REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 131 OF 2018

SOUTH NYANZA SUGAR COMPANY LIMITED..........................APPELLANT

VERSUS

JOSHUA ALOO ALOO...RESPONDENT

(*An appeal from the Judgment and Decree of Hon. C. M. Kamau Senior Magistrate Rongo in Rongo PMCC No. 31 of 2014 delivered on 4th day of September 2018)*

JUDGMENT

This is an appeal by South Nyanza Sugar Co Ltd, the appellant, against the judgment of **Hon. C. M. Kamau, Senior Resident Magistrate, Rongo** dated and delivered on 4/9/2018 in Rongo PMCCC 31/2014.

By a plaint dated 10/9/2014 and filed in court on 13/11/2014, **Joshua Aloo Aloo,** the Respondent (formerly plaintiff) sued the appellant (formerly defendant) for damages for breach of contract entered into on 26/7/2004. By the said contract, the respondent was contracted to grow and to sell to the appellant its sugarcane on the respondent's land parcel number 417, number 186 Kakrao Sub Location measuring 0.4 Ha. It was a term of the contract both express and implied that the contract would commence on 26/7/2004 and remain in force for five (5) years or until One plant crop and two ratoon crops of sugarcane are harvested on the plot whichever period was the less; that the plant crop and ratoon cane would be harvested at the age of 22 – 24 months and 16 – 18 months after planting and subsequent harvest respectively; that the appellant would exercise due care during the harvest. However, in breach of the said agreement, the appellant failed to harvest the plant crop when the cane matured and was ready for harvesting at 22 – 24 months of age; that the cane started deteriorating as a result of which the respondent suffered loss which he calculated to be Kshs. 326,430/=.

The appellant filed a defence on 17/2/2015 in which liability was denied and he claimed that if the respondent suffered any loss, it was due to his own failure to maintain the crop to the required standard. The defendant also denied the rate of the cane prices pleaded.

After the hearing, the court entered judgment in favour of the Respondent for Kshs. 122,713 in damages, and costs of the suit. Costs were to be calculated from the date of judgment.

Being dissatisfied with the judgment, the appellant preferred this appeal relying on five grounds of appeal which are as follows:-

> **1) That the learned trial magistrate erred in both law and fact in failing to find and hold that the respondent's suit in the subordinate court was statute barred;**
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> **2) That the trial court erred in failing to find and hold that the evidence which the respondent tendered in court was at variance with the pleadings in the plaint.**
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> **3) The trial court erred in failing to find and hold that the respondent's evidence was contradictory and the claim was not proved.**
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> **4) The trial court erred in entering judgment for the respondent against the appellant for Kshs. 122,713/= as damages for breach of contract whereas the claim had not been proved;**
>
> **5) That the trial court erred in awarding interest on the principal sum without assigning reasons and hence exercised its discretion wrongly;**
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> **6) That the court erred by awarding damages beyond the scope of the pleadings contrary to law and known legal / principles and it was a wrong exercise of discretion.**

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 Motor Boat Co Ltd (1968) EA 123.** The court said:-

> ***"…..this court is not bound necessarily to accept the judgment of fact by the court below. An appeal to this court therefore is by way of a retrial and the principles upon which this court acts in such an appeal are well settled.***
>
> ***Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."***

The respondent (PW1) adopted the contents of his statement. He testified that he entered into a contract with the appellant on 26/7/2004. He stated that the appellant ploughed and harrowed his farm, supplied seed cane and fertilizer. He weeded the cane four times and when it matured, the appellant did not harvest it and it dried up after the contract period. He denied having realized the ratoons because the crop was destroyed. According to PW1, he expected to harvest 135 tonnes per hectare and the rate of payment was Kshs. 135 per tonne. He claimed three crop cycles.

DW1 Richard Muok, a Senior Field Supervisor with the appellant testified and admitted that indeed the respondent entered into a contract with the respondent dated 26/7/2004 for five years; the plot measured 0.4Ha and the prevailing cane price was Kshs. 2,500 per tonne. He listed what they did for the respondent and the statutory declarations; that the plot was in Kakrao Sub location where the crop yield per acre was 59.17 per Ha and the Ratoon crop average yield was 46.54 tonnes per hectare. He stated that the respondent failed to avail the cane, in violation of clause 3:1:2 of the contract; that the ratoon crop never developed and that it is the respondent who breached the contract. He admitted that the plant crop developed but that the respondent failed to maintain the crop properly and they issued a notice to that effect. DW1 was not able to produce the said notice.

