REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 81 OF 2018

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD.....APPELLANT

AND

DANCUN OMONDI ODIWA.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. N. Lutta, SPM at the Magistrates Court in Kisii in Civil Case No. 448 of 2010 dated 29th August 2018*)

JUDGMENT

1. The respondent's case before the subordinate court was grounded on an agreement dated 26th March 2007 in which the appellant contracted the respondent to grow and sell to it sugarcane on its land parcel being Plot 490 in field number 130A in West Kogelo Sublocation measuring 0.1 Hectares. The respondent was assigned account number 147969 and planted cane as agreed. The respondent alleged that in breach of the agreement, the appellant neglected to harvest either the plant crop or the two ratoon crops when the same was mature and ready leaving the crop to go to waste causing the respondent to suffer loss and damage. The respondent claimed Kshs. 101, 250/- being the loss for the plant crop and two ratoons calculated on the basis of a yield of 135 tons per hectare at a price of Kshs. 2,500/- per ton.

2. In its statement of defence, the appellant denied the respondent's claim. It pleaded in the alternative that if there was an agreement, it policy was not to cut or harvest poorly maintained cane the respondent's cane was dwarfed by weeds and totally destroyed thus entitling the appellant not to harvest the cane. It also pleaded that the respondent was not entitled to any damages but averred that if there was an agreement as alleged tht the respondent entered into the agreement for purposes of obtaining inputs and services on credit from the respondent with the fraudulent and ulterior motive not to plant cane and later bring the suit to claim damages. It further stated that once the respondent planted the cane, he totally abandoned the far and did not undertake any husbandry. It contended that as a sign of the fraud, the respondent cleared the 1st and 2nd ratoon crop prior to the crops maturing.

3. At the hearing PW 1 testified and the case closed. In due course, the appellant applied to set aside the ex-parte proceeding and the same were set aside by consent. Richard Muok (DW 1), a senior field supervisor with the defendant testified and the matter was reserved for judgment. The trial magistrate heard the matter and awarded the respondent Kshs. 95,036.50 being damages for the plant crop and 1st and 2nd ratoons. The appellant appeals against this judgment on the basis of the memorandum of appeal dated 17th September2018.

4. Before I consider the grounds of appeal, it is important to recall the duty of the first appellate court. The first appellate court has a duty to re-evaluate and re-assess the evidence adduced before the trial court, keeping in mind that the trial court saw and heard the parties and giving allowance for that, and to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.* [1968] EA 123**).

5. Although the appellant denied the contract in its pleadings. Both PW 1 and DW 1 agreed that the parties entered into the agreement dated 26th March 2007 and that the contract was to last for a period of 5 years or until the plant crop and two ratoons were harvested, whichever period shall be less. PW 1 adopted his statement in which he admitted that the appellant proved him with serviced, fertilizer and seed cane to develop the plant crop but after the cane had matured the respondent failed to harvest it and it got burnt after 30 months. He therefore claimed damages.

6. On his part, DW 1 confirmed that the appellant provided services to the respondent for development of the plant crop amount to Kshs. 4,863/- which was to be deducted after harvesting the crop. He stated that appellant abandoned the plant crop and did not develop the ratoons. He took the position that the it was the duty of the farmer under the agreement of harvest and deliver the same to the Millers weighbridge under Clause 3.1.2 of the agreement.

7. Ms Anyango, counsel for the appellant adopted the grounds of appeal. She added that the respondent was to harvest and deliver the cane to the Miller under the agreement and in this case he failed to do so hence the appellant was not liable. She also pointed out that the trial magistrate did not take into account the fact that the case was burnt and the appellant was not bound to purchase the same. Counsel submitted that the calculation of damages was erroneous as the cane yield report presented by PW 1 was disregarded

8. Mr Oduk, counsel for the respondent, opposed the appeal and submitted that the appellant had not only a contractual duty to harvest the cane but also a statutory duty imposed by the Sugar Act. As regards the burnt cane, counsel submitted that the cane was burnt at 30 months long after the appellant was in breach of the agreement. He further submitted that the trial magistrate came to the correct conclusion in assessing damages based on the yield report produced by the respondent.

9. The key issue for consideration is whether the appellant breached the agreement. Both parties agree that the appellant did not harvest the cane. On one hand the appellant contends that it was not under any obligation to harvest and deliver the cane to the Miller under the agreement while the respondent asserts that it was under a contractual and statutory duty to deliver the cane.

10. Clause 3.1.2 of the Agreement relied upon by the appellant provides as follows:

> ***The Miller covenants and undertakes the following obligations:***
>
> *3.1.2 Inspect the cane and determine its maturity before authorizing the Grower or Outgrower to harvest and deliver the same to the Miller's weighbridge.*

11. The provision relied upon by the respondent in contained **section 6(a)** of the **Second Schedule** to the ***Sugar Act*** titled, "*Guidelines for agreements between parties in the sugar industry"*. The relevant guideline provides 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;*

The guidelines are made pursuant to **section 29** of the ***Sugar Act*** which provides as follows:

> *29. Sugar industry agreements*
>
> *(1) There shall be, for the purposes of this Act, agreements to be known as the sugar industry agreements negotiated between growers and millers, growers and out-grower institutions, and millers and out-grower institutions.*
>
> *(2) The agreements referred to in subsection (1) shall conform to the guidelines set out in the Second Schedule.*

12. From the foregoing, while I agree that the obligation of the grower under the agreement is to deliver the cane to the Miller, that provision is displaced by the statutory required in the Guidelines that requires the Miller harvest the cane. Since the provision is statutory, it is an implied term in the agreement which must be enforced.

