REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 33 OF 2019

TRANSMARA SUGAR COMPANY LIMITED.....APPELLANT

-VERSUS-

DAVID NYABUTO SINDANI.....RESPONDENT

(An Appeal from the Judgement and Decree of Hon. E. Muriuki Nyagah Senior Principal Magistrate (SPM) dated and delivered on 13/8/2018 in Migori CMCC No. 1377 of 2016 – David Nyabuto Sindani v Transmara Sugar Company Limited)

JUDGMENT

This is an appeal by Transmara Sugar Company Limited against the judgement and decree of the Hon. E. Muriuki Nyagah (SPM) dated and delivered on 13/8/2018.

The appellant is represented by the firm of Oyagi, Ong'uti, Magiya & Co. Advocates whilst the respondent is represented by the firm of Odingo & Co. Advocates.

By a plaint dated 3/2/2016 and filed in court on 31/10/2016, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for damages for breach of Sugarcane Growing and Supply Contract entered into on 6/6/2011. The respondent pleaded that he became a member of Transmara Out Growers Co. Ltd (TOCOL) upon signing the requisite membership forms for the purposes of growing sugarcane on his land and to sell the same to the defendant.

It was the respondent's case that at the time of the agreement, there was already existing sugarcane on the plot; that the respondent self - developed the sugarcane without the appellant's assistance; that the appellant without any reason refused and/or ignored to harvest the sugar cane which at the time of filing the suit had dried up in the plot; that 2 months after the sugarcane matured, the respondent notified the appellant in vain and demanded to know why it could not harvest and transport the contractual sugar cane on the said plots; that the actions of the appellant amounted to a breach of contract hence the respondent suffered damages.

Further to the foregoing, it was the respondent's case that pursuant to the Kenya Sugar Cane Research Foundation, his sugarcane farm measuring 0.3 hectares and it could produce an average of 2.88 tonnes and the price per tonne by the time the sugar cane matured was Kshs. 4,300/=; that the respondent invited the appellant to arbitrate the dispute and upon refusal, he instituted this suit.

The appellant filed a statement of defence dated 10/1/2017 on 12/1/2017 and generally denied the contents in the respondent's plaint. The appellant in particular denied that it was ever invited for arbitration proceedings and it would move the court that this suit be referred to arbitration.

After the hearing, the trial court entered judgement in favour of the respondent for Kshs. 371,520/= less statutory and contractual charges payable at the time, costs and interest from the time of filing suit.

Being dissatisfied with the judgement and decree, the appellant filed a Memorandum of Appeal dated 10/1/2019 and preferred fifteen (15) grounds of appeal.

I have carefully read the grounds of appeal advanced by the appellant. Before I consider the grounds, I make the following observations:-

a. Grounds 4 and 10 refer to a ruling made by the learned trial Magistrate. One of the prayers is that this court do set aside the ruling and decree/orders of the Magistrate's court dated 13/12/2018 where it found the appellant liable for Kshs. 1,200,000/=. There is no ruling being challenged before this court hence this is an irrelevant ground of appeal.

b. Ground 7 refers to failure of the trial Magistrate to accord the appellant an opportunity to call its witnesses. Looking at the record in the trial court, the appellant was accorded an opportunity to present its witnesses and on 1/11/2018 during the defence hearing, it called 2 witnesses. This ground lacks any basis.

The grounds of appeal can be summarized in the following three (3) grounds: -

i. That the learned trial magistrate applied wrong principles of law in arriving at the judgement awarding the plaintiff an outrageous amount in compensation for cane that never was;

ii. That the trial court failed to rely on the law and evidence and followed an unknown trajectory in law;

iii. That the trial Magistrate ignored the law, facts and evidence tendered in the defence documents and only relied on the evidence of the respondent to the exclusion of the evidence of the appellant.

The appellant therefore prays: -

i. That this court be pleased to allow the appeal and set aside the entire judgement and decree/orders of the Magistrate's court dated 13/12/2018 in CMCC No. 1377 of 2016.

ii. That the costs of this appeal and the costs incurred in the trial court and the superior court be borne by the respondent.

iii. Such further orders and/or other relief (s) as the court may deem necessary, just and expedient.

Directions on the appeal were taken on 7/7/2020, that the appeal be canvassed by way of written submissions and both parties complied.

In support of its appeal, the appellant filed its submissions dated 24/2/2020 on 25/2/2020.

The appellant submitted that general damages are not claimable in a breach of contract and relied on several case laws. It was the appellant's submissions that the duty to transport the sugarcane to them, was on the respondent and even if the duty was not on the respondent, the court erred in not finding that such costs incurred by the appellant were deductible. The appellant referred the court to clauses 3 and 10 (c), 10 (p) and clause 11 (c) (i) and (ii) of the contract.

