



**South Nyanza Sugar Co. Ltd v Ochola (Civil Appeal 35 of 2021)
[2023] KEHC 26659 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26659 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 35 OF 2021
RPV WENDOH, J
DECEMBER 19, 2023**

BETWEEN

SOUTH NYANZA SUGAR CO. LTD APPELLANT

AND

MARGRET AKINYI OCHOLA RESPONDENT

(An Appeal from the Judgement and Decree of Hon. J. Munguti Senior Principal Magistrate (SPM) dated and delivered on 21/4/2021 in Migori CMCC No. 88 of 2018)

JUDGMENT

1. South Nyanza Sugar Co. Ltd (the appellant) commenced this appeal against the judgement and decree of the Hon. J Munguti (SPM) dated and delivered on 21/4/2021. The appellant is represented by the firm of Moronge & Co. Advocates while Margret Akinyi Ochola (the respondent) is represented by the firm of Tom Mboya & Co. Advocates.
2. The respondent filed a suit in the trial court by a plaint dated 28/11/2016. The respondent pleaded that on 19/8/2007, she entered into a written agreement with the appellant to grow sugarcane on Plot No. 1727B measuring 0.9Ha, Field No. 66D vide Account Number 480052. The respondent particularized the breach by the appellant as failure to harvest the plant crop thereby compromising the growth of the 1st and 2nd ratoons and deliberately refusing to give consent to the respondent to dispose of the sugarcane to 3rd parties or to the open market.
3. It was further pleaded that as a result of the breach, the respondent lost approximately 90 tons per Ha for the plant crop and 90 tons per Ha for each ratoon and the price per ton at the time of signing the contract was Kshs. 3,500/=. The respondent prayed for judgement against the appellant for payment of the price of 3 unharvested cycles of sugarcane due to the breach, costs of the suit, interest and any other relief the court may deem just and expedient to grant.



4. In its defence dated 16/1/2017, the appellant denied each and every particular of the claim as pleaded and put her to strict proof thereof. The appellant averred that the respondent's claim was defective and it would raise a preliminary objection at the hearing. The respondent further pleaded that it would ask the court to deduct the sum total of the costs of goods and services provided to the respondent as well as the eventual costs for transport and harvest charges as shall be proven in the cause of the trial. The appellant prayed that the respondent's suit be dismissed with costs.
5. After hearing the case the Learned Trial Magistrate delivered his judgement on 21/4/2020. The trial court entered judgement in favour of the respondent in the sum of Kshs. 403,902/= for the plant crop and the 2 ratoon cycles, costs and interest from the date of filing the suit.
6. Being aggrieved by the said decision, the appellant commenced this appeal by a Memorandum of Appeal dated 19/5/2021 and preferred 8 grounds of appeal which can be summarized as follows: -
 1. The Learned Magistrate erred in both law and in fact when he awarded damages for breach of contract in the sum of Kshs. 403, 902/= which was an amount neither pleaded in the plaint nor proved at the trial as required by law;
 2. The trial Magistrate erred in both law and in fact when he failed to address himself to the question of identity of the plaintiff and the validity of the contract document relied upon by the plaintiff. The contract document had 4 pages;
 3. That the trial Magistrate erred in both law and in fact when he failed to consider whether he had jurisdiction on limitation to determine the suit;
 4. The trial court erred when it awarded a global compensation to the respondent in respect to crop cycles which were never developed by the respondent and therefore never existed at all.
7. The appellant prayed that the appeal be allowed and the judgement of the lower court be set aside and in its place an order be made dismissing the respondent's suit with costs.
8. Directions on the appeal were taken that the appeal be canvassed by way of written submissions. Both parties complied.
9. The appellant filed its written submissions on 15/8/2023. On the question of limitation of time, it was submitted that it is a jurisdiction issue and the court can address it suo moto or upon being raised by a party. The appellant submitted that the point of jurisdiction is in light of Section 4 (1) (a) of the Limitation of Actions Act Cap 22; that the contract was entered into on 19/8/2007 and therefore any cause of action arose not later than 6 years from the date of accrual of the cause of action; that the plant crop matures at 24 months from the date of planting; that the respondent failed to lead evidence on the date of planting; that since the contract is dated 19/8/2007 it will suffice as the date of planting; that the plant crop was therefore ready for harvest on 19/8/2009.
10. It was further submitted that the cause of action accrued on 19/8/2009 and any claim should have been preferred not later than 19/8/2015 but this suit was filed at the Ndhiwa Law Court on 28/11/2016, 1 year and 3 months beyond the period allowed under Section 4 (1) of Cap 22. On this ground, the suit ought to have been dismissed with costs to the appellant.
11. On the identity of the plaintiff and unproven contract, it was submitted that the identity of the farmer is to be captured in Schedule A and the jurat parts of the contract; that the identity card number at the jurat is not legible and appears to be overwritten in Schedule A whereas in the jurat, the identity card number does not appear at all. The respondent did not provide a certified copy of her identity card as an exhibit and the identity of the person who allegedly contracted with the appellant was not properly



