REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 87 OF 2018

BETWEEN

B. MATHAYO OBONYO.....APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. N. S. Lutta, SPM dated 29th August 2018 at the Magistrates Court at Kisii in Civil Case No. 500 of 2004)

JUDGMENT

1. The appellant's claim against the respondent was that by a written agreement dated 4th January 1996, he was contracted to grow and sell sugarcane on his parcel of land being plot number 316 in field no. 19 in North Sakwa location, Kakmasia Sublocation measuring 0.5Ha. After the agreement was signed, he was assigned number 260772. The agreement was to run for a period of 5 years commencing 4th January 1995 and remain in force during the period or until one plant crop and two ratoon crops of sugarcane were harvested on the said plot, whichever period is less.

2. The appellant claimed that the respondent breached the contract by failing to harvest the plant crop when it was mature and ready for harvesting at 22- 24 months of age causing it to dry up and it was abandoned by the respondent. The appellant therefore claims damages for loss of the plant and ratoon crops based on a yield of 135 tons per Ha and payment of Kshs. 1,730/- per ton for the 3 crops.

3. In its statement of defence, the respondent admitted that it entered into the agreement with the plaintiff claim but avers that the agreement was frustrated by factors beyond its control as it could not harvest the case due to tribal clashed that existed between neighbouring communities. It also contended in the alternative that if there was any loss, the maximum yield per Ha for the cane was 65 tons in the area where the appellant's land was situated. The respondent also pleaded that the appellant's cause of action was barred by the Law of Limitation and the suit was filed out of time and without leave of the court.

4. At the hearing, Thomas Obonyo (PW 1), who described himself as the agent of the plaintiff testified on behalf of the plaintiff while Richard Mwok (DW 1), a senior field supervisor with the respondent, testified. Following the hearing, the trial magistrate dismissed the suit on the ground that the suit was barred under **section 4(1)(a)** of the ***Limitation of Actions Act (Chapter 22 of the Laws of Kenya)***.

5. This appellant has now appealed against the judgment on the grounds set out in the memorandum of appeal dated 6th September 2018 as follows:

> *1. The trial magistrate erred in law and in fact in failing to adequately and properly consider the evidence in the trial.*
>
> *2. The learned trial magistrate erred in law and in fact by failing to compute the time when the cause of action arose.*
>
> *3. The learned trial magistrate erred in law and in fact in dismissing the suit on account of time bar without properly considering the evidence and the applicable law.*

6. From the grounds of appeal I have outlined above, the main issue for consideration is whether the appellant filed his suit outside the time permitted by the ***Limitation of Actions Act (Chapter 22 of the Laws of Kenya)*** ("the ***LAA***").

7. Mr Oduk, counsel for the appellant, filed written submissions which he highlighted to support his argument that the appellant suit was not

time barred. He submitted that under the Clause 1 of the agreement, it was to come into force from the 4th January 1996 and would remain force for a period of 5 years or until the plant or two ratoon crops were harvested on the plot whichever period was less. He therefore argued that breach of the contract constituted not just failing to harvest plant crop but also failing to harvest the two ratoon crops within the 5-year cycle. He relied on the case of ***Martin Akama Lango v South Nyanza Sugar Company Ltd*** **KSM HCCA No. 20 of 2000** where the court held as follows:

> *The clause says that agreement "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.*

8. Counsel therefore urged that by its very terms, the duration of the contract is 5 years where there have been 3 crop harvests. He contended that the agreement can only be determined in accordance with the provisions of the contract and thus an action for breach could be lodged at the end of the 5 year cycle notwithstanding that the breach took place when the respondent failed to harvest any of the crops. Mr Oduk added that the contract by its nature was a continuing contract calling for periodic performances and would continue in force until terminated by either of the parties. He pointed out that the contract was dated 4th January 1996 and was to last for 5 years upto 4th January 2001. It was breached by failing to harvest 3 times and that the limitation period of 6 years would have ended on 4th January 2007. He submitted that in the circumstances, the suit, having been filed on 5th May 2004 was filed within time. Counsel relied on several cases including ***South Nyanza Sugar Company Limited v Paul Lila*** **KSI HCCA No. 161 of 2005 [2014] eKLR**, ***Zadock N. Danda v South Nyanza Sugar Company Limited*** **MGR HCCA No. 11 of 2017 [2018] eKLR**, ***Zacharia Orwa Ondoro v South Nyanza Sugar Company Limited*** **[2018] eKLR** and ***South Nyanza Sugar Company Limited v Ezekiel Oduk*** **MGR HCCA No. 2017**.

