REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 76 OF 2019

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

-VERSUS-

DAVID OMOLO GARI.....RESPONDENT

(An Appeal from the Judgement and Decree of the Chief Magistrate's Court, Migori, the Hon. R.O. Odenyo Senior Principal Magistrate (SPM) dated and delivered on 19/6/2019 in Migori CMCC No. 439 of 2014 – David Omolo Gari v South Nyanza Sugar Company Limited)

JUDGMENT

This is an appeal by South Nyanza Sugar Company Limited against the judgement and decree of the Hon. R.O. Odenyo (SPM) dated and delivered on 19/6/2019.

The appellant is represented by the firm of Okong'o Wandago & Co. Advocates whilst the respondent is represented by the firm of Kerario Marwa & Co. Advocates.

By a plaint dated 16/10/2014 and filed in court on 24/10/2014, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for damages for breach of Growers Cane Farming and Supply Contract entered into on 9/3/2004.

It was the respondent's case that the appellant contracted him to grow and sell to it sugarcane on his land parcel being plot number 58 Field No. 17 vide Account No. xxxxxx; that pursuant to the agreement, the respondent developed the sugar cane plot measuring approximately 2.3 HA and upon on its maturity, he asked the appellant to harvest the said sugarcane as per the agreement but the appellant failed to do so thus breaching the terms of the contract. The respondent particularized the breach of contract and alleged that he lost approximately 230 tons of the plant crop and another 230 tons of the ratoon cycles. The respondent pleaded that as a result of the breach, he suffered loss for which he sought compensation.

The appellant filed a statement of defence dated 4/12/2014 filed evenly in which liability was denied and the respondent was put to strict proof thereof.

The appellant averred that the alleged plot being 2.3 Ha could only yield 138 tons as opposed to 230 tons as pleaded by the respondent; that if there was any loss suffered, it is the respondent who breached the terms of the contract by failing to harvest plant crop and thereby compromising the development of the 1st and 2nd ratoons by deliberately and recklessly refusing to give consent to the appellant to dispose of the developed sugarcane to 3rd parties or the open market.

The appellant also pleaded that if the contract existed as pleaded in the plaint or at all, then the appellant's costs put in the development of the cane, survey, plough, harrow, furrow, DAP and Urea Fertilizer Seed Cane, harvest, and transport charges cess and levy at 1% were deductible from the farmer's harvested sugarcane dues.

After the hearing, the trial court entered judgement in favour of the respondent for Kshs. 215,200/= in damages for breach of contract, costs of the suit and interest at court rates from the date of filing the suit till payment in full.

Being dissatisfied with the judgement and decree, the appellant filed a Memorandum of Appeal dated 3/7/2019, filed in court evenly and preferred twelve (12) grounds of appeal which can be summarized as follows: -

i. That the learned trial magistrate erred in law and in fact in failing to hold that the respondent's suit was statute - barred and failing to strike it out having failed to address the issues of limitation of time and the binding authorities cited to him;

ii. That the court erred in failing to find and hold that the evidence led by the respondent in an attempt to prove his claim was at variance with his plaint in material aspects like the estimated yields and cane prices and in doing so entered judgement for the respondent in error;

iii. The trial court erred in finding that only the respondent's plant crop was not harvested after it developed to maturity and that the respondent never developed the first and second ratoons as the respondent pleaded and testified, thus awarding the respondent for loss of the first and second ratoons in the net sums of Kshs. 62,000/= and Kshs. 91,200/= respectively as if the respondent had developed the said ratoons but they were not harvested;

iv. That the trial court erred in finding that the respondent's plot could yield an average of 80 tonnes of sugarcane per hectare which evidence was not based on evidence and that the respondent was himself in breach of the contract while deciding the merits of the suit before him;

v. That the trial court erred in entering judgement for the respondent against the appellant for the principal sum of Kshs. 215,200/= which was neither pleaded nor specifically proved and awarding interest on the aforementioned sum from the date of filing suit without assigning reasons for doing so thus exercising his discretion wrongly.

The appellant prayed: -

i. That this appeal be allowed with costs to the appellant.

ii. That this court re-evaluates the evidence and arrive at its own conclusion and findings on the whole of the respondent's suit at the trial court.

iii. The suit in the trial court be dismissed with costs.

iv. This court be pleased to order that any interest on a sum of money awarded as damages if any be calculated from the date of judgement if this court were to find that damages are due.

