REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

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

CIVIL APPEAL NO. 132 OF 2019

BETWEEN

TRANS MARA SUGAR CO. LTD...APPELLANT

AND

BEN KANGWAYA AYIEMBA...RESPONDENT

AND

CIVIL APPEAL NO. 02 OF 2020

(As a Cross-Appeal)

BETWEEN

BEN KANGWAYA AYIEMBA..CROSS-APPELLANT

AND

TRANS MARA SUGAR CO. LTD...CROSS-RESPONDENT

(Being an Appeal and a Cross-appeal from the judgment and decree

by Hon. M. M. Wachira Resident Magistrate in Migori Magistrate's

Civil Suit No. 684 of 2016 delivered on 5/09/2019)

JUDGMENT

Introduction:

1. The dispute before Court is between a sugar cane miller and a contracted farmer. *Trans Mara Sugar Company Limited* (hereinafter referred to as **'the Appellant'**) is the sugar miller whereas *Ben Kangwaya Ayiemba* (hereinafter referred to as **'the Respondent'**) is the contracted farmer.

2. The parties were in agreement that they entered into a Sugar Cane Growing and Supply Contract on 25/07/2011. I will henceforth refer it to as '**the Contract**'. According to the contract the Respondent was contracted by the Appellant to grow and sell to it sugarcane at the Respondent's parcel of land in Boikanga Sub-Location Nyakembene Location in Gucha Sub-County within Kisii County (hereinafter referred to as '**the farm'**).

3. Sometimes in 2016 the Respondent instituted *Migori Chief Magistrate's Court Civil Suit No. 684 of 2016* (hereinafter referred to as '**the suit'**) against the Appellant. The suit was on compensation from alleged breach of the contract.

The Suit:

4. The Respondent pleaded that the Contract was for a period of six years or until one plant crop and two ratoon crops of the sugarcane were harvested from the farm whichever event occurred first. The Respondent further pleaded that he discharged his part of the contract until the plant crop was ready for harvesting but the Appellant failed and/or neglected to harvest it.

5. The Respondent posited that the plant crop dried up on the farm and the development of the ratoon crops was compromised. He contended that he suffered loss as a result of the failure on the part of the Appellant to harvest the mature sugar cane from the farm.

6. The Respondent averred that the Appellant breached the contract by failing and/or refusing to harvest the mature plant cane crop. He sought damages for breach of the contract with costs and interest at court rates.

7. The Appellant entered appearance and filed a Defence. The Appellant however denied both the existence of the contract and any alleged breach thereof. It put the Respondent into strict proof thereof. The Appellant pleaded in the alternative that if there was any contract then the Respondent was the one who breached it for failure to harvest and deliver the sugar cane to the Appellant's weighbridge at the appropriate time. The Appellant prayed for the dismissal of the suit with costs.

8. The suit was finally settled down for hearing where both parties were represented by Counsels. The Respondent 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 Appellant called one witness. He was one *Stephene Mosaiko* (DW1) who was the Appellant's Registrar of Farmers.

9. The trial court rendered its judgment on 05/09/2019. The suit was allowed at Kshs. 559,360/= with costs and interest from the date of filing of the suit.

The Appeals:

10. Both parties were aggrieved by the judgment. The Appellant filed *Civil Appeal No. 132 of 2019* whereas the Respondent filed *Civil Appeal No. 02 of 2020*.

11. The Appellant raised 12 grounds of appeal in challenging the entire judgment. The Appellant contested the trial court's finding on the duty to harvest the cane, on the finding that the cause of action was properly pleaded and proved, on awarding compensation for the undeveloped first ratoon crop, in using incorrect cane prices, in misapplying the law hence delivered a *per incuriam* decision, reliance on a Yields Report by Kenya Sugar Research Foundation (KESREF) which was not part of the record and that the court failed to deduct the transport and harvesting charges from the decretal sum.

12. The Respondent challenged the judgment essentially on one ground. It was that the court erred by wrongly relying on the principle of mitigation of loss in declining to make an award for the second ratoon cane crop.

13. Directions were taken. The parties proposed and the Court agreed that the appeals be heard by way of written submissions. Civil Appeal No. 132 of 2019 became the main appeal and Civil Appeal No. 02 of 2020 was the Cross-Appeal. Both parties filed their respective submissions and referred to several decisions. They also highlighted on the written submissions virtually.

14. In support of the main appeal the Appellant submitted strongly that the trial court erred by rewriting the contract instead of interpreting it. It was urged that the contract was clear in Clause 10(c) that the Respondent, as the farmer, had the duty to harvest and deliver any mature cane crop under the contract to the Appellant as the miller. However, the court set aside that clause and relied on the **Sugar Act, No. 10 of 2001** (hereinafter referred to as '**the Sugar Act**') to introduce another new term unknown to the parties. The new term placed the duty to harvest the cane on the Appellant in a case where the Appellant remained unaware of the state of the Respondent's cane. It was contested that the finding flouted the settled legal position on freedom of contract.

