REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 255 OF 2006

JACOB OOKO ONACHO ..... APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree of the Senior Magistrate A.A. Ingutia dated 16th August, 2006 in CMCC No. 1523 of 2004 Kisii)

JUDGMENT

1. The appellant has filed this appeal against the decision of the trial court dismissing his claim for compensation for breach of contract by the respondent. He claims that he had entered into a contract with the respondent to grow and sell sugarcane on his plot but the respondent neglected to harvest all three crop cycles as agreed. The trial court found that contract had provided for arbitration of disputes arising between the parties therefore the suit was premature. The court also dismissed the plaintiff's claim on the grounds that there were no particulars of the claim sought in the plaint.

2. The grounds of appeal are as follows:

a. The learned trial magistrate erred in law by purporting to divest the court of the jurisdiction to determine the matter by wrongly relying on the arbitration clause in the parties agreement;

b. The learned trial magistrate erred in law in failing to adequately and sufficiently consider the evidence led in the suit and dismissed the suit in error;

c. The learned trial magistrate misdirected himself in dismissing the suit as the erroneous find that the claim was not specifically pleaded and/or that there was no particulars provided in the plaint, while the pleadings disclosed sufficiently the particulars, and the evidence adduced proved the claim on damages to the required standard;

Alternatively, and without prejudice to the aforestated the learned trial magistrate erred in law in treating the suit as a special damage claim and further fell into error when he failed to find that in as much as the evidence disclosed that the breach of the contract caused damage and injury to the appellant, damages were awardable and on the material before it the court was entitled to assess the same.

3. The parties filed their written submissions and highlighted the same before this court. Mr. Oduk, counsel for the appellant submitted that question of arbitration had not been raised before the trial court, therefore the court fell into error by determining the matter on issues that had not been pleaded. He submitted that the appellant's pleadings had been proper and that respondent's liability had been proved. He urged this court to award the appellant damages with interest from the date of filing suit.

4. Mr. Odero counsel for the respondent opposed the appeal stating that sugar actions were to be filed before the Sugar Tribunal. On the pleadings, he submitted that the appellant had been in a position to quantify his loss and seek a specific amount but had not done so therefore the trial court was right to dismiss the claim.

5. In response Mr. Oduk submitted that the respondent ought to have stayed the proceedings and referred the matter to arbitration. He also pointed out that the Sugar Act of 2001 could not apply to the contract which expired in 2000. He reiterated that the issue of jurisdiction had not been raised at trial.

6. As a 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, bearing in mind that it did not see or hear the witnesses. (See ***Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123***).

7. The plaintiff testified and called one witness in support of his case whereas the respondent called one witness. The plaintiff testified that he

had entered into an agreement with the respondent to develop cane on 20th February, 1996 in his one acre farm in Kadera. The agreement was for 3 harvests for a period of 5 years. He testified that the first harvest was to be after 24 months, the 1st ratoon after 14-16 months. He developed the cane but it was not harvested at all and dried up. He testified that he was expecting 138 tonnes which were to be sold at Kshs. 1,775/=. He lost all three crops for which he sought compensation. He stated that the respondent's expenses amounted to Kshs. 4,728/=

8. Booker Oloo (PW 2), an agricultural officer attached to the Ministry of Agriculture, recalled that he had received a letter of complaint from the complainant. He visited the plaintiff's farm on 2nd October, 2003 and assessed it. He prepared a report on 3rd October, 2003. He observed that the plant crop was never harvested and dried up in the farm. Consequently, Ratoon 1 and 2 were not developed. He got data from the respondent which showed that the plant crop would have yielded 100 tonnes. He estimated the value as Kshs. 51,900/= the respondent would have deducted their expenses from that amount. He testified that Ratoon 1 would have yielded 90 tonnes which would have sold for Kshs. 46,710/=. Ratoon 2 would have yielded 85 tonnes which would have yielded Kshs. 44,158/=. In total, the appellant would receive Kshs. 142,705/=

9. The defendant's witness, Francis Abongo testified that he worked for the respondent as a Senior Agricultural Supervisor. He acknowledged that there had been a contract between the respondent and the appellant.

10. Having considered the evidence tendered and the parties written and oral submissions, the issues arising for determination in this appeal are:

a. Whether the trial court erred in finding that the claim was premature for failure to refer the dispute to arbitration in line with the agreement between the parties;

b. Whether the appellant's claim is statute barred; and

c. Whether the appellant specifically pleaded and proved his claim for special damages;

11. On the first issue, the appellant contended that the issue of reference of the claim to arbitration had not been raised during trial and therefore the court fell into error in determining the suit on this basis. The appellant relied on the case of ***David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No. 76 of 2014 [2014] eKLR*** where the Court of Appeal held:

> *"It is a well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues which the parties have not pleaded...*
>
> *The court on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate one of them. A decision given on a claim or defence not pleaded amounts to determination made without hearing the parties and leads to denial of justice."*

12. The appellant also relied on the persuasive authority of ***Malawi Railways Limited and PTK Nyasulu MSCA Civil Appeal No. 13 of 1992*** where the Malawian Supreme Court of Appeal reiterated the above principle.The respondent on its part supported the trial court's decision. It contends that the dispute should have been referred to arbitration in accordance with the agreement and the Sugar Act, 2001.

