REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

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

CIVIL APPEAL NO. 157 OF 2018

BETWEEN

SOUTH NYANZA SUGAR CO. LTD …….....APPELLANT

AND

JACKSON OMOLLO KIBWANA…….……...RESPONDENT

(Being an appeal from the judgment and decree by Hon. E. M. Nyagah, Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 157 of 2018 delivered on 18/10/2018)

JUDGMENT

1. *Jackson Omollo Kibwana* (hereinafter referred to as '**the Respondent'**) filed **Migori Chief Magistrate's Court Civil Suit No. 157** of **2015** (hereinafter referred to as '**the suit'**) against *South Nyanza Sugar Co. Ltd* (hereinafter referred to as '**the Appellant'**).

2. The Respondent claimed that by a Growers Cane Farming and Supply Contract entered into on 20/06/2005 (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. 1859 Field No. 22A in South Kabuoch Sub-Location measuring 0.5 Hectare within Migori County.

3. 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 his 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.

4. 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 with costs and interest at court rates.

5. The Appellant entered appearance and filed a Statement of Defence dated 27/04/2016 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 he failed to properly maintain his 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.

6. The Respondent testified before the trial court. The Appellant also testified before the trial court through its Senior Field Supervisor as its sole witness. Both witnesses adopted their statements as part of their evidence and their lists of documents as exhibits.

7. The trial court rendered its judgment and allowed the suit by remedying the Respondent the value of three crops with interest from the date of judgment.

8. The Appellant was aggrieved by the judgment. The Appellant challenged the judgment on 9 grounds. The Appellant mainly contended that the Respondent never specifically pleaded the claim and that the claim was not proved. The Appellant prayed that the appeal be allowed and the suit be dismissed with costs.

9. Directions were taken, and the appeal was disposed of by way of written submissions where the Appellant duly complied. The Respondent did not file any submissions. The Appellant referred to several decisions in support of the appeal.

10. As the first appellate Court, 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).**

11. 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.

12. 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, 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** 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.***
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> ***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).

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

14. 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. 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 and that the Respondent abandoned the cane in the field.

15. In **Migori High Court Civil Appeal No. 10 of 2019 Trans Mara Sugar Co. Ltd vs. Nelson Dedege Mbai** (unreported) I recently dealt with the duty to harvest the cane in sugar contracts. This is what I stated: -

> *21.* ***I have in previous decisions dealt with the duty to harvest mature cane in sugar contracts. In Migori High Court Civil Appeal No. 86 of 2016 Elena Olola vs. South Nyanza Sugar Co. Ltd (2018) eKLR I reiterated what I had earlier on held in Migori High Court Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR as follows: -***
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> *28. ….. Further thereto, there is the Sugar Act (hereinafter referred to as 'the Act'). This Act was the applicable law by the time the contract was entered. The Act stipulated under Section 6(a) of the Second Schedule thereof, which Schedule was a creation of Section 29 of the Act, that: -*
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> *'The role of the miller is to -*
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> *(a) Harvest, weigh at the farm gate, transport and mill the sugar cane supplied from the growers' field and nucleus estate efficiently and make payments to the sugar cane growers as scheduled in the agreement.' (emphasis added)*
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> *29. 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.*
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> *22.* ***The foregone position was re-affirmed by the Court of Appeal in Nairobi Civil Appeal No. 165 of 2007 D. Njogu & Company Advocates vs. National Bank of Kenya Limited (2016) eKLR. The matter involved fees agreements entered into between a firm of Advocates and a client in lieu of the Advocates Remuneration Order. The parties later disagreed and the firm of Advocates withdrew its services. It then filed bills of costs under the Advocates Remuneration Order and in disregard of the fees agreements. The taxing officer disallowed the bills. A reference to the High Court was also disallowed.***
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> *23.* ***On appeal to the Court of Appeal, the Court restated the legal principle that: -***

23. Likewise we reiterate that any contract that contravenes a statute is illegal and the same is void ab initio and is therefore unenforceable.