Directions on the appeal were taken on 17/11/2020 and the court directed that it be canvassed by written submissions and both parties complied.

In support of its appeal, the appellant filed its submissions dated 30/3/2021 on 31/3/2021 and further submissions on 10/8/2021 in response to the respondent's submissions dated 6/7/2021 filed on 7/7/2021.

The appellant submitted **on the jurisdictional issue of limitation** of actions. It was contended that the suit was statute - barred as the contract, the subject of that suit was admittedly made on 9/3/2004, then the plant crop must have been planted on 9/3/2004 or soon thereafter; that the appellant allegedly failed to harvest the plant crop some 24 months later which fell on 4/3/2006 which was the time when the breach occurred; that the plaint was filed on 24/3/2014 which is some 8 years, 7 months and 20 days after the appellant allegedly breached the contract. The appellant submitted that the suit was thus filed 2 years, 7 months and 20 days outside the limitation period as provided for under Section 4 (1) (a) of the Limitation of Actions Act.

Secondly, the appellant submitted that the contract in issue which was allegedly breached was not formally produced in evidence as an exhibit; that the contract was annexed to the respondent's statement only had 3 pages. Thus, the trial court could not rely on that document as it was not produced at all; that the document annexed to the statement did not contain the terms of that contract as pleaded by the respondent in his plaint.

The appellant also contested the issue of award of interest on the principal sum of Kshs. 215,000/=. It was submitted that damages for breach of contract are not damages at large, but they are special damages which must be specifically pleaded and proved before they are awarded; that the respondent neither pleaded nor prayed for a specific amount in damages; that the character of the respondent's plaint, removed the respondent's case from the known class of special damages. The Magistrate was in error in awarding interest from the date of filing suit.

On the issue of limitation, the respondent submitted that the terms of the contract in particular clause 2 (a) stated that the contract was to run for a period of 5 years or until one plant crop and two ratoon sugar cane have been harvested whichever event occurs first; that this was also admitted by the appellant's witness in his statement dated 9/4/2019; that the appellant in this appeal, willfully, mischievously and deliberately failed to include the page that contains clause 2 (a) in its record of appeal despite the respondent producing the complete contract in the trial court.

It was further submitted that the contract was to run for 5 years and from 9/3/2004, the 5 years would have lapsed on 9/3/2009; that in computing the limitation, time should start to run from 9/3/2009. It was further submitted that from 9/3/2009, 6 years would lapse on 9/3/2015; that in this case, the plaint was filed on 24/10/2014 hence the suit was not statue barred.

On whether the evidence of the respondent was at variance with the plaint, it was submitted that the respondent pleaded that his plot was 2.3 Ha; that at paragraph 6 of the plaint, the respondent pleaded that he expected 230 tons for each cycle; that the respondent relied on the yield assessment report by KESREF and the schedule of sugarcane prices; that based on the aforementioned, his evidence was not at variance with

plaint. It was further submitted that since the appellant had failed to harvest the plant crop, then the respondent was entitled to the other 2 ratoon cycles.

Further, the respondent submitted that he was not in breach of the contract as this was not an issue in the trial court; that the appellant has not placed anything in the record of appeal to show that it pleaded that the respondent was in breach of the contract to enable the respondent respond.

On the award issued of Kshs. 215,000/=, the respondent submitted that the award was based on the evidence adduced by the respondent and the appellant; that in civil cases the standard of proof is on a balance of probabilities. The respondent reiterated that he pleaded his case properly before the trial court and he was entitled to the award.

It was further submitted that the appellant was now introducing issues which it raised via submissions. It is trite law that submissions cannot replace evidence that was adduced during trial. On the issue of interest from the date of filing suit, the respondent relied on several cases to support the position that interest should start running from the date of filing suit.

In its further submissions dated 10/8/2021, the appellant reiterated its submissions filed earlier. The appellant argued that it did not willfully and deliberately exclude one of the pages of the contract in issue from the record of appeal; that there was no possible exclusion in view of the record of the subordinate court. The appeal was admitted to hearing on 17/11/2010 and respondent is raising the issue of a faulty record of appeal too late.