13. Notwithstanding the conclusion I have reached, this case must be decided on the pleading between the parties. The appellant defence is that the respondent, *"failed to employ the recommended crop husbandry to the extent that the cane was overshadowed and dwarfed by weed and totally destroyed, the defendant was entitled contractually not to harvest."* It is clear that the appellant is urging a case inconsistent with it pleaded defence and this cannot be permitted. This position is supported by the decision cited by the appellant before the trial court, ***Adetuoun Oladeji (NIG) Ltd v Nigeria Breweries PLC*** **SC/2011** where Aderemi, JSC., expressed the view that:

> *[I]t is now very trite principle of law that parties are bound by their pleading and that any evidence led by any of the parties which does not support the averments in the pleadings or put it another way, which is at variance with the averments of pleadings goes to no issue and must be disregarded.*

14. The appellant also assailed the judgment on the ground that the trial magistrate should have considered the issue of the burnt cane. The appellant relied on Clause 6.2 of the agreement which provides;

> *6.2 The Miller shall not be bound to purchase from the Grower or the Outgrower any cane which had been burnt ……..*

15. The evidence of the issue of burnt cane, is that the cane got burnt after 30 months. PW 1 was not cross-examined on this issue hence his testimony was uncontroverted. In his statement, DW 1 stated that the plant crop was abandoned and was not availed by the farmer. Nothing in that statement referred to burnt cane. In cross-examination DW 1 agreed that the cane was not harvest. In considering the evidence, I again point out that the appellant did not raised the issue of the respondent's cane being burnt and that it was unable to harvest and or process the cane. Its defence was something else and bore no relationship to the burnt cane.

16. The facts of the case and I so find that On this issue the plaintiff's evidence is that the plant crop was never harvested within the time provided for in the agreement. The cane burnt after thirty months when the plant crop was to mature and be harvested not later than 24 months. By failing to harvest the plant crop within the agreed timelines, the respondent was in breach of the agreement. Since the plant crop was not harvest, the contract being for 5 years and contemplating the 1st and 2nd ratoon means that due to the appellants breach the respondent was unable to meet its obligations. I therefore find and hold that the respondent was entitled to damages for the three crop cycles

and in reaching this decision, I adopt the statement of principle ***Martin Akama Lango v South Nyanza Sugar Company Limited*** **KSM HCCA No. 20 of 2000** that:

> *[The Contract] remains in force for a period of five years or until one plant and two ratoon crops are harvested on the plot.*
>
> *To my mind what that means especially the last part is that one plant and two ratoon crops must be harvested in fulfillment of the obligation of the parties agreement…….. When the Respondent failed to do the harvesting and waited for until the crop was burnt by arsonists, it was in breach of the terms of the agreement and had the trial magistrate correctly interpreted the provisions of the said agreement, she should have held that the respondent was in breach of the contract and liable to pay damages.*

17. I now turn the quantum of damages. The appellant contested that yield per hectare assessed by the trial magistrate. In considering the same, the trial magistrate concluded as follows:

> *[28] The defendant submitted that the land in Kogelo West produced a yield of 65.23 tons/ha and ratoons 51.56 tons/ha which had not been proven. The plaintiff produced Pexh 3 which I adopt for crop yields as 130.4 tons for plant crop, 157.8 for Ratoon 1 and 112. 3 for ratoon 2 as per 1996/97. They submitted for 135 tonnes which I find reasonable.*

18. The determination of the yield per hectare is a question of fact. The trial magistrate elected to be guided by the respondent's evidence but fell in error by stating that the appellant had not proved his case on that point. However, there was evidence to support the appellant's position. DW 1 had in his statement given the yield of the plant crop and ratoons and produced a schedule to support its position which the trial magistrate failed to consider. I am therefore left with two conflicting reports. Both reports were admitted without objection and neither of the parties were cross-examined by the other on the basis or veracity of the reports. I would take the average of both reports thus I find the yield of the plant crop to be 97.81 tons per Hectare and for the ratoons to be 104.5 per Hectare.

19. For the reason I have outlined the would calculate the amount due to the respondent as follows:

Plant crop –97.81 tons X 0.1 ha X Kshs. 2.500/- = Kshs. 24,452.50/-

Ist Ratoon 104.5 tons X 0.3 ha X Kshs. 2,500/-= Kshs. 26,125.00/-

2nd Ratoon 104.5 tons X 0.3 ha X Kshs. 2,500/- = Kshs. 26,125.00/-

TOTAL KShs. 76,702.5

20. I now turn to the issue of interest. The appellant contended that interest ought to have been awarded from the date of judgment rather than from the date of filing suit. The court has discretion to award interest but such discretion is to be exercised judiciously bearing in mind established principles. The suit before the subordinate court was filed in 2010 remained in limbo until 15th September 2016 when it first came up for hearing. The appellant should not be penalised for the appellant's failure to prosecute the suit with diligence.

21. For the reasons I have set out herein, I allow the appeal and now make the following orders:

(a) The judgment be and is hereby set aside and substituted with a judgment for **kshs. 76,702.50/-** together with interest from 29th September 2014 until payment in full.

(b) The respondent shall have costs of the case before the trial court.

(c) The appellant shall have costs of this appeal assessed at Kshs. 15,000/- exclusive of court fees.

DATED and DELIVERED at KISII this 17th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Ms Anyango instructed by Otieno, Yogo, Ojuro and Company Advocates for the appellant.

Mr Oduk instructed by Oduk and Company Advocates for the respondent.