Further, the appellant disputed the yields that were to be produced in the cane farm and submitted different reports from the American Journal of Plant and Sciences and two other reports from the 'Contract sugarcane farming and farmers; incomes in Lake Victoria Basin; Journal of Applied Sciences' and 'Productivity of sugar factories in Kenya' a research paper. The appellant also submitted that placing reliance on the Sugar Act 2001 does not help in this instance since the parties signed a contract which cannot be re – written by this court.

In rebuttal, the respondent filed submissions dated 6/8/2021 on 16/8/2021. On general damages, the respondent submitted that the appellant did not challenge the respondent's evidence of his expectation of 29 tonnes which cost Kshs, 4,300/= per tonne. To rebut this position, the respondent relied on the findings in the **Court of Appeal at Kisumu Civil Appeal No. 278 of 2010 between John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd.**

The respondent supported his position that the Sugar Act was relevant as at the time when the contract was signed, parliament had enacted the said Act for the development, regulation and promotion of the Sugar Industry. The respondent submitted that Section 29 of the Sugar Act provided that the role of the miller, in this instance, the appellant, was to harvest, weigh, transport and mill the sugar; that Clause 10 (c) contravened the said section and therefore the same was null and void ab initio. The respondent placed reliance on the ruling by **Mrima J in Civil Appeal No. 10 of 2019 Transmara Sugar Co. Ltd vs Nelson Dedege Mbai.**

On statutory deductions, the respondent submitted that the trial Magistrate in his findings, ordered that the respondent be paid Kshs. 372, 520/= less statutory and contractual charges payable at that time. The appellant did not plead the charges of harvesting, transport, cess, levy or any other statutory charges that could have been taken into account while giving judgement, but the trial Magistrate held that the said award be made less statutory deductions hence the trial court could not give and/or award what is not pleaded or prayed for.

I have carefully considered the pleadings, proceedings in the trial court, the impugned judgement, grounds of appeal and the rival positions taken by both parties. I am of the view that the following issues are for determination.

i. Who has the duty to harvest, weigh and transport the cane?

ii. Whether the appellant was entitled to the damages for breach of contract.

It is a common principle that 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. See the decision in **Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123.**

On the duty to harvest, weight and transport the cane, there is no dispute that there was a contract signed by the parties. Clause 10 outlines the obligations of the Sugarcane Farmer. Clause 10 (c) of the contract provides that the Sugarcane Farmer shall: -

> **"Offer for delivery on maturity and deliver to the Miller all such cane as derived from his contracted cane field and no other using the Miller's transport or the Cane Farmer's appointed transporter approved in advance by the Miller."**

Each party took rival positions on the above provision. It is contended by the respondent that the above provision contravenes Section 29 of the Sugar Act **(The Act).** The appellant is of the view, that the duty did not fall upon it and in any case, it is trite law that courts cannot rewrite contracts for parties.

I have carefully read clause 10 (c). There is no ambiguity on who was responsible to transport the cane. That responsibility solely fell on the farmer (respondent).

The parties signed the instant contract on 6/6/2011. On cross-examination, **DW1 Mr. David Bosuben**, the appellant's cane accountant, confirmed that at the time the parties signed the contract, the Act was in force. The Act was passed in 1/4/2002. The Act was later replaced upon the enactment of the Crops Act which became operational as from 1/8/2014.

The Act was specifically enacted by Parliament to provide for the development, regulation and promotion of the sugar industry in Kenya.

The question then becomes what is the place of statutes where parties enter into contracts which contravene the statute? Are parties still bound by the contract by virtue of the doctrine of privity of contract?

In Patel v Singh (1987) eKLR the parties appealed to the Court of Appeal against the decision of Aganyaga J (as he was then) in which he held that the agreement for the advance of Kenyan money on the Indian Currency in India was contrary to Section 3 (1) of the Exchange Act was illegal and unenforceable in Kenya. The three-judge bench upheld the decision of the learned Judge of the Superior Court. **Nyarangi JA** quoting with approval the findings in ***Archbolds (Freightage) Ltd v S Spanglett Ltd*** *(1961) 1 QB 374, at page 388 Devlin L.J* (as he then was) in which the effect of illegality, of a contract was considered and the court held as follows:-

> **"The effect of illegality upon a contract may be threefold. If at the time of making the contract there is intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract *ab inito* and that arises if the making of the contract is expressly or impliedly prohibited by statue or is otherwise contrary to public policy."**

