



**William v South Nyanza Sugar Co Ltd (Civil Appeal 7 of 2023)  
[2024] KEHC 13527 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13527 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 7 OF 2023  
TA ODERA, J  
OCTOBER 23, 2024**

**BETWEEN**

**ALEX OTIENO WILLIAM ..... APPELLANT**

**AND**

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

*(An appeal from the Judgment and decree of the Senior Resident Magistrate,  
Kisii dated 17th August, 2018 Hon. S.K. Onjoro in CMCC No.506 of 2004)*

**JUDGMENT**

**Introduction**

1. Alex Otieno William the appellant herein was aggrieved by the judgment of the Resident Magistrate S.K. Onjoro dated 17<sup>th</sup> August, 2018 in CMCC No. 506 OF 2004, appealed to this court on the following grounds: -
  - a. The learned trial magistrate erred in law and in fact in coming to a conclusion that the court lacks jurisdiction to deal with the suit, on account of the provisions of the Sugar Act, yet the contract in issue was entered into long before the Sugar Act came into operation.
  - b. The learned trial magistrate erred in law in failing to find that the Sugar Act applied only to contracts made pursuant to the Act and it did not in any event have a retrospective operation or effect and had no saving clause at all.
  - c. The learned trial magistrate erred in failing to find that the plaintiff had proved his case on a balance of probability and was therefore entitled to the reliefs claimed.
  - d. The learned trial magistrate erred in law and in fact in entertaining a point of jurisdiction raised when he had no such powers as the court had in any event forwarded the suit for arbitration to the sugar arbitration tribunal which tribunal became moribund after the repeal of the Sugar



Act compelling all matter therein to be retransferred and dealt with the trial court, hence jurisdiction was not an issue.

2. The appellant prayed for orders that: -
  - a. The ruling judgment and decree of the trial court in CMCC No. 506 of 2004, be set aside.
  - b. There be judgment for the appellant as prayed in the plaint.
  - c. The court do award the appellant the sum of Kshs. 140,130 in damages.
  - d. There be an order as to interest, the same to accrue from the date of filing of the suit until payment in full.
  - e. The costs of the appeal and of the subordinate court be borne by the Respondent.

### **Factual Background**

3. The facts of this case are that appellant filed the plaint dated 25.4.2004 on 4.5.2004 against the respondent in the lower court for breach of contract dated 21.5.1995 which was to allegedly last for 5 years or harvest of 3 crop cycles of sugarcane. The appellant prayed for;
  - a. An inquiry as to damages for breach of contract and compensation of plaintiff for loss of sugarcane on 0.2 hectares for the three lost crop yields.
  - b. Costs of the suit.
  - c. Interest thereon at court rates until payment in full.
  - d. Any other relief as the court may deem fit to grant.
4. The respondent filed defence dated 14.6.2004, denying the contract, its breach, and privity of contract with appellant. In the alternative it pleaded that the cane was below their recommended quality. Also that even if the cane has matured it would not yield 135 tonnes per hectare as alleged and that if the crop had matured as alleged then, the appellant had a duty to harvest and deliver the same to mitigate his losses. It was also pleaded that the suit was premature, statute barred and it put appellant on notice that it was to raise a preliminary objection on jurisdiction at the first hearing.
5. Vide an application dated 16.5.2006 filed in Kisii CMCC 434 of 2003, the respondent objected to the suit and others in different courts being heard and arguing that the same ought to have been filed in the Sugar Tribunal. Hon. Wewa (Resident Magistrate) heard the application and delivered her ruling on 20.7.2006. The objection was dismissed on the grounds that the Sugar Act was not in force at the time the suit was filed and so it cannot operate retrospectively. There was no appeal against this ruling.
6. The appellant later filed the application dated 21.7.2008 seeking to have the suit referred to Arbitration. The parties preferred Sugar Arbitration Tribunal established under the Sugar Act 2001 to hear the matter. The court allowed the application vide its orders dated 18.2.2009. Before the claim was heard by the Tribunal, the Sugar Act was repealed on 14.1.2013 upon enactment of the [Crops Act](#).
7. The matter was heard in court thereafter. The appellant in his testimony told the court that he has a contract dated 21.3.1995 with the respondent. The same was for a period of 5 years and the respondent was to make 3 harvests of his sugar cane on his plot number 366 which measured 0.2 hectares on field no 67. He said the cane matured but was not harvested and so it dried up on the farm. He adopted his witness statement filed on 5.9.2016 in which he said that the respondent was paying Kshs. 1,730/= per tonne and that he expected to harvest at least 135 tonnes per hectare.



