



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 176 OF 2018

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

-VERSUS-

FRANCIS KOSKEI NTUITAI.....RESPONDENT

(An Appeal from the Judgement and Decree of Hon. R.O. Odenyo Senior

Principal Magistrate (SPM) dated and delivered on 5/12/2018 in Migori CMCC

No. 377 of 2014 - Francis Koskei Ntuitai 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 5/12/2018.

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

The background of this appeal is that by a plaint dated 15/10/2014, and filed in court on 16/10/2014, the respondent (formerly the plaintiff) sued the appellant (formerly the defendant) for damages for breach of contract entered into on 30/1/2004.

The appellant contracted the respondent to grow sugarcane on his land parcel being plot number 115A, measuring 01.5 Ha in field number 274 situated at Enoosaen Sub-Location in Enoosaen Division within Trans – Mara County and sell to it. The respondent was then assigned account number 713502. It was the respondent's case that he self-developed and planted the cane which was left to the appellant to cultivate, harvest and transport to its milling factory in Awendo.

It was a term of the contract both express and implied that the contract would come into force on 30/1/2004 and remain in force for a period of five (5) years or until one plant and two ratoon crops of sugar cane were harvested on the plot whichever period was less.

It was further an implied/express term and practice that: -

Within the five (5) year period or less the plant crop and ratoon would be harvested at the ages of not less than 22-24 months after planting and subsequent harvest respectively.

That the appellant would under the contract be bound to purchase all the cane that was available in the said plot when mature.

In breach of the terms of the contract, the appellant failed, refused and or neglected to harvest the plant crop on the said plot when it matured and the same dried up, an act that occasioned the 1st and 2nd ratoon to be undeveloped; that as a result of the appellant's actions, the respondent incurred loss of income for the plant crop and subsequent ratoons.

The respondent pleaded that the plot was capable of producing an average of 130 tonnes in the plant crop, 80 for the 1st ratoon and 65 tonnes for the 2nd ratoon. The estimated loss was a gross yield of 275 tonnes which the respondent claimed against the appellant.

The appellant filed a defence dated 7/11/2014 filed evenly in which liability was denied and the respondent was put to strict proof thereof.

The appellant averred that if there was any loss suffered, it is the respondent who breached the terms of the contract by failing to nurture the

sugar cane as agreed upon to an extent that harvesting poorly maintained sugar cane could have been uneconomical; that the respondent poorly maintained and never bothered to develop ratoons 1 and 2 as agreed upon.

The respondent also denied the appellant's claim that the plot was capable of producing a gross yield of 275 tonnes; that the vicinity where the respondent's plot was situated could only yield a maximum of 65 tonnes per Ha; that the payments on the crop yields would attract and be subjected to deductions from the input services it rendered alongside the harvest, transport charges and cess from the sugar cane proceeds; that the claim is quantifiable but the respondent failed to specifically plead his loss as such the suit ought to be dismissed.

Finally, it was averred that the suit is statutorily barred as envisaged under Section 4 of the Limitation of Actions Act and it ought to be struck out with costs; that preliminary objection to that effect would be raised at the opportune time and the respondent duly notified.

In his reply to the appellant's defence, the respondent stated that the defence was a mere denial. On the issue of jurisdiction, the respondent stated that the trial court had jurisdiction to determine the matter under the Sugar Act 2001 which was a creature of the Sugar Arbitration Tribunal ceased operations on 30/6/2013.

After the full hearing, the trial court entered judgement in favour of the respondent for Kshs. 663,390/= in damages for breach of contract, cost 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 17/12/2018 filed on 18/12/2018 based on ten (10) grounds of appeal which can be summarized in the following four (4) grounds:-

a. 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 notwithstanding the fact that the appellant had pleaded the defence of limitation of actions and the evidence led proved that limitation;

b. That the court erred in solely relying on the evidence, Respondent's to prove his claim before the trial court which was fatally and fundamentally at variance with and departed from the respondent's pleadings and in doing so, the respondent did not prove his claim;

c. That court erred in its analysis and final award of damages of Kshs. 663, 390. Which the respondent neither specifically pleaded nor strictly proved;

d. That the court erred in failing to take into account the fact that the respondent was in breach of the contract thus reached a wrong conclusion of fact and law when awarding the respondent compensation.

