REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO.2 OF 2016

BETWEEN

PARTRICK OWINO KULA ..... APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED.....RESPONDENT

(Being an appeal from the Judgment and decree of Hon. L.K. Sindani (RM) in Migori CMCC No.406 of 2014 dated on 16th December, 2015)

JUDGMENT

1. **PATRICK OWINO KULA** (the appellant) has contested the decision dismissing the claim he filed against **SOUTH NYANZA SUGAR COMPANY LIMITED** (the respondent) while he had sought damages for breach of contract.

2. The background to the claim was that on 20th April 2005, the parties had entered into an agreement where the appellant was to cultivate sugarcane on his plot No.852 field No.106A and upon maturity the respondent was to harvest the crop.

3. The contract was to run for 5 years until a plant crop or a ratoon was harvested. The respondent was to assist the appellant with inputs and services whose costs would be deducted from the proceeds of the sugar cane. The respondent was to harvest, weigh, transport the cane and pay the appellant for the same at the price prevailing then.

4. The appellant's case is that he developed the contracted sugar cane but the respondent in breach of the contract, failed to harvest it. He adopted the statement of claim filed and referred to the agreement book to demonstrate the existence of the contract. It was his contention that as a result of failing to harvest the 1st ratoon, the development of the 2nd ratoon was compromised and he lost approximately 60 tons of cane for the 1st ratoon and another 60 tons for the 2nd ratoon.

5. At the time of the contract, the price per ton ranged between Kshs.2,850/= and Kshs.3500/=. He therefore sought compensation for three cycles.

6. The appellant relied on the field assessment report compiled by Kenya Sugar Research Foundation to buttress his claim. At the hearing he informed the trial court that the respondent assisted him with ploughing, harrowing, farrowing, seed cane and fertilizers but the plant crop was not harvested and it dried up on the farm. He also produced a yield assessment report by PAUL SIMO.

7. The respondent's Senior Field Supervisor RICHARD MUOK (DW1) admitted that the company had contracted the appellant to grow sugarcane. However he was categorical that the plant crop was never availed as per the agreement despite the respondent company providing services for ploughing, harrowing and furrowing and also supplying seed can and 2 bags of DAP fertilizer which cost Kshs.23,031.20. It was his evidence that the case was crashed with 3rd party.

8. The trial magistrate pointed out that despite stating in the pleadings that the contract was entered into in April of year 2005, in his statement which appellant adopted as his evidence; he stated that the contract was in the year 2003 and in cross examination he said he developed the land in the year 2004. When the appellant's counsel filed his submissions he said the contract was entered in the year 2004 – then he worked out the calculations based on prices prevailing in the year 2003. The agreement book presented showed different years in different pages – reflecting both 2003 and 2005. On account of this the trial magistrate held that it was not clear which was the date of the contract.

9. Consequently the documents presented in support of the claim were rejected as they did not support the pleadings on the contract date.

10. The trial magistrate however pointed out that if the contract was in the year 2003 as contained in the document produced as in contract book, then the suit was filed 3 months after the lapse of time, and leave had not been sought to file the suit out of time.

11. The grounds for contesting these decisions are that the trial magistrate failed to consider, evaluate and balance the evidence, pleadings and submissions and therefore arrived at a wrong conclusion. The trial magistrate was accused of relying on mere technicalities to dismiss the case – the discrepancy on the dates was described as small, taking into account that the respondent had admitted that there had been a contract. The trial magistrate was also said to have misdirected herself in the issue of limitation of actions.

12. The appeal proceeded ex-parte, and Mr. Jura submitted on behalf of the appellant that although the contract document showed the year 2003 as the commencement of the contract, the actual planting was done in March 2004 and this is the date the appellant referred to in his testimony.

13. It was his contention that the contract was futuristic in the sense that preparing and developing came after actual signing of the contract document and it was to last for 5 years.

14. On this limb I confirm that the pleadings gave the date of the contract as 20th April 2005 whilst the appellant's statement which he relied on referred to the year 2003 as the date of the contract and on cross examination stated that he planted the crop in the year 2004.

15. Whilst I would accept the explanation from Mr. Jura regarding the futuristic nature of the contract which was entered into formally in the year 2003 and the physical execution began in the year 2004, it still does not explain how the year 2005 fits in nor is it said to have been a typographical error.

16. Yet there is evidence both documentary and even on admission of the respondent's own witness, that the respondent had indeed entered into a contract with the appellant for purposes of growing sugar cane. Under the circumstances it would be reasonable to accept the year 2003 as the date of the contract.

17. It appears from the statement of DW2 that cane was infact planted. So why didn't the respondent harvest it? The reason given is that the cane was crushed by an undisclosed jaggery and that it is the appellant who owes the respondent Kshs.23,000/= expended on the land.

18. The respondent however had no evidence of the cane being delivered to the un-named jaggery which then crushed the cane. I agree with Mr. Jura that the trial magistrate placed an extremely high standard of proof – once the cane was planted and had matured, it was the duty of the respondent to harvest, transport and mill it before delving into the issue of what sum is payable to the appellant, there is need to address the issue regarding limitation of time of filing the suit.

19. The contract document presented in court is entitled **"GROWERS CANE FARMING AND SUPPLY CONTRACT** shows the date of contract as 20th April 2015 – this has now been accepted as an excusable initially since the respondent says the contract was actually entered into in the year 2003 July as supported by the appellant's evidence and the documents. So when was the cane due for harvest with regard to the first plant crop?- that was undisclosed – both by respondent and the appellant, and the two page contract document does not state when the first harvest was expected.

20. Mr. Jura sought to rely on the written submissions presented at the trial court where it was argued that the first crop was due for harvest in August 2005 – but this is evidence from the bar which was never tested either by appellant's evidence of on cross examination of the DW2. I am therefore unable to place a finger as to exactly when the breach occurred so as to make a decision as whether the trial magistrate's finding that the suit was statute barred had no basis.

21. Consequently the appeal must fail and is dismissed with costs.

Written and dated this 25th day of January, 2017 at Homa Bay

H.A. OMONDI

JUDGE

Delivered and dated this 31st day of January, 2017 at Migori

A.C. MRIMA

JUDGE