The appellant's counsel, **Mr. Odero,** filed written submissions on 13/8/2020. He submitted that the respondent's suit was statute barred because the contract was entered into on 26/7/2004 when the crop was planted or soon thereafter, when the contract commenced. The cane was supposed to mature within 24 months which fell on 26/7/2006; that if the applicant failed to harvest that crop, then, the cause of action arose then on 26/7/2006; that this suit was filed in the lower court on 13/11/2014, eight years, 3 months after the contract was breached; that the suit was filed two years, three months after the limitation period; that in reckoning the limitation period, the starting point is when the cause of action arose but not when the contract should have ended; that since no leave of court was sought to extend time, the suit does not lie. Counsel anchored his argument on the decision of **Pacis Insurance Ltd =vs= Mohamed F. Hussein. MSA HCC 92 / 2015 (2017)eKLR.**

On failure to plead limitation in the defence, **Mr. Odero** argued that the issue of limitation was addressed by DW1 and PW1 was cross examined on it; that since the issue touches on jurisdiction, the reliefs cannot be granted. Counsel also relied on the case of **Farmers Choice Co Ltd v Dorleen Anyango Wasonga & Another (2015)eKLR**, where J. Aburili moved *suo motto* to dismiss the suit on the basis of the issue of limitation. This court is urged to deal with the issue of limitation and dismiss the appeal.

Counsel further relied on J. Mrima's decision in **South Nyanza Sugar Co Ltd =vs= Dickson Aoro Owuor HCCA 86/2015** where the court struck out the suit that had been filed without leave of court. Counsel further argued that limitation is a jurisdiction issue and can be raised at any time as was held in **Dubai Bank (K) Ltd vs Kwanza Estate Ltd CA 37/2014 (2016)**.

Counsel also made reliance on **B. Mathayo Obonyo =vs= South Nyanza Sugar Co Ltd 2019 RKLR** where J. Majanja agreed with the holding in **Dickson Aoro Owuor'**s case on when the cause of action arose under a cane agreement, that is, when the appellant failed to harvest the crop.

See also **Diana Kathumbi Kiio =vs= Reuben Musyoki CA 211 / 2015 (2018)eKLR** .

On the allegation that the respondent's evidence was not at variance with the pleadings, counsel referred to the respondent's statement where he stated that he did not realise the ratoon crop because the plant crop was completely destroyed whereas his pleadings were that the appellant never harvested the plant crop only and as a result, the respondent list expected yields from the plant crop and the 2 ratoons. Counsel urged that each party is bound by its pleadings as held in **Raila Amolo Odinga & Another v IEBC (2007) eKLR and David Sironga Ole Tukai v Francis Arap Muge & Another (2014) eKLR; Galaxy Paints Co Ltd v Falcon Guards Ltd (2000) 2EA 385**. Counsel also urged this court to consider High court decision **in John Ogola Nyanjwa =vs= South Nyanza Sugar Co Ltd 2017 EKLR and Jeckonia O. Ranga =vs= South Nyanza Sugar Co Ltd (2020) eLRK.**

Mr. Oduk, Counsel for the respondent argued that the respondents case is that they lost three crop cycles due to breach of contract by the appellant failing to harvest the plant crop in time or at all; that the appellant admitted the claim in their defence.

On grounds 5, counsel conceded that the discretion to award interest from the date of judgment without any reason assigned to it was erroneous and the proper order should have been that interest accrues from the date of filing suit that there had been no good grounds demonstrated to warrant this court to interfere with the decision of the trial court.

On the issue of limitation Counsel cited the case of **Town Council Awendo vs Nelson Oduor Onyangoo and 13 Others CA 161 of 2010** where the court held that the decisions in **Pacis and Farmers Choice (supra)** are persuasive.