The appellant prayed: -

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

b. 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.

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

d. 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 were taken on 16/11/2020 that the appeal be canvassed by way of written submissions. Both parties confirmed compliance on 12/4/2021 when this matter came up for mention.

In support of its appeal, the appellant filed its submissions dated 25 /3/2021 on 26/4/2021.

The appellant took up the jurisdictional point on limitation as the first issue. The appellant submitted that the suit was statute - barred. The contract was admittedly made on 30/1/2004 and the plant crop was planted on the same date or soon thereafter.

The first crop harvest was to be some twenty - four (24) months after the respondent planted the cane which fell on 30/1/2006. The respondent alleged that the appellant failed to harvest the plant crop when mature and ready thus the breach of the said contract occurred in February 2006 or earlier. Basically, this is when the cause of action accrued.

Further, the appellant submitted that the respondent filed the suit in the lower court on 16/10/2014 by the plaint dated 15/10/2014. This was a clear eight (8) years, seven (7) months and sixteen (16) days after the appellant allegedly breached that contract. This was two (2) years seven (7) months and sixteen (16) days outside the mandatory limitation period as prescribed by the Limitation of Actions Act Cap 22 Laws of Kenya. Thus, the suit is incompetent.

The appellant submitted that even if the time were to be computed from the date when it may be presumed that seed cane was supplied to the respondent and planted, that is on 29/7/2005, as the trial court reckoned, the suit was still statute barred. For purposes of Limitation of Actions Act, the six (6) year limitation period would have expired on 29/07/2013 and since the suit was filed on 16/10/2014, it was one (1) year three (3) months and sixteen (16) days out of time.

To further buttress this point, the appellant relied on the cases of **Pacis Insurance Company Limited v Mohammed F Hussein Mombasa HCCC No. 92 of 2015 (2017) eKLR**; **Farmers Choice Company Ltd v Doreen Anyango Wasonga & Another (2015) eKLR**; **South Nyanza Sugar Company Ltd v Dickson Aoro Awour Migori HCCA No. 86 of 2015 (2017) eKLR**; **Dubai Bank Kenya Limited v Kwanza Estates Limited**; **B. Mathayo Obonyo v South Nyanza Sugar Co. Ltd (2019) eKLR**; **Republic v Public Procurement Administrative Review Board & Another, ex parte Teacher Service Commission (2015) eKLR**; **E. Torgbor v Ladislaus Odongo Ojuok (2015) eKLR** and **Diana Katumbi Kiio v Reuben Musyoki Muli (2018) eKLR** which decisions addressed the issue of jurisdiction of a court.

It was submitted that the learned magistrate erred in finding that the respondent had lost an estimated total of 464 tons of sugar cane whilst the respondent estimated the loss at 275 tons from all the three cycles; That the learned trial Magistrate's findings were at variance with and departed from the respondent's pleadings thus erred in terms of computing the sum due beyond the scope of the pleadings.

The appellant also submitted that parties are bound by their pleadings and the court cannot grant relief beyond the scope of the pleadings of the party who has sought the award. The appellant relied on the cases of **Raila Amolo Odinga & Another v IEBC & 2 Others (2017) eKLR** and **David Sironga Ole Tukai v Francis Arap Muge & 2 Others (2014) eKLR** where the courts held that parties are bound by their pleadings and they cannot travel beyond their pleadings.

It is urged that the respondent did not specifically plead any amount in his pleadings. The respondent never pleaded the Kshs. 2,200 and Kshs. 2,500 per ton of cane awarded by the learned Trial Magistrate. The appellant relied on the cases of **South Nyanza Sugar Company Ltd v Fredrick Ogola (2015) eKLR** for the submission that the price of the sugarcane must be pleaded specifically for it to be the basis for the award of damages for breach of contract.