15. The Appellant referred to 8 decisions in support of the position that a court cannot rewrite a contract between parties. The decisions included **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR**, **Securicor Courier (K) Ltd vs. Benson David Onyango & Another (2008) eKLR**, **Samuel Kamau Macharia vs. Daima Bank Ltd (2008) eKLR**, **Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited (2014) eKLR** among others.

16. It was further submitted that the only instance where a court may interfere with a contract between parties was when there was evidence that the contract was illegal, void, voidable or unconscionable. The Appellant submitted that none of the vitiating factors was proved in this case. The decision in **Stanley Kamere & 26 Others vs. National Housing Corporation & 2 Others (2015) eKLR** among two other decisions were cited in support of the submission.

17. The Appellant also submitted that the provisions of the **Sugar Act** could not override the freedom of parties to a contract. It was submitted that the **Sugar Act** was void to the extent of interfering with the freedom the parties to the contract and that was the reason it was repealed. The Appellant also faulted the trial court in relying on the **Sugar Act** during a time when the law was long repealed by the enactment of the **Crops Act, 2013**.

18. The Appellant further faulted the trial court in finding it in breach of the contract. Riding on the argument that the duty to harvest the cane was on the Respondent, the Appellant submitted that the court failed to find that there was no blameworthiness on its part. It relied on the decision in **Hadley vs. Baxendale** (without citation) and several Latin maxims including *action non reum facit, nisi mens sit rea, commodum ex injuri su non habere debet* and *injuria propria non cadet in beneficium facientis*.

19. On the remedies sought, the Appellant submitted that the Respondent sought general damages for breach of the contract which remedy was not available in law. Several decisions were referred to on that legal principle.

20. The Appellant vehemently submitted that the suit was not proved even if it was duty-bound to harvest the cane. It was submitted that the size of the land was not proved, the prevailing cane prices were not availed and that there was no evidence on the projected cane yields. The court was also faulted in not deducting the harvesting and transport costs among other statutory deductions under the contract even after wrongly finding the Appellant in breach.

21. According to the Appellant, and without admitting liability, had the court taken into account the foregone deductions the award would have instead been Kshs. 134,887/=.

22. The cross-appeal appeal was opposed. The Appellant contended that the Respondent was not entitled to any proceeds on the second ratoon crop. It was the Appellant's position that the Respondent ought to have mitigated the loss by selling the cane to another miller. Reference to some persuasive decisions was made.

23. The Appellant then prayed that the appeal be allowed with costs, the suit be accordingly dismissed and the cross-appeal be as well dismissed with costs.

24. The Respondent opposed the main appeal and supported his cross-appeal. He submitted that the cause of action was properly pleaded. He relied on **John Richard Okuku vs. South Nyanza Sugar Co. Ltd (2013) eKLR**.

25. It was also submitted that the dispute was proved as required in law. According to the Respondent there was on record evidence on the size of the land, the yields and the cane prices.

26. On the duty to harvest and transport the cane, the Respondent contended that the duty was on the Appellant. The Respondent submitted that Clause 10(c) of the contract only provided for the Respondent's duty to offer the cane for delivery upon maturity to the Appellant. That was not the same as harvesting and transporting the cane by the Respondent.

27. On such ambiguity this Court was urged to note that the contract was a standard form contract wholly and fully prepared by the Appellant. The Respondent was only called upon to execute the same. The Respondent submitted that had the Appellant wanted to place the duty to harvest and transport the cane on the Respondent then the Appellant would have so expressly stated and with much clarity. On that score the Court was called upon to find that Clause 10(c) of the contract could only be interpreted in favour of the Respondent.

28. The Court was further called upon to note that the contract was entered into during the currency of the **Sugar Act** which placed the duty to harvest and transport cane on the millers. In any event it was submitted that where parties to a contract cannot agree on the interpretation of the terms of their contract then the provisions of the relevant statute apply. In this case the statute was the now repealed **Sugar Act**. A persuasive decision was referred to in support.

29. On mitigation of loss, it was submitted that the issue ought to fail since it was neither pleaded nor proved in the suit but only came up on appeal. Several persuasive decisions were referred to.

30. Responding to the issue of not making the deductions, the Respondent submitted that the court did not err since the Appellant neither pleaded as such nor tendered any evidence as the basis of the alleged deductions. It was submitted that the Appellant's attempt to introduce the evidence on the alleged deductions in its written submissions on appeal was an act in futility and far too late in the day.

31. The Respondent hence prayed that the main appeal be dismissed with costs and that the cross-appeal be allowed with costs.

Analysis and Determinations:

32. 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).**

33. 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.

34. I will henceforth deal with the issues as follows: -

(i) The duty to harvest and transport mature cane:

35. There was no dispute to the fact the parties entered into the contract. The contract was produced as an exhibit in evidence.