- established. The trial court should have held that the identity of the person testifying vis a vis the person appearing on the contract relied upon was not strictly proven and proceed to dismiss the suit.
12. On the unproven contract, it was submitted that the respondent did not tender nor rely on a full and complete contract book. The respondent only filed and tendered uncertified copies of only four (4) pages of the alleged contract. Even though the court stated that it was supplied with a full contract, the same was not served upon the appellant. It was submitted that Order 3 Rule 2 provides on the documents to accompany the suit; that if a party has not complied with the rules of filing documents, he has to seek leave to file the same out of time otherwise, a party is precluded from relying on the same. The appellant did not have the benefit of the entire contract book but was only limited to four (4) pages. The trial Magistrate should have interrogated the relevance of the four pages of the contract vis a vis the facts and evidence on record so that he could make a decision.
 13. On the reliance on the tampered evidence, it was submitted that the respondent her testimony confirmed that the contract document had alterations on its face and that she did not know who made the said alterations; that she admitted that the file number was changed to no. 66 and the ID number had been overwritten by another number under Schedule A. The court ought to have reached a finding that the authenticity of the alleged contract was in question, the contract was not binding and proceed to dismiss the suit with costs.
 14. In conclusion, the appellant submitted that the respondent's suit was time barred, the respondent relied on unproven, tampered with or altered document in an attempt to prove the contract and therefore could not have been relied upon in evidence before court. The appellant urged this court to find that the respondent's claim was not proven to the required standard and set aside the lower court's judgement and dismiss the respondent's suit with costs.
 15. The respondent filed her written submissions on 12/10/2023. The respondent submitted on six issues.
 16. On whether there was a contract between the appellant and the respondent, it was submitted that the respondent produced and exhibited an original copy of the contract in the trial court; that the respondent proved that she was the actual farmer who contracted her farm with the appellant by producing her original identification card which was confirmed, verified and approved by the appellant's Counsel. It was stated that the only issue that was raised by the appellant during the trial was fraud which was never pleaded nor backed by evidence. The respondent submitted that the agreement book was shown to the appellant's Counsel who allowed it to be produced having confirmed that it was genuine. The respondent asked this court to be persuaded and dismiss the appeal.
 17. On who has the duty to harvest, the respondent submitted that it has been held that if contract clauses oust the provisions of an Act of Parliament, the contract becomes illegal and void. The Sugar Act provisions provides that the miller (the appellant herein) has an obligation to harvest and transport the sugarcane.
 18. On whether the Magistrate had jurisdiction to hear and determine the suit, it was submitted that the question of limitation was not raised at the preliminary stage; that the issue of limitation cannot be dealt with in a summary manner or at a preliminary stage or as a preliminary objection; that the court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. The respondent contended that the appellant had been silent on this issue at the trial stage and cannot therefore introduced it at this level as the same is not a preliminary objection but it requires further interrogation of facts as when was the contract signed, when the contract commenced, when was the input supplied and when the actual plantation occurred. These facts were missing and were never introduced during trial.



19. Whether the respondent gave notice of remedy of breach, it was submitted that the respondent went to the appellant to inform it about the maturity of the cane but it never responded. Through a demand notice dated 13/9/2016, the respondent informed the appellant of her intention to file the suit but the appellant failed to harvest the sugarcane within 14 days and the same was never responded to.
20. On whether the respondent should be compensated for the breach, it was submitted that having found that the appellant breached the contract, this court should uphold the decision of the trial court and compensate the respondent. The respondent further urged this court to find that the appellant should pay costs of the suit and this appeal.
21. I have duly considered the appeal, both parties' submissions and the trial court's record. The following are the issues for determination: -
 - i. Whether the respondent proved breach of contract. In considering this issue, this court will consider: -
 - a. Whether the identity of the appellant was proved.
 - b. The validity of the contract produced.
 - ii. Whether the suit was statute barred.
 - iii. Whether the respondent was entitled to damages awarded.
22. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.

Whether the full contract was produced in evidence:-

23. The record of appeal contains a four paged contract. The appellant testified as PW1. She produced her national identity card and the record indicates (seen by court). On cross examination, the respondent did not challenge the contents of the national identity card or allege that the appellant was not one and the same person. The respondent's only issue is the information which has been overwritten on in the contract, in particular, the filed number and ID Number. George Ochieng an employee of the appellant, testified that there are 4 people who should sign the contract, that is, the farmer, chief, agent of the farmer, 2 signatories from the appellant' side and the respondent. The agent did not sign or provide his ID No. hence, the contract was not valid.
24. While it is true that it was a four paged contract which was produced in court, the respondent produced and marked as "PEXH2" the original contract. The appellant proceeded to cross examine the respondent based on the contents of the original contract and even though its witnesses impeached the validity of the contract, I have also perused the clauses of the contract, there is no clause which suggests that in the event that execution is not carried out by all the parties on the attestation part, the contract is unenforceable.
25. The appellant further claimed that the stamp on the attestation part is a forgery and so is the whole contract. This court agrees with the respondent that there is no report which has been made in relation to the forgery claims and a forensic report produced to prove the claims. The appellant cannot now run away from the terms of the contract. It is my finding that the respondent produced a proper contract and her identity was proven by production of the identity card.



