REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

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

CIVIL APPEAL NO. 115 OF 2018

BETWEEN

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

AND

FRANCIS KOSKEI NTUITAI.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. E. M. Nyagah, Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 396 of 2014 delivered on 09/08/2018)

JUDGMENT

1. The Respondent herein, *Francis Koskei Ntuitai,* filed *Migori Chief Magistrate's Court Civil Suit No. 396 of 2014* (hereinafter referred to as '**the suit'**) against South Nyanza Sugar Co. Ltd**,** the Appellant herein. The Respondent claimed that by a Growers Cane Farming and Supply Contract entered into on 19/07/2004 (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. 16A Field No. 60C in Enoosaen Sub-Location measuring 0.7 Hectare within Narok County.

2. 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. The contract was company developed since the Appellant supplied the Respondent with farm inputs and services including cane seed. The Respondent further pleaded that he discharged his part of the contract until the plant crop was ready for harvesting. The Appellant harvested it and paid him his net dues. The Respondent developed the first ratoon crop to maturity but the Appellant refused and/or failed to harvest it. The first ratoon crop dried up. He posited that he suffered loss of the first and second ratoon crops.

3. Aggrieved by the alleged breach of the contract the Respondent filed the suit. He sought for compensation on the loss of the unharvested two cycles of the sugar cane with costs and interest at court rates.

4. The Appellant entered appearance and filed a Statement of Defence dated 07/11/2014. The Appellant denied both the existence of the contract and any breach thereof. It put the Respondent into strict proof thereof. The Appellant contended in the alternative that if the contract was proved then the Respondent failed to exercise good crop husbandry to the extent that the crop was overshadowed and dwarfed by weeds and totally destroyed and as such the Appellant could not harvest such a crop. The Appellant prayed for the dismissal of the suit with costs.

5. The suit was finally settled down for hearing where both parties were represented by Counsels. The Appellant was the sole witness who testified and adopted his Statement as part of his testimony. He also produced the documents in his List of Documents as exhibits. The Respondent called its Senior Field Supervisor as its sole witness who also adopted his statement and produced the documents as exhibits.

6. The trial court rendered its judgment on 99/08/2018. The suit was partly successful. The court awarded the value of the first ratoon crop and Kshs. 10,000/= as nominal damages. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and the suit be dismissed the Appellant proposed 6 grounds in the Memorandum of Appeal dated 07/11/2016. There was no cross-appeal.

7. Directions were taken, and the appeal was canvassed by way of written submissions. The Appellant filed its submissions, but the Respondent did not despite having been given time to do so. The Appellant challenged the finding of the trial court vigorously. He submitted that the court erred in allowing a suit which had no proper pleadings, that the suit was not proved, that no general damages could be awarded

in breach of contract claims, mitigation of loss, limitation of time and the issue of when interest ought to run from. The Appellant relied on several decisions in support of the appeal.

8. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my 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).**

9. 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.

10. I will first deal with the issue of limitation of time since the jurisdiction of a court is dependent on whether a claim is within the statutory timelines. In other words, if a claim is filed outside the legal timelines then a Court lacks jurisdiction to deal with such a dispute.

11. The Appellant's position was that time started running from the time the first ratoon crop was not harvested. It submitted that the suit was hence filed out of time without leave of court. The Appellant relied on several decisions. They are **South Nyanza Sugar Company Ltd vs. Dickson Aoro Owuor (2017) eKLR** by yours truly, **Pacis Insurance Company Limited vs. Mohammed F. Hussein (2017) eKLR** by Otieno, J, **Farmers Choice Company Limited vs. Dorleen Anyango Wasonga & Another (2015) eKLR** by Aburili, J. and **Samson Okengo Olik vs. South Nyanza Sugar Company Ltd (2019) eKLR** by Ougo, J.

12. I have previously dealt with the issue of limitation of time in sugar contracts. In **South Nyanza Sugar Company Ltd vs. Dickson Aoro Owuor (2017) eKLR** I found that time began running from the date of the alleged breach. However, I reviewed that position later. I have since then severally held that time starts running from the end of the contractual period. That is the position I currently hold. Infact my current position is well known to the Appellant and the continued use of the decision in **South Nyanza Sugar Company Ltd vs. Dickson Aoro Owuor (2017) eKLR** can only be misleading and in bad faith.