The appellant further submitted that the interest on the principal sum of Kshs. 663, 390 was erroneous; that it is settled law that damages for breach of contract are not damages at large. They are special damages which must be specifically pleaded and proved and the respondent did not; that the learned Magistrate erred in awarding interest from the date of filing suit. The appellant submitted that from the record, the filing fees paid by the respondent was an amount for general and not special damages. The appellant relied on the cases of **South Nyanza Sugar Co. Ltd v Dominic Nyakwakwa Ongoma HCCA No. 22 of 2019 (Migori)**; **South Nyanza Sugar Company Limited v Samuel Nyagaresi Ibwago Migori HCCA No. 104 of 2018** and **South Nyanza Sugar Company Limited v Job Omondi Ongei Migori HCCA No. 140 of 2018** in which Chitembwe J held that in all the cases that a claim which is not for special damages does not attract interest. The interest payable is from the date of judgement and not from the date of filing suit.

In opposing the appeal, the respondent filed his submissions dated 12/04/2021 on 20/04/2021.

Briefly, the respondent submitted that the parties herein entered into a contract on 30/1/2004 which came into force the same date and was to last for five (5) years from 2004 - 2009. The period would cover the harvest of plant crop and two (2) ratoons.

The contract ended on 30/1/2009 and the lower court suit was filed on 16/10/2014 within five (5) years after the due date of the contract.

The respondent submitted that the matter was filed before the expiry of six (6) years from the date the contract expired. Consequently, the respondent's suit was not statute barred by way of limitation.

The respondent relied on the case of **Civil Appeal No. 25 of 2007 Afrofreight Forwarders Ltd & Africa Liner Agencies** in regard to a continual charge as enforceable and that the cause of action in a continuing charge does not lapse or die. The respondent submitted that the cause of action remained until the expected end of contract term.

The respondent prayed that the appellant's appeal be dismissed with costs and this court uphold the trial court's judgement.

After carefully considering the grounds of appeal and submissions by the parties, the following are the issues for determination: -

- i) Whether the suit filed in the Lower Court was statute barred;**
- ii) Whether the Lower Court had jurisdiction to hear and determine this matter;**
- iii) 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**. The court held:-

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

See also **Peters vs Sunday Post Ltd (1958) EA 424**

On the first issue on whether the suit was statute barred, I shall first consider when the cause of action arose.

It is not in dispute that parties entered into a cane growing contract which commenced on 30/01/2004. Paragraph 1 of the outgrowers Cane Agreement provides as follows:-

“This agreement shall come into force on and from the 30th day of January 2004 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 sugar cane are harvested on the Plot aforesaid whichever period shall be the less”.

Since the parties did not disclose exactly when the plant crop was grown, the court will presume that, that was done on the 30/1/2004 or soon thereafter.

Section 4 (1) of the Limitation of Actions Act provides as follows in relation to actions on contracts and 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.**

Black’s Law Dictionary (10th Edition) defines the word “accrue” means “**to come into existence as an enforceable claim or right.**” Lord Diplock’s definition of a cause of action in the case of **Letang vs Cooper (1964) 2 ALL ER 929** at pages 934 as:-

“ a cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

Therefore, in interpreting the word ‘accrued’ as per the Statute, the cause of action for breach of contract ‘accrued’ can only be brought at the time the actual breach occurred. This is when it can be said the time started running. There is overwhelming authority that in contract, a cause of action arises at the time of breach of contract. In **Diana Kathumbi Kiio vs Reuben Musyoki CA 211 / 2015 (2018)eKLR** the court said:-

“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.”

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

“[17] There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. 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.” Emphasis mine.

Similarly, in **B. Mathayo Obonyo v South Nyanza Sugar Co. Ltd (supra)** 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 position taken in South Nyanza Sugar Company Limited v Diskson Aoro Owuor (Supra) in determining when the cause of action accrues... Thus under the outgrowers 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 LAA, the time begins to run.”

As per the Respondent, the breach of contract occurred when the appellant failed to harvest the matured cane. The cause of action accrued then and in terms of Section 4(1) (a) of the Limitation of Actions Act, the time began to run from the time of breach.

