REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 75 OF 2019

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

-VERSUS-

CHARLES M. NYANTAHE.....RESPONDENT

(An Appeal from the Judgement and Decree of Hon. R.O. Odenyo Senior Principal Magistrate (SPM) dated and delivered on 29/5/2019 in Migori CMCC No. 412 of 2014 – Charles M. Nyantahe 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 Senior Principal Magistrate, dated and delivered on 29/5/2019.

By a plaint dated 13/10/2014 and filed in court on 24/10/2014, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for damages for breach of contract entered into on 1/3/2004.

It was the respondent's case that the appellant contracted the respondent to cultivate/develop sugarcane on plot number 1064, field number 10 vide account number 550044. The respondent developed sugarcane on plot measuring approximately 0.9Ha. It was further pleaded that upon maturity of the sugarcane, the respondent asked the appellant to harvest/purchase the said sugarcane as per the agreement, but the appellant unreasonably and in breach of the contract, refused or failed to harvest the plant crop, 1st and 2nd ratoons.

The respondent particularized the breach of contract by the appellant and pleaded that he lost approximately 90 tons for the plant crop and 90 tons for each of the ratoon cycles. The respondent asked the trial court to compensate him for the appellant's breach of contract for the loss occasioned by the appellant.

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

The appellant particularly denied that the plant crop, the 1st and 2nd ratoons could yield a total of 90 tons and pleaded that the vicinity where the sugarcane was grown, yields an average of 60 tons per Ha and with the plot being 0.9 Ha, only 54 tons could be realized.

The appellant further averred that if the contract existed, the appellant's cost of developing the cane, survey, plough, harrow furrow, DAP, and urea fertilizer seed cane, harvest and transport charges, cess and levy at 1% be deducted from the farmer's harvested sugarcane dues.

After the hearing, the trial court entered judgement in favour of the respondent for Kshs. 249,480/= 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 the memorandum of appeal dated 2/7/2019. Pursuant to leave of court dated 5/10/2020, based the appellant filed an amended memorandum of appeal dated 5/10/2020 on ten (10) grounds of appeal which can be summarized in the following five (5) grounds: -

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 and/or determine that issue at all, and ignoring binding authorities cited to court, notwithstanding that the appellant raised and satisfactorily argued the fact that the respondent's suit was statute - barred;

ii. That the court erred in both law and fact in failing to hold that the evidence which the respondent led was at variance and departed from the respondent's pleadings;

iii. The court erred in law and fact in finding and holding that only the respondent's plant crop was not harvested after its maturity and that the respondent never developed his first and second ratoons as pleaded by the respondent, he compensated the respondent for the loss of the first and second ratoons as if they had been developed in the first place and hence the awards were speculative;

iv. The court erred in fact in finding that the plot could yield an average of 80 tonnes of sugarcane per hectare and applying that estimate in compensation due to the respondent, which finding and holding were based on no evidence at all;

v. That the court erred in law and in fact in assessing and awarding damages of Kshs. 249,480/= as compensation for unharvested sugarcane which amount was neither pleaded nor proved.

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 that the appeal be canvassed by way of written submissions. In support of its appeal, the appellant through the firm of Okong'o Wandago Advocates filed its submissions dated 24/5/2021 evenly.

The appellant submitted that the contract was entered into between the parties on 1/3/2004; that the breach of the said contract was in late March of 2006 when the appellant allegedly failed to harvest the plant crop; that basically, that is when the cause of action arose but the suit was filed on 24/10/2014, a period of 2 years, 6 months and 24 days outside the mandatory limitation period prescribed by the Limitation of Actions Act, Cap 22 Laws of Kenya. Thus, the suit was incompetent. The appellant relied on several case laws to support its position.

Secondly, the appellant submitted that the respondent did not prove breach of the contract because the respondent did not prove the terms of the contract, which were allegedly breached; that the respondent testified on 15/7/2015 but he never produced any exhibits, that is the contract, nor any other related document to prove existence of the contract.

The appellant submitted that it was the respondent who breached the terms of the contract. In cross - examination, the respondent admitted that he abandoned sugarcane farming after he got discouraged when the appellant failed to harvest his sugarcane from the plot in 2004; that this was evidence that the respondent did not maintain his cane to maturity and on this basis, the respondent breached the terms of the contract himself and the appellant could not have failed to harvest sugarcane which the respondent abandoned in the year 2004, the same year the contract allegedly was entered into.

On award of interest, the respondent submitted that the award of interest from the date of filing suit was unjust and disproportionate; that an appropriate award of interest should run from the date of the judgement which was on 29/5/2019 had there not been an appeal.

The appeal is opposed. The respondent filed his submissions dated 13/07/2021 on 29/07/2021 through the firm of Kerario Marwa Advocates.

