



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 93 OF 2017

CHARLES OOKO MAGANDA.....APPELLANT

-VERSUS-

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

(Being an appeal from the judgment and decree by Hon. M.M. Wachira, Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 2527 of 2015 delivered on 07/09/2017)

JUDGMENT

1. By a Growers Cane Farming and Supply Contract dated 14/09/2007 (hereinafter referred to as '**the Contract**') the Respondent herein, **South Nyanza Sugar Co. Ltd**, contracted the Appellant herein, **Charles Ooko Maganda**, to grow and sell to it sugarcane at the Appellant's parcel of land Plot No. 517 Field No. 11D in Kadera Kwoyo Sub-Location 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. At the time the contract was entered the Appellant had already ploughed, furrowed and harrowed his parcel of land. He had further planted the seed cane.

3. Aggrieved by an alleged breach of the contract, the Appellant filed **Migori Chief Magistrate's Court Civil Suit No. 2527 of 2015** (hereinafter referred to as '**the suit**') on the 10/11/2015 claiming damages for breach of contract, compensation for the loss of three crops, costs and interest at court rates from 14/09/2012.

4. The Respondent entered appearance and filed a Statement of Defence dated 27/11/2015 denying the claim and averred that if at all the Appellant suffered any loss then the Appellant was the author of his own misfortune as he failed to properly maintain the crop to the required standard to warrant the crop to be harvested and milled.

5. The suit was finally settled down for hearing. Both parties were represented by Counsels. The Appellant was the sole witness who testified and adopted his Statement as part of his testimony. He also produced the documents in his List of Documents as exhibits. The Respondent called its Senior Field Supervisor as its sole witness and who also adopted his Statement as part of his testimony and produced the documents in his twin Lists of Documents as exhibits as well.

6. The trial court rendered its judgment and dismissed the suit with costs on 07/09/2017 on account of failure to prove the claim. That is the judgment subject of this appeal.

7. The Appellant in praying that the appeal be allowed, and appropriate compensation be awarded, proposed the following four grounds in the Memorandum of Appeal dated 06/10/2017 and evenly filed: -

1. The learned trial magistrate erred in law and in fact, when he failed to make an award to the plaintiff / appellant for plant crop, Ratoon 1 and Ratoon 11 yet the plaintiff pleaded and proved that the defendant did not harvest his plant crop thereby

compromising his development of the 1st and 2nd ratoon.

2. The learned trial magistrate erred in law and in fact, when he failed to evaluate and balance the pleadings, evidence and submissions there reaching to a wrong conclusion that the plaintiff / appellant had failed to prove that the defendant breached the contract by failing to harvest the plant crop.

3. the learned trial magistrate e erred in law and in fact, when he held that there is no evidence that the ratoons crops were developed yet it was not practically possible to the plaintiff appellant to develop the ratoon crops once the defendant / respondent had breached the contract by failing to harvest the plaintiff's plant crop.

4. The learned trial magistrate as biased against the appellant.

8. Directions were taken, and the appeal was disposed of by way of written submissions where both parties complied and referred to several decisions.

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 certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

11. I will first deal with the issue as to whether the contract was breached. The existence of the contract is admitted. According to paragraphs 6 and 7 of the Plaint the Appellant contended that the Respondent failed to harvest the plant crop and thereby compromised the development of the twin ratoon crops. The Appellant reiterated the position in his written statement which he adopted as part of his evidence. However, when the Appellant testified before the trial court, he stated that the Respondent harvested the plant crop and infact issued him with a Statement. The Statement was not produced as part of the exhibits. The Appellant further stated that he was only claiming compensation in respect of the two ratoon crops. To that end, I find that the evidence was at variance with the Plaint. In reconciling that inconsistency, I am satisfied that indeed the Appellant was truthful when he testified and hereby find that the Respondent harvested the plant crop and issued the Appellant with the requisite statement.

12. Having so found, it was incumbent upon the Appellant to prove that he undertook the expected crop husbandry on the first ratoon crop up to maturity. That evidence did not come up at the trial neither was it contained in the Appellant's statement which was adopted as part of his evidence. There being no evidence that the Appellant discharged the expected duty of care on the first ratoon crop up to maturity, his claim cannot succeed. Infact the foregone bolsters the Respondent's defence that the Appellant was the author of his own misfortune as he failed to properly maintain the crop to the required standard to warrant the crop to be harvested and milled.

13. In civil litigation a party is under a duty to prove any issue it wants the court to rely on a decision. In other words, a party must not only plead an issue but must also prove it if the issue is not admitted. That is the rationale in *inter alia* **Section 107** of the **Evidence Act, Cap. 80** of the Laws of Kenya.

14. In this case I hereby find and hold that the Appellant failed to prove that the Respondent acted in breach of the contract. Consequently, the appeal must fail and is hereby dismissed with costs. The decision of the trial court is hereby affirmed.

15. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 23rd day of November 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Kerario Marwa instructed by the firm of Kerario Marwa & Co. Advocates for the Appellant.

Messrs. Otieno, Yogo, Ojuro & Company Advocates for the Respondent.

Evelyne Nyauke – Court Assistant



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