REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 240 OF 2011

MARGARET A. ASINGO ..... APPELLANT

VERSUS

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

(Being an appeal from the judgment and decree of the Resident Magistrate P.L. Shinyada (RM) dated 26th October 2011 in CMCC No. 1506 of 2004 Kisii)

JUDGMENT

1. The appellant has filed this appeal from the decision of the trial court dismissing her suit against the respondent for breach of an Out growers' cane agreement. The appellant is aggrieved by the decision of the trial court dismissing her suit on the grounds that she did not properly plead her claim.

2. The parties consented to having this matter settled by way of written submissions. In her submissions, the appellant stated that the claim had been properly and adequately pleaded as a special damage claim such that the respondent was able to quantify and rebut it. The appellant further submitted that contrary to what the trial court had assessed as the damages it would have awarded had the claim succeeded, she was entitled to a sum of Kshs. 186,840/=, as the trial court based its assessment on one crop cycle yet the appellant had claimed for 2 crop cycles.

3. On its part, the respondent agreed with the trial court's finding that the claim had not been properly pleaded. It submitted that it was incumbent upon the appellant to quantify the amount of loss in her pleadings, particularize the claim and thereafter lead evidence in proof. The respondent argued that the appellant had failed to do this and had also failed to state when the cause of action arose.

4. The respondent argued that if the breach was taken to have occurred by failure to harvest the plant crop when it matured at 24 months, then the appellant's claim was time barred. The respondent submitted that according to the appellant, the plant crop ought to have been harvested in or around April 1997 therefore by the time the suit was filed on 22nd November 2004; it was caught up by the limitation of actions. The respondent further contended that if on the other hand the breach of contract occurred by failure to harvest the ratoon crops, then there was no obligation on the respondent to harvest the cane after the contracted 5 years. As the plant crop had been harvested on 21st October 1998, the ratoon crop would have matured outside the contracted time span.

5. Being a first appellate Court, my role 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***).

6. At the hearing of this matter before the trial court, the appellant testified that she had entered into an agreement with the respondent to plant sugarcane on her plot number 84 D, field No. 176 measuring 0.5 hectares. She produced a copy of the contract dated 27th April 1995 and stated that the agreement was for 3 harvests. She grew the sugarcane and the plant crop was harvested after four years. She produced the harvest advice notes which were dated 20th and 21st October 1998 as exhibits. The yield for the plant crop was 15 stacks for which she was paid Kshs. 25,000/= after deductions had been made. She had developed the 1st ratoon crop but that it dried up and was used as firewood. She lost two harvests from which she expected a yield of 137 tonnes per hectare at the price of Kshs. 1,730/= per tonne. On cross examination, the appellant stated that the plant crop had produced 18 tonnes and admitted that the yield from the plant crop was normally higher than that of the ratoons. On its part the respondent did not call any witness.

7. Having duly considered the record of appeal, the subordinate court's file and the parties' written submissions, I conclude that the following as the issues in dispute:-

a. Whether the appellant filed her suit within the stipulated time; and

b. Whether the appellant's claim was properly pleaded and proved.

c. 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*** held as follows on the first issue;

> *"By craft and innovation the learned Judge, in grave error extended time by relying on negotiations by the parties and suspending time for this period. 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.***
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> > ***"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."***

9. **Section 4 (1) (a)** of the **Limitation of Actions Act** prohibits the institution of actions based on contract at the end of six years from the date the cause of action accrued. The respondent raised this issue in its defence, in a notice of preliminary objection and its submissions before the lower court. Therefore the appellant had sufficient opportunity to address the same.

10. The court in ***Joseph Odira Ombok v South Nyanza Sugar Company Ltd Civil Appeal No. 83 of 2018 [2018] eKLR***, cited with approval the decision of the court in ***South Nyanza Sugar Company Limited v Diskson Aoro Owuor MGR HCCA No. 85 of 2015 [2017] Eklr*** where it was held:

> *"[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."*

11. The appellant's claim is for loss of the 1st and 2nd ratoon crops. The respondent did not deny the appellant's assertion that the plant crop should have been harvested at 24 months and the ratoon crops 16 to 18 months later. Since the contract is dated 27th April 1995, the plant crop should have been harvested on or about April 1997 and the 1st ratoon crop on or about August, 1998. By the time the suit was filed on 22nd November, 2004, six years had lapsed from the time the 1st ratoon crop was due for harvest. The suit was therefore time barred and could not lie.

12. As for the second issue, the appellant sought judgment against the respondent for *"Damages for breach of contract and order that the defendant do compensate the plaintiff for loss of the 1st and 2nd ratoon crops on 0.5 hectares of land at the rate of 135 tonnes per hectare and payment of Kshs. 1,730/= per tonne."*

13. In her paragraphs 3, 7 and 9 of her plaint, the appellant pleaded the acreage of her plot as 0.5 hectares, she indicated the average produce she expected from the two crop cycles she had lost as 135 tonnes per hectare and also stated the price at which the cane was selling for at the time as 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 her claim for special damages and the trial court erred in holding otherwise. I rely 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*** in support of this finding.

14. In proof of her claim, the appellant testified that her plot measured 0.5 hectares and that the price of cane at the time was Kshs. 1,730/=. This was not disputed by the respondent, who did not call any witness in support of its case. However, the appellant stated that she expected 137 tonnes per hectare for her ratoon crops but did not give a basis for this estimate. She further admitted in cross examination that she did not expect from the ratoon crops, a higher yield than what she had gotten for the plant crop. As such I find that the appropriate estimate in this case was 18 tonnes for each crop cycle.

15. If the appellant had filed her suit within the stipulated time, I would have assessed damages at **Kshs. 31,140/=**made up as follows:

> **0.5 hectares x 18 tonnes x Kshs. 1730/= x 2 crop cycles = Kshs. 31,140/=**

16. The upshot of all the foregoing is that this appeal fails. The respondent shall have costs for this appeal which I assess at Kshs. 15,000/=.

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

R.E.OUGO

JUDGE

In the presence;

Miss Koko h/b Mr. Oduk For the Appellant

Mr. Odero **For the Respondent**

Rael **Court clerk**