13. I recall dealing with the issue in **Migori High Court Civil Appeal No. 80 of 2017 South Nyanza Sugar Company Ltd vs. Ezekiel Oduk (2019) eKLR** where I stated as follows: -

> ***20. On whether the suit was statute-bared by limitation, I must say that I have previously dealt with the issue and held that sugar contracts are different from other forms of contracts. To understand that differential context one must appreciate how sugar farming is undertaken. It all starts with the planting of the cane seed. At maturity, when the first harvest (usually referred to as 'the plant crop') is harvested that gives way to the regeneration of the second cycle of the cane (usually referred to as 'the first ratoon crop'). That cycle once harvested gives way to another one and it so continues depending on the application of the best agricultural husbandry on the cane crop. It is for that reason the sugar contracts usually specify the crop cycles and as such a farmer is in a position to know of the expected earnings from the contracted cycles.***
>
> ***21. Therefore, if the plant crop is not harvested then the chances of the farmer reaping from the ratoon crops or the contracted cycles, as the case may be, are certainly curtailed and the farmer loses all the expected proceeds of the cane crops. In other words, when the plant crop is not harvested then the farmer cannot develop the first ratoon crop and the subsequent ratoon crops as well. It is for that reason that I have always been of the considered position in sugar contracts, that in any instance of breach unless the breach is remedied, the farmer is entitled to be compensated for all pending cane crop cycles under the contract and as such the limitation of time starts running from the end of the contract period. That is because …… under the sugar contracts the miller has the sole discretion to extend the contract period and to only notify the farmer of its decision. Therefore, despite breach the miller can extend the contract period and take care of any loss occasioned to a farmer.***
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> ***22. From the foregone, given that the contract was allegedly entered into 10/10/1994 and it was for a period of 5 years, then the limitation time started running from 09/10/1999. That being so, the Respondent had up to 08/10/2005 to file the suit. As the suit was filed on 14/07/2005 then it was within time and the objection on limitation of time is for rejection.***

14. In this case the contract date was 19/07/2004. The contract period was 5 years. From the foregone, time began running as from 18/07/2009. The Respondent had upto 17/07/2015 to file the suit. Since the suit was filed on 17/10/2014 then it was within time. The ground on limitation of time therefore fails.

15. On the issue of the pleadings, I can only refer to the Court of Appeal in **John Richard Okuku vs. South Nyanza Sugar Co. Ltd (2013) eKLR.** The Court had the following to say on pleadings in sugar disputes: -

> ***In 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.***
>
> ***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.

16. All the essentials pointed out by the Court of Appeal are present in the suit. I therefore find and hold that the Respondent sufficiently pleaded the claim. The ground also fails.

17. On whether there was breach of the contract, I have carefully gone through the analysis by the trial court. There is no dispute that there was a contract between the parties. The parties are in agreement that the Respondent planted and maintained the plant crop to maturity. The plant crop was harvested by the Appellant and the Respondent duly paid his net dues.

18. The Respondent further testified that he maintained the first ratoon crop until it matured but the Appellant failed to harvest the crop. The Appellant alluded to the contrary. DW1 relied on his statement dated 29/05/2018 which he adopted as part of his evidence. The statement contended that the Respondent failed to maintain the crop and also failed to avail the mature cane to the Appellant contrary to Clause 3.1.2 of the contract.

19. The parties had various obligations under the contract. The Appellant, for instance, was under a duty to notify the Respondent of any breach of the contract and to call for its remedial action. That was under **Clause 6.2.** The said Clause 6.2 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 and 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. If it was true that the Respondent failed to maintain the first ratoon crop as required, then it was incumbent upon the Appellant to issue a formal notice to that effect. The notice would have pointed out the breach and called for a remedial action. That notice would have been served pursuant to **Clause 9** of the contract which 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.

21. The Appellant did not issue or serve the required notice. There was nothing to demonstrate the allegation that the Respondent failed to develop the first ratoon crop.

22. The Appellant also contended that the Respondent failed to harvest and deliver the mature cane to the Appellant. From the pleadings the twin issues were not part of the Appellant's pleadings. The Appellant took the position that there was no contract between itself and the Respondent. It only pleaded in the alternative that if the contract was proved then the Respondent was guilty of not exercising good crop husbandry hence breached the contract. Therefore, the issue of harvesting and delivery of the cane was never an issue to the Appellant. The issue was only raised at the trial on the adoption of the statement of the Appellant's witness.

