Respondent cited the holding in Migori HCCA No 47 of 2019 South Nyanza Sugar Company Limited v Francis Aderi Dedege where Chitembwe J held:

> "This is a civil claim and the standard of proof is one of balance of probabilities....."

15. In the Cross Appeal the Respondents submitted that there was no basis upon which exemplary damages were awarded as the same was never prayed for and was therefore illegal, irregular and unjustifiable as the contract between the Appellant and the Respondent was purely commercial.

16. The Respondent argued that the circumstances of the case herein did not meet the criteria for award of exemplary damages as restated in the case of Godfrey Julius Mbogori and Another v Nairobi City County [2018] Eklr.

17. That the case before the Trial Court did not call for consideration of exemplary damages as there was no oppressive, arbitrary or unconstitutional wrong doing on the part of the Respondent. The Respondent also relied on the Court of Appeal holding in South Nyanza Sugar Company Limited v Oreko Civil Appeal No 138 of 2017 to support their position that exemplary damages were not appropriate in the circumstances.

18. The Respondent further argued that time was of essence in the contract and the Appellant ought to have proved that he planted sugarcane and subsequently developed the 1st and 2nd ratoons.

19. It was also submitted that the Trial Magistrate erred in failing to make provision for transport and harvesting charges.

20. The Respondent relied on the decision in Ezekiel Omambia vSouth Nyanza Sugar Company Limited to support its position that award to the Appellant must be subject to the standardized transport and harvesting charges.

21. The Respondent also urged the court to make an order that the award to the Appellant should be subject to support it gave to the Appellant in developing the cane and that each party should bear its own costs of the appeal.

Analysis And Determination

22. This being the 1st appeal this court is mandated to re-evaluate and scrutinize the evidence and judgment of the lower court afresh, and make conclusions and independent decision on whether to allow the appeal. The court does this even though it did not have the opportunity to see and hear the witnesses 1st hand. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

23. Having considered the grounds of appeal and rival submissions and having re-evaluated and scrutinized the evidence and judgment of the trial court afresh the issue that arises for determination is:

_whether the Trial Magistrate erred in finding that the Appellant was not entitled to be compensated for loss suffered when the Respondent breached the contract by failing to harvest the Plant Crop thereby compromising the development of the 1st and 2nd ratoon crops under the contract.

_Who bears the costs of the appeal.

24. The Appellant claimed that the Appellant did not carry out the 1st and 2nd harrowing and also failed to furrow and heavily relied on the decision of Chitembwe, J. (as he then was) in South Nyanza Sugar Company Ltd vs. Francis Aderi Dedege (supra), wherein he held that it was the outgrower's responsibility to inform the sugar company when the ratoon crop was ready and that the failure of a farmer to prove that they did so is fatal to a claim of this nature. However the agreement between the parties provided the Outgrower at Clause 3 with strict rules that indicates that there are scheduled visits by the Company to the farmer's shamba and notification thereof of the farmer by the Company of any works or operations that may be required to be done. Therefore, it goes without saying that it was the duty of the Respondent to inform the Appellant or his representative of the appointed date of each harvesting or any other works or operations. This is to say, according to the wording of the contract, it was not the duty of the Appellant to notify the Respondent that the plant crop or the ratoons were ready for harvesting. The contract reveals that there is a system developed by the Respondent to ensure scheduled and/or follow up visits to the farmer's shamba to ensure that the farmer has maintained, cultivated and tended his shamba for purposes of obtaining satisfactory yield. It is telling that despite that elaborate system, the Respondent did not have any evidence whatsoever to demonstrate that the Appellant had failed to maintain the shamba satisfactorily; or that it had valid reasons to rescind its contract with the farmer on account of breach of contract on his part.

25. In consideration of the terms of the contract the Appellant could not have been expected to do anything that was contrary to the provisions of the said agreement and the Trial Magistrate having found that the Respondent breached the terms of the said agreement they are thereby held liable to restitute the Appellant to the position he would have been had the terms of the said contract been performed.

26. In the case of South Nyanza Sugar Company Limited v Oreko which the Respondent has also relied on in its submissions the Court of Appeal held that the Appellant was entitled to be compensated for all the 3 cycles as the contract was for a period of 5 years and the failure to harvest the plant crop compromised the development of 1st and 2nd ratoon crops.

27. This court is in agreement with the Respondent that the Appellant did not plead for exemplary damages and there was no basis for the Trial Magistrate to award the same as the suit was not based on any wrong doing that would require punishment and deterrence.

28. This court finds that the appeal has merit and sets aside the judgment of the Trial Court and substitutes it thereof with an award for the Plant Crop, Ratoons 1 and 2 respectively.

29. From the plaint, the statements of witnesses for both parties and documentary exhibits it can easily be discerned that certain figures have been alluded to which should guide the court in arriving at appropriate compensation.

30. The contract document indicates that the Appellant's plot was 7.12 Ha and at paragraph 6 of the Plaint the said plot was expected to yield 63 tonnes for the plant crop at Kshs. 4,300/= per tonne and in their submissions indicated expected yield for the 2 ratoon crops at 40.36 tonnes at Kshs. 3,800/= per tonne.

31. The Respondent on the other hand claimed that denied that the Appellant's plot was 7.12Ha and said it was 0.39 Ha as per exhibit D 1 and 2 which are shown to have been made at a later date. They also stated at paragraph *6* that they were paying contracted farmers Kshs. 3,800/= per tonne subject contractual, statutory and other deductions which included:

    (a). Cost of all inputs and services, including survey, seedcane and fertilizer.

    (b). Harvesting charges Kshs307/= per tonne

    (c). Transport charges Kshs. 690/= per tonne

    (d). Cess 1% of the total cane value

    (e). Levy 1% of the total cane value

    (f). Interest on the costs of input 17% p.a

32. The Appellant did not factor the deductions alluded to by the Respondent and did not dispute that such deductions should be factored in.

33. In pursuit of the Court of Appeal decision in South Nyanza Sugar Company Limited v Awino Oreko Kisumu Court of Appeal C. A. No 138 of 2017 this court finds that the Appellant was entitled to be compensated for all the 3 cycles as the contract was for a period of 5 years and the failure to harvest the plant crop compromised the development of 1st and 2nd ratoon crops.

34. This court therefore enters judgment for the Appellant in the following terms:

    1. Plant Crop 7.12 Ha x63.82 tonnes x4,300/= Kshs. 1,953,913.12/=

    2. Ratoon 1 7.12Ha x40.36 tonnes x3,800/= Kshs. 1,091,980.16/=

    3. Ratoon 2 7.12 Ha x40.36 tonnes x3,800/= Kshs. 1,091,980.16/=

    Totals Kshs. 4,137873.44/=

35. Subject to the deductions referred to by the Respondent namely:

Harvesting charges Kshs 307/= per tonne

(c). Transport charges Kshs. 690/= per tonne

(d). Cess 1% of the total cane value

(e). Levy 1% of the total cane value

(f). Interest on the costs of input 17% p.a

36. Costs of the appeal will go to the Appellant and interest to accrue from date of filing of the suit. Orders accordingly.

DELIvERED DATED AND SIGNED AT MIGORI THIS 27TH DAY OF MARCH, 2025.

A. ONG'INJO

JUDGE

Judgment delivered in the presence of