Counsel further argued that the decisions in **Pacis and Farmers Choice** cases (supra) are wrong in treating a cause of action as being extinguished by limitation of time. He urged that it is the right of action and not the cause of action that is extinguished because limitation of time is evidence based; that the appellant cannot raise the issue of limitation on appeal when it was not raised in the Memorandum of

appeal; that since evidence may be required to compute time, limitation cannot be dealt with on appeal because, the evidence, even if it existed, cannot be interrogated at the appeal stage. Based on the decisions of **Tanganyika Farmers Association Ltd =vs= Unyamwezi Development Corporation Ltd 1960 EA 620 and North Staffordshire Railway Company vs Edge 1920 AC254** which held that no facts or evidence exist upon which the court can base its decisions and no new point of law can be raised on appeal, Counsel argued that the cases relied upon of **Diana Kathumbi (supra), Mathayo Ohongo and Dickson Aoro Owuor** are not relevant. He urged that the decision in **Dickson Aoro** to the effect that time runs not as from the terminal end of the contact but on the nature of the contract and when it was executed. He relied on the case of **Zadock K. Danda vs. South Nyanza Sugar** where Mrima J who decided that **Dickson Aoro** case departed from his earlier position. According to counsel, the instant contract should have lapsed on 26/7/2009 and therefore one needed to interrogate whether the 3 crops had been harvested within the 5 years to determine whether there was any breach.

I have duly considered the grounds of appeal and all the submissions by counsel. I think the issues for consideration.

1) When did the cause of action arise;

2) Did the trial court have jurisdiction to deal with this matter;

3) Whether the Respondent proved his claim;

4) Whether the trial court exercised its discretion properly;

5) Who is entitled to the costs of the appeal?

There is no doubt that the contract the subject of these proceedings was made on 26/7/2004. The contract document was produced by the Respondent. At paragraph 1 of the contract it provides:-

> **" This agreement shall come into force on and from 26th day of July 2011 and shall (unless previously determined in accordance with the provision hereof) remain in force for a period of five years or until one plant and two ratoon crops of sugarcane are harvested on the plot aforesaid whichever period shall be the less.**
>
> **Provided that the said period may be extended by the parties hereto such a longer period as shall be mutually agreed subject to the terms and conditions herein contained by a Memorandum of extension and endorsed hereon."**

Though the provision provided for extension of the contract by the parties, there is no evidence that there was any attempt to extend it. The contract was to run for 5 years. Although it was not disclosed when the crop was planted, it must have been on 26/7/2004 or soon thereafter. According to the Respondent, the crop, was to be harvested at 22 to 24 months. The crop should therefore have matured and ready for harvesting by latest 26/7/2006. If the appellant failed to harvest the crop then it was on or about 26/7/2006. It is the appellant's case that, that is when the cause of action arose. In the case of **Diana Kathumbi (supra**) the court referred to **Lord Diplock's** definition of a cause of action in the case of **Letang v Coper (1964)2 ALL ER 929 at page 934 as :-**

> **" a cause of action is simply a factual situation that existence of which entitles one person to obtain from the court a remedy against another person."**

The question that begs is when did the right for the respondent to claim from the appellant accrue? There is overwhelming authority that in contract, a cause of action arises at the time of breach of the contract. In the case of , **Diana Kathumbi (supra)** the court stated :-

> **"According to the author in the Journal of International Banking and Financial Law, "What the Limit "(2007) 451BFL642, "in contract the cause of action accrues when the breach occurs when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage."**

In B. Mathayo Obonyo vs South Nyanza Sugar Co Ltd (2019)EKLR Majanja J, held as follows:-

> **"In my view, the question under section 4(1) of the LAA is when does the cause of action accrue? I adopt the question taken in South Nyanza Sugar Co Ltd vs Dickson Aoro Owuor (supra) in determining when the cause of action accrues. Thus, under the Out growers cane agreement, such as the one subject to the suit, the right to sue for breach of contract arose when one of the parties failed to meet its obligations under the contract.**
>
> **In the case at hand, this could only arise when the respondent failed to harvest the plant crop. This is when the cause of action accrued and when, in terms of Section 4(1) (a) of the Limitation of Action Act, the time begins to run.."**

Taking guidance from the above cited cases, the cause of action herein arose on 26/7/2006 two years after the contract was entered into. When the first crop was supposed to be harvested, and the appellant allegedly failed to do so. The respondent's case was that the appellant failed to harvest the cane crop and hence failed to meet its obligations under the contract. That means that once the crop was not harvested the issue of harvesting the ratoon would not arise. I have considered the case of **Zadock Danda (supra**) which was relied upon by the respondent and in my view the facts were not exactly the same as the instant case. The judge said in part:-

> **" It will therefore be without any basis to hold to the argument that the cause of action arose 24 months post the commencement of the contract since by then, the contract had not been formally executed. The date a cause of action**

accrues depends on the nature and the provisions of that contract. There are some straight forward and clear contracts which speak for themselves on such an such issue."

