



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. 83 OF 2018**

**BETWEEN**

**JOSEPH ODIRA OMBOK ..... APPELLANT**

**AND**

**SOUTH NYANZA SUGAR COMPANY LTD .....RESPONDENT**

**(Being an appeal from the Ruling and Decree of Hon. S. N. Makila, SRM dated 14<sup>th</sup> September 2018 at the Chief Magistrates Court at Kisii in Civil Case No. 481 of 2010)**

**JUDGMENT**

1. This is an appeal against the judgment of the subordinate court dismissing the appellant's suit on the ground that it was filed outside the time permitted by the *Limitation of Actions Act (Chapter 22 of the Laws of Kenya)* ("the LAA").
2. The appellant's claim against the respondent was that by a written agreement dated 4<sup>th</sup> January 1995 he was to grow and sell sugarcane on his parcel of land being plot number 576 in field no. 84 in Kakmasia Sub-location. The agreement was to run for a period of 5 years commencing 4<sup>th</sup> January 1995 and remain in force for during the period or until one plant crop and two ratoon crops of sugarcane were harvested on the said plot, whichever period is less.
3. The appellant claimed that the respondent breached the contract by failing to harvest the plant crop in time and the 2 ratoon crops when the same were ready and mature. He therefore claimed damages for breach of contract and an order that the defendant do compensate the plaintiff for the loss of three crops on his land measuring 0.6Ha at a rate of 135 tonnes per hectare and payment of Kshs. 1,730/- per tonne for the expected 3 crops.
4. The respondent denied the plaintiff claim and pleaded that the appellant's cause of action became statute barred in January 2003 and by the time the suit was filed in 2010 the suit had become statute barred and could not lie.
5. The plaintiff (PW 1) testified during the hearing. He testified that his claim was made on behalf of his deceased brother whose cane was never harvested. He claimed damages equivalent to the three crop cycles. The respondent did not call any witnesses but instead opted to argue the preliminary objection in response to the plaintiff's case.
6. The trial magistrate considered the arguments by the parties and took the view that respondent was entitled to raise the preliminary objection and that the suit was statute barred as it was filed outside six years from the date the contract would have ended or in fact breached.
7. This appellant has not appealed against the said ruling on two grounds set out in the memorandum of appeal as follows:
  1. *The trial magistrate erred in law in dismissing the plaintiff's suit on account of limitation of time whereas the same had not been pleaded.*
  2. *The trial magistrate wrongly allowed to be raised the issue of statutory bar which issue was alien to the pleading, the trial and the suit.*
8. Mr Oduk, counsel for the appellant, supported his position by citing the case of ***Stephen Onyango Achola and Another v Edward Hongo Sule and Another KSM CA Civil Appeal No. 209 of 2004 [2004]eKLR*** where the Court of Appeal stated as follows:

*The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such a defence and thus let the suit proceed to trial on its merit.*

9. Contrary to the appellant's submission that the respondent pleaded the defence of limitation at paragraph 5 of the Statement of Defence as follows;

*5. WITHOUT PREJUDICE to the generalities foregoing the defendant pleads and avers that based on the pleading in the plaint at paragraph 3, 5, 6 & 7 of the plaint, the plaintiff cause of action if any became statute barred January 2003 and by the time the suit was filed in 2010 and had become statute barred and cannot lie.*

10. Since the plea of limitation was pleaded, the grounds of appeal I have set out herein fail. I however allowed the appellant to argue the substantive issue of the limitation of action. I would point out at this stage that although the issue was raised as a preliminary point, it was raised as appellant's submission to the respondent's case as the appellant decided not to call any evidence. Nothing in this appeal turns on whether in fact that issue of limitation could be raised as a preliminary objection in the strict sense.

11. Turning to the substantive issue, **section 4(1)(a)** of the **LAA** provides as follows:

*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*

12. The question before the trial magistrate was when did the respondent's cause of action accrue for purposes of **section 4(1)(a)** of the **LAA**. Two arguments, which had the support of decided cases, were made by the parties. The appellant took the position 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.*

13. Counsel for the respondent urged the court to apply the contrary view taken in **South Nyanza Sugar Company Limited v Paul N. Lila KSI HCCA No. 161 of 2005 [2014] eKLR** where the Court held as follows:

*I do agree with the Respondent herein that this case is founded on contract which was to last up to 26<sup>th</sup> April 2000 and any suit based on that contract was capable of being filed all the way to 26<sup>th</sup> April 2000. It was agreed that the contract was to last for 5 years that is from 27<sup>th</sup> April 1995 to 26<sup>th</sup> April 2000.*

14. The trial magistrate held that in either case the appellant's claim was statute barred. That the agreement between the parties was signed on 4<sup>th</sup> January 1995 was not in dispute. In the former case, the first breach would have occurred at least 2 years into the agreement when the plant crop was expected to have been harvested hence the suit would have to be filed 4<sup>th</sup> January 2003 latest. In the latter case, the agreement would expire on 4<sup>th</sup> January 2000 and by that argument, the claim ought to have been filed on 4<sup>th</sup> January 2006 latest. As the suit was filed in 2010, the claim would be time barred in either case and the trial magistrate was correct to so hold.

15. 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 (10<sup>th</sup> 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 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.

16. 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 21<sup>st</sup> day of DECEMBER 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Oduk instructed by Oduk and Company for the appellant.

Mr Anyango instructed by Otieno, Yogo and Ojuro and Company Advocates for the respondent.