36. Clause 10(c) of the contract provided as follows: -

> **The sugarcane farmer shall offer for delivery on maturity and deliver to the Miller all such cane as derived from his contracted cane field and no other using the Miller's transport or the Cane Farmer's appointed transporter approved in**

advance by the miller.

37. The parties did not agree on the above provision. Each of them took a different position. According to the Appellant the contract placed the duty to harvest and transport the mature cane on the Respondent. The Respondent was of the converse position.

38. I have considered the whole clause carefully. To me, a holistic approach rendered the clause very clear and unambiguous. The clause placed the duty to harvest and transport the mature cane from the farm firmly on the Respondent.

39. The Appellant rightly captured the legal position that Courts ought not to interfere with contracts entered into by parties unless on settled exceptions. Several binding decisions were referred to.

40. The Respondent argued that clause 10(c) of the contract contravened the provisions of the **Sugar Act**. As a result, it was submitted that the said provision of the contract must give way to the statute.

41. The **Sugar Act** became the law regulating the sugar sector in Kenya as from 01/04/2002. It was however repealed by the enactment of the **Crops Act No. 16 of 2013** (hereinafter referred to as '**the Crops Act'**). The **Crops Act** became operational as from 01/08/2014.

42. The contract was entered into by the parties on 25/07/2011. By that time the **Sugar Act** was the law guiding the operations within the sugar sector. Infact the contract made reference to some institutions created under the **Sugar Act.** An example was the dispute resolution mechanism under clause 9.1 to 9.4 inclusive which incorporated the Kenya Sugar Board and the Sugar Arbitration Tribunal.

43. The second schedule of the **Sugar Act** provided for the roles of the various institutions in the sugar sector. The institutions included the Kenya Sugar Board, the Kenya Sugar Research Foundation, the out-growers' institutions and the millers.

44. **Section 6** of the second schedule under **the Sugar Act** (*pursuant to Section 29 of the Sugar Act*) provided for the role of the miller. **Sub-section (a)** provided as follows: -

> **6**. **The role of the miller is to –**
>
> **(a) harvest, weigh at the farm gate, transport and mill the sugar-cane supplied from the growers' fields and nucleus estates efficiently and make payments to the sugar-cane growers as specified in the agreement;**

45. The **Sugar Act** therefore placed the duty to harvest and transport mature cane on the miller. On the flipside, the Appellant contended that the contract placed the said duty on the farmer.

46. The Appellant however argued that the **Sugar Act** could not override the freedom of parties to a contract. It submitted that the **Sugar Act** was hence void to that extent and that was the reason it was repealed.

47. By placing clause 10(c) of the contract and the provisions of the **Sugar Act** side by side, it is clear that clause 10(c) of the contract contravened a statutory provision.

48. It is hence important to consider the effect of the contravention.

49. The general rule is that Courts do not enforce contracts which are in contravention with statutes. In **Nairobi Civil Appeal No. 165 of 2007 D. Njogu & Company Advocates vs. National Bank of Kenya Limited (2016) eKLR** the Court of Appeal stated as follows: -

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

50. The English Court of Appeal in **David Taylor & Son v Barnett Trading Co [1953] 1 WLR** was illustrative on the fate of contracts that are deemed illegal at formation. In that case, Barnet Trading Co agreed to sell steak to David Taylor for a period of 4 months at a particular price. The company failed to deliver and David sued for damages. At the date of entering in into the contract there was in place an order preventing the buying or selling of meat over a certain price. The contract exceeded that particular set price. The Court held that the contract was illegal at its formation and as such could not be enforced.

51. There are however exceptions to the general rule. In determining the consequences of the illegality, Courts will distinguish between those contracts that are illegal at formation and those that are illegal through performance.

52. According to *Chitty on Contracts Thirty-Second Edition Vol. 1, General Principles Sweet & Maxwell Thomson Reuters publishers at* pages 1335-1339 as a general rule a contract will be considered illegal at its formation when it is outrightly based on an illegal act. Contracts falling under this category cannot be enforced. Where a contract is illegal at formation neither party will acquire rights under that contract regardless of whether there was any intention to break the law. The contract will be void *ab initio* and it will be treated as if it was never entered into.