8. Defendant called one witness i.e Richard Muok Senior, it's field supervisor who adopted his witness statement filed in court. He admitted that the respondent entered into an agreement with appellant for 5 years for 3 harvests and that the area of the land was 0.2 ha and that the harvesting charges was Kshs 210 per tonne and transport Kshs. 399 per tonne and cess Kshs. 1 of the total cane value that the crop and levy at 1 % of the total cane value. He said that the yield would be at an average of 66.56 tonnes per hectare and ratoon crops at Kshs. 48.76 per acre in kagmasi area where the land is situated. He also told the court that the crop was never availed to defendant but was crushed to jaggery in December 1996 despite the appellant having received payment of Kshs 10,000/=. Also that the ratoon crops were not developed by the appellant as required.
9. The learned trial magistrate upon considering the pleadings filed by the parties, the testimonies of their witnesses and their written submissions rendered its judgment on 17<sup>th</sup> August, 2018. The learned trial Magistrate in his judgment dismissed the suit on grounds that the court lack jurisdiction to determine the matter for reasons that suit was filed on 5<sup>th</sup> May, 2004 at which time the sugar Arbitration tribunal was the appropriate forum to hear and determine the matter.
10. It is against the above decision of the learned trial magistrate that the Appellant herein approached through this Appeal raising the grounds that I have outlined hereinabove.

### **Written Submissions by the Parties**

11. The learned counsel for appellant in his submissions submitted that the objection on jurisdiction of the court was raised by the respondent vide an Omnibus application dated 16.5.2006 in CMCC no 434 of 2003 alleging that the suit ought to have been filed in the Sugar Arbitration Tribunal and not the subordinate court. The learned counsel went on to submit that Hon. S.R Wewa (RM) heard the motion and dismissed the objection as per the ruling on page 21-22 of the record. The matter proceeded to trial and vide an application dated 21.7.2008 wherein appellant sought that the matter be referred to arbitration. Further that the parties preferred the Sugar Arbitration Tribunal created under the Sugar Act which came into operation on 2.4.2002. The orders were granted on 18.2.2009 but before the matter was heard the Sugar Act was repealed following the enactment of the [crops Act](#) on 14.1.2013 and the matter went back to the lower court.
12. The learned counsel for the appellant thus decried that on 8.5.2006 the trial magistrate, ruled on the same issue of jurisdiction which Hon. Wewa who was a court of concurrent jurisdiction had dealt with and dismissed the suit. The learned counsel underscored that the issue of jurisdiction was res judicata under section 7 of the [Civil Procedure Act](#) as it had been dealt with by Hon. Wewa (R.M as she then was) in CMCC no. 434 of 2003 trial magistrate and the same was dismissed and there was no appeal against that order. The Appellant equally submitted that section 68 of the [civil procedure Act](#) bars a party from disputing an order which was not appealed from. The learned counsel argued too that the trial magistrate erred in re-opening the issue of jurisdiction as the Sugar Act and that the Act had no retrospective effect.
13. He submitted that even if there was no previous ruling on jurisdiction, the contract dated 21.3.1995 was not made under the sugar Act or in contemplation of the provisions and operations said Act. Also that the sugar Act only applies to specific contracts made under the Act or in contemplation of it.