13. There was no dispute that the parties entered into a contract for the development of sugar on the appellant's farm. The terms of agreement were reduced into writing in an agreement dated 20th February, 1996. According to that agreement the parties were required to refer the matter to arbitration in accordance with clause 13 of that contract. Contrary to the respondent's assertions that the arbitration was governed by the Sugar Act, the agreement provided that the arbitrator was to be chosen by the parties and the arbitration was to proceed in accordance with the Arbitration Act. S**ection 6** of the **Arbitration Act No. 4 of 1995** provided as follows:

> ***6(1)*** *A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters an appearance or files any pleading or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration, unless it finds-*
>
> *(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or*
>
> *(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*

14. From the above provision of law it is apparent that a party who wishes to rely on an arbitration clause ought to have made the application when that party entered appearance or filed pleadings before taking any further step in the proceedings. This was not done in this case. The parties opted to be subject to the jurisdiction of the court and readily participated in the trial process to its conclusion and could not then rely on the arbitration clause thereafter.(See ***Kisumuwalla Oil Industries Ltd vs. PAN Asiatic Commodities PTE Limited & Anor Civil Appeal No. 100 of 1995[1990] eKLR*** and ***Corporate Insurance Company v Loise Wanjiru Wachira Civil Appeal no. 151 of 1995 [1996]eKLR***) With respect, I find that trial court erred when it held that the suit was premature and bad in law for failure to refer the matter to arbitration.

15. The second issue arising also relates to whether the court had jurisdiction to hear the matter. The defence of limitation of actions was raised by the respondent in its defence. In its written submissions, the respondent reiterates that the appellant's claim is statute barred. The respondent argues that the breach of contract occurred in February 1998 since the appellant was claiming in respect of failure to harvest the plant crop which should have been harvested within 24 months. The respondent contends that the appellant should have filed his suit by

February 2004 yet the claim was filed on 22nd November 2004, outside the prescribed period. The respondent relied on the case of ***South Nyanza Sugar Co. Ltd v Dickson Aoro Owuor [2017] eKLR*** and ***South Nyanza Sugar Co. Ltd v Peter Okanda Okech [2012] eKLR and on the case of Patrick Owino Kula vs. South Nyanza Sugar Co. Ltd v*** in support of this argument.

16. The **Limitation of Actions Act** at **section 4 (1)** provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. The Court of Appeal in the case of ***Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another Civil Appeal No. 39 & 40 of 2016 [2016] eKLR*** found that parties are bound to bring an actions based on a contract within the prescribed time limits. The court held:

> *"Where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time. That is what the court stated in* ***Divecon v Samani (1995 – 1998) I EA 48 at p.***
>
> *"No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract."*

17. The appellant's claim against the respondent was for all three crop cycles. According to the agreement between the parties, the appellant claimed that the plant crop should have been harvested at the age of 22 to 24 months and the ratoon crops at the age of 16 to 18 months. Thus the appellant's cause of action accrued when the respondent failed to harvest the plant crop. The appellant further claimed that the contract between the parties commenced on 20th February, 1996. It is taken that the plant crop should have been harvested on or about 20th February, 1998 and the ratoon crops 16 to 18 months after planting and subsequent harvesting. By the time the suit was filed on 22nd November, 2004, six years had lapsed from the time the cause of action arose. The appellant did not seek leave to file its suit out of time and I am therefore constrained to find that the appellant's claim was time barred.

18. For finality, I will deal with the last issue which is whether the appellant specifically pleaded and proved his claim for special damages.

19. The respondent relied on the case of ***Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016]eKLR*** where the Court of Appeal held that special damages must not only be specifically pleaded, but they must also be strictly proved with as much particularity as circumstances permit. The respondent claims that the appellant had a duty to specifically particularize his claim and thereafter lead credible, cogent and consistent evidence in proof of the pleaded case, which he failed to do.

20. The appellant on his part relied on the case of ***Silvan Ketch vs. South Nyanza Sugar Co. Ltd. HCCA No. 210 of 2001*** where the court allowed the appellant's claim holding that though the appellant in that case had not stated the total amount he claimed, he had given the figures for his claim which had not been controverted by the respondent. The appellant submitted that the respondent had understood the claim such that it specifically denied the yield, rate and area claimed by the appellant. He also relied on the decision of the Court of Appeal in ***John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010***which was of a similar view.

21. The existence of an agreement between the parties was not in issue. The respondent's witness acknowledged that there had been a contract between the parties. The respondent did not lead evidence in support of its defence that the contract had been frustrated by tribal clashes in the area or its claim that the appellant's plot would only yield 19.5 tonnes.

22. The appellant on his set out his claim in her paragraphs 3, 7 and 9 of his plaint. He pleaded the acreage of his plot as 0.3 hectares, indicated the expected yield from the lost crop cycles as 135 tonnes per hectare and stated that he expected to sell the crop at Kshs. 1,730/= per tonne. Considering the nature of the acts from which the cause of action arose, I find that the appellant sufficiently pleaded his claim for special damages and the trial court erred in holding otherwise. I rely on the binding decision of the Court of Appeal in ***John Richard Okuku Oloo vs. South Nyanza Sugar Co. Ltd Civil Appeal No. 278 of 2010*** in support of this finding.

23. Had the appellant filed his claim within time, I would have awarded a sum of Kshs. 142, 725/= based on the computations of PW 2 less Kshs. 4,728/= which were the expenses the appellant admitted the respondent had used in developing his plot.

24. In the end, I find this appeal unmerited and dismiss it with costs to the respondent which I assess at Kshs. 25,000/=

Dated, **signed** and **delivered** at Kisii on **10th** day of **April 2019.**

R.E. OUGO

JUDGE

In the presence of;

Miss Koko For the Appellant

Mr. Odero For the Respondent

Rael Court clerk