53. In **Kisii Civil Appeal 72 of 2008 Safari Inns Ltd & 2 Others v Deutsche Investitions-Und Enwicklungsgellschaft ('Deg') & others [2011] eKLR** the Court of Appeal considered instances where an illegal contract at formation may still be enforced. Referring to the decision in ***Nathalal Raghavji Lakhani -vs- H.J. Vaitha & Another [1965] EA 452*** the Court observed as follows: -

…. a plaintiff is not entitled to relief in a court of equity on the ground of illegality of his own conduct. In order to obtain relief, he must prove, not only that the transaction was illegal, but something more: he must prove either pressure or undue influence. If all he proves is an illegal agreement, he is not entitled to relief…

54. Again, the Court of Appeal considered the issue in **D. Njogu & Company Advocates vs. National Bank of Kenya Limited** (supra). The matter involved fees agreements entered into between a firm of Advocates and a client in lieu of the Advocates Remuneration Order under the **Advocates Act, Cap. 16** of the Laws of Kenya. The agreements provided for lesser fees than those provided for in the said Order. The agreements therefore contravened the statute for they provided for undercutting on the legal fees. Such conduct is expressly prohibited under the **Advocates Act**. 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. On appeal to the Court of Appeal the Court reiterated the general legal position on unenforceability of illegal contracts at formation. However, the Court went further and considered the facts of the matter. It pointed out that the Advocates were the legal experts who were advantaged on legal issues as against their clients. The Court held that the Advocates could not willingly contravene the law by entering into a void agreement and later seek to go round their actions. The Court firmly stated that since the Advocates had made their bed, they must lie on it. The appeal was disallowed.

55. The other category are the contracts which are illegal through performance. Those are contracts which are not primarily not hinged on an illegal act. However, such contracts contain clause(s) which are contrary to a statute(s). Those impugned clauses normally come to the fore during the performance of the contract.

56. A Court faced with a contract which is illegal by performance must consider whether such a contractual provision which is contrary to a statute may be severed and the rest of the contract enforced.

57. In **Shaw -vs- Groom [1970] 2QB 504**, it was held that where a contract or its performance is implicated with breach of statute, it does not entail that the contract is avoided. Where the Act does not expressly deprive the Plaintiff of his civil remedies under the contract the appropriate question to ask is whether, having regard to the Act and the evils which it was intended to guard and the circumstances in which the contract was made and to be performed, it would in fact be against public policy to enforce it.

58. The English decision in **Parking Eye Ltd v Somerfield Stores Limited EWCA [2012]** dealt with the issue in great detail. The brief facts of the case were that the claimant, Parking Eye Ltd, entered into a written agreement to supply the defendant, Somerfield Stores Limited, with an automated monitoring and control system at some of its supermarket car parks. The system was designed to record vehicle registration numbers, enabling customers whose stay exceeded the free parking time allowed by the defendant to be identified and charged. The charges were to be collected by the Parking Eye Ltd. Several months later the Somerfield Stores Limited wrote to the claimant purporting to terminate the agreement with immediate effect. It claimed that a letter sent to customers by Parking Eye Ltd was deceptive and used illegal means to induce people to pay and therefore amounted to a tort. On this basis they argued that the illegality rendered the whole contract unenforceable.

59. The High Court rejected Somerfield Stores Limited's defence of illegality. It was held that Somerfield Stores Limited's termination of the contract was in repudiatory breach. Parking Eye Ltd was able to claim damages for lost revenue during the unexpired term of the contract. The Judge, *Lord Justice Hegarty QC*, had the following to say: -

> ***32. The Law Commission itself was not prepared to accept that the law was in a straightjacket: that once it was shown illegal performance of any sort was intended at the time of the making of the contract, unenforceability would follow automatically.***

60. The *Lord Justice Hegarty QC*, developed the following principles to be considered in deciding whether an illegal contract by performance may nevertheless be enforced: -

> **i. The object and intent of the party seeking to enforce the contract** – if one party intends to perform the contract in a way that involves the commission of an illegal wrong at the time of entering the contract, they will not be able to enforce the contract. Therefore, if the parties were not aware at the outset that the contract was illegal and the parties had no 'fixed intention' of acting unlawfully, the contract may be upheld.
>
> **ii. The centrality and gravity of the illegality** – if the illegality is not central to the contract and is merely a minor aspect, it may be held to be too remote to render the contract unenforceable.
>
> **iii. The nature of the illegality** – in Parking Eye Ltd, the performance of the contract involved a tort (of deceit) and therefore the gravity of this illegality was not sufficient to make the contract unenforceable.

61. Dissatisfied with the foregone findings, Somerfield Stores Limited appealed.

62. The Court of Appeal affirmed the finding of the High Court. The Court found that the illegality was incidental to part of the performance of the contract but far from central to it. The Court further held that a contract creating long term relationship would be examined as a whole, so that where there was a chance to remove the illegality from future performance, the contract could remain in force. The court also made the observation that there would be less scope to rectify one-off contract and in such instances is more likely to be held unenforceable. The Court stated as follows: -

> 35. It is important to emphasise that the facts in this case are different from those in any of the cases to which we were referred. For the contract here was not all-or-nothing, legal or illegal, as regards either its performance or its intended performance. That may, for instance, generally be the case in a contract of sale or one for carriage of goods. But this contract involved continuous performance over time. And its performance was never intended to be carried out in a wholly illegal manner. On the contrary the

performance could be carried out and was intended to be carried out mainly lawfully. Indeed, it was in fact largely carried out lawfully because most motorists paid on the first or second letters and never received the third, offending, letter. Moreover, the judge's finding that if the contract had carried on instead of being repudiated the letters would all have been rendered innocuous means that no part of the damages claimed would be compensation for loss of income obtained by any unlawful means……

> 75. The judge was in my view right to reject Somerfield's illegality defence. The considerations which caused him to do so were that Parking Eye had no fixed intention of acting unlawfully, for reasons which I have discussed, and that the illegality was incidental to part of the performance of the contract but far from central to it.