Counsel cited section 2 of the (Repealed) Sugar Act provides:

“In this Act, unless the context otherwise requires— “agreements” means the agreements specifying the standard provisions governing the rights and obligations of growers, millers



and out-grower institutions in the sugar industry; “Board” means the Kenya Sugar Board established”.

14. Equally the learned counsels submitted that as at 29.3.2000 the contract had terminated and so the plaintiff had by virtue of the breach acquired an entrenched interest in the prevailing law then to enable him agitate his rights. The learned court brought to the attention of this court of the provisions of section 23 of the *interpretation and general provisions Act* which provides to the effect that any provision of an amended written law shall not affect previous operations of a written law so repealed or anything duly done or suffered under a written law so repealed. He thus contended that the sugar Act that came into force in 2001 could not be relied upon by the court to deny the Appellant a chance to litigate issues that arose to breach of his contract that he entered into with the defendant prior to the enactment of the repealed sugar Act.
15. He contended that the parties having opted to pursue resolution of the dispute before the sugar Arbitration tribunal later 2008 which tribunal was subsequently closed upon the repealing of the sugar did not at all cost mean that the court had lost jurisdiction of the matter. He contended that the trial court erred in dropping jurisdiction when there was no alternative body left to hear the Appellants grievances. To support his argument, the learned counsel relied on the case of Jeremiah Otieno Madara vs Sukari Industries Limited (2019) eKLR where the court of Appeal held that the plaintiff had a right to elect to either pursue a common law remedy or the remedy provided for under the statute and that under section of the *Civil Procedure Act*, courts have Jurisdiction to hear suit of a civil nature except suits on which its cognisance is either expressly or implied barred.
16. On the issue of damages, the learned counsel submitted that the learned trial magistrate erred by failing to consider the issue. He submitted that from the record the plaintiff had provided adequate evidence to prove loss which the defendant failed to controvert. He thus urged the court to adopt the Appellants submissions at the law court at page 56 of the record of Appeal as part of the Appellant’s submissions in this Appeal.
17. The learned counsel for the Respondent on his part submitted that the alleged breach of the contract occurred when the sugar Arbitration tribunal was in existence and thus the plaintiff having filed his suit on 5<sup>th</sup> May, 2004 when the sugar tribunal in existence, the trial court lacked Jurisdiction entertain the matter. He therefore contended that the learned trial magistrate did not err by dismissing the suit for want of Jurisdiction. The learned counsel relied in the case of Eliud Wafula Maelo vs Ministry of Agriculture and 3 others (2016) where the court of Appeal observed that section 31 of the sugar act (repealed) established a specific tribunal with sole purpose to arbitrate on disputes arising between any parties who included growers and any other institution under section 29.
18. On the issue as to whether the Appellant was entitled to damages the Respondent submitted that, the Appellant had in his suit claimed that his parcel would yield 135 tonnes for each of the three cycles which claim he underscored to be false since it is common Knowledge amongst the parties herein that the production levels declines with each subsequent ratoons. He underscored that DWI in his testimony stated that the appellant’s suit land being located at Kakmasia, the plaint would only average to 66.56 tonnes per hectare and the ratoons 48.76 tonnes per hectare.
19. He contended that while DWI produced a cane yield report, the plaintiff did not provide any evidence to prove that it was possible for his farm to yield the 135 tonnes per hectare and as such, he had failed to prove his claim. He argued too that the plaintiff failed to produce any evidence that his cane had matured and was capable of being harvested. He contended pictures to prove such fact was would have sufficed but the Appellant failed to tender any. He thus concluded that the was nothing before court to demonstrate that in deed there were mature cane for harvesting.



