REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

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

CIVIL APPEAL NO. 73 OF 2018

BETWEEN

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

AND

JONYO ARUNGA.....RESPONDENT

(Being an appeal from the judgment and decree by Hon. Maina Wachira, Senior Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 485 of 2005 delivered on 29/05/2018)

JUDGMENT

1. *Jonyo Arunga,* the Respondent herein, filed **Migori Chief Magistrate's Court Civil Suit No. 485 of 2005** (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 29/02/1996 (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. 344A Field No. 281B in North Kanyajuok Sub-Location measuring 0.4 Hectare within Migori 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 rendered various services and supplied inputs to the Respondent towards the development of the cane crop.

3. The Respondent further pleaded that he discharged his part of the contract until the plant crop was ready for harvesting. The Appellant harvested the plant drop and paid the Respondent hi net dues. The Respondent developed the first ratoon crop upto maturity but instead the Appellant for no apparent reason refused and/or failed to harvest the first ratoon crop. The first ratoon crop dried up. The Respondent posited that he suffered loss of the first and second ratoon crops.

4. Aggrieved by the alleged breach of the contract the Respondent filed the suit. He sought for compensation for the loss.

5. The Appellant entered appearance and filed a Statement of Defence dated 18/10/2005. The Appellant denied the contract as well the alleged breach thereof. It put the Respondent into strict proof thereof. The Appellant further pleaded that the Respondent suffered no loss and if at all he suffered any such loss then

the Respondent was the author of his own misfortune in that he failed to properly maintain the sugar cane crops to the required standards or at all to warrant the same being harvested and milled as the same was uneconomical. The Appellant further pleaded that the Respondent was guilty of failure to mitigate loss. It prayed for the dismissal of the suit with costs.

6. 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 closed its case without calling any witness.

7. The trial court rendered its judgment on 29/05/2018. The suit was allowed. The court awarded the net value of the first and second ratoon crops at Kshs. 78, 787/20 with interest and costs.

8. The Appellant was aggrieved by the judgment and lodged an appeal. In praying that the appeal be allowed and appropriate compensation be awarded proposed 13 grounds in the Memorandum of Appeal dated 28/06/2018 and evenly filed in Court.

9. Directions were taken and the appeal was disposed of by way of written submissions. Both parties duly complied.

10. In its submissions the Appellant contended that the suit was defective for want of proper pleadings. It was also submitted that the suit was not proved. Further, it was submitted that even if the suit was proved the court erred by not subjecting the unsubstantiated earnings to appropriate statutory and contractual deductions. The Appellant submitted that the court further erred by not taking into account the doctrine of mitigation of loss. The Appellant also raised the issue of limitation of time. The issue of when interest ought to run from was also hotly argued. The Appellant referred to several decisions in support of the appeal.

11. The Respondent opposed the appeal. He submitted that the suit was competent and that the court rightfully awarded him proceeds for the two ratoon crops. He relied on several decisions as well in opposition to the appeal.

12. 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).**

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

14. I will first deal with the issue of limitation of time since the jurisdiction of a court is dependent on a claim which 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.

15. 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.

16. 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.

17. In **Migori High Court Civil Appeal No. 80 of 2017 South Nyanza Sugar Company Ltd vs. Ezekiel Oduk (2019) eKLR** 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.

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.

18. In this case the contract date was 29/02/1996. From the foregone time began running as from 28/02/2001. The Respondent had upto 27/02/2007 to file the suit. Since the suit was filed on 16/09/2005 then it was within time. The ground on limitation of time therefore fails.

19. As to whether the claim was properly pleaded, I recall the Court of Appeal in **John Richard Okuku vs. South Nyanza Sugar Co. Ltd (2013) eKLR** where 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.***
>
> ***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.

20. 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 hence fails.

21. 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. Although the Appellant denied the contract in its pleadings the Respondent produced the contract book as an exhibit. Infact the said contract book was allowed as an exhibit by the consent of the parties. The Appellant did not challenge the contents of the contract book or at all during cross –examination. The Appellant did not even raise the issue of fraud it had pleaded. The contract was properly proved to have been entered by the parties.

22. On the basis of the contract the Respondent testified that he maintained the plant crop until it matured and the Appellant harvested it and paid him the net dues. The Appellant did not deny such. It was the Respondent's further testimony that he developed the first ration crop upto maturity but the Appellant failed to harvest the cane.

23. The Appellant denied the position in its defence. However, it never adduced any evidence to the contrary. Infact the Appellant did not avail any witness at the trial. The evidence of the Respondent was therefore uncontroverted.

24. 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.

25. There was nothing to counter the Respondent's position. Therefore, the Respondent's claim was not sufficiently opposed.

26. The failure on the Appellant to harvest the mature first ratoon crop cane was hence 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).

27. There was evidence on the preponderance of probability to the effect that the Appellant was in breach of the contract. The trial court rightly so held.

28. 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.

29. In this case the Respondent led evidence that the Appellant failed to harvest the first ratoon crop. The trial court found that the Appellant was in breach of the contract. Resulting thereof it naturally yielded that the development of the second ratoon crop was compromised by the non-harvest of the first ratoon crop. The Respondent was therefore entitled to the proceeds of the two cane crops yields since the pleadings claimed as such.

30. On the question 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**).

31. 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**.

32. 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).**

33. 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).

34. 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……***

35. In this case the issue of mitigation of loss was pleaded by the Appellant in the statement of defence. However, the defence did not state how the Respondent was to mitigate the loss. Of course that was the realm of evidence. Since the Appellant did not adduce any evidence and did not even cross-examine the Respondent of the aspect of mitigation of loss then the issue of mitigation of loss, although pleaded was not proved. As said the Respondent was therefore entitled to the net proceeds of the two ratoon crops.

36. The trial court rightly found that there was no dispute on the size of the land. It so relied on a Survey Report which was produced in evidence as an exhibit. The court was also rightly guided by the KESREF Report which was an independent report on cane yields. The Appellant produced its cane prices schedule.

37. Based on the information contained therein and in view of the contract provision on when the plant crop, first and the second ratoon crops would have been harvested, the court made the right assessment. Contrary to the submissions by the Appellant, the said sums were subjected to both the statutory and contractual deductions.

38. I however noted in the judgment that the trial court stated that *'the remedy for breach of contract is usually general damages'*. Respectfully, that is not the position in law. 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.....***

39. 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).***

40. In this case although the trial court stated that general damages was the remedy in breach of contract claims, the court went ahead and awarded what was rightfully due to the Respondent under the contract. Despite the foregone the court was correct in the award on the two ratoon crops.

41. 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.

42. 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.

43. The upshot is that none of the grounds of appeal is successful. The appeal is hereby dismissed with costs.

Orders accordingly.

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

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

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

2. **kerariom@gmail.com** for the firm of Messrs. Kerario Marwa & 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