63. The Court of Appeal further observed that crude application of the general contractual illegality rules could lead to harsh decisions hence the need to consider severity, centrality and nature of illegality on facts of each case. The Court observed;

> ***3.53 As our overview of the present law has shown, the crude application of the general contractual illegality rules could lead to unnecessarily harsh decisions. So how have the courts successfully avoided this potential for injustice in relation to the dispute before them? This has been achieved largely by the use of two methods. The first is by the creation of the numerous exceptions to the application of the general rules….***

> ***3.54 The second method of avoiding harsh decisions is seen in the way in which the application of the relevant rules can be strained in order to meet the justice of the particular case . . .***

64. In **Standard Chartered Bank v Pakistan National Shipping Corporation (No 2) [2000] 1 Lloyds Rep 218** the Court held that the policy of the law is to protect the public from deceit and maintain standards of commercial morality.

65. In **Reynolds v Kinsey 1959 (4) SA 50** the Court stated as follows: -

> ***…where the contract is not unlawful on its face and is capable of performance in a lawful way and the parties merely contemplate that it will be performed in a particular way which would be unlawful, the parties, through ignorance of the law, failing to appreciate that fact, the contract may be enforced on the ground that there was never a Fixed intention to do that which was later discovered to be lawful and that while the parties contemplated such unlawful act, they did not intend to do it. In other words, knowledge of the law is of evidential significance with respect to the parties intended mode of performance. It is important in this situation that at least the party seeking to enforce the contract can carry it out in a legal manner.***

66. From the foregone analysis it is clear that contracts which are illegal by performance are not outrightly unenforceable. A Court must transcend beyond the borders of the illegality in determining on whether the rest of the contract may still be enforced. The considerations include the intent of the party seeking to enforce the contract, the centrality and gravity of the illegality, the nature of the illegality and public interest.

67. I will now apply those principles to this case. On the intention of the party seeking to enforce the contract suffice to say that the party is the Appellant. The contract was prepared by the Appellant. It is a standard-form contract. The Appellant was 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.

68. The Respondent has been described as a small-scale peasant farmer. According to the contract the size of the farm was only 0.8 Hectares. There was 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.

69. The Appellant was well aware that it incorporated an illegal term in the contract. That was clause 10(c). The Appellant therefore intended to benefit from the illegal term right from the formation of the contract.

70. Was clause 10(c) central to the contract? The agreement was not a one-off contract. It was to be performed over a long period. According to Clause 1 the duration was a period of 6 years or until three distinct cane crops were harvested from the farm whichever period was less. The contract was on cane growing on the farm. The Respondent was to plant and maintain the cane crops and upon maturity the Appellant was to purchase the cane. The Appellant was at liberty to extend credit facilities to the Respondent.

71. The contract comprised of various crucial stages. One important stage led to the another important one. The stages included the development of the seed cane, farm preparation, the planting of the seed cane, ensuring that good crop husbandry is applied on the cane upto maturity, harvesting, transportation of the cane to the Appellant's weighbridge, weighing the cane and payment.

72. The harvesting and transportation of the mature cane was one of the central issues in the contract. The clause was knowingly and intentionally incorporated into the standard form agreement by the Appellant. If it is held that the illegal term rendered the rest of the contract unenforceable then the Appellant would be the ultimate beneficiary from that illegality. The principle running through the thread of decisions above is to the effect that a party should not be allowed to benefit from its own self-made illegality except if it pleads and proves any of the factors that may perfectly vitiate a contract.

73. There is the issue of public interest as well. Courts must protect the public from deceit and help maintain standards of commercial morality. Where a dorminant party for instance in a standard form agreement uses its obvious advantage to create a situation where it remains to fully benefit from the agreement in every manner and in total disregard to the weaker recipient party's position whatsoever, public interest demands that the dorminant party be estopped from enjoying such benefit.

74. The foregone position finds its basis in the constitutional principles in **Article 10** of the **Constitution of Kenya** and in some of the decisions referred to above. The national values and principles of governance in the **Constitution** binds any institution or individual whenever applying or interpreting the Constitution, enacting, applying or interpreting any law or making or implementing any public policy decision to be bound and guided by such values and principles including human dignity, equity, social justice, equality, protection of the less privileged among others.

75. The position that a party ought not to benefit from intentional and own-made illegalities is so central and easily flows from the above values and constitutional principles.