Since none of the parties disclosed when exactly the plant crop was planted, the presumption by this court is that the cane was grown at the time when the parties entered into the contract that is on 30/1/2004 or soon thereafter.

It therefore goes without saying that the breach occurred ***on or about 30/1/2006 twenty four (24) months after the agreement was signed and when the plant crop ought to have matured.*** The appellants ought to have filed suit within six (6) years from 30/1/2006. It means that time for filing suit lapsed on 30/1/2012. I do not agree with the submission that the contract was a continuing one.

The respondent filed the suit by a plaint dated 15/10/2014 on 16/10/2014. This is approximately ***two (2) years*** after the time of limitation contemplated under Section 4(1) of the Limitation of Actions Act.

There is no evidence on record that the appellants sought leave of court to file the suit out of time. I am of the firm view that the suit was time barred.

I find that the suit was statute barred.

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 statute of limitation period, the trial court was devoid of jurisdiction and ought to have downed its tools and not touched this matter.

Without going into much detail on the other issues raised in the appeal, I must point out that it is trite law that a party is bound by its own pleadings. At paragraph 12 and 13 of the plaint the Respondent had specifically pleaded the expected yield of 275 tons. However, the trial court without basis went ahead to award the Respondent much more than what his claim was i.e 464 tons. I am guided by the Supreme Court decision of **Raila Amollo supra and David Sironga Ole Tukai vs Francis Arap Muge & 2 other (2014) eKLR** where the court reiterated the earlier case when it said:-

"In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."

I also agree with the appellants Submission that having failed to specifically plead the amount of money payable per ton of sugarcane there was no basis for the award made by the trial court for 2200 per ton for first crop and 2500/= per ton for the ratoon crops. Being a special damage claim for breach of contract, the particulars of the payment per ton was fundamental. I agree with the finding by J, Manjanja – **South Nyanza Sugar Co =vs= Fredrick Ogola (2015) eKLR** where he said

"It was clear then that the only indicator of the price was the pleading which the court adopted for the plant crop. I find that the price of the sugarcane was an essential element of the Respondent's claim, and the claim being in the nature of special damages, ought to have been pleaded and proved with particularity. This legal position has re-stated in many cases, among them Hahn v Singh [1985] KLR 716, Coast Bus Service Ltd =vs= Sisco Murunga Ndanyi & 2 others, Nairobi CACA No. 154 of 1992 (UR).

Although the Respondent pleaded the price of sugarcane per ton, he did not prove the price, hence there was no basis for making the award. Likewise, the Respondent's submissions on various prices in respect of the plant crop and 1st ratoon were not supported by any evidence. Unless there are admissions or agreed facts, submissions are not a substitute for proof of facts. In Douglas Odhiambo Apel & Another v Telkom Kenya Limited, Nairobi CACA No. 115 of 2006, the Court of Appeal expressed.. that:

We find that the learned judge was entirely correct in holding that at a formal proof requiring assessment of damages, a plaintiff is under a duty to present evidence to prove his case. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court. The need for proof is not lessened by the fact that the claim is for special damages. Unless a consent is entered into for a specific sum, then it behoves the claiming party to produce evidence to [prove special damages claims."

Lastly, having failed to specifically plead the damages due to the Respondent, the interest could only be awarded from the date of judgment but not from the date of filing suit.

Since the first issue for determination being jurisdiction, is well settled, it is unnecessary to address all the other issues in detail as they fall by the way.

In the end, I make the following orders: -

- a) **The appeal be and is hereby allowed.**
- b) **The Lower Court Judgement and Decree is set aside.**
- c) **The respondent shall bear the costs in the subordinate court and of this appeal.**

DELIVERED, DATED AND SIGNED AT MIGORI THIS 29TH DAY OF JUNE, 2021.

R. WENDOH

JUDGE

Judgment delivered in open Court and in the presence of:

No appearance for the appellant. Though Mr. Odera was present in court when the date for delivery of judgment was given and was supposed to notify the Respondent's counsel

No appearance for the respondent.

Nyauke Court Assistant.