Apaloo JA went on to further add: -

> **"But whether it was known to the parties or not, section 3 of the Exchange Control Act forbids the transaction entered in to by the parties under pain of criminal section. The upshot, of this, was that the appellant sought the aid of the court to enforce a contract made illegal by statute. Well settled principles of the common law preclude this court from assisting him. Although I am in disagreement with the learned Judge holding that on the facts, a loan contract was not established, I think the alternative ground on which he founded his conclusion, namely, that the contract was unenforceable on the ground of illegality, seems to me plainly right. I am accordingly in respectful agreement with my learned brothers that this appeal fails and should be dismissed."**

Further, a different bench of the Court of Appeal in **Njogu & Company Advocates v National Bank of Kenya Limited (2016) eKLR held:**-

> **"…any contract that contravenes a statute is illegal and the same is void, *ab initio* and is therefore unenforceable. The logical conclusion of this finding would be that the contract between the appellant and the respondent regarding the payment of legal fees is unenforceable."**

It is clear that contracts which are founded upon illegality and which contravene public policy, are void ab initio. The court cannot aid parties to enforce illegalities. I also associate myself with the views of Mrima J in ***Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR*** *in relation to the Sugar Act, he held as follows:-*

> ***"The Act being an Act of Parliament went through all the stages of law-making until it became law in Kenya. The Act can only be subordinate to the Constitution and/or may in specific and clear instances be ousted by an express provision on another Act of Parliament. In this case there is an attempt by the contract to oust the provision of the Act. The contract is an agreement between the parties herein whereas the Act is an expression of the will of the people of Kenya through Parliament. The contract is hence subordinate to the statutory legislation. Any attempt by parties to an agreement to otherwise oust the provisions of an Act of Parliament can only be void and severable as far the attempt is concerned. The contract therefore offends the express provisions of the Act in respect to the duty to harvest the cane and as such it cannot stand in the face of the Act; it must give way to the Act."***

I hasten to add that, the drafters of the Sugar Act, intended to protect farmers who after investing their resources in planting sugar cane, are left with it in their plots to go to waste, and since they would not have capacity to acquire the heavy machinery required to harvest the cane, the sole responsibility to harvest the sugarcane was placed on the millers. A contract which is drafted contrary to the provisions of the Act is against public policy.

Section 29 of the Act provides for the Sugar Industry Agreements. The agreements under this Section, should conform to the guidelines set

out in the Second Schedule of the Act, which provides the general scope of sugar agreements and further outlines the roles of the parties in the sugar industry. Section 6 (a) of the Second Schedule provides among others that the role of the miller is to:-

> **"harvest, weigh at the farm gate, transport and mill the sugar-cane supplied from the growers' fields and nucleus estates efficiently and make payments to the sugar-cane growers as specified in the agreement;"**

Therefore, Clause 10 (c) of the agreement dated 11/6/2011 is null and void, because it contravened the provisions of the Sugar Act and is unenforceable. The duty to harvest, weigh and transport the sugar rested with the appellant.

Does it then mean that, the whole contract becomes unenforceable? or is it sufficient to sever the illegal contractual clause (s)? The Five Judge Bench Court of Appeal in **Nairobi Civil Appeal No. 224 of 2017 Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others (2017) eKLR** had the following to say: -

> **"Whether or not a contract is severable depends on the terms and conditions of the contract. Where a single contract is signed by the parties, there is a presumption of unity of contract - a presumption that the contract is indivisible and is to be performed as one. Severability turns on the intent of the parties and a court may examine extrinsic evidence - evidence outside the writing-to determine whether the parties actually intended an illegal term to be severable. If the contract makes provision for severability then it is severable. However, if the contract has no provision for severability, a court will determine if the contract is indivisible or severable. Such determination by the court will take into account amongst other things the nature of goods, services or works to be performed."**

In essence, if there is no severability clause like in the present instance, the Court is called upon to determine on the extrinsic evidence and intention of the parties. The intention of the parties whether or not there was an illegal clause, was for the planting, development and harvesting of the sugar cane.

Having found that the duty to harvest the mature cane, lies with the appellant, the question of whether there was breach of contract on the part of the appellant, is in the affirmative. It is therefore my considered view that the respondent was right to initiate a suit against the appellant for breach of contract.

One whether the appellant was entitled to damages, the appellant disputed the findings of the trial Magistrate on the yields that the plot could produce and the amount due to the respondent. The appellant attached several reports to support its position. The appellant also faulted the trial Magistrate for not considering the statutory deductions. The respondent submitted that he pleaded and proved the expected tonnage per acre and price per tonne.

In arriving at his decision on the amount due to the respondent, the learned trial Magistrate relied on the report provided by the Kenya Sugar Research Foundation (KESREF). The appellant produced reports in support of its case, but it did not attempt to lead the trial court either orally or in its submissions for the court to strike a balance and make a conclusion. Even in the appellant's defence, it simply contained general denials and there was no counterclaim on the issue of the statutory dues applicable at that time. On cross - examination, DW1 admitted that he had no document to show the statutory deductions applicable at that time.