76. From the above analysis I find that although clause 10(c) of the contract which placed the duty to harvest and transport the mature cane on the farmer was illegal for contravening the express provisions of the **Sugar Act,** the Appellant cannot benefit from that illegality.

77. The next consideration is whether the illegal clause 10(c) of the contract is severable from the contract.

78. The starting point when dealing with the doctrine of severability is the contract itself. If the contract provides a severability clause, then that is the binding position. If the contract is silent then reference may be made to extrinsic evidence on the intention of the parties.

79. The position was affirmed by the Court of Appeal in **Nairobi Civil Appeal No. 224 of 2017 Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others (2017) eKLR** where a Five-Judge Bench had the following to say: -

> ***136. Whether or not a contract is severable depends on the terms and conditions of the contract. Where a single contract is signed by the parties, there is a presumption of unity of contract - a presumption that the contract is indivisible and is to be performed as one. Severability turns on the intent of the parties and a court may examine extrinsic evidence - evidence outside the writing-to determine whether the parties actually intended an illegal term to be severable. If the contract makes provision for severability then it is severable; however, if the contract has no provision for severability, a court will determine if the contract is indivisible or severable. Such determination by the court will take into account amongst other things the nature of goods, services or works to be performed.***

80. The importance of the intention of the parties and their conduct was the central issue in **Zerbetz -vs- Alaska Energy Centre 708 F.2d at 909.** That was a case filed in the High Court of Alaska. In that case, a state agency hired the Plaintiff as its Executive Director for a term of three years. The employment contract was extremely differential to the Plaintiff, providing that he could declare the agreement terminated and receive balance of his three-year salary if agency attempted to interfere with his management in certain specified ways. The contract also provided that the agency could declare the agreement terminated by giving the Plaintiff thirty-day notice of its termination. The Plaintiff and the agent apparently did not get along well, and the agency declared the contract terminated by providing the Plaintiff with the required thirty-days' notice. When the Plaintiff brought suit for the balance due to him under the contract, the agency argued that the contract was unenforceable on grounds of public policy. The Trial Court agreed and granted summary judgment for the agency.

81. On appeal, the decision was reversed by the **Supreme Court of Alaska.** The Court agreed that the provisions allowing for the Plaintiff to declare contract terminated if the agency interfered with his management constituted an improper and unenforceable abdication of public authority. The Court believed however, that those provisions might be severable from the remainder of the contract, including the thirty-days' notice clause on which the agency had relied in terminating the Plaintiff. The Court stated that whether the provisions were severable depended on whether they were essential parts of the agreed exchange, that is, whether the parties would have made the agreement even without them.

82. The Supreme Court then remanded the case back to the High Court and directed the trial judge to make such examination on the intention and the conduct of the parties since the written contract did not designate any of its provisions as essential nor did it contain severability clause.

83. The principle of severability rides on the position that the freedom of parties to a contract has its limits. Even where there exists an offer, acceptance and consideration, a Court must be careful not to enforce a contract whose intent and subject matter is illegal or contrary to public policy. A contract tailored in a manner to exempt oneself from liability for intentional illegalities and wrongs must not be enforced.

84. The main consideration on whether an illegal contractual provision may be severed from the agreement is the intention of the parties. To ascertain the intention of the parties Courts are to examine all the circumstances surrounding the contract and not to merely adhere to the contract text. Such factors include extra-contractual evidence such as declarations submitted to the Court or testimonies during trial. Courts may also consider any contextual circumstances beyond the written contract text, such as the pre-contractual negotiation history or the parties' post contractual conduct.

85. According to legal scholars *Charles J. Goetz* and *Robert E. Scott* in their presentation on *The Limit of Expanded Choice; An analysis of the interactions Between Express and implied Contract Terms, 73 CALIF L. REV. 261,308 (1985)* the above approach is commonly referred to as the ***contextualist approach*** in contract interpretation.

86. In dealing with the critical question of severability and enforceability, a Court must therefore determine the nature of the illegality, whether the parties would have made the agreement even without the illegal term and whether the remainder of the agreement can still be enforced without the impugned provision.

87. I dealt with these considerations as I analyzed the effect of the illegal clause 10(c) of the contract. Suffice to say that the intention and conduct of the parties indeed connoted their unreserved determination to carry out their contractual obligations to the end. In so doing, the Appellant would get raw cane for its factory and the Respondent would earn an income.

88. As the law vested the duty to harvest and transport the mature cane on the Appellant then the contract would still be valid and enforceable even without the clause 10(c) or any such like provision. The contract could therefore be enforced even without the clause 10(c).

89. I now find and hold that clause 10(c) of the contract was severable from the rest of the contract and that the contract would still be enforceable.

(ii) Whether the contract was breached:

90. Having found that the duty to harvest the mature cane and to transport it to the weighbridge was on the Appellant and in view of the Appellant's position, it then follows that the Appellant did not harvest and/or transport the mature plant cane crop.