26. From the submissions by both parties, it is agreed that the contract was entered into on 19/8/2007. The respondent testified on cross examination:-

I planted the sugarcane around July. Sony sent them tractor to plough my land. they gave me 1 bag of fertilizer. Sony harvested the land before supplying seed cane. The company gave me DAP for planting, urea in but no urea was supplied for top dressing. INCC means initiating non contracted cane. I do not know why this (sic) did not wire CD - Company development since they ploughed for me.”

27. The testimony of the respondent brings out two issues; while the respondent claims that the appellant ploughed the farm and supplied to her the fertilizer and other farm produce, the contract was abbreviated INCC - “Initially Non - Contracted Contract.” This means that the respondent is the one who ploughed the farm by herself as opposed to CD - Company Developed which means that it is the company which developed the farm. Either way, whether the contract was INCC or CD, having found that the terms of the contract were binding on the parties and the respondent having testified that the cane was planted in July, this court will assume that the cane was planted in the month of July 2007.
28. The appellant contended that the plant crop ought to have been harvested on or before 19/8/2009. The cause of action accrued then and the suit should have been filed not later than 19/8/2015. Instead, the suit was filed on 28/11/2016. Therefore, it was statute barred. The appellant argued that since this was not an issue in the trial court and no evidence was led on it, the issue of limitation of time is now moot.
29. Section 4 (1) (a) of the *Limitation of Actions Act* provides as follows in relation to actions based on contracts, tort and certain other actions: -

The following actions may not be brought after the end of six years from the date on which the cause of action accrued –

- a. actions founded on contract;
30. An issue of limitation of time, goes to the root of the court’s jurisdiction. If none of the parties pleads the issue of jurisdiction, but the court takes note that it has no jurisdiction to hear and determine the suit before it, it can act suo moto and address the issue in the first instance. Admittedly, the appellant did not address the issue of jurisdiction before the trial court but it has raised it in this appeal.
31. The Court of Appeal in *Anaclet Kalua Musau vs Attorney General & 2 Others* (2020) eKLR held: -

Albeit the issue of the suit being statute barred was not raised by the defendants who did not participate in these proceedings, that matter goes to the jurisdiction of the court to determine whether it can entertain a claim which is statute barred...I therefore find that in as much as the court would have wished to assist the plaintiff to access justice in the court for the sad and sudden regrettable loss of his beloved son, failure to institute suit against the Government within the stipulated statutory period of one year or twelve months from the date when the cause of action arose, extinguished the suit in limine... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.”



32. The Supreme Court in the case of *Nasra Ibrahim Ibren vs Independent Electoral and Boundaries Commission & 2 Others* Supreme Court Petition No. 19 of 2018, stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:-

A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B"* [2008] 1 EA 367 stated thus:

“What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied)

33. The same position was held by Nambuye JA in the case of *Isaak Aliaza v Samuel Kisiavuki* (2021) eKLR as follows:-

I wish to reiterate that the position in law is therefore that a jurisdictional issue is a fundamental issue whether it is raised either by parties themselves or the Court suo motu, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.”

34. Whether or not the issue of jurisdiction was raised by either party or even in the pleadings, the fact remains that a suit filed outside the statutory timelines is automatically barred and the court has no jurisdiction.
35. Clause 1 (f) of the contract stated that the maturity of the plant crop would be 24 months. Since it was established that the cane was planted in July 2007, the plant crop should have been harvested on or before August 2009. The cause of action accrued then and the suit should have been filed within 6 years. The time for filing the suit lapsed in the month of August 2015. The suit was first filed in Ndhiwa Law Courts on 28/11/2016. This is almost a year after the statutory limitation period.
36. The foregone position is that the suit filed in the trial court was statute - barred. The trial court had no jurisdiction to entertain it. Even if the Magistrate proceeded with the suit to its logical conclusion and the issue of jurisdiction is raised on appeal, the appellate court would have to deal with it first. The suit in the trial court should have been struck out for being incompetent.
37. The appeal is hereby merited. It is allowed with costs in the lower court and of this appeal to the appellant.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 19TH DAY OF DECEMBER, 2023.

R. WENDOH

JUDGE

Judgment delivered in the presence of;

No appearance for the Appellant.

Ms. Ogutu holding brief Mr. Tom Mboya for the Respondent.

Emma & Phelix Court Assistants.