In rebuttal, the respondent submitted that it is not disputed that the contract was entered into on 1/3/2014; that it was to run for a period of 5 years or until one plant crop and two ratoons of the sugar cane had been harvested whichever event occurred first; that from 1/3/2004, 5 years would have lapsed on 1/3/2009; that in computing the limitation of time, it should start running from 1/3/2009, that is 5 years from the date of contract; that Section 4 of the Limitations of Actions Act states that an action founded on contract cannot be brought after the expiry of 6 years which would take us upto 1/3/2015; that this plaint was filed on 24/10/2014, hence the suit was not statute barred.

The respondent submitted that there was no variance between the evidence of the respondent during trial and the plaint, as he filed a statement and adopted the same. The respondent further submitted that the trial Magistrate did not err in compensating the respondent for the ratoons as the unharvested plant crop hindered development of the ratoons, and a farmer cannot be blamed for not developing the ratoons.

Further, the respondent submitted that he supported his evidence with a yield assessment report by Kesref and there was no other evidence to controvert that of the respondent on the yields. On the issue of the respondent breaching the contract himself, the respondent submitted that the same was not raised as an issue in the appellant's defence and the respondent has not placed anything in the record of appeal to show that it pleaded the same. On the issue of interest, the respondent admitted that the same should run from the date of judgement.

After carefully considering the arguments and submissions of the parties before this 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 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.**

On the first issue, whether the suit was statute barred, it is not in dispute that parties signed a contract dated 1/3/2004. The suit before the lower court was filed on 24/10/2014. The appellant submitted that it was statute barred since it was filed 2 years after the limitation period. The appellant further submitted that since the suit was statute - barred, the trial court lacked jurisdiction to hear the suit and grant any reliefs.

On the other hand, the respondent submitted that the contract period lapsed on 1/3/2009 and any cause of action founded on the contract can be brought within 6 years until 1/3/2015.

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."**

The issue of limitation is a preliminary point which needs to be addressed first to determine whether or not the trial court had the requisite jurisdiction to hear and dispose of a suit.

In addition, the issue of jurisdiction can be raised at any stage by any party or even by the court ***suo moto***. In this instance, the appellant did not raise the issue of limitation of time through a formal notice of preliminary objection but through its submissions, and still the trial court had the obligation to consider the objection raised.

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 –**
>
> **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 (2019) eKLR** 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."**

Under the Outgrowers Cane Agreement signed between the appellant and the respondent, the breach occurred at the time when the respondent failed to harvest the matured plant crop. The cause of action accrued then and in terms of Section 4(1) (a) of the Limitation of Actions Act, the time begun to run from then.

In his plaint, the respondent did not specifically plead when the sugarcane plant crop was planted in his plot; but on cross - examination, the respondent testified that he planted the cane in the year 2003 and it was to be harvested after 1 ½ years. He clarified that he started planting on the date he signed the contract which must be March 2004.In the contract itself, there is no clause which states when the plant crop was to be harvested, save that it states the contract shall remain in force for a period of 5 years or until one plant or two ratoon crops are harvested whichever period is less.

Further, in cross - examination, the respondent testified that after the lapse of the 1 ½ years, since the plant crop was not harvested, he became discouraged and abandoned the farm.

It is clear that the plant crop was planted in the year 2004 and the harvest was to be done after 1 ½ years (18 months) . The due date for harvest was to be in the month of October 2005 or thereabouts. This is when the breach occurred and the cause of action accrued. The respondent ought to have filed the suit within 6 years from the date of breach. That is, before the month of October 2011. The respondent filed the lower court suit on 24/10/2014 approximately 3 years after the time of limitation as contemplated under Section 4 (1) of the Limitation of Actions Act.

There is no evidence on record that the respondent sought leave of court to file the suit out of time.

In **Owners of the Motor Vessel "Lilian s" vs Caltex Oil (K) Ltd (1989) KLR Nyarangi J** held:-

> **"Where the court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing.**

> **Jurisdiction must be acquired before judgement is given…Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

Having found that the suit was filed outside the limitation period, the trial court was devoid of jurisdiction and ought to have downed its tools.

Since the first issue for determination is well settled, it would be a waste of judicial time to address the other issue as it fall by the way.

Consequently, I make the following orders: -

a. The appeal is hereby merited and is allowed as prayed.

b. The suit in the lower court dated 13/10/2014 and filed on 24/10/2014 be and is hereby dismissed.

c. The Lower Court Judgement dated and delivered on 29/5/2019 and its consequential Decree issued on 26/7/2019 be and are hereby set aside.

d. Costs and interest of the lower court suit and this appeal are awarded to appellant.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 28TH DAY OF APRIL, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Mr. Odero for the Appellant.

No appearance for the Respondent.

Nyauke Court Assistant.