91. The failure to harvest the cane led to the loss of the plant crop and compromised the development of the ratoon crops. As a result, the intended gains under the contract were not attained. The failure was therefore a breach of a cardinal contractual obligation on the part of the Appellant.

92. The issue is answered in the affirmative.

(iii) Whether the suit was proved as required in law:

93. The suit was civil in nature. **Sections 107, 108** and **109** of the **Evidence Act**, Cap. 80 of the Laws of Kenya placed the incidence of burden of proof on the party which desired the court to find in its favour. That burden was on the Respondent.

94. In discharging the said burden, the Respondent was called upon to prove his case on a balance of probability. According to the Amended Plaint dated 28/02/2017 the cause of action was the failure by the Appellant to harvest and transport the mature plant cane crop.

95. The Respondent testified and adopted his statement as part of his evidence. He also produced exhibits including the contract, demand letter, KESREF Report on yields and a schedule of cane prices.

96. The Respondent stated that he planted the plant cane crop and applied the required plant husbandry until the cane matured. The Appellant's witness, DW1, did not dispute the position. The contention was on the duty to harvest and transport the cane.

97. With such a state of affairs, there is evidence to the effect that the Respondent proved his case on a preponderance of probability. The cause of action was hence proved in law.

(iv) Remedies:

98. The Respondent is entitled to compensation given that the Appellant was in breach of the contract. In **Migori High Court Civil Appeal No. 92 of 2015 James Maranya vs. South Nyanza Sugar Co. Ltd (2017) eKLR** I dealt with the issue of the remedies in breach of contracts. This is what I stated: -

> ***16. .... It is well settled in law that general damages cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of 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......*
>
> ***17. The reason as to why general damages cannot be awarded in cases of breach of a contract was explained in the case of Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015) eKLR as follows:***
>
>> *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).*

99. The remedy arising from breach of contract is therefore in the nature of special damages. It is settled that a claim on special damages must be specifically pleaded and proved. (See the Court of Appeal in **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**).

100. The Court of Appeal dealt with how a claim on breach of contract in sugar cases may be presented to Court. The Court in **John Richard Okuku vs. South Nyanza Sugar Co. Ltd (2013) eKLR** had the following to say on pleadings in sugar disputes: -

> ***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 persuaded 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.***

101. In this case the Respondent prayed for damages for breach of contract in prayer 1a of the Amended Plaint. It is worth to note that the Respondent did not pray for general damages but just damages. In that case damages could mean general as well as special damages.

102. The plaint further pleaded the size of the farm (paragraph 3A), the expected yields (paragraph 8) and the cane prices (paragraph 9). The claim was properly pleaded.

103. 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 proved 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 contract and the pleadings. Equally, when a miller failed 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. The rationale of that finding was that: -

> ***….. the success of the main plant crop determines the success of the first ratoon crop and likewise the success of the first ratoon crop determines the success of the second ratoon crop. In other words, if the main plant crop is compromised then the ratoons will definitely and equally be compromised. Hence, unless the miller is in a position to foresee its failure to harvest the cane in advance and put the farmer on appropriate notice and in accordance with the agreement, there is very little a farmer can do to salvage the situation once the miller fails to harvest the cane under the Agreement.***

104. The foregone is however subject to the legal position that disputes based on breach of contracts are subject to the principles of ***remoteness***, ***causation*** and ***mitigation***.

105. I have previously discussed the applicability of the principle of mitigation of loss in sugar contracts in **Migori High Court Civil Appeal No. 74 of 2018 South Nyanza Sugar Co. Ltd vs. Rehema Joseph Nkonya** (unreported). I stated thus: -

> ***20. …… 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.*

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.

106. I am still of the foregone position. The principle of mitigation of loss in this case equally does not aid the Appellant. That is because the Appellant did not plead the issue in its Defence and neither did it lead any such evidence at the trial. The issue only arose on appeal. That was too late in the day. It was therefore 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)**.

107. Having so found, I hereby hold that since the Appellant so pleaded he was therefore entitled to compensation for the three cane crops, that is the plant crop, the first ratoon crop and the second ratoon crop.

108. The matter however did not end there. The Respondent was still under a legal duty to prove the size of the land, the expected yields and the cane prices.

109. There was no dispute on the size of the farm. It was pleaded as 0.8 Hectares. Page 1 of the contract also provided the size of the farm as such. On the expected yields, the Respondent relied on the KESREF Report. The Report was prepared in November 2008 and was on yields within the general South Nyanza region.

110. The Appellant did not adduce any evidence on the yields. Despite listing a Sugar Report on average yield and productivity of sugar factories in Kenya and a Report on contract sugarcane farming and farmers' income in the Lake Victoria Basin as some of the documents the Appellant wished to rely on in its List of Documents the documents were not formally produced in evidence. The documents did not therefore form part of the evidential record in the suit. The Court of Appeal in **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR** held that: -

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification……

111. I must point out that the Respondent listed a Yields Report by Kenya Agricultural and Livestock Research Organization (KALRO) within Trans Mara zone between 2013 and 2014 as one of the documents he intended to rely on in his supplementary list of documents. The said report was however not produced as an exhibit, but the KESREF report.