This court, sitting on appeal, is tasked with the duty to re-evaluate the evidence of the trial court, examine the findings of the trial court to see if it applied the wrong principles in reaching its decision. The appellate court is not an avenue for a party who neglected to present its case properly before the trial court to introduce issues which it would have best ventilated before the trial court.

The appellant was presented with an opportunity to counter the arguments of the respondent on the expected yields before the trial court but it did not. The trial court and this court are not experts in sugar cane farming to have imagined and/or interpreted the graphs and reports on what the expected yields would have been. Presenting the counter - arguments on the expected yields and the amount due at this stage, will do no good. The arguments on appeal, however attractive they are, the respondent's case before the trial court remained uncontested.

Perhaps, the point of departure I have with the trial Magistrate is the award of statutory deductions. It is a common practice that it is the miller who provides the famer with the seedlings, fertilizers and other materials to enable him to grow the sugar cane.

In this particular instance, however, the respondent pleaded that at the time when the agreement came into force, there was already existing sugar cane on his farm. This particular averment was merely denied by the appellant but it did not put further evidence to prove that there was no existing sugar cane on the respondent's farm but that, it provided the necessary materials to develop it.

Clause 10 (h) also places the responsibility of preparation of land for planting of cane, the application of fertilizers and other materials on the farmer (respondent) but with the recommendation of the miller (appellant).

The issue of deductions is factual. The appellant was under an obligation to prove that it extended a hand in assisting the respondent to develop the cane. The same applies to the costs of harvesting and transportation. The appellant cannot now purport to sneak such arguments at the appellate stage through submissions. Submissions do not constitute evidence and allowing the same would be against the rules of practice on trials and evidence. Since the appellant did not prove and on its own admission through DW1, that it did not have documents to prove the statutory deductions, I am of the view that the same must fail entirely.

> **In Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR Mrima J, held that once a farmer proved that the miller failed to harvest the plant crop at maturity, then they are entitled to the proceeds from the ratoons. The rationale being that the success of the ratoons depended on the miller harvesting the plant crop first.**

The terms of the agreement were to run **until the farmer has harvested on maturity one Plant Crop and two ratoon crops or for a period of six years from the date the crop is planted whichever, shall be the lesser of the two.**

The plant crop was to be harvested between 18 - 26 months, the 1st ratoon 16-24 months and the 2nd ratoon 16-24 months. The respondent testified that at the time of the contract, there was already an existing cane of 9 months. The appellant did not cross-examine the respondent on this fact and therefore I shall take it as uncontroverted.

If the plant crop were to be planted at the time when parties entered into the contract in June 2011, it would have matured after 24 months, in May 2013 but factoring in the 9 months that the plant crop was already in ***the 'shamba'*** the plant crop would be mature for harvesting in September 2012.

The 1st ratoon was expected to mature between 16 - 24 months. From September 2012, 24 months would be September of 2014. The 2nd ratoon would be expected to be ready for harvesting in another 16 - 24 months. From September 2014, 24 months would be September 2016 when the 2nd ratoon would be ready for harvesting. This is well within the timeframe period of the agreement.

According to the report by KESREF, the prices of sugar cane were fluctuating. The plant crop which matured in September 2012, would have been sold for Kshs. 3,800/= per tonne, the 1st ratoon which matured in September of 2014 would have been sold at Kshs. 3,100/= per tonne. There is no figure which shows what would have been the price of the 2nd ratoon which matured in September of 2016. I take judicial notice that the 1st and 2nd ratoons usually maintain the same price per tonne and there is little or no fluctuation in their prices. I will award Kshs. 3,100/= for the 2nd ratoon. Since the tonnes expected of 28.8 was not disputed, I shall use the same to make the calculations.

The calculation thereof is:

Plant crop

28.8 × 3,800 =109,440/=

1st ratoon

28.8 × 3,100 =89,280/=

2nd ratoon

28.8 × 3,100 =89,280/=

Total: 288,800/=

From the foregone, the appeal partially succeeds in terms of the damages awarded to the respondent. The judgement and decree delivered on 13/8/2018 is hereby set aside.

The final orders are as follows: -

a) Damages for breach of contract - Kshs. 288,800/=.

b) Interest of (a) above at court rates from the date of the lower court's judgement.

c) Costs of the lower court suit to the Respondent.

d) Half costs of this appeal to the Respondent.

Dated, Delivered and Signed at Migori this 26th day of April, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of

No appearance for the Appellant.

No appearance for the Respondent.

Nyauke Court Assistant.