REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CIVIL APPEAL NO. 74 OF 2018

BETWEEN

SOUTH NYANZA SUGAR CO. LTD.....APPELLANT/CROSS-RESPONDENT

AND

REHEMA JOSEPH NKONYA.....RESPONDENT/CROSS-APPELLANT

(Being an appeal and a cross-appeal from the judgment and decree

by Hon. M. M. Wachira, Senior Resident Magistrate in Migori

Chief Magistrate's Civil Suit No. 242 of 2015 delivered on 29/05/2018)

JUDGMENT

1. There is an appeal and a cross-appeal in this matter. The appeal was instituted by South Nyanza Sugar Co. Ltd whereas the cross-appeal was instituted by Rehema Joseph Nkonya.

2. Rehema Joseph Nkonya (hereinafter referred to as '**the Respondent'**) filed **Cause No. 1490 of 2012** before the defunct Sugar Arbitration Tribunal (which cause was later transferred to and was assigned as **Migori Chief Magistrate's Court Civil Suit No. 242** of **2015** (hereinafter referred to as '**the suit'**) against South Nyanza Sugar Co. Ltd (hereinafter referred to as '**the Appellant'**).

3. The Respondent claimed that by a Growers Cane Farming and Supply Contract entered into on 01/09/2006 (hereinafter referred to as **'the Contract'**) the Appellant contracted the Respondent to grow and sell to it sugarcane at the Respondent's parcel of land Plot No. 187C Field No. 52 in Moheto Sub-Location measuring 1.0 Hectare within Migori County.

4. The Respondent pleaded that the Contract was for a period of five years or until one plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first. That, the cane was company-developed in that the Appellant provided the Respondent with inputs and services. That, the Respondent discharged her part of the contract until the plant crop was ready for harvesting but the Appellant refused and/or failed to harvest it hence compromised the development of the ratoon crops and that she suffered loss.

5. Aggrieved by the alleged breach of the contract the Respondent filed the suit claiming compensation for the loss of the unharvested three cycles of the sugar cane amounting to Kshs. 504,400/= with costs and interest at court rates.

6. The Appellant entered appearance and filed a Statement of Defence dated 14/03/2013 wherein it denied both the contract and the breach and put the Respondent into strict proof thereof. The Appellant further averred that if at all there was any such breach then the Respondent was the author of his own misfortune as she failed to properly maintain her crops to the required standards or at all to warrant the same being harvested and milled. The Appellant prayed for the dismissal of the suit with costs.

7. The Respondent and her witness testified before the Tribunal. The proceedings before the Tribunal were adopted by the trial court. The Appellant testified before the trial court through its Senior Field Supervisor as its sole witness.

8. The trial court rendered its judgment and allowed the suit by remedying the Respondent the value of the plant crop and the first ratoon crop with interest from the date of judgment.

9. Both parties were aggrieved by the judgment. The Appellant filed an appeal whereas the Respondent filed a cross-appeal. The Appellant challenged the judgment on 9 grounds. The Appellant mainly contended that the Respondent never specifically pleaded and/or proved the claim and that there was no evidence of plot size, cane yields or applicable cane prices. The Appellant prayed that the appeal be allowed and the suit be dismissed with costs.

10. On her part, the Respondent raised 3 grounds of appeal. She contended that the court erred in ordering interest to run from date of judgment instead of the date of filing of the suit before the Tribunal, that the court ignored binding decisions and precedents and that the trial court did not assign any reasons to its decision. The Respondent prayed that the order on interests be varied accordingly.

11. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied. Several decisions were rendered by the parties in support of their rival positions.

12. As the first appellate Court, the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348).**

13. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

14. I have previously dealt with all the issues raised in this appeal. Since I have not changed my position on any of the issues I will reiterate what I previously held in past decisions. On how pleadings ought to be drafted in a suit on breach of sugar cane contracts, I must observe that the Respondent indeed quantified her claim to Kshs. 504,400/= in paragraph 6 of the Statement of Claim dated 30/11/2012 filed before the Tribunal. However, even if that was not the case still the decision of the Court of Appeal at Kisumu in **Civil Appeal No. 278 of 2010 John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd (2013) eKLR** comes to play where the Learned Judges stated as follows: -

> ***In the case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and which was 0.2 hectare (paragraph 3 of plaint), average cane proceeds per acre was given as 135 tonnes and the price per tonne was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.***
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> ***The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.***
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> ***We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof.***
>
> ***Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filling suit.*** (emphasis added).

15. I therefore find that the suit was not bad in law.

16. As to whether the suit was proved, there is no doubt that the contract was entered into. The Appellant's witness so admitted in his evidence before the trial court. It was further admitted that the Respondent was assisted to develop the cane up to maturity. The only point of departure according to the Appellant's witness before court was that the Respondent failed to avail the cane to the Appellant at maturity.

17. The trial court upon evaluation of the evidence found that the duty to avail the cane was on the Appellant and as such the Appellant was in breach f the contract. That is the position of this Court. (See **Migori High Court Civil Appeal No. 158 of 2018 Isaya Owino Mbogo vs. South Nyanza Sugar Co. Ltd (2019) eKLR** among many others). I must however note that the issue of non-delivery of the cane was not raised in the pleadings by the Appellant and was as such a non-issue.