9. The respondent's position was grounded on the evidence and its case was that the claim was barred by limitation as the agreement between the parties was made on 4th January 1996. It contended that the plant crop was cultivated after the agreement was entered into evidenced by the seed cane delivery note dated 23rd February 1996 produced by the appellant and that since the appellant alleged that the respondent failed to harvest the plant crop when it was mature and ready for harvesting at the 24th month, after planting, the cause of action accrued by 25th February 1998. Since the suit which was filed on 5th March 2004, 6 years 3 months after the appellant failed to harvest the plant crop, it was time barred.

10. Mr Odero, counsel for the respondent, submitted that under **section 4(1)(a)** of the ***LAA***, the starting point for reckoning limitation periods is the time when the cause of action arose and not when the contract would have ended. In this case, the cause of action arose when the respondent failed to harvest the plant crop 24 months into the contract. Counsel cited the case of ***South Nyanza Sugar Company Ltd v Dickson Aoro Owuor*** **MGR HCCA No. 86 of 2015 [2017] eKLR** to support his proposition.

11. The crux of this appeal is when does the cause of action accrue under **section 4(1)(a)** of the ***LAA*** which provides as follows:

> *4(1) The following action may not be brought after the end of six years from the date when the cause of action accrued -*
>
> *(a) actions found on contract [Emphasis mine]*

12. The appellant case is founded the argument that the contract was to last for five years hence the last day of the contract is when the cause of action would have accrued. That argument found favour and was explained in the case of ***South Nyanza Sugar Company Ltd v Ezekiel Oduk (Supra)*** where the court explained its reasoning and which I quote in extensor 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 if the farmer is to be compensated for the loss occasioned in the entire contract period on one hand and on the other hand time starts running from the breach, then the farmer shall benefit twice; from the breach of the contract and from the use of the land as the contract will be deemed to have been terminated. Another reason is that 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.*

13. On the other hand, the respondent's case is supported by the decision in ***South Nyanza Sugar Company Limited v Diskson Aoro Owuor***

MGR HCCA No. 85 of 2015 [2017] eKLR where the court held that;

> *[17] There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.*

14. In my view, the question under **section 4(1)** of the ***LAA*** is when does the cause of action accrue. I adopt the position taken in ***South Nyanza Sugar Company Limited v Diskson Aoro Owuor*** **(Supra)** in determining when the cause of action accrues. According to ***Black's Law Dictionary (10th Edition)*** the word *"accrue"* means *"to come into existence as an enforceable claim or right."* Thus under the outgrowers cane agreement, such as the one subject to the suit, the right to sue for breach of contract arose when one of the parties failed to meet its obligations under the contract. In the case at hand this could only arise when the respondent failed to harvest the plant crop. This is when the cause of action accrued and when, in terms of **section 4(1)(a)** of the ***LAA***, the time begins to run.

15. I am constrained to disagree with the reasoning in ***South Nyanza Sugar Company Ltd v Ezekiel Oduk*** **(Supra)**. To hold that the cause of action accrues at the end of the contract period is inconsistent with the meaning of the legislative language and in particular the ordinary meaning of the term, *"accrue."* To take an extreme example, it would not make sense for instance, to say that when person is employed on permanent and pensionable time, if he is dismissed, could wait until the time of retirement, which may be 20 or 30 years to pursue a claim. Secondly, decisions cited by the appellant seem to be based on the fact that a grower would be entitled to damages equivalent to the two crop cycles. In my view, this reference is only for purposes of calculating the loss and does not determine the limitation. Lastly, even if the agreement if for five years and is performed in cycles, like any other contract it is terminated by breach. It is the breach that gives rise to the cause of action.

16. I agree with trial magistrate that the claim was statute barred and I too, would have dismissed the case.

17. I dismiss the appeal and award costs of the appeal to the respondent which I assess at Kshs. 15,000/- exclusive of court fees.

DATED and DELIVERED at KISII this 15th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr Oduk instructed by Oduk and Company for the appellant.

Mr Odero instructed by Okongo, Wandago and Company Advocates for the respondent.