## Issues of Determination

20. Having considered the grounds of Appeal, factual background of this matter, the impugned decision of the learned trial magistrate and the written submissions of the parties as hereinabove outlined, I find that issues for determination are;
  - a. Whether the trial had jurisdiction here the dispute
  - b. Whether the appellant was entitled to damages for breach of contract

## Analysis and Determination

### Whether the trial had jurisdiction here the dispute

21. It is a common fact between the parties that vide an agreement dated 21<sup>st</sup> March, 1995, the Respondent contracted the plaintiff to grow and sell sugar on his land at Kakmisa sub-location for a period of 5 years which were to lapse in the year 2000. The sugar Act (repealed) came into force in 2001 after the termination of the contract. It therefore goes without saying that the trial court made a serious error in holding that the court lacked Jurisdiction to hear and determine the suit by virtue of the provisions the sugar Act (repealed) which therefore meant that the court was unjustly applying the said act retrospectively to bind engagements between the parties to the detriment of the Plaintiff. Hon. Justice Musinga, J. (as he then was) in South Nyanza Sugar Co. Ltd vs. Isaiah Owino Lawi Kisii HCCA No. 159 of 2006 observed as follows: -

“I have carefully perused the record of appeal. It appears to me that that outcome of the application before the trial court depended on whether the Sugar Act, 2001 was applicable in interpreting the contract that was entered into on 11<sup>th</sup> April, 1996. The simple answer is “NO.” The reason was well articulated by the learned trial magistrate that the Act came into operation on 1<sup>st</sup> April, 2002 and its provisions cannot apply retrospectively. The aforesaid agreement contains an arbitration clause at paragraph 13 but the same does not have any link with the Sugar Act, 2001. The Act established the Sugar Arbitration for purposes of arbitrating disputes arising between any parties under the Act and not otherwise. The provisions of that Section cannot be relied upon in determining disputes in contracts that were entered into long before the Act was enacted. This appeal must therefore fail and I dismiss the same with costs to the respondent.”

### Whether the appellant was entitled to damages for breach of contract

22. The Appellant in outlining his claim for breach of contract claimed that it was a term in the contract that the Respondent was to within the 5 year period or less expected to harvest the plant crop and ratoon at the age of 22 to 24 months and 16 to 18 month after planting and subsequent harvest respectively and that the defendant was under the contract bound to harvest all the cane that was available in the field.
23. He also claimed that in breach of the contract, the defendant failed to harvest the cane when it was ready to harvest consequences whereof he lost the cane dried up and was abandoned. From the above assertions of the Plaintiff, it is outright that the defendant herein was expected that, for the 1<sup>st</sup> cycle the crop to harvest the cane by 21<sup>st</sup> March 1997 at which time 24 months would have lapsed as provided for in the contract. From the testimonies of the parties, the Respondent did not harvest any sugar cane on the said date then it means that the contract was breached in March 1997 when the defendant failed to harvest the sugar cane.



24. Under section 4(1) of the limitation of action act a claim for breach of contract must to be instituted within a period of six years from the date of breach and that time should start running from the date when the damage is first sustained. In the case of, Diana Kathumbi Kiio =vs= Reuben Musyoki CA 211 / 2015 (2018) eKLR. the court stated: -

“According to the author in the Journal of International Banking and Financial Law, “What the Limit “(2007) 451BFL642, “in contract the cause of action accrues when the breach occurs when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage.”

25. In the case of In the case B. Mathayo Obonyo vs South Nyanza Sugar Co Ltd (2019) eKLR Majanja J faced with similar circumstances 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 question taken in South Nyanza Sugar Co Ltd vs Dickson Aoro Owuor (supra) in determining when the cause of action accrues. Thus, under the Out growers 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 Limitation of Action Act, the time begins to run.”

26. In this instance case the breach of contract occurred in March, 1997 which therefore means that the Appellant was expected to institute the suit on or before March, 2003. Based on such a finding it is outright the Plaintiff suit was time barred and the trial court would not have entertained it even if it had Jurisdiction. 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 Limitation of Action Act, the time begins to run.”

27. From the forging therefore I find no merit in the Appeal before and the same is dismissed with cost to the Respondent.

It is so ordered.

**T.A ODERA**

**JUDGE**

**23.10. 24**

Delivered virtually via teams platform in the presence of:

Miss Theuri h/b for Mr Oduk for the appellant

Odhiambo: I hold brief for Miss Onyango for the respondent

Court Assistant - Oigo