I have carefully considered the record of appeal, the rival submissions and the proceedings in the trial court. The following are the issues for determination: -

i. Whether the suit filed in the Lower Court was statute barred.

ii. Whether the award by the trial court was founded on proper legal principles.

This being a first appeal, the court has the duty to re-evaluate, and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bear 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 Motorboat Co Ltd (1968) EA 123.**

On the issue of limitation; the respondent's suit being one of breach of contract, the document which would have led the court to determine the dispute was the contract signed by both parties. From the court record, the contract document which formed part of the respondent's list of documents and the same one in the appellant's record of appeal, is the one dated 9/3/2004. The contract does not contain the clauses which outline the contractual obligations of the parties to it. The document only has the front page, Schedule A which contains the details of the famer and the execution part.

The respondent pleaded in paragraphs 3 and 4 of his plaint that he entered an agreement with the respondent on 9/3/2004 and pursuant to the terms of the agreement, the respondent developed the sugarcane but upon its maturity the appellant failed and/or refused to harvest the sugarcane. Therefore, it breached the contract.

The appellant denied the existence of a contract dated 9/3/2004 but through its defence witness one George Ochieng an employee of the appellant as a Senior Field Supervisor, it admitted the existence of the contract. Even in the appeal before this court, the appellant is not denying that a contract existed, rather it is contesting the timing of filing the suit.

In the Court of Appeal case, **Isaak Aliaza v Samuel Kisiavuki (2021) eKLR,** Nambuye J.A held that:-

"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."

Therefore, the issue of jurisdiction must be addressed first when it is raised at whichever stage by any party or even by the court ***suo moto***. An objection to the jurisdiction of the court can come in many forms one of them being a plea on limitation of time.

Section 4 (1) 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 –

actions founded on contract;

…

…

…

…”

As provided by Statute, actions relating to contracts can only be brought to court **before the lapse of six years from the time which the cause of action accrued**.

According to Black’s Law Dictionary (10th Edition) the word **“accrue”** means **“to come into existence as an enforceable claim or right.”** Therefore, in interpreting the word accrued as per the Statute, the cause of action on breach of contract can only be brought at the time the actual breach occurred. This is when it can be said the time started running.

Courts have defined the period when the alleged breach is said to have occurred and/or accrued. In the case of **South Nyanza Sugar Company Limited v Dickson Aoro Owuor (supra)** the court held that;

> **“…It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.”**

Going by the averments and admissions of the parties, the sugar cane was to be planted when the parties entered into the contract on 9/3/2004 or soon thereafter. The sugar cane was to be harvested on or about 9/3/2006. That is, 24 months after maturity. Therefore, the cause of action arose on 9/3/2006 when the appellant allegedly refused to harvest the sugar cane.

According to Section 4 (1) of the Limitation Act, time starts running at the point of breach. The action cannot be brought after the end of six years when the breach occurred. It can only be brought within 6 years from the time when the breach occurred. Thus, any claim for breach of contract should have been filed on or before 9/3/2012. The respondent filed his claim on 24/10/2014 some 2 years after the limitation period. The suit filed in the trial court was statue - barred. The trial court had no jurisdiction to entertain it. It ought to have downed its tools.

I should conclude my judgement at this point but I am inclined to comment on the contract that was produced in evidence before the trial court. I have carefully considered the proceedings in the trial court and read the judgement of the Learned Magistrate Hon. Odenyo (SPM) dated and delivered on 19/6/2019.

PW1 stated that he filed a statement and list of documents which he adopted as his evidence. It is trite law that for a party to expect the court to refer to its documents, the same must be produced as an exhibit in court. The contract, even in its incomplete manner, was not produced as an exhibit in court. The trial court in rendering its judgement did not even refer to the contract produced. There was no basis for the award of damages.

From the foregone, I make the following orders: -

i. The appeal is merited and allowed as prayed.

ii. The suit in the lower court dated 16/10/2014 and filed on 24/10/2014 be and is hereby dismissed.

iii. The judgement dated and delivered on 19/6/2019 and the consequential decree of 27/11/2018 be and are hereby set aside.

iv. Costs and interest in the lower court and this appeal are awarded to appellant.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 30TH DAY OF MARCH, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Odero for the Appellant.

No appearance for the Respondent.

Nyauke Court Assistant.