112. The KESREF Report was the only evidence adduced in the suit on yields. The Report was by an independent party and resulted from series of research in the sugar industry over time. The report stated that the average yields were 80 tonnes per hectare for the various cane crops.

113. On the cane prices the Respondent produced a schedule of prices as an exhibit. The schedule gave comparative cane prices as offered by the Appellant and another entity (Sukari) between 2010 and 2015. The report was produced in evidence with the concurrence of the Appellant. The contents thereof were not challenged in cross-examination. On a balance of probability, the schedule settled the issue of the cane prices.

114. According to page 1 of the contract, the plant crop was planted in January 2011. In respect to Clause 1 of the contract the plant crop was expected to mature and in any event be harvested not later than February 2013. The first ratoon crop would have been ready for harvesting not later than January 2015. The second ratoon crop would have been ready for harvesting not later than December 2016.

115. The Respondent therefore expected a gross income of Kshs. 243,200/= on the plant crop. The first ratoon crop would have realized Kshs. 198,400/=.

116. The schedule of the cane prices produced in evidence was for cane prices between 2010 and 2015. In this case the second ratoon crop would have been due for harvesting by December 2016. The schedule did not provide for the cane prices in 2016.

117. The cane prices were not agreed on in the contract. The Respondent in paragraph 9 of the Amended Plaint averred as follows: -

The Plaintiff will rely on the Cane Produce prices as issued from time to time by the Defendant to establish his/her loss, but in any event the price per tone at the time of the contract ranged between Kshs. 3400/=.

118. The Respondent was well aware that the cane prices were not constant. They differed from time to time. That was the reason why the prices were to be specifically proved. The Respondent did so by producing the schedule of prices.

119. In its Defence the Appellant denied the alleged price of Kshs. 3,400. The cane prices therefore became a contested issue and could only

be resolved by appropriate evidence.

120. In view of the absence of any evidence on the cane prices as at December 2016, this Court is unable to quantify the resultant compensation for the second ratoon crop. A Court is only able to compute the compensation based on the size of the farm, the expected yields and the then prevailing prices. If one of them is missing the claim turns out to be unproved.

121. Consequently, the award for the second ratoon crop was therefore not proved and is hereby declined.

122. There was also the issue of deductions. Clause 11(d) of the contract provided as follows: -

> **In exceptional circumstances and its sole discretion avail credit facilities to the Farmer provided that:-**
>
> > **(i) The Miller shall charge interest on any credit that may be allowed to the Farmer at such rates as may from time to time be notified by the Miller to the Farmer.**
> >
> > **(ii) The Miller shall be entitled to deduct such principal, interest and any other statutory taxes from the payment to the Farmer in respect of the first cane harvest from the Farmers land subsequent to the grant of the credit. Provided that any outstanding dues shall be recovered from subsequent crops.**
> >
> > **(iii) Where a Farmer ends up with a debt balance the Miller shall notify the Farmer of the said balance and demand immediate settlement thereof and no sale lease or re-plough of the land shall be allowed until definite acceptable arrangements have been made and agreed upon between the Miller and the Farmer on how same shall be settled.**

123. The issue of deductions was factual. The Appellant was under an obligation to prove that it extended any credit facilities to the Respondent. There was no such evidence.

124. On the costs of harvesting and transporting the cane and other alleged statutory deductions, the Appellant again did not avail any evidence on the applicable rates during the trial. There was an attempt by the Appellant to introduce such evidence by way of submissions in this appeal. The approach is contrary to the defined and settled rules of procedure on trials and evidence. Such submission is without any basis and is for rejection. The issue of the deductions ought to have been pleaded or at least evidence ought to have been led at trial on the same. The claim therefore failed.

125. The Respondent was therefore entitled to the sum of Kshs. 441,600/= for the plant crop and the first ratoon cane crop.

Conclusion:

126. Having dealt with the issues raised in this appeal, the following final orders do hereby issue: -

> **a) The appeal by the Appellant, Trans Mara Sugar Company Limited, is hereby partly allowed.**
>
> **b) The cross-appeal by the Respondent, Ben Kangwaya Ayiemba, is hereby dismissed with costs.**
>
> **c) The award of Kshs. 559,360/= is hereby revised to Kshs. 441,600/=. The sum shall attract interest at Court rates from the filing of the suit.**
>
> **d) The Appellant shall also have one-half of the costs of the main appeal.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of July 2020.

A.C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. ronaldoyagi@rediffmail.com for the firm of Messrs. Oyagi, Ong'uti, Magiya & Company Advocates for the Appellant.

2. advocate685@gmail.com for the firm of Messrs. Nelson Jura & 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