23. I must reiterate the position that a statement of a litigant or a witness is not a pleading. It is also not part of the Court's evidential record until it is properly produced and adopted by the Court as such. The issue of the Respondent's failure to harvest and avail the mature plant crop to the Appellant was to be pleaded in the statement of the defence and proved at trial. That was not the case in the suit. The alleged failure to harvest and deliver the cane to the Appellant was hence a non-issue. (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).**

24. The foregone hence yields that the Respondent's claim was not sufficiently opposed. There was evidence on how the Respondent took care of the first ratoon crop until maturity. The failure on the Appellant to harvest the mature cane was in blatant breach of the **Sugar Act, 2001** (now repealed), which was the then prevailing law and under which the contract was entered. (See **Migori High Court Civil Appeal No. 86 of 2016 Elena Olola vs. South Nyanza Sugar Co. Ltd (2018) eKLR, Migori High Court Civil Appeal No. 41 of 2016 Jane Adhiambo Atinda vs. South Nyanza Sugar Co. Ltd (2017) eKLR** among others).

25. On a balance of probability therefore the Respondent proved that the Appellant failed to harvest the first ratoon crop at maturity. That was a breach of the contract. The trial court was hence right in its evaluation of the evidence.

26. On the resultant remedy, I have dealt with the issue on several other occasions. In **Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR** I found 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 and the pleadings.

27. In this case the Respondent led evidence that the Appellant failed to harvest the first ratoon crop. The Respondent was entitled to the proceeds of the first and second ratoon crops. The trial court compensated the Respondent for expected proceeds for the first ratoon. It also

awarded nominal damages. The Respondent did not appeal that decision.

28. From the above analysis the trial court was right in awarding the expected earnings from the first ratoon crop. As to whether the court was right in awarding nominal damages my attention was drawn to several decisions by the Appellant.

29. The Court of Appeal in **Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai Kisumu Civil Appeal No. 239 of 1997 (UR)** emphatically expressed itself thus:

> ***.... As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract.....***

30. In **Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015) eKLR** I dealt with the issue as to why general damages cannot be awarded in claims hinged on breach of contracts. This is what I stated: -

> ***The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR).***

31. I still hold that position. The upshot is that the award of nominal damages of Kshs. 10,000/= was not available to the Respondent.

32. I will now deal with the issue of mitigation of loss. I 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**).

33. 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 be 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**.

34. 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).**

35. 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. I have also previously held that the manner in which the standard sugar contracts are drafted leave no room to the farmer to do anything in mitigating losses even in cases of breach. In this case for instance *Clause 2(b)(iii)* of the contract gave the Appellant the sole power and discretion to extend the contract period without reference to the Appellant. (See **Migori High Court Civil Appeal No. 10 of 2016** case (supra).

36. 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** 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.***
>
> ***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……***

37. In this case, and as said, 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. The Appellant only raised the issue for the first time in its Memorandum of Appeal. The issue of mitigation of loss was not an issue of law but of fact. It had to trace its genesis from the Appellant's pleadings. One therefore wonders how the Respondent was expected to deal with a non-issue.

38. As to whether the award of Kshs. 61,422/= for the first ratoon crop was correct, the court was guided by the Appellant's cane yields report and the cane prices schedule. Based on the information contained therein and in view of the contract provision on when the first ratoon crop would have been due for harvest the trial court was right in its assessment. The court also subjected the earnings to harvesting and transport charges. The award of Kshs. 61,422/= was hence in order.

39. On when interest ought to run from, the trial court was right in finding that it ought to run from filing of the suit. That is the position laid by the Court of Appeal in **John Richard Okuku vs. South Nyanza Sugar Co. Ltd (2013) eKLR**.

40. 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.

41. 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.

42. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

a) The appeal hereby partly succeeds and the finding of the learned magistrate awarding the Respondent Kshs. 10,000/= as nominal damages be and is hereby set aside accordingly;

b) The award of Kshs. 72,422/= by the trial court is hereby substituted with an award of Kshs. 62,422/= with interest at court rates from the date of filing of the suit;

d) The Respondent shall have costs of the suit whereas the Appellant shall have one-third of the costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. **okongowadangomigori@gmail.com** for the firm of Messrs. Okong'o Wandago & Company Advocates for the Appellant.

2. **soodingoadvocates@gmail.com** for the firm of Messrs. Odingo & Company Advocates for the Respondent.

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

A. C. MRIMA

JUDGE