24. ***I must however disclose that the Court of Appeal eventually also disallowed the appeal. The reason was that the Advocates were the legal experts who knew the law and were advantaged compared to their client. The Advocates could not willingly contravene the law by entering into a void agreement and later seek to go round their actions. The Court stated that since the Advocates had made their bed, they must lie on it.***

25. ***In this case the contract was prepared by the Appellant. It is a standard-form contract. It was dated 22/03/2011. By that time the Sugar Act was the law regulating the sugar sector.***

26. ***The Appellant is a fully-fledged enterprise. This Court takes judicial notice that further to its external Advocates the Appellant has its in-house Legal Officer(s) who appear before Court on matters for and against the Appellant.***

27. ***The Respondent has been described as a farmer. There is no indication that the farmer was in any way endowed in law. The Appellant was hence at an advantaged position in coming up with the contract. It definitely had the advantage of legal experts.***

28. ***Guided by the settled legal principle as stated by the Court of Appeal aforesaid and the circumstances of this case, I find that the clause(s) of the contract that placed the duty to harvest the mature cane on the farmer (Respondent) are void ab initio. Those clauses are unenforceable since they contravened express provisions of the Sugar Act.***

16. On whether the Respondent abandoned the cane, each party had a rival position. The Respondent contended that he undertook all crop husbandry until the plant crop was ready for harvest. As said, the contract was not denied. There was also evidence of Job Completion Certificates on furrowing, ploughing and seed cane supply.

17. The suit was a civil claim. Pursuant to **Section 107** and **Section 109** of the **Evidence Act**, Chapter 80 of the Laws of Kenya, a party which relies on a fact must prove the existence of such a fact. On a balance of probability, the Respondent proved that he planted and cared for the plant crop.

18. It is imperative to note that the Appellant had taken the position in paragraph 5 of the Statement of Defence that the Respondent failed to develop the crop as expected under the contract.

19. The Appellant was hence under a duty to prove that it complied with contract on its part in demonstrating its defence. *Clause 6.2* of the contract provided for what the Appellant/Miller was to do in cases where the farmer failed in his/her obligations. The Clause stated as follows: -

The Miller shall be entitled to upon expiry of a fourteen day notice and at its own discretion and without relieving the Grower of the obligations under this agreement, in the event that the Grower does not prepare, plant an d maintain the plot and the cane in accordance with his obligations under this agreement and / or instructions and advise issued by the Miller to (but not limited to) carry out such operations on the plot which the Miller shall in its sole discretion deem necessary to ensure satisfactory yield and quality.

20. The Appellant produced a warning letter dated 15/06/2006 among other documents as exhibits.

21. The Respondent vehemently denied receipt of the warning letter as well as the truthfulness of its contents. He also denied that he was ever in breach of the contract either as alleged or otherwise. The Respondent further maintained that it was the Appellant which was in breach of the contract by failing to harvest the plant crop at maturity.

22. On service of documents, *Clause 9* of the Contract stated as follows: -

Any notice or demand by the Miller under this agreement shall be deemed to have been properly served upon the Grower if delivered to the Provincial Administration for onward transmission to the Grower or delivery by hand or sent by registered post or facsimile at the address of the Grower shown in this agreement. In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by registered post at 10 a.m. Seven (7) days following the date of posting (notwithstanding that it is returned undelivered) or if sent by facsimile on the completion of transmission. Where the notice or demand is sent by registered post it will be sufficient to prove that the notice or demand was properly addressed.

23. I have carefully gone through the record but did not find any evidence of service of the warning letter as required under the said *Clause 9*. It will therefore be without any basis for this Court to assume that service of the warning letter was effected on the Respondent. I therefore decline the Appellant's contention that it issued and served the warning letter upon the Respondent.

24. The foregone analysis presents that the Appellant failed to demonstrate its defence after the evidential burden of proof shifted to it. The Respondent therefore proved his case against the Appellant as required in law.

25. On the resultant remedy for the breach I have also 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.

26. 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.

27. 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**).

28. 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**.

29. 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).**

30. 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.

31. 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……***

32. 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?

33. 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.

34. Returning to the case at hand, the Respondent was hence entitled to compensation for the expected value of the plant crop and the two ratoon crops as pleaded. That is what the trial court awarded. The court relied on the Appellant's Survey Certificate which gave the size of the land as 0.5 Ha. The court further adopted the yields as proposed by the Appellant in all the three crop cycles. The court also relied on a Cane Price List produced by the Appellant as an exhibit. The trial court had all what was required to determine the expected income for the three crops. It also deducted the sums as proposed by the Appellant. I do not see how the Court erred.

35. 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.

36. 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.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically: -

1. morongekisii@yahoo.com for Messrs. Moronge & Company Advocates for the Appellant.

2. soodingoadvocate@gmail.com Messrs. Odingo & Company Advocates for the Respondent**.**

3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE