



**Nyandiga v South Nyanza Sugar Co. Ltd (Civil Appeal 131 of 2021)
[2023] KEHC 22775 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 131 OF 2021
RPV WENDOH, J
SEPTEMBER 20, 2023**

BETWEEN

RICHARD A. NYANDIGA APPELLANT

AND

SOUTH NYANZA SUGAR CO. LTD RESPONDENT

*(An Appeal from the Judgement and Decree of Hon. R.K. Langat (PM)
dated and delivered on 2/5/2019 in Rongo PMCC No. 252 of 2016)*

JUDGMENT

1. This is an appeal by Richard A. Nyandiga (the appellant) against the judgement and decree of the Hon. R K Langat dated and delivered on 2/5/2019. The appellant is represented by the firm of Oduk & Co. Advocates while the respondent is represented by the firm of Moronge & Co. Advocates.
2. By a plaint dated 14/8/2016, the appellant sued the respondent for damages for breach of contract, costs of the suit, interest from 10/3/2005 until payment in full and any other relief.
3. The appellant pleaded that by an agreement dated 10/3/2005, the respondent contracted him to grow and sell to it sugarcane from his land parcel being plot number 1025 field no. 23 in Kanyamgony A Sub - Location measuring 0.9 hectares; that the appellant duly signed the agreement and was assigned account number 235xxx and planted the cane as agreed.
4. It was further pleaded that it was a term of the contract that it would commence on 10/3/2002 and remain in force for a period of 5 years, or until one plant crop and two ratoon crops of the sugarcane were harvested whichever period will be less; that within the 5 year period, the plant and ratoon crops would be harvested at 12 - 18 months and 22 - 24 months respectively. The appellant contended that in breach of the agreement, the respondent failed, refused and/or neglected to harvest the plant and ratoon crops.



5. Further, it was contended that on or about 14/9/2022⁷ when the sugarcane was 30 months old, the respondent cut and harvested the plant crop when it was overmature and highly deteriorated but neglected to harvest the two ratoon cycles when the same were mature, which went to waste and caused loss to the appellant. The appellant particularized the loss of damages of the two ratoon crop cycles at a total of Kshs. 534, 600/=.
6. The respondent filed a defence dated 10/10/2016 in which it denied the allegations in the plaint and put the appellant to strict proof thereof. The respondent stated that it failed to harvest the two ratoon crops as the appellant failed to properly maintain the said cycles leading to low yields. The respondent further contended that the suit was filed after the lapse of 11 years and should be dismissed.
7. After the hearing, the trial court found in favour of the respondent and dismissed the appellant's suit with costs.
8. Being dissatisfied with the judgement and decree, the appellant filed a Memorandum of Appeal dated 16/12/2021 on the following three (3) grounds: -
 - i. That the learned trial magistrate erred in law in failing to appreciate that the duration of the contract was 5 years during which period the respondent was obligated to harvest the sugar cane on the appellant's farm 3 times and that time started to run at the end of the said 5 years;
 - ii. That the trial court wrongly computed the time in the face of clear provisions of the contract;
 - iii. The trial court erred in fact and in law in failing to find that the appellant had proved his case on a balance of probabilities.
9. The appellant prayed: -
 - i. That the judgement and decree dated 2/5/2019 be set aside;
 - ii. The court do assess and award the appellant's damages for breach of contract.
 - iii. Interest and cost of the suit and of the appeal be borne by the respondent.
10. Directions on the appeal were taken and the appeal was canvassed by way of written submissions. It is only the appellant who complied by filing submissions dated 16/10/2022 which I have duly considered.
11. I have considered the grounds of appeal, the submissions by the appellant and the trial court's record and the only issues for determination seems to be: -
 - i. Whether the suit filed in the lower court was statute barred.
 - ii. Whether the applicant proved his case.
12. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
13. A similar holding was held in the Court of Appeal for East Africa which took the same position in *Peters vs Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows: -

" It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing



the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion...”

14. It is not in dispute that parties entered into a contract which commenced on 10/3/2005. It is also not in dispute that the plant crop was harvested by the respondent on 14/9/2007.
15. According to clause 1 (f) of the contract, the maturity date of the plant crop was not later than 24 months, for the 1st ratoon crop not later than 22 months after harvest of the plant crop and for the 2nd ratoon crop not later than 22 months after harvest of the 1st ratoon.
16. The appellant did not tell the trial court the exact date he planted the plant crop. The assumption therefore is that the plant crop was planted on or about 10/3/2005 on the date of the commencement of the contract. The plant crop was to be harvested not later than 24 months, that is, on or before 10/3/2007. However, the harvest was done almost 6 months later. Although none of the parties further explained the delay in the harvest, a delayed period of 6 months cannot be termed as a delay which can lead to a breach of contract.
17. The plant crop was self-developed by the appellant. Despite the unexplained delay of six months before harvesting, the respondent still showed intention of harvesting the plant crop and did harvest as per the appellant’s testimony he was paid Kshs. 160,000/=.
18. The 1st ratoon was to be harvested within a period of not later than 22 months after harvest of the plant crop. The 1st ratoon was therefore to be harvested on or before 14/7/2009.
19. Section 4 (1) of the Limitation of Actions Act provides as follows in relation to actions on contracts, tort and certain other actions:

The following actions may not be brought after the end of six years from the date on which the cause of action accrued –

 - a. actions founded on contract;
20. As provided by Statute, actions relating to contracts can only be brought to court before the lapse of six years from the time which the cause of action accrued.
21. According to Black’s Law Dictionary (10th Edition) the word “accrue” means “to come into existence as an enforceable claim or right.” Therefore, in interpreting the word accrued as per the Statute, the cause of action on breach of contract can only be brought at the time the actual breach occurred. This is when it can be said the time started running.
22. Courts have defined the period when the alleged breach is said to have occurred and/or accrued in sugarcane growing contracts. In the case of South Nyanza Sugar Company Limited vs Diskson Aoro Owuor (2017) eKLR the court held: -

“ 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."

23. Similarly, in *B. Mathayo Obonyo vs South Nyanza Sugar Co. Ltd* (2019) eKLR Majanja J held as follows:

" 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 Owner* (*supra*) in determining when the cause of action accrues... 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."

24. In *Real Music House Limited v Kenya Institute of Educational (K.I.E.) & 4 others* (2020) eKLR the court held:-

A perusal of the particulars of loss enumerated at paragraph 13 of the plaint shows that the claim is specifically for loss of business for five years from 1997 to 2001 and other losses related to the publishing, production and marketing of the books during the said period. I find that the plaintiff's entire claim accrued as at the year 2000 when the plaintiff realized that its orders for books had drastically reduced due to the withdrawal of music and arts from the education curriculum...As I have already stated in this ruling, it was not established that the 1st defendant agreed not to plead limitation or, by conduct, induced the plaintiff into believing that it would not plead limitation of actions. Having found that the cause of action herein is founded on contract, it is clear that the suit ought to have been filed within 6 years from the year 2000 when the alleged breach of contract accrued. The suit herein was filed in 2012, 12 years after the cause of action arose and is therefore clearly time barred within the meaning of Section 22 of the *Limitation of Actions Act*.

25. Guided by the above decisions, time starts running from the time when the breach occurred. In the present case, the alleged breach occurred on or about 14/7/2009 when the respondent failed to harvest the 1st ratoon crop. That being the case, the suit ought to have been filed before the lapse of 6 years that is, on or before 14/7/2015.
26. The suit was filed on 17/8/2016. This is almost a year after the cause of action arose and outside time contemplated by Section 4 of the *Limitation of Actions Act* on actions founded on breach of contract. There is no evidence that the appellant sought leave of the court to file the suit out of time. The suit is therefore time barred within the meaning of Section 4 (1) (a) of the *Limitation of Actions Act*.
27. The suit was therefore non suited and the trial Magistrate was right in holding so. The other issue for determination falls by the way. The appeal is devoid of merit and it is hereby dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 20TH DAY OF SEPTEMBER, 2023.

R. WENDOH

JUDGE

Judgment delivered in the presence of;



Miss Theuri for the Appellant.

Mr. Bosire for the Respondent.

Emma & Phelix Court Assistants.