18. On the resultant remedy for the breach I have previously held in **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** that once a farmer proves that the Miller failed to harvest the plant crop at maturity then the farmer is entitled to the proceeds of the plant crop as well as the ratoon crops subject to the pleadings. Equally, when a Miller fails to harvest the first ratoon crop then the farmer is entitled to compensation for the first and second ratoon crops subject to the contract. In this case the Respondent was entitled to the proceeds of the plant crop and the first ratoon crop yields since the pleadings claim as such.

19. Closely related to the aspect of remedy is the issue of mitigation of loss. The issue is one which is hotly contested almost in every appeal and is pending determination at the Court of Appeal. There are divergent views by the High Court on the issue.

20. I must certainly affirm the position that disputes based on breach of contracts are subject to the principles of ***remoteness, causation*** and ***mitigation***. I further agree with the Court of Appeal in several decisions that a party alleging breach of contract must take steps to mitigate loss (See **African Highland Produce Limited vs. John Kisorio (2001) eKLR**).

21. The question which now arises is how should a Defendant handle the issue of mitigation of loss in a suit where the Plaintiff did not plead

how it/he/she mitigated the loss? That question is factual. To me, the burden rests upon the Defendant to demonstrate how the Plaintiff ought to have mitigated the loss. Such approach must first find its basis in the pleadings. By doing so the Plaintiff would be put in sufficient notice and accorded an opportunity to challenge the evidence on mitigation of loss if need be. That is the essence of a fair trial in **Article 50(1)** of the **Constitution**.

22. A defendant should not raise the issue of mitigation of loss on appeal at the first instance. By doing so, the issue becomes a non-issue. The issue must be pleaded and proved. (See the Supreme Court ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** and the Court of Appeal in **The Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR).**

23. I have consciously taken the foregone position on the understanding that contracts are between parties and each contract must be independently scrutinized as there may be some instances where the principle of mitigation of loss may reasonably not be applicable in a dispute more so depending on the terms of such a contract.

24. The foregone has been echoed by some Courts. **Majanja, J.** in **Kisii High Court Civil Appeal No. 60 of 2017 South Nyanza Sugar Co. Ltd vs. Donald Ochieng Mideny (2018) eKLR** when he recently (on 21/12/2018) rendered himself on the issue after considering several past decisions including some by yours truly and held that: -

> ***15. Mitigation of damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (See African Highland Produce Limited vs. Kisorio (1999) LLR 1461 (CAK). Since the appellant did not contest the respondent's claim, it did not show how the respondent could mitigate the loss.***
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> ***16. The appellant's arguments in support of the appeal were attractive but at the end of the day the respondent's case before the trial court was not contested and for this reason, I dismiss the appeal……***

25. In this case the issue of mitigation of loss was not pleaded by the Appellant in the statement of defence. Instead, the Appellant denied the existence of the contract. The Appellant only pleaded in the alternative that upon proof of the contract then the Respondent failed to exercise diligence in growing the cane. The Appellant unfortunately did not lead any evidence on the position. There was no mention of the issue of mitigation of loss or at all. How then was the Respondent expected to respond to a non-issue?

26. I therefore find and hold that the issue of mitigation of loss having not been raised in the suit cannot be subject of an appeal.

27. Returning to the case at hand, the Respondent was hence entitled to compensation for the expected value of the plant crop and the first ratoon crop. That is what the trial court awarded. It relied on the Appellant's Survey Advice Note which gave the size of the land as 0.9 ha. A cane yield assessment report was produced by PW2. It estimated the yields at 105 tonnes per hectare. No alternative report was produced, but the Appellant's witness only testified that the yields would have been 63.82 tonnes per hectare in Moheto area. The court adopted the estimate for the plant crop as indicated in the report. Since the report was silent on the yields on the ratoon crops the court adopted an average of the yields proposed by the parties. The court further relied on a Cane Price List produced by the Respondent as an exhibit. The trial court had all what was required to determine the expected income for the plant crop and the first ratoon crop. That is what the court did.

28. On the issue of interest, the Court in **John Richard Okuku Oloo** (supra) settled the same. It held that interest must run from the date of filing the suit and as such the trial court did not err in making that order. I must add that the Court of Appeal was alive to the fact that the lower court case had been filed in 1998 when it rendered its judgment in 2013 after a period of 15 years. The simple reason thereto is that it is well settled in law and has been so held over time that interest starts running from filing of suit in special damages claims like in this case. The Respondent was denied the use of his money for all that period and the interest remain the sole consolation. Further, if the trial court was to otherwise find that interest ought to begin running from any other date then that was a factual issue which ought to have been pleaded and proved and the Respondent given an opportunity to respond. The argument comes too late in the day and is for rejection.

29. Having dealt with all issues raised in this appeal, I must find and hold, which I hereby do, that the appeal is hereby dismissed with costs, but the cross-appeal is allowed with costs. For clarity, the order on interest in the judgment is set-aside and replaced with an order that interest shall start running from the filing of the claim before the Tribunal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of February, 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Marvin Odero Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Appellant/Cross-Respondent**.**

Mr. Kerario Marwa Counsel instructed by the firm of Messrs. Kerario Marwa & Company Advocates for the Respondent/Cross-Appellant**.**

Evelyne Nyauke – Court Assistant