I agree with the finding in that case that the date a cause of action accrues depends on the nature and the provisions of that contract. In that case, the contract had not been executed by the parties by twenty four (24) months when the contract was allegedly breached by the appellant's failure to harvest the first crop. The respondent stated in this case as follows :-

"It matured. Sony did not harvest it. It dried up and after the contract period, l used the farm for maize farming. I did not realize the ratoons because the plant crop was completely destroyed."

The above statement buttresses the fact that the cause of action arose when the first crop matured but the appellant failed to harvest.

The respondent filed his claim on 14/11/2014 by his plaint dated 10/11/2014 it was eight years and three months after the appellant allegedly breached the contract by failing to harvest the sugarcane. Under Section 4(1)(a) of the Limitation of Actions Act , actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.

In the instant case, the cause of action arose on 26/7/2006. By the time this suit was filed on 13/11/2014, eight years and 3 months had lapsed. It means that the suit was filed outside the six years period allowed under Section 4 (1) (a) of Limitation of Actions Act. The suit was therefore filed over 2 years, after the six years had lapsed. There is no evidence that the Respondent sought the leave of the court to extend the time for filing the suit.

The appellant contends that limitation is a jurisdiction issue and the trial court should have considered it even if it was not pleaded or raised by the appellants. In **Pacis Insurance Co (supra)** J. Otieno in addressing an issue that had not been pleaded stated:-

***"On the basis that this suit was filed outside the time provided by the statute, I hold, even though the parties did not bring it up, that this suit was filed out of time and is in its present state, incapable of attracting any orders from the court . It does not lie**."*

Similarly, in **Farmers Choice Co Ltd (supra**) J. Aburuli, took up the issue of limitation that had not been pleaded or raised by any of the parties and determined the case on the issue. I appreciate that the above two cases were of persuasive nature having been made by courts of concurrent jurisdiction.

In **Dubai Bank K Ltd case supra,** the court also dealt with the issue of limitation which it held goes to jurisdiction. The court said :

"... It would therefore have been prudent for the Appellant to raise the question of jurisdiction before the superior court, as that way, this court would have had the benefit of the reasoning of the superior court on the issue. However, we must now determine whether the issue of jurisdiction can be properly raised by the Appellant at this stage. In Floriculture International Ltd v Central Ltd & 3 others [1995]eKLR, the court held that the issue of jurisdiction can be argued at any time…. The reasoning is that even where the question of jurisdiction is no raised, that does not necessary (sic) confer jurisdiction on the court if it has none. Accordingly, we find that the Appellants are not precluded from raising the jurisdictional issue for the first time on appeal, having not raised it in the superior court."

In **Republic vs. Public Procurement Administrative Review Board & Another, Exparte Teachers Service Commission [2015] eKLR** the court relied on the Court of Appeal decision of **Pauline Wanjiru Thuo vs David Mutegi Njuru CA 278 of 1998** where the Court of Appeal held that a preliminary objection based on limitation can be taken for the first time on appeal because it goes to jurisdiction.

Having considered both the submissions and case law on the above issue, I am convinced that an issue of jurisdiction can be raised at any time even on appeal. In this case, the first ground of appeal in the Memorandum of Appeal raised the issue of limitation.

In **South Nyanza Sugar Ltd vs Dickson Aoro (supra)** the court struck out the suit for having been filed out of time. In **Owners of the Motor Vessel "Lilian S" vs Callex Oil (K) Ltd (1989) KLR 1, Nyarangi JA,** expressed himself on the issue of jurisdiction when he stated :-

An issue that goes to jurisdiction cannot, in my view, be termed a mere technicality. To the contrary, the issue goes to the root of the matter, since without jurisdiction, the Court has no option but to down its tools.

Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given….. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a 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."

Jurisdiction being everything and this case having been filed out of time that is, contrary to the provisions of Section 4 of the Limitation of Actions Act, and this court having come to the conclusion that the trial court had no jurisdiction in this case, the respondent's claim does not lie. I find no reason to consider the other issues and they fall by the way. This appeal is allowed with costs of the appeal and the lower court, to the Appellant.

Dated and Signed at Migori this 18th day of March, 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of

Mr. Odero for Appellant

Oloo Court Assistant